

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE HRISHIKESH ROY
HON'BLE MR. JUSTICE ABHAY S. OKA
HON'BLE MRS. JUSTICE B.V. NAGARATHNA
HON'BLE MR. JUSTICE J.B. PARDIWALA
HON'BLE MR. JUSTICE MANOJ MISRA
HON'BLE MR. JUSTICE UJJAL BHUYAN
HON'BLE MR. JUSTICE SATISH CHANDRA SHARMA
HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Civil Appeal No. 4056-4064/1999

MINERAL AREA DEVELOPMENT AUTHORITY ETC.

Petitioner(s)

VERSUS

M/S STEEL AUTHORITY OF INDIA & ORS

Respondent(s)

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1 **HARISH SALVE:** May I please Your Lordships. I had My Lords, when Your Lordships rose
2 for the day on Thursday, I had finished showing Your Lordships the 1935 Act. Now, the
3 statutory landscape, because my first heading and I will try and race through and finish all the
4 points by tomorrow, first heading, if I may encapsulate, my point is, the true nature of royalty
5 is to be determined, not by semantics but by the analysis of the -- and I deliberately use this,
6 MMRD and MMDR Acts and the rules. Dictionaries don't help. And that's where, in our
7 submission, the *Kesoram* logic gets flawed.

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But by the MMDR Act?

10

11 **HARISH SALVE:** Yes. MMRD and MMDR Act. The first one was 'Regulation and
12 Development', which got flipped to 'Development and Regulation'. Not that there is any real
13 difference between the two.

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

16

17 **HARISH SALVE:** If I may, My Lord, show these two. It begins with the 1948 Act and this
18 Your Lordship will find in Volume IV, page 891.

19

20 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

21

22 **HARISH SALVE:** This was My Lord, a rather short statute and this really, My Lord focused
23 on conferring rulemaking power. Your Lordship will recall, whether this is under the '35,
24 where oil fields were still a part. That adds another nuance to this, which I'll deal with,
25 separately. "It is hereby declared that it is expedient in the public interest that Central
26 Government should take under its control, the regulation of mines and the development of
27 minerals." That's how they understood the two expressions. You don't regulate minerals.
28 That's how their English was. Very carefully worded. Minerals are defined in the widest
29 possible word. It says minerals include natural gas and petroleum. Mining lease, Your
30 Lordship, may see the definition in D. Means "a lease granted for the purpose of searching,
31 winning, working, getting making merchantable, carrying away or disposing of minerals." So,
32 if Your Lordship is pleased to notice the width of the declaration, it's very wide. And that's
33 why, the three cases which have not been shown so far, which directly dealt with these, took
34 the view that there's almost denudation, because declaration is very bad. This Act My Lord
35 was thus, it only provided in Section 4, that, "No mining lease shall be granted after the

1 commencement of the Act otherwise, then, in accordance with the rules, made under the Act,
2 and anything granted is void." Then 5 was the rulemaking power of the Central Government.

3

4 And Your Lordship may see 1, is Central Government may by notification in the official gazette
5 made rules for regulating the grant of mining leases or for prohibiting the grant of leases in
6 respect of any minerals. And then My Lord, in 2, what is the important in D. Fixing the
7 maximum and minimum rent payable by Lessee whether the mine has worked or not, that's
8 debt. Then My Lord 6. power to make rules with respects to mineral development which again,
9 1. is the general power, Central Government may by notification make rules for the
10 conservation and development of minerals. And then it says, in particular, what is important
11 is My Lord, (i). I mean, I'm not troubling Your Lordships by reading the details out there. All
12 the dimensions are covered. The technical bits, the working bits and (i) says, and I read it a
13 little slowly, "the levy and collection of royalties, fees or taxes in respect of minerals mined,
14 fouried excavated or collected". Please mark the word if Your Lordships don't mind 'levy'
15 because Your Lordship asked a question, I didn't want to interrupt you when Your Lordship
16 asked that question about if the State can't tax, can the Union tax? And the answer given by
17 this court is yes. And that's how all the validation acts were upheld. But that's a separate
18 conundrum, we deal with each separately.

19

20 **JUSTICE B. V. NAGARATHNA:** This act is a pre-constitution act? 1948 Act.

21

22 **HARISH SALVE:** No, no. After *India Cements* struck down, Parliament came with a
23 validating legislation, that was challenged saying where does Parliament have the power. Your
24 Lordships said that if the state doesn't have the power, then it goes to Parliament. I call that
25 the '*Kannadasan* Conundrum'. your Lordships will have to consider it separately. And it has
26 to be under 97, it doesn't say under what? But that's a separate conundrum. Let me not digress.

27

28 **JUSTICE HRISHIKESH ROY:** This particular provision that you have read out just now
29 (i), subclause (i), they have used different expressions. Levy, they don't strictly simply speak
30 of royalty. They talk about Levy of royalty, Levy of fee Levy of taxes. So, these are all used
31 differently.

32

33 **HARISH SALVE:** Your Lordship may just see the rules, because what's our case. Let me tell
34 you why I'm troubling Your Lordships showing all this. Once the 48 Act came into place, the
35 exactions were all treated on par. And in fact, in the Parliamentary debates relating to the 57
36 Act, one of the members said, the royalties, which is the tax on minerals, has been now also
37 taken away by Parliament and you are imposing it under 9. There was no 9 in the old Act.

1 That's important, Your Lordship, notice here. Now we have 9 under the new one. There was
2 no 9.

3

4 **JUSTICE HRISHIKESH ROY:** That again speaks of royalty only.

5

6 **HARISH SALVE:** Yes. What is the character of that royalty? We say it's an exaction because
7 let me not get ahead of myself. I have to show all that. But this is how these were all considered
8 as royalty, fees, taxes in respect to mineral mine. And the word used is levy. Levy is normally
9 a word which one used for an exaction not contractual payment. There was nothing our
10 submission is going to be. There was nothing contractual left here. It was all statutory. And
11 now we have gone to the extent, My Lord, again, I'm getting ahead of myself. But I want to
12 show all this. We have gone to the extent, if you don't pay royalty, you can be sent to jail. It's a
13 criminal offense not to pay royalty. If a tenant doesn't pay a landlord, you can evict him, you
14 can cancel his lease, you can throw him out. You can't send to jail. So, these are all now
15 statutory exactions.

16

17 **JUSTICE HRISHIKESH ROY:** Does it have anything to do with the word royalty? 'Royal
18 dicta'.

19

20 **HARISH SALVE:** My Lord, today what has happened is... totally it has, I'm so sorry, My
21 Lord.

22

23 **TUSHAR MEHTA:** It originated in Britain with that.

24

25 **JUSTICE B. V. NAGARATHNA:** What was given to the crown.

26

27 **HARISH SALVE:** It is what the Crown took as its share. They took everything as their share.
28 That's why originally My Lord, I'll show Megeri has a very interesting passage. Except gold
29 and silver everything belonged because those are the royal minerals. If you wanted to hunt in
30 the forest, you had to pay a royalty, if you took any of the royal animals. To fell a tree, some
31 trees were marked. It's a very -- it started that way. It always started because otherwise what
32 in English Law is called the estate in fee simple. Absolute ownership. But everybody was a
33 tenant of the Crown. Till now we have free holds. so, may I quickly show this Act? So, My Lord
34 this is one point which I wanted to make and, yes, I acknowledge the word levy has -- It's again,
35 not a term of art. Levy can mean charge, levy can mean collection. Levy can mean, fixing the
36 point of recovery, et cetera. But what is important is the assessment, everything. But the
37 important point is the phrase. I'm not putting too much emphasis, but showing how the

1 legislation was drawn. Levy and collection of royalties, fees and taxes. There's a lot more
2 fleshing out of this in the rules. Then Section 7. I'll only read the heading. We don't need to get
3 into any details. The power to make rules or modification of existing leases. If there's anything
4 Your Lordships want me to show in particular, please. I'm trying to pace...

5

6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

7

8 **HARISH SALVE:** So that I finish by tomorrow, but it's not with the idea to skip anything.
9 Then Section 10, which was noticed in one of the cases that all rules had to go before the
10 Central Legislature. So basically, even if later on the State has made rules. They say you're
11 making it under as Union Law, you are making it as a delegate. You're not making it in your
12 Entry 23 capacity. This is My Lord, the '48 Act. Now it's the Mineral Concession Rules...

13

14 **JUSTICE HRISHIKESH ROY:** Mr. Salve. You might read the penalties' part that's Section
15 9, I think.

16

17 **HARISH SALVE:** Yes, My Lord. Section 9: Any rule made under provision of the Act may
18 provide for contravention shall be punishable with imprisonment, which makes 10 to 6
19 months or both, which may extend to Rs. 1000. Now My Lord, this became a lot more sharper
20 in the '57 Act. In fact, I'm going to read the statement of objects only. Your Lordships had a lot
21 of it was, '48 Act was virtually a skeleton law, saying everything will be done by the rules. But,
22 in '57 the idea was they said, no, we must have a lot more in the Act and a lot less in the rules.
23 So, it has gone, and these cases have now, over the decades, come to this Court and Your
24 Lordships have clarified. If you have a lease and don't pay, you get hit by the Act. If you don't
25 have a lease, like in the sand mining cases then the IPC will apply. Under this Act, My Lord,
26 there was a general delegation of the power to impose penalty under Section 9. And and
27 interestingly, My Lord curiously, Section 13 Act was binding on the Crown. Then My Lord we
28 come to the rules. which are the Mineral concession Rules and these are in Volume IV(i). Your
29 Lordships have Volume IV(i)?

30

31 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Page 28, right?

32

33 **HARISH SALVE:** I've got a scanned copy of the book. Whatever is convenient to see My
34 Lord.

35

36 **JUSTICE HRISHIKESH ROY:** Volume IV?

37

1 **HARISH SALVE:** We have ruled....

2

3 **CHIEF JUSTICE D. Y. CHANDRACHUD:** copy as well. But you can go to the scanned
4 copy,

5

6 **HARISH SALVE:** Whichever is convenient. Scanned copy page 3 first. Definition of Mining
7 Lease. "Mining lease means, a lease to mine, quarry, bought, dig, search for, win, work and
8 carry away minerals specified." Then minor mineral minerals are defined. Won't trouble Your
9 Lordship with the detail. And Rule 4 is important. "The rule shall not apply to minor minerals.
10 The extraction of it, which shall be regulated by such rules as the State Government may
11 prescribe." A lot more flexibility that time. So, the rulemaking power upon the State came from
12 Rule 4 of the Central Rules. Then My Lord, there used to be a concept of a "certificate of
13 approval," which was later dropped, that nobody could get a mine, unless he has a certificate
14 of approval. I won't trouble Your Lordships with that. Come straight to Rule 13... Sorry. Rule
15 14, which is at page 5. Now, what is important is, My Lord, all these apply only to Government-
16 owned minerals. That Your Lordship get from the heading of Chapter III. The heading which
17 Your Lordship will find at page 5. And I want to show 14 straight away. "An application for a
18 prospecting license shall, in the case of land in which the minerals belong, to the government,
19 be made to the State Government concerned, through such officer, et cetera, et cetera." So, it
20 is under the Union Rules, that you went to the state. Then 17. And one important feature. I'll
21 just mention it and then I'll show. The whole thing had become statutory. There's nothing
22 contractual. The state used to make orders of grant or refuse orders of grant. And if they did,
23 there was a "revision" before the Central Government and then, of course, it used to come in
24 judicial review to the Courts under 226. So, it became a whole statutory mechanism, right from
25 prospecting license, grant of leases. You passed a statutory order, granted a lease, somebody
26 who was not happy went to the Union Government and the Union Government decided it in
27 revision. I will show all those provisions. Rule 17 says, the State Government may grant to
28 refuse a license. Subject to the provisions of Rule 13, the State Government may grant to refuse
29 a license. In case of refusal, intimation shall be given to the applicant in writing, et cetera, et
30 cetera, on the payment of a fees. All this shows the character. There's no contractual they say.
31 you're not discussing anything with the state.

32

33 Then My Lord Rule 18. I don't propose to read it. Just the heading is enough, 'Priority'. So,
34 there was a statutory priority on how this would be granted. Then there used to be a register
35 of prospecting licenses under 20. And 23 is relevant. Every prospecting license shall include
36 the following conditions. Please see the first, the licensee shall pay prospecting fee as may be
37 fixed by the State Government not less than two anna's, not more than Re. 1 per acre of land

1 covered by the license. It's clearly an exaction. And (ii) was in the case of mineral rather than
2 gold, silver, precious stones or mica, the license shall not confer upon the licensee a right to
3 win or carry away the minerals. Then the rest is all matter of detail. So even for prospecting
4 license, you have to pay a fee. And today it may seem very little, but not at that time. It was not
5 so little in 1948. Re. 1 an acre. If 1000, 2000 acres are granted Rs. 2000 significant amount of
6 money then. Then 24 at page 11, Right to Mining Lease: "On or before determination of his
7 license, a licensee shall have a right to a mining lease or leases over the whole or parts of the
8 area covered by the license in accordance with the rules". Then the next chapter again is grant
9 of mining lease in respect of land in which the minerals belonged to the Government.

10
11 Then My Lord is 26, I'll just read the headings. This was about the certificates of approval, et
12 cetera as a condition of eligibility. Rule 27 was the application for a mining lease. The
13 application had again, a statutory levy of fees in Rule 28. And then they inserted 28(a), which
14 Your Lordship will find at 13. It said, when a mining lease is granted, the formal lease shall be
15 executed within six months. So, the grant was by an order. So there used to be an order
16 sanctioning the lease, and there used to be to borrow the words of the rule, a formal lease
17 executed within six months. Rule 35 at page 14, the area of the mining lease, not troubling
18 Your Lordships, with the detail. Rule 40 is relevant which is at page 15, the period for which a
19 mining lease may be granted shall be 30 years, and for so and so, and for 20 years other
20 minerals shall ask for a shorter period. The lease shall be renewable at the option for one or
21 two periods not exceeding the duration of the lease in the case of iron ore or bauxite to the
22 manufacturer aluminium and one period not exceeding the duration. In the case of other
23 minerals. When the renewal is granted, the surface royalty and surface rent charge will be at
24 the rates and force at the time of the renewal. Dead rent shall be charged at the rate a state
25 government may fix within the time limit specified in the 3rd schedule in force. Then My Lord,
26 Rule 41 that's important, directly relevant for us. Every mining lease shall include the following
27 conditions. One, the lessee shall pay royalty on minerals. Please mark the words 'dispatched
28 from the leased area' in accordance with Schedule 1 to the rules. So, this was mandatory. The
29 lease shall have a condition that you will pay royalty on the minerals dispatched and this has
30 to be in accordance with the Schedule. Provided further, in the case of lease executed after
31 coming into force, you should not be required to pay during, the currency, et cetera, et cetera.
32 Then (ii), if any mineral not specified in the lease is discovered in the leased area, it shall not
33 be disposed mineral without obtaining a lease. If he fails to apply within twelve months from
34 the discovery. Government may give the lease in respect of any mineral to any other person.
35 The Lessee shall also pay for every year except the first year of the lease yearly dead rent within
36 the limit specified in the Third Schedule. Though the rules as maybe fixed by the State
37 Government in the lease and if the lease permits the working of more than one mineral, the

1 State Government may charge separate rent in respect of each mineral, provided that the lease
2 shall be liable, Lessee shall be liable to pay dead rent or royalty in respect of each mineral
3 which is higher. (iv) is important because when I deal with **Murthy's** case, this will have some
4 bearings. The Lessee shall also pay for the surface area used by him for the purpose of the
5 mine's surface rent at a rate not exceeding the land revenue and the cess is accessible on the
6 land as maybe specified by the State Government in the lease. Please mark the words. 'Rate
7 not exceeding the land revenue', and then it is added 'and cess is accessible on the land'. So
8 that becomes the condition of the lease. The rest are My Lord, all technical conditions. I won't
9 trouble Your Lordships with the details. Rule 42 is the rights of the Lessee, the only technical
10 things working mines, sinking pits et cetera, et cetera. Then My Lords there was a separate
11 chapter, Chapter 5.

12

13 **JUSTICE J.B. PARDIWALA:** Anything with regard to 47, Mr. Salve? Just have a look at it.

14

15 **HARISH SALVE:** Rule 47?

16

17 **JUSTICE J.B. PARDIWALA:** Yes. It says a mining lease granted by a private person.

18

19 **HARISH SALVE:** Yes. I was going to read that whole chapter. It's very important. The
20 provision of the chapter shall apply to mineral concessions granted by private person. Then
21 very interestingly same conditions are put. You have to have a certificate of approvals. You
22 can't grant it to whomever you like. The conditions of prospecting license are specified, the
23 conditions of mining lease are specified. And 47 is part of that chapter. The mining lease
24 granted by a private person shall be subject to the following conditions. Except leases in
25 respect of coal, iron ore, bauxite from the manufacturer of aluminium for which period the
26 lease shall be of 30 years. All leases shall be for a period not exceeding 20. They shall be
27 renewable at the option of the Lessee for one term, et cetera. Then 2 is not relevant. That's one
28 interest, single interest. Please turn to (iv) the provisions of 1, 2, 3 4, 5,7, 8,9 10, 11 and 15 of
29 Sub-rule (i) of Rule 41 shall apply to such lease. So that takes us back, My Lord to page 16(i).
30 The very first one, he shall pay royalty. So statutorily that's imposed even on when a private
31 person is granted with such modification that for the State Government the word Lessor will
32 be substituted. The Lessee may determine. I'm so sorry. And 51 is important.

33

34 "No person in granting or transferring or obtaining a prospecting license or a mining lease or
35 any right title of interest in a license or lease shall charge any premium in addition to or in lieu
36 of prospecting fee, surface rent, dead rent and royalty, specified in the license or lease
37 proportionate to such right." I want to state the point for that. I want to flag one point here. I

1 don't want to get into it, because that's a separate part, but it's very important. "Is the state's
2 right to tax the mineral rights granted by a private lease?" It is possible to argue that, "that is
3 not an exaction of the kind which would denude the power of the state." Because, the law treats
4 as two separate classes, 'land vesting in the government' and 'land other than the government.'
5 They could have made one common rule saying, "the royalty shall not execute Schedule 1." It's
6 the same schedule. It's the same rate.

7

8 **JUSTICE B. V. NAGARATHNA:** But who grants the mining lease makes a difference. If it
9 is by a private person, then the royalty goes to the private person.

10

11 **HARISH SALVE:** And, 'is that an exaction by the state?' The answer is, possibly no.

12

13 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Does the nature change merely because their
14 land vests in the State Government?

15

16 **HARISH SALVE:** It would. It would. Nature of what? Let me be very clear....

17

18 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Nature of the royalty is the same.

19

20 **HARISH SALVE:** No. I'm sorry...

21

22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Whether.... the quantum is obviously the
23 same. But, the nature of the royalty, whether the royalty is demanded by the State Government
24 or by a private person, who owns the land, who owns the mineral rights, is essentially the same.

25

26 **HARISH SALVE:** My Lord, the point, which.... that's why the thing is, we didn't open this
27 case. My learned friend... that's why I said 90% of what he argued is non-contentious. The
28 expression "royalty is a tax" is a very shorthand expression. The real point is something very
29 different. How we developed it to saying, "royalty is an exaction by the state, which is regulated
30 and Section 9 displaces any further exactions, which takes to the next step about 'royalty,
31 therefore being akin to a tax' and which then becomes a short hand expression, 'royalty is a
32 tax' and that shorthand expression then is treated like a proposition of law, saying 'royalty is a
33 tax', and then you say, "hold on a minute." That's very counterintuitive to say 'royalty is a tax.'"
34 What is the real legal principle on which we say that Section 9... and there is a serious change
35 made in the new act, which I will come to. Why do we say Section 9 displaces any possible tax
36 on mineral rights? Is because, the limitation contained in Entry 50, which says "subject to law
37 in mineral development." The exaction by state is contained in that. That it is an exaction is

1 enough for me. I maybe right or maybe wrong. But what we are going to show is that, if I am
2 right, that this is an exaction by the state, and then Your Lordship will have to see, whether an
3 exaction by the state pegged at a particular figure. Whether that can be added to by having a
4 de facto tax on royalty and trying to say, but this is only a measure. That's the real point.
5 Royalty is a tax, this shorthand expression has created certain conceptual problems. And it is
6 very counterintuitive to say, royalty a tax. I'm only showing, it is completely statutory. There's
7 no contractual element left in any of these.

8

9 **JUSTICE ABHAY S. OKA:** So, you're also proceeding on the footing that royalty is not a
10 tax.

11

12 **HARISH SALVE:** Not in its classic sense. It's not. It's very counterintuitive to say royalty is
13 a tax. The real point, which Your Lordships have to consider is not if royalty is a tax or not a
14 tax. In fact, Your Lordships will see the questions which have been framed. The way they have
15 been framed is what are the real limitations in Entry 50. Either we are right or we are wrong.
16 That's the real point. Because this, akin to tax, became therefore a tax and therefore royalty is
17 a tax. This is sometimes shorthand expressions are treated like proposition of law, and then
18 you run into conceptual problems,

19

20 **JUSTICE HRISHIKESH ROY:** Mr. Salve, in the judgments that are under discussion in
21 the present proceeding, if they have an idea to interpret in the constitutional sense, what is
22 tax. Because if you go into the definition section of taxation 366...

23

24 **HARISH SALVE:** 28.

25

26 **JUSTICE HRISHIKESH ROY:** 28, in those *India Cements* and *Kesoram*, they did not
27 have that idea in their mind.

28

29 **HARISH SALVE:** That's my point. In that sense, nobody said royalty is a tax under 366(28),
30 and that may be taking a point, one step too far and one unnecessary step, for me. As I started
31 by saying, my case is based on what is the limitation in Entry 50. I mean, whether I'm right or
32 whether I'm wrong is another matter. What is the limitation in Entry 50? If there is a complete
33 quote, of how much a state can receive from land which vests in the state, is that not what
34 occupies the field? And is that not what removes from the state's taxing power, the power to
35 tax royalty? Then you run coach and fore through this. The Union says for and Your Lordships
36 will see why. They said, states are overcharging royalty at the cost of other states. I'll show all
37 that in the material. So, they said we must fix it. Now you fix the rate of royalty at Rs. 50 per

1 ton. And then you say, yes, royalty Rs. 50 per ton. And 300% of the royalty is tax on minerals.
2 What's the use of fixing? And then you pass it off saying oh this is only a measure; this is a tax
3 of land. This is a tax on mineral rights, and so on and so on.

4

5 **JUSTICE B. V. NAGARATHNA:** There could be various types of exactions on mineral
6 rights.

7

8 **HARISH SALVE:** Yes.

9

10 **JUSTICE B. V. NAGARATHNA:** If that is considered to be, the impost or taxes or whatever
11 you may call exactions as a genus, then royalty is only a species.

12

13 **HARISH SALVE:** I'm deeply obliged. And that is why...

14

15 **JUSTICE B. V. NAGARATHNA:** That is only one aspect. Sorry...

16

17 **HARISH SALVE:** Your Ladyship is absolutely right. In fact, the problem arises when we
18 start, generalizing.

19

20 **HARISH SALVE:** We have to see each law and see where it sits. This side of the line or that
21 side of the line. It's very difficult in these matters to try and enunciate some sort of one mantra
22 for all problems. It doesn't fit that way. There is a law which my learned friend was defending,
23 which said Rs. 1.50 paisa for any land used for any purpose. Maybe it passes muster. So, it's
24 notthis attention to detail, and this is very important because on the one hand, we are
25 balancing national competing equalities and on the other hand, you're dealing with a very vital
26 power, a power of the tax conferred on the state. So, we have to be very careful and the devil
27 lies in the details. You have to look at exactly what is it that we are talking.

28

29 **JUSTICE B. V. NAGARATHNA:** If one species of exaction is taken away from Entry 50,
30 other species of exactions are available to the state.

31

32 **HARISH SALVE:** They remain. They remain.

33

34 **JUSTICE B. V. NAGARATHNA:** It will remain. But royalty cannot substitute for all species
35 of exactions.

36

1 **HARISH SALVE:** My respectful submission that is precisely what this Court will have to
2 delineate. What is it that gets taken away and see the laws which we are concerned with. Do
3 they cross the line or do they stay within the line? And I would My Lords submit any
4 generalized statements is where we get into difficulties, because this is a very sensitive area of
5 Constitutional Law. It's a complex area. And either way, a generalized statement saying, oh,
6 any kind of tax can pass muster, is as flawed as saying no tax can pass muster. But I'm getting
7 ahead of myself, if I show all these rules.

8

9 So, My Lord, the important thing which I wanted to show is that the rules right from '48 had
10 two packages. They did not treat the State as yet another owner of land. And, in fact, Rule 47
11 mirrored Rule 41. They didn't have one common rule applicable to both. Now, what's the
12 significance of that, I will develop later. Because the State, as the owner of minerals, the genesis
13 of that goes back into our land reform laws. And the later and currently the National Policy
14 2019 make it more and more clear. We are now talking in term of intergenerational liquidity.
15 We are talking of State as owning mineral resources and owning it for public good, et cetera,
16 et cetera. No longer the concept of the Crown, the Raja owned everything, and it's with his
17 permission that you took. You were taking his wealth, so you gave him a part of the produce.
18 That concept has died. What did you give the King? Everything belonged to him. So, you take
19 something you share with him. Land revenue was that, you shared produce. Those colonial
20 concepts have perished post our Constitution in '50. That's the point which I'm trying to make.
21 So, we have to accommodate that. And that is why, right from '48, the State, as the owner of
22 mineral, was treated separately from a private owner. They could just have put everything
23 under 41. One more rule, and I'm done with this. Page 22. There's a completely different track
24 running for State leases. Rule 57.

25 Any person agreed by an order of a State Government refusing to grant a certificate of
26 approval prospecting license or mining lease refusing to renew a certificate of approval,
27 refusing to renew a prospecting license or cancelling prospecting license, refusing to permit
28 transfer, et cetera may within two months. of the order apply to the Central Government for
29 reviewing the same. This was My Lord called the revision. As young lawyers we all benefited
30 out of this provision considerably, going to Shastri Bhavan to argue these revisions.

31

32 **JUSTICE B. V. NAGARATHNA:** Is it the same as the Mines Tribunal?

33

34 **HARISH SALVE:** Came later. Yes.

35

36 **JUSTICE B. V. NAGARATHNA:** Popularly called the Mines Tribunal though.

37

1 **HARISH SALVE:** Yes. Earlier it used to be a civil servant, Joint Secretary or somebody
2 sitting here.

3

4 **JUSTICE B. V. NAGARATHNA:** [UNCLEAR] to Government.

5

6 **HARISH SALVE:** Schedule 1, which imposes or rather, which sets out the rates of royalty is
7 at page 25. Coal 5%, mica so and so, gold, silver, chromide, oil, shale.... only to show that this
8 was... at that time, it was not *ad valorem*. It was what, My Lord, borrowing the Excise Duty
9 language. Except coal was 5% for statutory price. It was what we, in Excise Law, we used to
10 call 'the specific rates.' So much 'per quantity.' And the unit used at that time it has gone into
11 disuse, 'Maund.' This is My Lord, the Rule of.. Concession Rules of '49. I think, it may be more
12 better use of time, if I show Your Lordships, the '57 Act, the '57 Rules. And then go to the
13 judgments, that have interpreted.

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Fair enough.

16

17 **HARISH SALVE:** Now, the '57 Act, My Lord, there have been.... the problem with the
18 textbooks now, is there was very serious, very substantial changes made in 2015. So, I wanted
19 My Lord to see the Act as it first came, and that's the 19.... This Act, Your Lordships will find
20 at page 92 of Volume IV(i). Objects in reasons... if Your Lordships have.... no, it's in the Volume
21 IV statutes, the '57 Act. I may have to ask Your Lordship first to turn to Volume IV, page 910.
22 "The statement of objects and reasons" is important.

23

24 **JUSTICE J.B. PARDIWALA:** Same volume?

25

26 **JUSTICE ABHAY S. OKA:** Yes.

27

28 **JUSTICE J.B. PARDIWALA:** Page?

29

30 **JUSTICE ABHAY S. OKA:** 910.

31

32 **HARISH SALVE:** The differentiation made between petroleum and other minerals in Item
33 53 and 54 of the union lists has rendered separate enactment necessary. The present bill deals
34 only with minerals other than petroleum

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Volume IV, page 910?

37

1 **HARISH SALVE:** 914. I'm so sorry. 910. It begins at 910.

2

3 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

4

5 **HARISH SALVE:** "The statement of objects and reasons" is set out at page 914. "The
6 differentiation made between petroleum and other minerals of 53 and 54, the union list has
7 rendered separate enactments for the two necessary. The present bill deals only with minerals
8 other than petroleum. At present, both are dealt with under Mines and Minerals Regulation
9 Development Act. Opportunity has been taken of putting forward this legislation to make some
10 necessary changes in the provision of the existing act, it [UNCLEAR]. These changes refer to
11 the prescription of maximum 50 sq. miles." Then My Lord, the second 'renewal', third is
12 'authorization of government to undertake prospecting and mining after prior consultation',
13 'promulgation of rules'. 5 is important. "The recovery of royalty, dead rent and other sums due
14 to the Government in the same manner and arrears of land revenue." And incidentally, when
15 Your Lordship had seen the section, as to "why is this here?" My learned friend said, "oh, no,
16 this is only for some past dues on '48 Act." That's... That's simply not right. It is for dues under
17 this law, because it says under this act and the old rules, continued only to the extent they were
18 compatible with this Act. Then My Lord it goes on further. A number of provisions hitherto
19 dealt with under the rule making powers of the Central Government have been transferred to
20 the Act in order to restrict the scope of subsidiary legislation. These provisions are and My
21 Lord we are concerned with (iii), the power to prescribe rates of royalty for various minerals
22 in Clause 9 and Schedule II. There was an amendment made in 58 and My Lord some of the
23 concerns flagged need to be seen. If Your Lordship sees para 2 of the next one. Your Lordship
24 has statement of objects and reasons of the amending Act 58. The mines and minerals 57 which
25 replaces the Act of 48 specifically extend the rate of royalty prescribed in the second schedule
26 to mining leases granting in respect of coal also makes it obligatory for the terms and condition
27 of the leases to be brought in confirmative to provisions of 13 to 18. It is considered that these
28 changes will have numerous undesirable consequences. The area covered by the mining leases
29 are principally in West Bengal and Bihar. They account for as much as 80% of the total coal
30 production. The royalties paid on coal vary over a wide range, but are generally much below
31 the rate per ton prescribed in the schedule. A sudden and uniform increase in royalties is likely
32 to have unsettling effect on the industry, and may retard the program of coal production under
33 the second five-year plan. The same adverse effect would be felt by sudden modification. The
34 object is to exempt mining leases granted so on and so forth. I wanted to show this because of
35 the impact of royalty on development, they are joined at the hip if one may use that expression.
36 And that's flagged in this statement of objects and reasons that if you suddenly increase
37 royalty, it has a direct impact. And the concern My Lord, because, for example, coal was found

1 mostly in West Bengal and Bihar. And if you increase the rates of royalty, it impacts other
2 states. I will only show My Lord the '72 Act for the present and then move to the statute. The
3 statement of objects and reasons of the '72 Act. Over 14 years have elapsed since the Mines
4 and Mineral regulation and Development Act came into force. In course of these years, large
5 strides have been made in the development of mines and minerals. The production task before
6 the nation in the fields of steel, non-ferrous metals, fertilizer, chemicals, power generation,
7 call for measure of systematic and massive utilization of the natural resources of the country.
8 The Mineral Advisory Board has from time to time reviewed the working of Mines and Mineral
9 Regulation Development Act and made recommendations for amending some of the existing
10 provisions of the introduction of these new provisions. The recommendations cover the
11 following principal points. And (ii) is the imposition of specific obligation or holding of mining
12 leases in respect of payment or royalty for minerals removed by their agent sub-lessees
13 provision for statutory basis for calculation of dead rent, et cetera, et cetera. And (x) is
14 important. The creation of a first charge on the assets of the holder of a mineral concession on
15 account of mining dues. So, it is not only that the state was treated separately where the lands
16 belong to the state. That was given a full statutory exaction or almost it was akin to a tax
17 because your assets could be charged, you could be put on penalty, and you could, if you
18 removed it without payment of the royalty to the state, it's a criminal offense. Now, why? The
19 reason is, My Lord and now, one realizes why the framers of the Constitution put that
20 limitation in Entry 50, while the tax on mineral rights was given to the State. A state richly
21 endowed with minerals oversees the task before the nation in the field of steel, non-ferrous
22 metals, fertilizers, and chemicals. A State which has a lot of ore of a particular kind. This is
23 very important. I'm sorry. This how this works.

24

25 **KAPIL SIBAL:** I'll speak for myself how this works on ground [INAUDIBLE].

26

27 **HARISH SALVE:** Union has put a very helpful affidavit. I'm not going into that because we
28 divided our work. My Learned Friend will be showing that. And that is why this limitation was
29 cast, because My Lord please consider, if this is the perspective and then you have a free
30 running tax on mineral rights which the State can impose on royalty. It will run coach and fore
31 through all this. It has the potential to run coach and fore through.

32

33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Then Parliament can certainly legislate by
34 saying...

35

36 **HARISH SALVE:** It has.

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That these will be the limitations on the taxing
2 power.

3

4 **HARISH SALVE:** It has. Question is, does Parliament have to use that specific word, or is it
5 discernible from the Act.

6

7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** You're saying that the entire taxing power is
8 excluded because this is an occupied field.

9

10 **HARISH SALVE:** No, I'm sorry. The necessary implication. Ultimately, it will come down
11 to, if I may say so, in all humility. Does Parliament need to say, and the State shall not impose
12 any tax or is it clearly discernible from the provisions that this is all that the State was meant
13 to get. It ultimately boils down to that. Because if we accept that Parliament can say, and you
14 shall not recover any tax, anything beyond this. Is the absence of the words determinative of
15 the matter? Or can one find from the architecture of the law, the purpose of the law, the object
16 of the law, for mineral development, that if you leave this free, all this mineral development,
17 so much wasted eloquence.

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So, your contention then is basically that
20 royalty is akin to a, it's a compulsory exaction one. Two being a compulsory exaction. It is akin
21 to a tax or an impost. And therefore, since Parliament's legislation, Parliamentary legislation
22 has provided for the quantum of the...

23

24 **HARISH SALVE:** How much you can get.

25

26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Of the levy, which is in the nature of a tax or
27 impost. Therefore, the State can't....

28

29 **HARISH SALVE:** How much Parliament has said your fiscal exaction from this mineral
30 which is vested in public trust on you is Section 9 and no more. Now, is that not a limitation
31 which would curtail the taxing power of the State? That's the point. Or does Parliament have
32 to add the words in Section 9 saying, "and you shall not have any more tax."

33

34 **JUSTICE B. V. NAGARATHNA:** Because the limitation has to be imposed by Parliament
35 by law.

36

37 **HARISH SALVE:** By law.

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JUSTICE B. V. NAGARATHNA: But can the law be implied? It has to be expressed.

HARISH SALVE: No. The law is there.

JUSTICE B. V. NAGARATHNA: It has to be expressed.

HARISH SALVE: It is expressed. Section 9 says, when I develop it. The Court will see when you say you shall recover this and not more than this. I mean, does it really mean do you really need the words, and you shall not impose a tax on receipt. You can't. Your whole taxing structure, the architecture of the tax on mineral rights becomes incompatible with the law and mineral development.

CHIEF JUSTICE D. Y. CHANDRACHUD: You shall not recover more than this on account of this particular head, which is royalty.

HARISH SALVE: No, I'm sorry My Lord. My point is slightly different.

CHIEF JUSTICE D. Y. CHANDRACHUD: Once royalty has been provided for.

HARISH SALVE: I agree.

CHIEF JUSTICE D. Y. CHANDRACHUD: The state cannot say that well, we are going to demand anything apart from this towards royalty. Because then you are governed by Section 9...

HARISH SALVE: My Lords, please consider where we are. If you say in mineral development, this is the entire package. And now the law goes this far saying for all, for the local purposes. Parliament has imposed cesses under the Union Legislation and your validation law was upheld on the ground that now this taxing power is only with Parliament. If that is how, if that's the statutory, that's the constitutional landscape.

What do we really mean by saying, "subject to a law in relation to mineral development?" It doesn't say "taxing power, subject to a ceiling laid by Parliament." If it said, "subject to a ceiling laid by Parliament", one would say, "show me the Act? Where's the ceiling?" Parliament has not imposed to ceiling, you go. I'm getting ahead of myself. But in Entry 50, the words are very different. My learned friend's submission has been.... "Show me where is this?" Where does it

1 say, "you will not have more than this much tax." That's not what Entry 50 says. If taxing
2 mineral rights becomes incompatible with a Law of Mineral Development, your power stands
3 denuded. You don't have, you don't need a law saying and you will not recover tax. That is my
4 interpretation of Entry 50. Maybe right may be wrong.

5

6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** If taxing mineral rights becomes
7 incompatible....

8

9 **HARISH SALVE:** With these architecture of the Law of Mineral Development.

10

11 **CHIEF JUSTICE D. Y. CHANDRACHUD:** With the architecture.... stands denuded.

12

13 **HARISH SALVE:** That's right. And My Lord, in one sense, while, I think when the Attorney
14 was making his submission, My Lord, the Chief Justice spoke of the different mantras of List
15 II.

16

17 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

18

19 **HARISH SALVE:** And the real answer lies there. Because nothing, no words, no nuance of
20 this should be ignored. Your Lordships have always said, "we look very carefully at the entries."
21 And these are not loosely worded entries. They are not very carefully created entries. Once I've
22 shown this architecture, I have to develop that. But, My Lord, there are broadly 3-4 kinds of
23 mantras. One, is sharing mantra. Parliament will legislate on this; you will legislate on this.
24 Public order, other than 'deployment of Centrally Armed Forces, Centrally Armed Forces.' So,
25 you deal with this. Parliament will deal with that. The second is, the overlap mantra. Subject
26 to law made by Parliament. So, there is a shared legislative power with supremacy in List I.
27 The third is, other than those declared by Parliament by law. And some degree of confusion
28 has come, if I may say so, My Lord. Although they are directly interrelated... of the interplay
29 between 54 and 23, in which Your Lordship shall see those 3 or 4 cases. And the limiting words
30 of 50. They are very different. One is your regulatory power is denuding. That by itself doesn't
31 denude your taxing power. My Lord, if we run a blue pencil through the words, "subject to any
32 limitations imposed by Parliament, by development." The fact that the State lost the Entry 23
33 part, means it lost the taxing power. If we are right -- and this is a point to be fully developed,
34 I'm just foreshadowing this submission -- that 50 is *sui generis*. And it is not a limitation on
35 your taxing power. That limitation flows from the Law of Mineral Development, not from a
36 legislation per se, made by Parliament. And if the architecture of the Law of Mineral

1 Development makes it incompatible to have a tax on mineral rights, then your power stands
2 denuded. That's the real point.

3

4 **JUSTICE B. V. NAGARATHNA:** That means the taxing power is not really denuded as
5 such.

6

7 **HARISH SALVE:** It is eclipsed by a Law for Mineral Development.

8

9 **JUSTICE B. V. NAGARATHNA:** But the Law for Mineral Development is not exhausted
10 yet. There could be... It is dynamic.

11

12 **HARISH SALVE:** Yes, of course. If tomorrow the '57 Act is repealed, your power springs
13 backs in its plenitude.

14

15 **JUSTICE B. V. NAGARATHNA:** No, and also there could be various other types of
16 provisions coming up in the interest of mineral development.

17

18 **HARISH SALVE:** That's why, again, you have to see what there is.

19

20 **JUSTICE B. V. NAGARATHNA:** Yes.

21

22 **HARISH SALVE:** Generalizations create a problem. That's why I start with the acts, the old
23 act, the new act, the rules, the concession. And then say, how do you fit in the power to taxes?
24 One can't say, look at the entries and therefore your power is gone. Or, look at the declaration
25 and your power is gone.

26

27 **CHIEF JUSTICE D. Y. CHANDRACHUD:** No, MMDR Act?

28

29 **HARISH SALVE:** I'm sorry.

30

31 **CHIEF JUSTICE D. Y. CHANDRACHUD:** If there was no MMDR Act, MMRD Act and
32 MMDR Act, and the state were to enact a legislation on royalty, that legislation on royalty
33 would be referable to what Entry?

34

35 **HARISH SALVE:** 23.

36

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right, therefore, therefore, once it is referable
2 to Entry 20, a legislation, royalty is referable to Entry 23. Therefore, correspondingly a central
3 legislation on royalty is referable to Entry 54.

4
5 **HARISH SALVE:** My Lord, there's no problem with this.

6
7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Once we accept that a legislation on royalty by
8 the state would be referable to Entry 23. The reason why the state cannot impose royalty, is
9 because the law is referable to Entry 54.

10
11 **HARISH SALVE:** Your Lordship, with great respect, is absolutely right. The problem is 50
12 curtails the taxing power with reference to Entry 54. And that's the real point of this case. It is
13 not a taxing power versus a taxing power. My Lord, speaking for myself, quite frankly, the
14 *Kannadasan* logic is a little hard to understand, Your Lordship, will see that. So, let's put
15 that to one side, whether the absence of state parliament can tax. I start by saying if state was
16 to fix a rate of royalty limiting, it would be 23. Parliament has done it in 54. The point is does
17 a law 54 eclipse your taxing rights in 50? My interpretation of 50 is 'yes, it does'. If I'm wrong,
18 I'm wrong. But that's my interpretation. That's the real point for Your Lordship, to consider.
19 That is the structure of 50...

20
21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right. To accept that submission, we will have
22 to make one more hypothesis.

23
24 **HARISH SALVE:** Yes.

25
26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That any power to tax directly impinges upon
27 mineral development.

28
29 **HARISH SALVE:** Yes, it does. It does. And that My Lord, there can be no doubt. Because if
30 you say royalty impinges on mineral development. If you say a tax of 200% on royalty will
31 clearly impinge on mineral development, because here you will go by the substance. The direct
32 impact and consequence of the law will be on mineral development. That's the impact on that.
33 And that's the point for Your Lordship, to consider. Because we cannot be My Lord, if one may
34 say so, we protect the state's right to recover. And Parliament has gone to the extent now post
35 2015, saying auction, get all the money you can for the mineral. And over and above that, every
36 lessee will pay to a district fund, every lessee will pay to a national fund, a cess imposed by
37 Parliament, and all that money goes to the states.

1
2 The point is leaving it to each individual state, which really means, the richly endowed States,
3 to add yet another layer of economic burden, will clearly impinge on mineral development.
4 Either if My Lord, royalty rates don't impinge on mineral development, then of course it is
5 another matter. But if royalty rates impinge on mineral development, then a tax, this is like an
6 additional tax. I'm not saying in its legal character. I'm saying in its fiscal effect. 10% *ad*
7 *valorem* royalty and then 30% mineral tax on *ad valorem* means your rate becomes 13%, not
8 10%. Now, fixing 10% is necessary for mineral development. And then allowing the State to
9 jack it up to 13%, 15%, 17% clearly impinge on mineral development. Is it forbidden or not
10 under 50 is another matter. That's My Lords, how it has to work, and that's why to see what is
11 on the ground, i.e. the law and how it works my Learned Friend will show from the Union's
12 affidavit. It is very necessary for Your Lordships to get a real picture of how 50 and as My
13 Lords, generalizations don't help in this field. You have to see what there is. Does this obstruct
14 this law or does this not obstruct this law. And quite frankly, My Lord, why do I labour the
15 point that it's an exaction. Because the way law has been crafted, it has been taken out of the
16 contractual field. It has been made into a statutory impost. Why all this? To protect the
17 revenues of the State. Because Parliament acknowledges that this is an important. Mineral
18 resource, it's an important source of revenue for the State. So, it might be fully protected. It's
19 statutory. You must enforce it. You can distrain, you can prosecute to make sure you get your
20 exaction, that's not what denudes the power. I'm sorry, My Lord. It's not that. That is what
21 empties it out. Our submission is that now let's look at entry 50. If this is what is there, the '57
22 Act in its original *avatar*, then modified, modified, modified. Now, as we find it, is there any
23 space left to have a tax on mineral rights which will not trip mineral development? And that's
24 how it has been seen. And with respect, Your Lordship is absolutely right. Regulating rates.
25 Parliament has not, I put ***Kannadasan*** to one side, that puts in one sentence. It is clear if
26 the States cannot tax, Parliament can tax, that's the logic the State's managed to save all their
27 collections. But I have My Lord separate -- I deal with it separately. I call it the ***Kannadasan***
28 Conundrum. Possibly the understanding was that if, by law on mineral development, you
29 constrain Entry 23, then the limitation on 97 goes up. So, Parliament [UNCLEAR]. It doesn't
30 say so, but that's the only reason which can sustain that.

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Mr. Salve can you now go to the 1957 Act, And
33 then the rules, and then judgments.

34

35 **HARISH SALVE:** This was necessary so that Your Lordships know in what context I'm
36 showing. Now the '57 Act I'm going to show it in two parts. How it originally came and now

1 how it stands, because it's undergone some serious re-engineering, if one may so use the
2 expression in 2015.

3

4 If Your Lordships first pick up Volume IV(i), page 150 onwards. This was before the 2015
5 amendments. Section 2. "It is hereby declared that, it is expedient in the public interest that
6 Union should take under its control, the regulation of mines and the development of minerals,
7 to the extent here and after provided." Then the definitions are pretty much the same. Your
8 Lordships have page 150. My Lord Justice Oka has page 150? My Lords, same definitions... I'll
9 just very quickly show them. Mineral lease is in C, the same thing as the previous act. Then My
10 Lord, minor mineral is defined, please don't bother with the details. Section 4, is the
11 prohibition on prospecting mining operations in any area except in accordance with the
12 prospecting license or mining lease granted under the act and the rules. So, My Lord, this now
13 cuts through private ownership. Then My Lord, Section 5 is the restriction on prospecting
14 license. I'm not reading all these. Details are not necessary. We can come straight to Section
15 9, which used to earlier be in the rules, now in the statute. "The holder of a mining lease,
16 granted before the commencement of the Act shall not, withstanding anything contained in
17 any instrument of lease or any law for the time being enforced at the commencement pay a
18 royalty in respect of any mineral removed or consumed by him or by his agent, manager, et
19 cetera, et cetera." That is My Lord pre and post is in two. The holder of a mining lease granted
20 on or after the commencement of the act shall pay royalty in respect of any mineral removed
21 or consumed by him or by his agent, manager, employee, or contractor or sub-lessee, from the
22 leased area at the rate for the time being, as the 2nd Schedule." Please mark one thing. This
23 will have some relevance when I'm dealing with the Entry 50 point. Royalty is specifically, on
24 any mineral removed or consumed by him and the state cannot alter this. So, it has to be
25 royalty and it has to be on the royalty removed or consumed. A mineral removed or consumed.
26 And Sub-section 3 was that the Central Government may, by notification, the gazette amends
27 the 2nd Schedule, so as to enhance or reduce the rate at which royalty shall be payable in
28 respect of any mineral, with effect from such date as may be specified in the notifications".
29 Completely My Lord, occupied in the field, as far as royalty is concerned. What its implications
30 are, we'll deal with separately. Then 9(a) is 'dead rent to be paid by a lessee'. Yes, I'm sorry.
31 Then the proviso says, "Central Government shall not enhance the rate of royalty in respect of
32 any mineral, more than once, during a period of 3 years. Now, My Lord, this proviso is very
33 relevant. There is a discussion of this proviso, but it straightaway provides a response to a
34 question which My Lord, the Chief Justice was pleased to put to me. "Does this affect mineral
35 development?" "Yes, it does." Even the Central Government's power is reined in, that this will
36 be the rate of royalty and even you, the Central Government, will not revise it more than once
37 in 3 years. And this was criticized in the discussions by some people saying you're reining in,

1 and they said, no it is necessary to encourage people to develop the views. You have to rein this
2 in.

3

4 Then My Lord 9(a) deals with dead rent. 'Holder of a mining lease for the grant before or after
5 the commencement shall notwithstanding anything contained in the instrument of lease paid
6 to the state government every year. Dead rent at such rate as may be specified in the third
7 schedule'. Again, My Lord, shall pay, formula. And then My Lord, the rulemaking power,
8 because there's quite some discussion of this in the judgments, Section 13 page 154, Your
9 Lordships compilation. The Central Government may by notification in the official gazette
10 make rules for regulating the grant of prospecting license and mining leases in respect to
11 minerals and for the purposes connected there with. One or two things which are relevant. (g)
12 The terms on which and the condition subject to which any other prospecting license or mining
13 lease may be granted or renewed. So, complete displacement. Then My Lord, over the page.
14 (i)' The fixing and collection of fees for prospecting licenses or mining lease, surface rent,
15 security deposits, fines are the fees of charging and the time within which the manner in which
16 dead rent or royalty shall be payable'. I'm only showing all this to show that royalty now is an
17 exaction. Whether it displaces the power under 23, under 50 or not is a separate matter. But
18 royalty is an exaction. That's very clear. Then My Lord, section.... may I go ahead? Section 15,
19 14 and 15. Provisions of 5 to 13, shall not apply to quarry leases, mining leases or mineral
20 concession in respect of minor minerals. 15, 'A state government may, by notification, the
21 official gazette may rule for regulating the grant of quarry license, mining lease or other
22 mineral concession in respect to minor minerals and for purposes connected therewith'. And
23 this My Lord, is virtually this echoes 13, except that it's the state government which makes the
24 rules. And Your Lordship, will find here in (g). 15(g), 'The fixing and collection of rent, royalty
25 fees and other charges at the time and within which the manner these shall be payable'. Now,
26 this fixing of royalty by the state is also under Central Legislature, and that has some bearing
27 as one of Your Lordships' constitution bench judgement notices, on the denudation point.

28

29 Just to complete My Lord. Section 20 and 21: The provision of this Act and rules made there
30 under shall apply in relation to the renewal after the commencement of this Act of any
31 prospecting license or mining lease granted before such commencement as they apply in
32 relation to the renewal of a prospecting license or mining lease granted after such
33 commencement. And then 21, whoever contravenes the provision of Sub-section 1 of 4 shall
34 be punishable with imprisonment, which may extend to two years or 10,000. And that My
35 Lord, 4, now, of course, it is far more clearer after a lot of amendments have been made. This
36 is where you operate other than in accordance with the terms and conditions of a mining lease.
37 And one of the terms and conditions is payment of royalty. Some more Sections have been

1 inserted which make it even more direct. But even in addition. Obviously, it loses its
2 contractual character. That is as far as the Act is concerned. Yes. I'm sorry. Yes. I should have
3 shown that one. Section 25, page 160. Any rent, royalty, tax, fee or other sum due to the
4 Government under this Act or the rules made thereunder. I do not argue. Let me make it clear,
5 that merely because of this, royalty becomes a tax. That's not a wrong way of reading the
6 Section. Suffice it to say, royalty is now a statutory exaction. Does it displace a tax is another
7 matter. So, you have to take it step by step. But penal provisions and provisions such as 25
8 make it a statutory impost, if I may use a neutral verb. And this impost is for mineral rights.
9 The State, the mineral rights are granted under a Central Legislation by the State not by the
10 State under its own legislation, the State is creating these mineral rights now under a central
11 legislation and is allowed to charge a sum of money, which is a statutory impost. I get that far.
12 And on First Schedule, just for the record is...

13

14 **JUSTICE HRISHIKESH ROY:** Mr. Salve, before you go to the schedule...

15

16 **HARISH SALVE:** Yes.

17

18 **JUSTICE HRISHIKESH ROY:** This delegation power under 26, Central Government gives
19 power to the State to do everything that is there under the Act?

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21 **HARISH SALVE:** As a delegate of the Union.

22

23 **JUSTICE HRISHIKESH ROY:** That's right. So, what is this thing? Are you trying to....

24

25 **HARISH SALVE:** My Lord this is a power under Entry 54, not under Entry 23, doesn't
26 restore Entry 23. There's a world of a difference between the State. My Lord, the Air and Water
27 Act. Say the state will. The state will. You are acting under Union Legislation. Your Legislative
28 Power is not being restored. The Union says I will because all these rules the Union can
29 tomorrow correct you, withdraw you, take it away. When the State acts sovereign to its limited
30 extent. The Union can't tell the State, "Make a rule like this. Don't make a rule like that." So,
31 here, it's under the delegation of the Union.

32

33 **JUSTICE HRISHIKESH ROY:** 54?

34

35 **JUSTICE B. V. NAGARATHNA:** So, it's virtually the Union granting the lease.

36

1 **HARISH SALVE:** That's right. It is My Lord, the Union, saying, "this is how you will create
2 these mineral rights and this is what you will charge for it." Does that amount to the kind of
3 limitation 50 contemplated? I will deal with that. Let's not mix up all the points. But at least
4 let me be clear as to how far I have got. And this is fortunately for me, I don't need to reinvent
5 the wheel on this. There are three judgments which have said this. Reading *Kesoram* doesn't
6 help. That's why, in fact, I thought I should be opening a case by saying *Kesoram* is wrong.
7 Saying *Kesoram* is right is of course, itself, what it does. These are the real points of this case
8 and these are the questions referred to Your Lordship for resolution by the referring order. If
9 they remain... It is, a lot of what Your Lordship are hearing, is nothing new. The late Mr.
10 Nariman had said all this when we argued *India Cements*. The privilege of being with him.
11 But it didn't get captured in the judgment. That's all. And finally, there was one point made
12 just to deal with it. Section 29. Because then my learned friend said Section 25 was only if
13 there, something which continued. Even the old rules don't continue in full. All rules made,
14 are purporting to have been made under the Mine and Minerals Regulation and Development
15 Act 1948. '53 or '48 shall, so far as they relate to matters for which provision is made in this
16 act are not inconsistent, be deemed to have been made under this act, as if this act had been
17 in force on that date on which such rules were made and shall continue to enforce until they
18 were superseded by new rules under the act. This is the usual adaptive provision saying rules
19 will continue to the extent consistent with the act. And then My Lord, 30 is the 'power of
20 revision'. And that's important. Because the Union, My Lord is pleased to ask me, "is the State
21 acting on its own?" "No." Because the Union.... See the power of revision. The Central
22 Government, may of its own motion and application, made within a prescribed time by any
23 party. Revise any order made by the State Government or authority. For major minerals, it is
24 complete, blanket power of the Union.

25

26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The 2nd Schedule gives us the royalties now?

27

28 **HARISH SALVE:** Yes. And that's only rest to show that 2nd Schedule gives the royalties.
29 Some are My Lords, for example for precious, semi-precious stones... It was *ad valorem*. The
30 sale price at the pits mouth, some was per ton. Sometimes there are these simple expressions
31 become so complicated with technology. Pits mouth is easy to understand. When you produce
32 gas, what's the pit... What is the price well head price? That which is 2 km under a... kilometre
33 of water or that which is at the flange point after the gas is cleaned? Now My Lord, this is, as
34 far as this is concerned, the Act as it was. Please see the... I'm sorry. Mineral Concession Rules,
35 1960. And then I'll show some of the amended provisions of the Act.

36

1 Volume IV(i) My Lord. And My Lord very quickly, if I may, show material parts My Lord. The
2 certificate of approval got jettisoned. Then My Lord, Chapter 3, again divided between land in
3 which minerals vest in the government. And even whether minerals vest in the state
4 government, all the grants are under the Union Legislation. All the steps are under Union
5 Legislation and Union rules, because the MC rules were made by the Central Government. I'll
6 just give the numbers to go it quickly. Rule 9, 10, 11, 12, say how it is to be granted. Again, a
7 statutory mechanism. The details are not of any importance. 14, is the conditions of a
8 prospecting license and Your Lordship, will just see that again, page 237. Every prospecting
9 license granted shall, in addition to any other condition that may be specified, subject to the
10 following condition, namely one, 'the licensee shall pay such prospecting fee as maybe fixed
11 by the state government, being not less than 50 paisa, not more than Rs. 500 per hectare of
12 land cover'. We have under Chapter 4, My Lord, unless there is anything specific Your
13 Lordship, wants me to read, I'm just skipping through. Chapter 4, begins page 239.
14 'Application for grant of mining lease', which vest in the garment shall be made to the state
15 government in form one through such officer authority at the state government specified. So,
16 the, that action of the state government is of specifying an authority also is under the Union
17 rules. Then Sub Rule 4 says, 'Once the government receives an application and decided to
18 grant an area to an applicant, it must communicate the precise area to the applicant'. Then
19 what the mining plan must have. And if we move on My Lord, Rule 24 is 'disposal of
20 application for mining lease'. This is My Lords, by the orders were passed. Now, it's interesting
21 to see Rule 26 page 242. The State Government after giving an opportunity of being heard and
22 may, for reasons to be recorded in writing, communicated to the applicant, refused to grant or
23 renew a mining lease for a whole, a part of the area. The whole understanding these are
24 minerals vested in the state. They have to be developed. We need private capital to come in. It
25 is all becoming extremely tightly controlled by Union law and Union rules. Then My Lord,
26 conditions under Rule 27. Similarly, My Lord, 27(1)(c), is 'dead rent' 27(1)(d), is 'surface area',
27 'surface rent'. And please mark My Lord, it says 'water rate' in (d). So, the water rate is imposed
28 here. Now, what is interesting is 27 (5)

29

30 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Which page is it?

31

32 **HARISH SALVE:** 242. If the lessee makes any default in the payment or royalty as required
33 under Section 9 of the payment of dead rent as required under 9(a) or commits a breach of
34 any of the conditions in 1, 2 and 3, except a condition referred to in (f) of 1, the State
35 Government shall give notice to the lessee, requiring him to pay the royalty or dead rent and
36 remedy the breach within 60 days. And if the royalty dead rent is not paid and the breach not
37 remedied, the state government may without prejudice to other proceedings that may be taken

1 determine the lease, forfeit the amount of security deposit. So even this is not under central
2 rules. So, the entire operation of mineral rights, the creation, the administration, the terms
3 and conditions, and its determination. The minerals vest in the State. The mineral
4 development is entirely under the Union. And again, My Lord Rule 31. This puts us onto the
5 form.

6

7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

8

9 **HARISH SALVE:** Then My Lord, Rule 31: Where on an application for the grant of a mineral
10 lease, an order has been made for the grant of such a lease. A lease deed in Form K or in a form
11 as near thereto in circumstances may require be executed within six months. So, this is now
12 My Lord, a statutory form which sets out how the lease is to be granted. Here again, My Lord
13 there is a separate chapter 5, page 247, which deals with minerals which vests in a person other
14 than the government. I want trouble Your Lordships with the details. It has the same thing,
15 including no premium conditions of mining lease, et cetera. But for the state, the mining lease
16 has to be in Form K. And finally in Chapter 7 is revision. Any person agreed by any order made
17 by the state government or the authority in excise bars conferred on it by the act or rule may
18 within three months from the date of the communication apply to the Central Government
19 triplicate for revision etc. It is a complete controlled by the Union. Now My Lord, there's an
20 important point to note, page 251 because this will have some bearing when I deal with the
21 Entry 49. Entry 50 point. The holder of a prospecting license...

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Which provision?

24

25 **HARISH SALVE:** I'm so sorry My Lord. Rule 72.

26

27 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 72.

28

29 **HARISH SALVE:** The holder of a prospecting license or mining lease shall be liable to pay
30 to the occupier of the surface of the land, over which he holds the prospecting license, or as
31 the case may be, the mining lease. Such annual compensation as may be determined by an
32 officer appointed by the State Government by notification on this behalf in the manner
33 provided in Rules 2 to 4. So, My Lords, the distinction is made between the mineral rights and
34 the surface of the land. This will have some bearing on whether you can say I'm taxing the
35 surface rights and the measure of that is the value of the mineral rights, which is the *Murthy*
36 logic.

37

1 **JUSTICE B. V. NAGARATHNA:** Entry 49?
2

3 **HARISH SALVE:** Entry 49. It's tax on surface rights. But the measure is the royalty. So, this
4 is one, My Lord. The Form K begins at page 264. One or two important things in this. I just
5 want to show this because it's important. It speaks about royalties to be paid. No question
6 about it. And that said, in part 5, page 267. "And surface rent and water rate...." The details are
7 not relevant. I'm very quickly, just showing the provisions. And part 7, "covenants of the lessee
8 is interesting. The lessee shall pay rents, water rate and royalties reserved at such times as may
9 be provided, and also pay and discharge all taxes, rates, assessments, impositions whatsoever
10 being in the nature of public demands, which from time to time, shall be charged, assessed or
11 imposed by the authority of the Central Government upon or in respect to the premises and
12 works except demand for land revenues." So, My Lords, this is important. This contemplates
13 public demands which shall from time to time be assessed or imposed by the authority of the
14 Central Government, not by the State Government. That means the power flows from the
15 Central Government. Whoever may be the... whether it's done by State, an officer of the State
16 or done by an officer of the Centre. That My Lord, unless there's anything else I can show to
17 Your Lordships. But that's as far as is relevant for the present. Like the previous renewal, I
18 didn't read it, because it's pretty much the same as the '48. Now, we may now come to the new
19 Act, as it now stands. My Lord this should again be at Volume IV, begins at page 910.
20

21 **JUSTICE HRISHIKESH ROY:** What is the water rate?
22

23 **HARISH SALVE:** My Lord, I have tried projecting....
24

25 **JUSTICE HRISHIKESH ROY:** I do not know whether...
26

27 **HARISH SALVE:** I'll try and answer the question tomorrow My Lord, because these are such
28 old...
29

30 **JUSTICE HRISHIKESH ROY:** You are correct. Because...
31

32 **HARISH SALVE:** Could be under local laws.
33

34 **JUSTICE HRISHIKESH ROY:** It may have nothing to do with the law but when Jamshetji,
35 the original Jamshetji, he wanted to set up steel plant. So, for steel you need iron ore.
36

37 **HARISH SALVE:** Yes.

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JUSTICE HRISHIKESH ROY: I am remembering what is written by R.M. Lala in 'Beyond the Last Blue Mountain' book.

HARISH SALVE: Yes, yes.

JUSTICE HRISHIKESH ROY: So there, he brought, I think the expert from Paris, perhaps. One was identified as a world expert. He brought him and they were traveling on elephant back to find out where the rich Iron ore could be available. And eventually they found a mountain of iron ore where I think the percentage is about 60%, which is very high. but then they realize that there's no water, because water is essential in order to extract the ore.

HARISH SALVE: Yes.

JUSTICE HRISHIKESH ROY: And then they said that it's not going to work out. But suddenly just after some steps on bullock carts and elephants, they suddenly found a vision of two rivers, or three rivers converging and a huge water body. And that is where I think Jamshedpur, the current Jamshedpur.... I think, that's this water thing is a very relevant thing for mining.

HARISH SALVE: In fact, if one goes, I didn't want to enter that. My learned friend is going to be showing....

JUSTICE HRISHIKESH ROY: We are trying to distract you a little.

HARISH SALVE: No, no My Lord, my learned friend is going to show that part. Mineral development today is a very highly complex. In fact, one of the problems today which people criticize is, because of all this which we have created, India has 17% or 18% of the world's mineral resources, and we import iron ore. We import coal. And that is why, My Lord, we are now taking a very firm position, even with the COP that why should we give up our coal resources. The western world has finished off all their coal resources, are now lecturing us, saying don't use fossil fuel after they've exhausted their fossil fuels. We still have our fossil fuel lying very much in the bowels of the earth.

JUSTICE HRISHIKESH ROY: The Chief Justice was mentioning generational equity.

HARISH SALVE: That's right.

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JUSTICE HRISHIKESH ROY: Inter-generational.

HARISH SALVE: That has now come in My Lord. In fact, so many of these concepts, the Act which I'm going to show now, have come in and how tight the scheme has become and now we have acknowledged. We flirted with the idea of saying, this must all be reserved. There was a time when we used to all challenge reservation by states, the public sector, reservation by this, reservation by that. All that lead to is a decline in production. Even coal mines, now, gradually we are seeing the production of coal going back into private hands because the technology, the capital investment and the efficiency is far greater in a resource where you allow the private to come in and control them rather than do it yourself. These are all changing ideas. And the idea now of the Act which, somewhere along the way, as they say what's in a name, but somewhere along the way the Regulation and Development Act became the development and regulation. It only shows the increasing concern over develop. Earlier concerns were about reigning in private exploitation. Now it is more about developing our resources which are held for the benefit of the people. So, there's a shift in ideology and I'll show My Lords the National Mineral Policy of 2019 when I close this part of the.... The new Act, if Your Lordship sees the Act as it now stands, declaration is the same, so I won't read it. Please notice some definitions added, aa, 3(a)(a).

CHIEF JUSTICE D. Y. CHANDRACHUD: Is the Act in short form?

HARISH SALVE: Page 921 onwards Volume IV. I'm using the book because, I'll be able to give Your Lordship pages. But I found it very difficult because somebody has copied from SCC online and that in between has commentaries, judgments and then the next section. You don't know where the commentary ends and where the section begins.

CHIEF JUSTICE D. Y. CHANDRACHUD: Yes.

HARISH SALVE: 3(a)(a) Dispatch means removal of minerals or mineral products from the leased area and includes the consumption of minerals and mineral products within the leased area. The other definitions are pretty much the same, so I will not trouble Your Lordships by reading them. 4 is the same. And what are the interesting to note apropos the question which Your Lordships was... the comment which My Lord made. 4(b) notwithstanding anything contained in 4(a) the Central Government main interest of maintaining sustained production of minerals of the country, prescribe such conditions as necessary for the commencement continuation of production by the holders of the mining leases who have acquired rights

1 approvals clearances and the like, under 8(b). Page 936 My Lord. I'm sorry, that should be the
2 break up.

3

4 Today, the old notion of sovereign, et cetera.... Today it's all seen as a partnership. So, if you
5 are given the mineral, it's not for your private humour. You have to sustain production. And if
6 you don't, the government can make rules. If you are not keeping up the pace of production,
7 get out. Somebody else will come in and do a better job. In fact, yes, I'm grateful to my friend.
8 One of the conditions adding in the old termination provisions... In fact, please see 4(a) My
9 Lord. It's very important. "Whether Central Government, after consultation of the State is of
10 the opinion, with expedient in the interest of Regulation of Mines and Mineral Development,
11 preservation of natural environment, control of floods, prevention of pollution, or to avoid
12 danger to public health or communications, or to ensure safety of buildings, monument or the
13 structures, et cetera, et cetera. Request the State Government to make a premature
14 termination of a prospecting license. So, this is the first, and a lot of changes have been made.
15 I remember one of the things we struggled here in the forest matter was to get the Karnataka
16 mines closed, state mines, which was creating pollution. Now it's become statutory. And sub-
17 section 4 of this, is the mirror image, is the other side of the picture, where the holder of a
18 mining lease fails to undertake production and dispatch for a period of 2 years after the
19 execution of the lease or having commenced production and dispatch has discontinued the
20 same for a period of 2 years, the lease shall lapse on the expiry from the date of execution and
21 maybe the discontinuance of production and dispatch. And then we have 4(b), which is
22 efficiency. So today, My Lord, it's more, you are really working a concession, not just for your
23 private gains, but as a part of the overall mechanics of mineral development. Then My Lords,
24 the period, for which such leases may be granted, is statutorily controlled under Section 7 and
25 8. I won't trouble Your Lordships with the details.

26

27 And then we have Section 9 which is at page 942. "The holder of a mining lease.... 9(i) is the
28 past My Lord, not commencement of the act. Notwithstanding anything contained in the
29 instrument of lease are in the law enforced, et cetera... pay royalty at the rate for the time being
30 specified in the 2nd Schedule." And sub-section 2 is current times. "Holder of a mining lease
31 granted after the commencement shall pay royalty in respect of any mineral removed or
32 consumed by him by his agent, et cetera, et cetera in the leased area." If Your Lordships see
33 this now and go back to Section 4(1)(a)...

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** What page would that be? The PDF page?

36

1 **HARISH SALVE:** 924. "No person shall transport or store or cost to be transported or store
2 any mineral, otherwise, then in accordance with the provision." So, 4(1) is the same. "No
3 person will undertake reconnaissance, prospect of mining operations in accordance with the
4 terms and reconnaissance, et cetera." And now transportation expressly is brought in. And if
5 Your Lordships see Section 9(2), it says, "royalty on mineral removed or consumed." So, if you
6 are transporting it without paying the royalty on mineral, you're violating 4. And if you're
7 violating 4, it's a criminal offense.

8
9 So, that is one important dimension of the matter. Then My Lord, two other new provision,
10 which Your Lordship, must see are, 9(b) and 9(c). How My Lord, these operate are there in
11 the Affidavit of the Union, but then My Lord, the Learned Solicitor will be showing this. I don't
12 want to duplicate work. So, I'll just show the provision and the legal implications. So, this is
13 what the states used to always say that people take the mineral away and we are left with the
14 baby. We are the ones who have to deal with the areas. So, 9(b) is very important. In any
15 district affected by mining related operations, the state government shall by notification
16 establish a trust as a non-profit body to be called the, District Mineral Foundation. My Lord,
17 this came in 2015. Let me just anecdotally take five minutes, two minutes distraction here.
18 This was first done by Your Lordships, in the *Vedanta* case, when granting Environmental
19 Clearance. Your Lordships said for that area you will set up a trust headed by the Chief
20 Secretary. People from the company will be there. Of the top line you will contribute a
21 percentage and that will be used for development of that area, the Lungowe mining. The
22 government, despite which didn't grant the lease for that of another story. But that was one of
23 first brought here. Two important things have been brought by Your Lordships, and it might I
24 don't know whether Your Lordship, ever seen the details. The *NPV* judgment. The net present
25 value judgment, on how -- and it started with mining, because when you start diverting forest
26 land for non-forest purposes, it's not enough that you pay for the tree or you pay for the land.
27 You have to pay the net present value of the loss to ecology. There are now complex
28 mathematical models on how that is to be calculated. And Your Lordships, judgment on that.
29 That's the inter-generational equity, how Your Lordship, started it, and now, of course, the
30 statute has picked up. And now 9(b) is ruled. Now here again, it's under Union Legislation.

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

33

34 **HARISH SALVE:** This is under Union Legislation. So, the state does it under Union law.
35 And then My Lord, the rate is at sub-section 5 of 9(b). The holder of a mining lease or a
36 composite license granted on or after the date of the commencement of the Act 2015 other
37 than those covered by sub-section 2 of 10(a), shall in addition to the royalty, pay to the district

1 mineral foundation of the district in which the mining operations are carried out, an amount
2 equal to such percentage of the royalty, as is paid in terms of the 2nd Schedule, not exceeding
3 one third of the royalty as may be prescribed by the Central Government. My Lord, this is
4 exactly what the taxes are doing. So, this is not an impost by the state. It's an impost by the
5 Union. I have little bit using a colourless word, impost. My Lords may call it a tax, fee or
6 something in between. And this is exactly what number of the laws under challenge purport to
7 do. The holder of mining lease granted before or after the commencement of the act shall in
8 addition to the royalty, pay to the District Mineral Foundation in which the mining operations
9 are carried on, an amount not exceeding the royalty paid in terms of the 2nd Schedule, in the
10 manner and subject to [UNCLEAR]. It's royalty and an amount not equal. The same thing all
11 over again. My Lord, this is a small thing which Your Lordship directed by way of NPV. I don't
12 know what the figure stands now, but My Lords last, when I was assisting Your Lordships is
13 10 years, 8 years ago, 9 years ago, I think it had hit 40,000 crores, 50,000 crores. The interest
14 on which was enough to do so much for the States. And I do remember we got a request from
15 the people in Assam, the forest rangers saying, can we have some money from this. An
16 application was brought by the CEC, that Central Empowered Committee, As Amicus I used
17 to move those applications. And what did they want? They wanted 8 lakhs or 10 lakhs. They
18 said, 'We want to buy two gypsies and two, three guns so that we can chase the poachers'. And
19 My Lord that little amount made so much difference in containing poachers. If these funds are
20 properly utilized, there's so much which can be done. And these are large amounts of money.
21 My Learned Friend will give the exact figures. These are large amounts of money. Then there
22 is another under 9(c). The Central Government shall by notification establish a trust as a non-
23 profit, autonomous body to be called the National Mineral Exploration Trust. This is for doing
24 exploration work. And in sub-section 4 of 9(C). The holder of a mining lease or a composite
25 license shall pay to the trust 2% of the royalty in terms of the 2nd Schedule. Please mark how
26 it is done, 2% of the royalty.

27

28 **JUSTICE B. V. NAGARATHNA:** These have all come in 2015?

29

30 **HARISH SALVE:** Yes.

31

32 **JUSTICE B. V. NAGARATHNA:** But we are considering the acts prior to them?

33

34 **HARISH SALVE:** Of course. My submission is going to be even before these sections were
35 put in, what was the connotation of mineral development? These sections, these are all
36 mineral development sections. So, if that power was taken away, it was for the Union to do it.
37 The Union waited till 2015 to do it, but they've done it. But if the power is not available, the

1 limitation came in. It came in by the overall Act and realizing that that limitation is taking
2 away the power of the State to raise resources, the Union has not filled in the gap. I'll My Lord,
3 deal with this more fully, but just to show this is now the new structure. This is one. The second
4 very important change which has come is Section 10(b).

5

6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Page?

7

8 **HARISH SALVE:** 948. Now, the State cannot grant mining lease by an order, et cetera. It is
9 now all to go by auction. I'm deliberately not reading 10(a). It has a lot of cases pending on
10 10(a), construction issues. Anything said by nine judges, My Lord will even by in passing will
11 affect those. 10 (b) is what we are concerned, the provisions of the Section shall not apply to
12 cases following under 17(a), then mineral specified in part A of the first, which is coal and
13 lignite. That's only the two fuel minerals. Minerals specified in part B of the 1st Schedule. Your
14 Lordships may be pleased to note that, this is only the atomic minerals. Other than that,
15 everything is covered. And then land in respect to which minerals do not vest in the
16 government. So, that is still maintained. Now where the government land is concerned, see
17 now, the qualitative change which has come. First, My Lord, "the state has to notify the areas
18 for grant of lease". That's in sub-section 3. "In areas, where the existence of mineral content,
19 a very notified mineral, is established in the manner prescribed by the Central Government.
20 The State Government shall notify the area for grant or mining lease for such notified mineral
21 in terms and conditions subject to which mining leases shall be granted and any other relevant
22 conditions as may be prescribed by the Central Government." So, this continues. "As may be
23 prescribed by the Central Government." The proviso is not relevant for us for the present. Sub-
24 section 4. "For the purpose of granting a mining lease in respect to any notified mineral in the
25 notified area, State Government shall select through auction by a method of comparative
26 bidding, including e-auction, an applicant who fulfils.... " And My Lord, the criteria is given.
27 What is important is 5. "The Central Government shall prescribe the terms and conditions and
28 the procedure subject to which, the auction will be conducted, including the bidding
29 parameters." So, everything which the State does is, as per prescribed by the Centre and under
30 the authority of the Centre. And any mineral rights now are created by this process. Just for
31 the record, 11(a) is mineral rights for coal and lignite. We don't need to see the details. Section
32 13, page 958. "Read with the definition of mineral concession." So, My Lord, definition is now
33 in 13. Sorry. 922, 3(a)(e) is the definition of mineral concession, which means "either
34 reconnaissance permit, prospecting license, mining lease, composite license." So now, My
35 Lord, we have this umbrella expression. Mineral concession. And Section 13 says the Central
36 Government may by notification in the official gazette make rules for regulating the grant of
37 mineral concession." Earlier My Lord, we had this reconnaissance permit and prospecting

1 license, mining lease etc. They have now coined this expression 'mineral concession.' An
2 umbrella expression, and said mineral concession with respect to minerals and the purposes
3 connected therewith.

4

5 In My Lord 13, just see one or two things, if Your Lordships don't mind. In sub-section 2(f),
6 "The procedure for obtaining a mineral concession in respect of any land in which the minerals
7 vest in a person other than the government and the terms on which and the condition subject
8 to which a permanent license or lease may be granted or reduced." So, now My Lord, this is
9 made much more stricter. And My Lord, (i), just below that, "fixing and collection of fees for
10 mineral concession, surface rent, security deposit fines or other fees or charges, and the time
11 within which... and the manner in which dead rent or royalty shall be payable. So, even that is
12 now done by the Central Government by rules. And just for completeness...

13

14 **JUSTICE B. V. NAGARATHNA:** The state executes the lease deed. Is there any other form
15 under the 1957 Act where a private person can execute?

16

17 **HARISH SALVE:** K. Even the 57 Act. The only thing is the royalty goes to a private person.

18

19 **JUSTICE B. V. NAGARATHNA:** Private person?

20

21 **HARISH SALVE:** Otherwise, everything is controlled completely.

22

23 **JUSTICE B. V. NAGARATHNA:** Because under that the rents and royalties are reserved
24 under the lease deed.

25

26 **HARISH SALVE:** Yes.

27

28 **JUSTICE B. V. NAGARATHNA:** But there are no other reservations made under that?

29

30 **HARISH SALVE:** No.

31

32 **JUSTICE B. V. NAGARATHNA:** Such as what you said 9(b) and 9(c) where a percentage
33 of the royalty has to be paid. They are not reserved under the lease deed.

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35 **HARISH SALVE:** I'll just check that My Lord, one minute please. But what is important is
36 the ground reality is the major minerals. I don't think there are any private interest, which
37 really remain.

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CHIEF JUSTICE D. Y. CHANDRACHUD: Mr. Salve, we go now to the case law or...?

HARISH SALVE: My Lord, I have few more sections to show, then the, what I call the trilogy.

CHIEF JUSTICE D. Y. CHANDRACHUD: Yes.

HARISH SALVE: *Hingir* [UNCLEAR].

CHIEF JUSTICE D. Y. CHANDRACHUD: Which is the trinity?

HARISH SALVE: *Hingir* [UNCLEAR]. They have, My Lord... That's why I said, no need to re-invent the wheel, the interplay between 23 and 54 and how cess is fit or don't fit has been discussed. There are one or two cases which I'll have to deal with. And I say so candidly, in no case has there been... I mean, it may have been submitted to the court, but in no case will Your Lordships find a full discussion of 50. 23 and 54 have been discussed, and they do cast a shadow on 50. And there is a connection, which Your Lordship will see when I come. But in no case...this is the first time I am inviting Your Lordships to focus on 50 and interpret 50. That discussion Your Lordship will not find. But after *Hingir*, after the trilogy of cases, there have been one or two others which I need to explain. One is that *Chaman Lal*, and the other is the *Western Coalfields'* judgment, which analyses all this and deals with it. I want to argue my case without citing either *India Cements* or *Kesoram*. None of Your Lordship's hearing but I do propose to deal with *India Cements* after I finish the first principles analysis. Now, My Lord, I had finished showing almost all the provisions, just one or two...

CHIEF JUSTICE D. Y. CHANDRACHUD: Even if we come to the conclusion, that in paragraph 34 there's an obvious error, we are a bench of nine. So anyway, we have to...

HARISH SALVE: Nine... My Lord, it turns, whether there is an error, whether there is not.

CHIEF JUSTICE D. Y. CHANDRACHUD: But we have to look at it as a matter of first principle.

HARISH SALVE: First principles My Lord. And I start by saying, the only real assistance Your Lordships...

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Unless we, of course, come to the conclusion
2 that **India Cements**, which is what they will argue, have been argued... that **India Cements**
3 has interpreted in **Kesoram** does reflect the correct position of law. But, then to decide that
4 again we have to decide...

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6 **HARISH SALVE:** Again... Exactly, I have to criticize **Kesoram's** [UNCLEAR]. If Your
7 Lordships say no, I'm wrong, our submissions are wrong and **Kesoram** is right, that's the end
8 of the matter. Or vice versa. So, My Lord, whether **Kesoram** should have done these to **India**
9 **Cements** or done that to **India Cements**, frankly, I don't think it's a very useful way of
10 addressing the problem. And I start by saying, in none of these cases, will Your Lordships find
11 a rigorous analysis of two propositions. What really is the meaning of 50? And the different
12 mantras, if I may borrow the Chief Justice's phrase.

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14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

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16 **HARISH SALVE:** And the second Your Lordship will not find in any of the cases, is a
17 rigorous analysis of 49 and 50. The special, excluding the general, is it a carve out? Is it not a
18 carve out? Everybody has said, okay, 50 is not there, 49 is there. But can 49 operate it on
19 minerals in respect of 50? And the third My Lord, which needs a little clarification, the **Ralia**
20 **Ram** principle, measure, was for the first time, if one may say so, contained and clarified, not
21 in **Bombay Tyres**, in **RR Engineering**, where Your Lordship said, yes, but you have to
22 remember it is only a measure, don't make it a tax. An excessive levy starts then affecting not
23 just the measure, but it starts affecting the tax itself. That's the first time Your Lordship
24 administered that caution. **Bombay Tyres** brought it back. And there are two recent cases
25 where **Acer**, Your Lordship struck down saying you can't include a non-dutiable item in a
26 measure. And how that will play out in our case? So, these are the three broad areas which
27 Your Lordship will have to consider, and none of these, Your Lordship will find has been
28 analysed. I start by saying in the judgment in our favour, **India Cements** or in **Kesoram**,
29 the judgment against us. So really, it's for Your Lordships to consider all these aspects and
30 come to a conclusion, one way or the other.

31
32 I had almost finished one or two new provisions My Lords Section 70, which only show now
33 the overriding powers. They added now Section 17, which applies to all areas which vest in the
34 government of a state or any other person and gives the Central Government the power to
35 undertake reconnaissance, prospecting and mining operations and then they have to pay
36 something. Details are not necessary My Lord.

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

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3 **HARISH SALVE:** And My Lord since Your Lordships have mentioned this, I must point out,
4 and I don't need to read the section. Section 18, Conservation and Systematic Development of
5 Minerals. Now, there is an express provision here. Something which is relevant to the Entry
6 54 versus Entry 23 discussion is Section 20(A). Again, a newly added provision. This was
7 added in 2015 which is, notwithstanding anything contained, Central Government may issue
8 such directions to the state as may be required for the conservation of mineral resources or
9 any policy matter in the national interest and for scientific sustainable development. Now 21
10 has one addition. Your Lordships saw 21 of the Act as originally brought in. Please see 21 now.
11 It says, whoever contravenes the provisions of 101(a) of 4 shall be punishable with an
12 imprisonment which may extend to five years. Your Lordship saw Section 4(1)(a) at page 925,
13 where transporting. So, if you even move it without paying royalty it is now an expressly
14 provided for criminal offense under 21. And we still have Section 25. My Lord, there are
15 policing provisions like the power to search and power of the State Government to make rules
16 for illegal mining, et cetera, in 23(B), 23(C) and then again, the State Act under Union
17 Legislation. And then we have 25. 24 is the power of inspection, et cetera, which is there earlier
18 also. And then we have 25, continues, any rank, royalty, fee, tax fee or other sum due to the
19 government under this act or the rules made there under terms and conditions of any mineral
20 concession. They have the certificate of the officer as may be specified by the State
21 Government, on this behalf by general [UNCLEAR] recovered in the same way. So, these are
22 all statutory now, statutory dues and liable to recovery in this fashion. And again, My Lord,
23 Section 31, has the power of... Central Government has been given a power to relax any of the
24 rules in the interest of develop... mineral develop. So, My Lords that's how the law is. It's
25 spread wider. Yes. One last thing which remained. I need to show Your Lordships the auction
26 rules. One or two provisions to show how now the state...How the mineral rights are
27 transferred. That will be another aspect of the discussion on tax on mineral rights. My Lord,
28 Volume IV, page 2176. Your Lordship will find the Mineral Auction Rules, 2015.

29

30 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Page 2...?

31

32 **HARISH SALVE:** 2176.

33

34 **JUSTICE B. V. NAGARATHNA:** Volume?

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36 **HARISH SALVE:** IV. Just one or two rules are what Your Lordship needs to see because the
37 details are not necessary. Rule 8. Rule 8. Bidding parameters. The State Government shall

1 specify in the tender document the minimum percentage of the value of mineral dispatched,
2 please mark that. Have some bearing... which shall be known as the 'reserve price'. The value
3 of the mineral dispatch shall be an amount equal to the product or the mineral dispatched in
4 a month, the sale price grade-wise by the Indian Bureau of Mines. And the bidder shall quote,
5 as per the bidding parameter, for the purpose of payment to the State Government, a
6 percentage of the value of the mineral dispatched, equal to or above the reserved price and the
7 successful bidder shall pay to the State Government, an amount equal to the percentage
8 reported and the value of the mineral dispatched. This is how mineral rights are now created.

9
10 **JUSTICE B. V. NAGARATHNA:** The expression 'mineral development' in Entry 50 of List
11 II, can it not be related to only Section 18 of the 1957 Act?

12
13 **HARISH SALVE:** My submission is going to be, that these are not terms of art. Conservation
14 of minerals is an integral part of mineral development. If you waste them, how are you going
15 to develop them, so the question is, where is the emphasis? Earlier, we believed only in
16 regulating. Let people do what they did when it was considered a prime business resource.
17 With the change in emphasis, where we treat this now as a, national resource. This is a change
18 in our thinking, which has come. Now development comes ahead of regulation. Development
19 is important. Regulating it is an integral part to development.

20
21 **JUSTICE B. V. NAGARATHNA:** So, therefore...

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23 **HARISH SALVE:** Development is a larger, if one may say so, the larger field, which means
24 you regulate how it is processed, how it is progressed. Sometimes it is necessary not to allow
25 removal in order to make sure that you get the maximum possible benefit of the mineral
26 resource, without compromising other factors. My Lord, things which we never did. Your
27 question is very important, things which we never did, we do today. And it started with
28 Environment Law. It's now come into this law. You have to do what is called a cost benefit
29 analysis. What is the cost of the activity? So today, we look at life very differently. What is the
30 cost benefit analysis of mineral development? You are taking the mineral out, it's value
31 addition. So, if you're taking coal out, the value of coal in generating electricity, and that
32 electricity used to say manufacture aluminium, used to manufacture steel, et cetera, et cetera.
33 So that's the value chain, that's the benefit. What's the cost? The cost is degradation of land,
34 degradation of forest, human displacement. All this comes in the cost. And it's only when the
35 benefit outstrips the cost. Now that is the new bunker of develop. So now when we talk of
36 mineral development, we talk of it very differently from very different lenses. Then we thought,

1 in the days of the Crown where development basically meant running away with whatever you
2 could lay your hands on.

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4 **JUSTICE B. V. NAGARATHNA:** So, only the limitation is with regard to mineral
5 development?

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7 **HARISH SALVE:** My Lord, its only mineral development, is pretty much everything.

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9 **JUSTICE B. V. NAGARATHNA:** Correct. But then, before imposing the tax, then the State
10 has to see whether there is any limitation imposed by Parliament by law on mineral
11 development.

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13 **HARISH SALVE:** Correct.

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15 **JUSTICE B. V. NAGARATHNA:** Which is traceable to...

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17 **HARISH SALVE:** 54

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19 **JUSTICE B. V. NAGARATHNA:** ... no and Section 18, particularly, of the Act.

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21 **HARISH SALVE:** Of course.

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23 **JUSTICE B. V. NAGARATHNA:** It gives various aspects.

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25 **HARISH SALVE:** ...not only 18, the entirety of the Act.

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27 **JUSTICE B. V. NAGARATHNA:** Correct.

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29 **HARISH SALVE:** I'm going to make that good. There are so many other provisions in the
30 Act. 18 is a part of a larger... Entry 50 is not to be so narrowly construed, is going to be my
31 submission, because they are legislative eventually. Your Lordships have always held,
32 legislative entries have to be construed broadly. Today, it's 18, tomorrow it may be something
33 more, something less. The ambit of the entry, has to be seen as the entries play with each other
34 and how they interface. What I propose to do after I give the trilogy of cases, explain the one
35 or two other cases. Then, I propose to address the Court on an area which, in one sense, is
36 untraversed so far - A rigorous analysis of Entry 50 and how it plays out with Entry 23 and
37 Entry 54. Ultimately, the answer to the question which this Court is dealing with today in this

1 reference, will depend on 50, and the limits of 50. So, I've shown Rule 8. And then, there is a
2 whole detail of how bidding process has to be done, and then the mining lease is to be granted.
3 Important to show, that today, it is by statute, that in order to obtain mineral rights, another
4 aspect of this will be, the State taxing rights created under a Union Legislation. So that will
5 have some bearing. It's one thing where a private lessee creates... a private owner, creates
6 rights. But where a State itself has created rights as a facet of mineral development, can you
7 tax those rights, is going to be one aspect of entry...

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9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** When the Centre has created.

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11 **HARISH SALVE:** Yes. Under a Central Legislation. A State may be acting under the central
12 law. But where the Centre is creating these rights. And that's what the Court will have to see.
13 To what extent? If 23, as the trilogy of cases says, is virtually gone, it's now all Entry 54, then
14 the creation of these rights, where do you find these rights? Do I find them in 54? Do I find
15 them in the State? Do I find them in the Sovereign? Ownership of the State, or do I find them
16 in law? But that will become an important element in the analysis of Entry 50. That's why I'm
17 showing all these provisions. Now, My Lord, with this may I... Yes, one last thing My Lord, the
18 National Mineral Policy, then we are done with this. It's a 2019 policy. Page 2319. I just wanted
19 to show para 3. 'The core of the functions of State in mining', and this is under the heading of
20 Mineral Development. Only to show that the word 'Mineral Development' has a much wider
21 sweep. 'The core of the State in mining, will be facilitation and regulation of exploration...'

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Where do we read, Mr. Salve? 232...

24

25 **HARISH SALVE:** I'm sorry My Lord, 232... Yes. So, this is only to show, that 'mineral
26 development' includes regulation. That's all. Even in the policy. And, I'm so sorry. Just one
27 thing, and then I'm done with it. Responding to My Lady's observation. Please see Section 13
28 of the Act. I've shown this earlier. Now, this comes under the heading of regulation. And in the
29 regulation head we have 13(2)(f). I had already shown this 13(2)(f) and 13(2)(i), which includes
30 fixing and collection of fees, rent, security, royalty and the payment to district fund, payment
31 to this fund, payment to that fund. So, regulation and development are overlapping concepts.
32 In fact, development is the larger concept, which it takes in regulation. Now My Lord may I
33 move quickly ahead. Policy is there Your Lordships will see it. The three. The trilogy My Lord.
34 **61(2) SCR 537** is *Hingir-Rampur* and this is in all these three judgments can be found in
35 Volume (V). It begins at page 142 of Volume (V). The first para My Lord, gives the details,
36 there were two leases. Then para 2 is interesting. This will be a part of our submissions,
37 especially when we deal with Entry 49. Pursuant to Section 5 of the Orissa's Estates Abolition

1 Act all the right title and interest of the Zamindar of Rampur in the land's demised to the first
2 petitioner under the second lease vested in Respondent 1 of the State of Orissa. In fact, state
3 by state this is how the state became the owner of the minerals. Since the first petitioner has
4 duly paid the rent reserved by the lease to the appropriate authorities and observed, performed
5 all the covenants. And interestingly My Lord all these abolition acts when they were
6 challenged, they were upheld not under Entry 23. They were all upheld under the power of
7 acquisition of the State. Then the details are given about the rules where a cess was imposed
8 and page 144, para 6 Your Lordships will find the challenge. The petitioners contained
9 impugned action rules, *ultra vires* the powers of the legislature, and any event repugnant to
10 the provisions of the existing law. According to the petition, the cess levied under the
11 impugned act is not a fee, but in reality, a levy in the nature of duty of excise on the coal
12 produced as the first petitioner's [UNCLEAR] Rampur colliery in belongs so and so.
13 Alternatively, it is urged. In fact, My Lord the first contention is relevant because this is what
14 led to Justice Wanchoo's dissent, which has created some confusion in ***India Cement***.

15
16 So, the first contention was with the excise duty, second was alternative, which means that
17 even if the levy imposes a fee relatable to Entry 23 and 66 of the Seventh Schedule, it would
18 nevertheless be *ultra vires* having regard to the provisions of 54 and List I, read with the
19 Central Act, 53 of 1948. This contention Your Lordship may mark. This is really what we are
20 concerned with. The petitioner saw the alleged, even if the levy of the fees would be similarly
21 *ultra vires* having regard to Entry 52 in this one, et cetera. Now My Lord, the discussion as far
22 as the present case is concerned, what is relevant is from para 16, only to show what the Act is,
23 at page 149. Let us now examine the scheme of the impugned act, as the Preamble showed that
24 it has been passed because it was thought expedient to constitute mining areas and the mining
25 areas development fund in the State of Odissa. It has 11 sections. Section 3 provides for the
26 constitution of a mining area, wherever it appears necessary for the State is necessary and
27 expedient, to provide amenities like communication, water supply, electricity for the better
28 development of the area in the State of Odissa, wherein any mine is situated or to provide for
29 so and so. And these are the general mining area provisions. Paras 17 at page 150, the scheme
30 of the Act, clearly shows it's been passed for development mining areas in the State. The basis
31 for the operation is the constitution of a mining area, and it is in regard to mining areas thus
32 constituted, that the provision of the Act come into place. It is not difficult to appreciate the
33 intention of the state legislature evidence by this Act. Orissa is an underdeveloped State in the
34 Union, though it has a lot of mineral wealth of great potential value. Unfortunately, its mineral
35 wealth is located generally in areas sparsely populated with bad communications. Inevitably,
36 the exploitation of the minerals is handicapped by lack of communication and the difficulty
37 experienced in keeping labour force sufficiently healthy. Mineral development therefore

1 requires, provision should be made for improving communications by constructing good
2 roads. This is important because, the development itself requires regulation of activities and
3 preservation. The discussion... first part relates to whether it's a duty of excise that begins at
4 paragraph 20. It's only necessary because otherwise Justice Wanchoo's dissent and mineral
5 rights doesn't become clear. Para 20 notes the contention, it is however urged that the cess
6 levied by 4(2) is in substance in reality a duty of excise, as we have already noticed, 4(2)
7 provides, that the rate of levy shall not exceed 5% of the valuation of the mineral at pits mouth.
8 In other words, it's the value of the minerals produced, which is the basis for calculating the
9 cess payable by mines' owners. And that precisely, is the nature in which the duty of excise is
10 levied. The entry and passed Parliament to imposed duties of excise *inter alia* on goods
11 manufactured when minerals are produced, et cetera et cetera. When the minerals are
12 produced from mines and excise is intended to be imposed on them, it would normally be
13 imposed at pits mouth. And that is precisely what the impugned Act purports do. It's also
14 contended, that the rate under 4(2) indicates it must operate, not merely the fee, but a duty of
15 excise. That was the contention. The argument may be carefully examined before the character
16 of the cess is determined. It is not disputed that at under Entry 23 in List II with Entry 66, the
17 legislature can levy a fee, in respect of mines and mineral development. Entry 23 reads thus
18 and My Lord the Entry is set out. We will deal with the condition imposed by the latter part of
19 this Entry later. For the present, it is enough to state that the regulation of mines and minerals
20 development within the competence of the State Legislature. 66 provides that fees and respect
21 to the matters in the said list can be imposed by the State, subject, of course, to the exception
22 of fees taken by the court. The argument is, though, the legislature is competent to levy a fee
23 of mines and minerals, if the statute passed in substance and effect imposes the duty of excise,
24 it is traveling outside the jurisdiction and it's trespassing on the legislative powers of
25 Parliament. The argument is based on two considerations. The first relates to the form in
26 which the levy is imposed and the second relates to the extent of the levy authorized. The extent
27 would always depend on the nature of, services intended to be rendered, and the financial
28 obligations, if the services intended to be rendered to the notified mineral areas, require that
29 a fairly large share should be collected, and the correlation can be definitely established
30 between the proposed services and the impost. It would be unreasonable to suggest that
31 because the rate of the levy is high, it is not a fee, but a duty of excise. In the present case, if
32 the development of mining areas involves considerable expenditure which necessitates the
33 levy of the prescribed rate, it only means, that the services being rendered to the mining areas
34 are very valuable, and the rate, pair and substance is compensating the State for services
35 rendered by him. It is significant, Petitioners don't seriously suggest that the services intend
36 are a cloak and not genuine, other than the taxes have no relation to the services, if they are
37 unreasonable and excessive. Therefore, in our opinion, the rate and the extent of the rate

1 allowed to be imposed by 4(2), cannot by itself alter the character of the levy from a fee into
2 that duty of excise, if the correlation between the levy and services were not genuine or real,
3 or the levy was disproportionately higher. When the requirement of a service is intended to be
4 rendered, it would have been another matter. Then, as to the form in which the impost is
5 levied, it is difficult to appreciate how the method adopted by the Legislature in recovering the
6 impost can alter its character. The character of the levy must be determined in the light of the
7 test we have referred. The method in which the fee is recovered, is a matter of convenience,
8 and it by itself, cannot fix upon the levy the character of the duty of excise. It has often been
9 considered in the past, it's already been held, that the method in which it is levied, may be
10 relevant in determining the character. It's significance in defence cannot be exaggerated.

11

12 Then My Lord, all these classic cases are cited. I'm proposed to read these My Lord. This **Ralia**
13 **Ram** is... and is and then **Byramjee Jeejeebhoy**. Then My Lord, the next para is the
14 **Governor General in Council vs Province of Madras**. I will My Lord deal with them
15 when I deal with **Bombay Tyres**, which in those case... and **RR Engineering** . So, My
16 Lord, I don't want to take up time here reading these cases. 24 onwards is the discussion where
17 it goes into this Entry 54 and Entry 23. And this is important, because here, they upheld it only
18 on one ground. They said the declaration has to be post 1950. The 48 Act Declaration doesn't
19 deal you. Otherwise, they said, it's a complete sweep. Please see para 24 onwards. The next
20 question which arises, even if the cess is a fee, and as such, may be relatable to 23 and 66. Its
21 validity is still open to challenge, because the Legislative competence of the State Legislature
22 under Entry 23, is subject to the provisions of List 1, with respect to regulation and
23 development under the control of Union. And that takes us to Entry 54 in List 1. This entry
24 reads thus. Then, My Lord, entry is set out. "The effect reading the two entries together, is
25 clear. The jurisdiction of the State Legislature under Entry 23, is subject to the limitation
26 imposed by the latter part of the entry. If Parliament, by its law, has declared that the
27 regulation and development of mines should, in public interest, be under the control of the
28 Union to the extent of such declaration, the jurisdiction of the State Legislature is excluded".
29 Please mark the words, 'to the extent of the declaration'. "In other words, if a Central Act has
30 been passed, which contains a declaration by Parliament as required by Entry 54, and if the
31 declaration covers the field occupied by the impugned Act, the impugned Act would be *ultra*
32 *vires*, not because of any repugnance between the two statutes, but because the State
33 Legislature had no jurisdiction to pass the law. The limitation imposed by latter part of Entry
34 23, is a limitation on the Legislative competence of the State itself. This position is not in
35 dispute". This is extremely important, this principle. So, it's not a 'do/don't' kind of
36 repugnance. And I must show a section in the Union Act which stops or which runs counter to
37 a provision in the State Act for the State Act to play.

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JUSTICE B. V. NAGARATHNA: In this paragraph, they don't discuss Entry 50.

HARISH SALVE: Because they were not concerned with 50. Because they held it's a fee. Fee means 23. And here they said, but for the fact that the declaration under '48 Act is not good enough, you have to struck the fees down.

JUSTICE B. V. NAGARATHNA: So, till 1957 Act came they could do it. States had the freedom.

HARISH SALVE: And that's why, in the next two cases, *Tulloch* and this it was struck down. But this principle was, everybody reaches back to *Hingir* and said principal was settled in that case. See the next para is also relevant. It is urged by Mr. Amin, that the field covered by the impugned acts is already being covered by the MMRD Act 1948, and he contends that in lieu of the declaration made by under Section 2 of the impugned act is.... declaration of the 2 of the impugned act is *ultra vires*. 155. Yes. The Central Act was passed to provide for the regulation of mines and oil fields. The development it may be stated at this stage that Acts 67 or 57, which has been subsequently passed by Parliament at 53 or 48, has now been limited only to oil fields. They are however, concerned with the operation of the act in 52 and at that time applied to mines as well as oil fields. Section 2 of the Act contains the declaration to the expediency and control by the Central Government. It reads thus. and then declaration et cetera. It is common ground that at the relevant time this act applied to coal mines. Section 4 of the act provide that no mining lease shall be granted after the commencement of this act. Otherwise then, in accordance with the rules made under the act. Section 5, empowers the Central Government to make rules by notification regulating the grant of mining leases or for prohibiting the grant of such leases in respect of any mineral or any area. Section 4 and 5 thus purport to prescribe necessary conditions in accordance with the mining leases that have to be executed. This part of this act has no relevance to our present purpose. Section 6 of the Act, however empowers the Central Government to make rules by notification in the official gazette for the conservation and development of minerals. 6(2) lays down several matters in respect to which rules can be framed by the Central Government. This power is, however, without prejudice to the generality of the powers conferred to the government by 6(1). Amongst the matters by 6(2) is the levy and collection of royalties, fees or taxes in respect to minerals mined, quarried, excavated or collected. It is true that no rules have in fact been framed by the Central Government in regard to the levy and collection of any fees, but in our opinion, that would not make any difference. If it is held that the act contains the declaration referred to Entry 23, there would be no difficulty in holding that the declaration covers the field of conservation and

1 development of minerals, and the said field is indistinguishable from the field covered by the
2 impugned act. What Entry 23 provides is that the legislative competence of the State
3 Legislature is subject to the provisions of List I with respect to the regulation and development
4 under the control of the Union. And Entry 54 on List I require a declaration by Parliament by
5 law that the regulation and development of mines should be under the control of the Union in
6 public interest. Therefore, if a Central Act has been passed for the purpose of providing for
7 conservation and development of minerals, and if it contains the requisite declaration, it would
8 not be competent for the State Legislature to pass an act in respect of the subject matter
9 covered by the declaration. So, it's not a section-by-section measure. The field is occupied and
10 it is displaced from the State's list. In order that the declaration should be effective, it is not
11 necessary that the rule should be made or enforced. All that is required is a declaration by
12 Parliament that it is expedient in the public interest to take the regulation and development of
13 mines under the control of the Union. In such a case that test must be whether the legislative
14 declaration covers the field or not. Judged by this test, there can be no doubt that the field
15 covered by the impugned act is covered by the Central Act of 1948. I will just pause here for a
16 minute. This is very important for my... the building block of my submissions. The '48 Act and
17 that's why I trouble Your Lordship seeing it in some detail, unlike the '57 Act, had no provisions
18 beyond saying the Centre may make rules, the State may make rules. That's all that it did. The
19 Centre may make rules for the following, the State may make rules for the following. And the
20 argument was, but there are no rules and this court said, doesn't matter, all we need to look at
21 the declaration. If the declaration is there, 23 then stands denuded.

22

23 **JUSTICE B. V. NAGARATHNA:** But it is only to the extent.

24

25 **HARISH SALVE:** That is not what the law is...

26

27 **JUSTICE B. V. NAGARATHNA:** No, but...

28

29 **HARISH SALVE:** Correct. That's not how it is construed, and I'll come to that. It is not
30 section by section, if the subject matter is occupied...

31

32 **JUSTICE B. V. NAGARATHNA:** To the extent, that is what entry...

33

34 **HARISH SALVE:** If I may just digress. In fact, the interpretation placed extent is not by the
35 number of sections or the points covered. Yes. And the declaration has been understood very
36 widely because the declaration now is the regulation and develop of minerals. And that's how

1 this Court has always understood the declaration to be. Not by an individual rule or by a sub-
2 section or a by a section.

3

4 **JUSTICE B. V. NAGARATHNA:** Then what is the meaning to be given to the expression
5 "to the extent to which such declaration is made by Parliament, by law, to be expedient with
6 the public interest?"

7

8 **HARISH SALVE:** Correct. Parliament could have made a lesser declaration but the Section
9 2 declaration says, 'it is hereby declared, that the development and regulation of mines is in
10 the interest... public interest in the Union'. Finished [INAUDIBLE] gone.

11

12 **JUSTICE B. V. NAGARATHNA:** So, you are saying, the entire development and entire
13 regulation... Regulation is a part of development.

14

15 **HARISH SALVE:** Correct in other words, the entry said, we will leave it to Parliament to
16 define the extent. What this judgment is based is on the declaration. If Your Ladyship turns
17 back for a second, the declaration is set out,

18

19 **JUSTICE B. V. NAGARATHNA:** Yes.

20

21 **HARISH SALVE:** At page 155, the last few lines of 155. It is hereby declared 'that it is
22 expedient in the public interest, that the Central Government should take under its control the
23 regulation and development of mines and oil fields. And the development of the minerals to
24 the extent hereinafter provided and all the rules for granting lease, this... that... everything
25 goes.

26

27 **JUSTICE B. V. NAGARATHNA:** But, Section 2 says to the extent hereinafter provided...

28

29 **HARISH SALVE:** Correct. And there was nothing there. There's nothing left because... that's
30 why I showed all the sections, right from the time of considering, notifying, minerals, grant of
31 leases, imposition of royalties, checking safeguards, search this, form... you will do it in this
32 form. A form will say like this, this is the least you will execute... nothing is left.

33

34 **JUSTICE B. V. NAGARATHNA:** There could be something beyond that. Beyond what is...

35

36 **HARISH SALVE:** Nobody has said....

37

1 **JUSTICE B. V. NAGARATHNA:** [UNCLEAR].

2

3 **HARISH SALVE:** And the development of mineral areas...

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But Mr. Salve, actually, they were construing
6 the relationship between Entry 54 of List I and Entry 23 of List II.

7

8 **HARISH SALVE:** That's right.

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The reference to declaration is contained in...

11

12 **HARISH SALVE:** 23.

13

14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Entry 54.

15

16 **HARISH SALVE:** Yes sorry, Entry 54.

17

18 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Once that declaration is made because Entry
19 54 is conditional, regulation and development, regulation of mines and mineral development
20 to the extent which such regulation or development, under the control of the Union is declared,
21 by Parliament by law to be expedient. So, declaration comes under Entry 54.

22

23 **HARISH SALVE:** Entry 54.

24

25 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That declarations contain into... once the
26 declaration is made under Entry 54...

27

28 **HARISH SALVE:** 23 is out.

29

30 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Then 23 is out. So really speaking, they were
31 considering the relationship between Entry 23 and Entry 54. It had nothing to do as such with
32 the tax, because here was a fee.

33

34 **HARISH SALVE:** My Lord, how this impact. This does impact...

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** This doesn't come up at all.

37

1 **HARISH SALVE:** This does impact. In fact, when I come to my analysis of 50, I will My Lord,
2 because, 50 also is subject to law relating to mineral development. For the present, I am only...

3

4 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Limitations by law.

5

6 **HARISH SALVE:** I agree. Accept that, completely accept. But if Your Lordship, you don't...
7 I'll come to 50 in a moment. For the present, I wanted to clear one ground. This is not a section-
8 by-section analysis. Your Ladyship's question to me was very important.

9

10 **JUSTICE B. V. NAGARATHNA:** To the 'extent provided' here in answer...

11

12 **HARISH SALVE:** What is the meaning of to be 'extent provided', that has been interpreted.

13

14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 23 by itself is made subordinate to a
15 declaration, to Entry 54 of List I. So, because it says, 'subject to the provisions of List 1...
16 Subject to the provisions of List 1, with respect to regulation and development under the
17 control of the Union'. So, the entirety of Entry 23 is subordinate to...

18

19 **HARISH SALVE:** Subordinate to...

20

21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** ... to Entry 54 of List 1.

22

23 **HARISH SALVE:** It is not quantitative.

24

25 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right. Once a declaration is made, then the
26 test, as Justice Gajendragadkar says is, the subject of the State Act.

27

28 **HARISH SALVE:** Subject.

29

30 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Does it cover a field covered by the
31 declaration?

32

33 **HARISH SALVE:** That's the point which I was trying to make.

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But that subordination is not there insofar as
36 Entry 50 is concerned.

37

1 **HARISH SALVE:** No, it's not. In fact, I'm sorry...

2

3 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Entry 50... Entry 50 is restricted by the
4 limitations which are imposed.

5

6 **HARISH SALVE:** My Lord, I'm sorry. As I said in the morning, my submission is based not
7 on the Principle of Subordination, because 50 is a very different mantra from 54.

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right.

10

11 **HARISH SALVE:** I was first, as a building block of my submissions, one of the questions
12 which arose, and my learned friend said is, and Mr. Dwivedi repeatedly emphasized the word
13 'to the extent', 'to the extent'. That's not how it was understood. It is the subject matter test
14 which applies.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But in what context?

17

18 **HARISH SALVE:** No, in 50, 54...

19

20 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The subject matter test, squarely because,
21 Entry 23 is subordinate to Entry 54. Once a declaration is made in a law which is enacted with
22 reference Entry 54, then the State Law cannot occupy the same field.

23

24 **HARISH SALVE:** That's the first step of my submission, and...

25

26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right. That has absolutely no bearing on the
27 taxing provision. The taxing...

28

29 **HARISH SALVE:** Whether it does or does not, I will...

30

31 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Entry 50 is completely... While crafting Entry
32 50 of List 2, they could have said, 'subject to the provisions of List 1'.

33

34 **HARISH SALVE:** No. It could have been much narrower.

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Regulation and development.

37

1 **HARISH SALVE:** On the contrary, it would have been narrower. My submission is going to
2 be the words of 'limitation' today are wider than earlier, because My Lo the two concepts are
3 very different. In fact, what My Lord the Chief Justice is saying, is exactly what the point which
4 I'm going to... which I'm relying on. This is the... 50 has a very different construct. First, My
5 Lord, I want to fix where do the mineral rights source from today? And for that... because what
6 is the tax on mineral rights, we have to first get facts....

7

8 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Entry 50 itself militates against the Doctrine
9 of Occupied Field, because, it says, "Subject to limitations imposed by law, by Parliament".

10

11 **HARISH SALVE:** Yes.

12

13 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So, when it says 'limitations imposed by law',
14 it necessarily means that the law must engraft certain limitations which will operate as a
15 restraint on the taxing power...

16

17 **HARISH SALVE:** I, My Lord, completely...

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Not by inference and not by Doctrine of
20 Occupied Field.

21

22 **HARISH SALVE:** My Lord, I'm sorry. On the contrary, as I said, there are three or four kinds.
23 There are some which are shared, there are some which are occupied. 50 stands in a class by
24 itself. I have not found any other entry like 50. What are the contours of 50, I'm going to come
25 to. But My Lord, to get to 50, one of the points made, and I was getting past those because
26 there are three judgments on this. And this has direct bearing on Entry 49, 50, which is one of
27 the important points of *Kesoram* I have to deal with. I was only putting across the point, that
28 it is a subject matter test which applies to 54, Rule 22.

29

30 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right. 23 and 54, because of the relationship
31 between the two entities actually.

32

33 **HARISH SALVE:** Yes. That's all that I wanted to show My Lord. And, that discussion is very
34 important, because how that impacts 50? May I continue?

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

37

1 **HARISH SALVE:** Responding to Your Ladyship's question. The expression to the extent
2 hereinafter providing has been understood as a concept of subject matter, not of specific
3 provisions of the Act. And if I may just show that again, that's the discussion made, which I
4 was just reading at page 155 in the middle of paragraph 24. The jurisdiction of the legislature
5 under Entry 23 is subject to the limitation imposed if Parliament by its law has declared that
6 the regulation and development of mines should be in public interest, should be to in the
7 control of the Union to the extent of such declaration. The jurisdiction of the State Legislature
8 is excluding to the extent of the declaration, not the specific provision. Now the declaration is
9 unconditional.

10

11 **JUSTICE B. V. NAGARATHNA:** But in this paragraph 24, there is no reference to, to the
12 extent hereinafter.

13

14 **HARISH SALVE:** It is to the extent of the declaration.

15

16 **JUSTICE B. V. NAGARATHNA:** They were dealing with, not the 1957 Act. They were
17 dealing with the 1948 Act.

18

19 **HARISH SALVE:** Yes. The language is the same. Exactly the same language. In fact, it is set
20 out, the declaration is quoted. It's there in the judgment. Para 25. Please see para 25 again, if
21 I read it a little slowly the discussion will become clear.

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** About seven lines from the bottom,

24

25 **JUSTICE B. V. NAGARATHNA:** Yes.

26

27 **HARISH SALVE:** It is hereby declared that it is in the expedient and the public interest that
28 the Central Government should take under its control the regulation of mines and oil fields
29 and the development of minerals to the extent hereinafter providing. Exactly the same
30 declaration. It is common ground that at the relevant time this act applied to coal mines. So,
31 you have to see in that context. Section 4 provides that no mining lease shall be granted after
32 the commencement in accordance with the rules. And Section 5 empowers the Government to
33 make the rules by notification for regulating the grant of mineral leases, or for prohibiting the
34 grant, et cetera. Section 4 and 5 thus purport to prescribe necessary condition in accordance
35 with which mining leases have to be executed. This part of the act has no relevance for our
36 present purposes. Section 6, however, imparts the Government too by rules by notification in
37 the gazette for the conservation and development of minerals. 6(2) lays down several matters

1 in respect of which rules can be framed. This power is, however, without prejudice to the
2 generality of the powers conferred in the Central Government under 6(1) amongst the matters
3 covered by 6(2) is the levy and collection of royalty, fees, taxes in respect to minerals mined,
4 quarried, excavated and collected. It is true that no rules have, in fact, been framed by the
5 Government in regard to the levy and collection. But in our opinion that would make no
6 difference. If it is held that the act contains the declaration refer to in Entry 23 there would be
7 no difficulty in holding that the declaration covers the field of conservation and development
8 of minerals. So, the coverage of the field. Legislative field and the said field is indistinguishable
9 from the field covered by the impugned act. And I submit that position in fact stands
10 strengthened rather than weakened by the '57 Act. '57 is much wider than the '48 Act. So, in
11 that way the extent is dealt with. That broadly, the grant of, I mean right from birth to death.

12

13 **JUSTICE B. V. NAGARATHNA:** Yes.

14

15 **HARISH SALVE:** The grant of lease, license, fees. How you apply, what you do, how you run
16 a lease and the absolute power to frame rules, including the State Government is given powers
17 by Union. So, the field is occupied and once that field is occupied, the declaration denudes
18 Entry 23. I'm not saying it denudes 50. I'm saying, it denudes 23. Then paragraph 26, it says,
19 still remains to be considered whether 2 of the Act amounts to a declaration as required by
20 Article 54. When the Act was passed in '48 legislative part of the Central and Provincial
21 legislature were governed by the relevant entries in the Seventh Schedule, Entry 36 in List I
22 correspond to Entry 54 on List I. It reads thus, and then that entry is set out. 'It would be
23 noticed that the declaration required by Entry 36 is a declaration by dominion law.' Referring
24 to Section 2, it is clear that the declaration contained in this section is put in a passive voice,
25 but in the context, there'd be no difficulty in holding, that the declaration, by necessary
26 implication, has been made by dominion law. It's a declaration contained in a section passed
27 by dominion legislature and it is obvious declaration by dominion law. When a declaration by
28 a dominion law be constitutionally a declaration by Parliament, under Entry 54 and this was
29 said, it is not. That reasoning is not relevant for us today. So, the court says, that declaration,
30 under dominion legislation doesn't help.

31

32 Para 36 at page 161. There's one more point which is yet to be considered. Mr. Amin contends,
33 that Entry 23 in List II, subject to the provisions in List I, with respect to the regulation and
34 development under the controls of Union and according to him, Entry 52 in List I is one such
35 provision. In this connection, he relies on the entry which deals with industries, the control of
36 which, by the Union, is declared by Parliament to be experienced in public interest. This Act
37 has been passed to provide for development and regulation in certain industries, one of his

1 undoubtedly coal mining industry. Section 2 of the Act declares, it is expedient in the public
2 interest, that the Union should take under the control industry specified in the First Schedule.
3 This declaration is the declaration made by Parliament and if the provisions are to be read,
4 with the declaration covered by the same fee is covered by the impugned Act, to undoubtedly
5 affect the *ultra vires* of the Act. But in dealing with the question, it's important to bear in mind,
6 the Doctrine of Pith and Substance. You've already noticed that in Pith and Substance the
7 impugned Act is concerned with the development of mining areas notified under it. The
8 Central Act on the other hand, deals more directly with the control of all industries in the
9 course of industry of court. I'm so sorry, My Lord. This discussion is a little important because,
10 Entry 23, there is also an eclipse by 52, could be. One is directly 54 versus 23. Now the interplay
11 of 52 and 23. This is the only judgment which deals with it, and it says if the subject matter is
12 the same. Of course, even that declaration would affect 23. But then they say by Pith and
13 Substance, this is from development or mining areas, that deals with industry and therefore
14 the two don't overlap. On that basis, this Act is upheld. The majority, now My Lords comes
15 closer home. Page 162. Please see para 37. Our conclusion is, that the impugned Act is relatable
16 to Entries 23 and 66 of List II of the Seventh Schedule, validity is not impaired and affected by
17 52 and 54, of List I, read with Acts 65 and 53. In view of this conclusion, it is unnecessary to
18 consider whether the impugned Act can be justified, under Entry 50 of List II, or whether it is
19 relatable to 24 of List III and suffers from the vice of repugnance. The result is petition fails.
20 So, this judgment primarily went on the basics. It's a fee, there is no declaration in the 48 Act,
21 which denudes therefore, sustains. It notices 52 could have overshadowed, but it says the
22 subject matter of 52 is different.

23

24 **JUSTICE B. V. NAGARATHNA:** So, they didn't deal with Entry 50, List II as such.

25

26 **HARISH SALVE:** They didn't. Justice Wanchoo deals and Justice Wanchoo's dissent is
27 considered in *India Cement* and criticized. And that sentence criticizing his reasoning. It
28 doesn't say so and so... when I read *India Cements*, I will explain is considered to be a
29 mistake, that how could *India Cements* say in one place royalty is not a tax, one place royalty
30 is a tax. Justice Wanchoo starts at page 162... at page 163, para 42. He teased up the first issue
31 about tax and fee. I won't trouble Your Lordship reading that discussion. His Lordship says,
32 'in principle, there's no difference between tax and fee'. And then at page 166, para 46. "Let
33 me then look at the pith and substance of the cess which had been imposed. The cess consists
34 of a levy not exceeding 5% of the value of mineral at the pits mouth *prima facie*. Such a levy is
35 nothing more or nothing less than a duty of excise. Entry 84 of List 1 gives power to levy duties"
36 And then, he sets out Entry 84. Then the famous *Governor General in Council vs*
37 *Province of Madras*. And, I don't need to trouble the Court with the line of reasoning he

1 follows. He comes to the conclusion at page 171, para 52. He starts analysing the law, and the
2 last three lines of para 52. “Looking at that”, at page 172. I don't want to read the whole para,
3 because we're not really concerned with the reasoning. “Looking at that, the cess in this case,
4 is in pith and substance, nothing other than a duty of excise under Entry 84. And therefore,
5 Legislature was incompetent to levy it as a fee”. So, what turned with him, was that this was a
6 tax on production or manufacture, because it was on the ‘mineral removed’. Then he gets into...
7 because of the view he took, then he had to consider the alternative submission of Entry 50,
8 and that discussion is in para 53.

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right.

11

12 **HARISH SALVE:** “The next contention on behalf of State of Orissa is, the cess is not justified
13 as the fee. It's a tax under Item 50 of List II of the 7th Schedule. 50 provides for taxes on
14 mineral rights, subject to any limitations imposed by Parliament by law relating to mineral
15 development. This raises the question as to what are taxes on mineral rights? Obviously, a tax
16 on mineral rights was different from taxes on goods produced in the nature of duties of excise.
17 If the tax on mineral rights also includes tax on minerals produced, there would be no
18 difference between taxes on mineral rights and duties of excise”. Now pausing here for a
19 minute. A royalty which is based on the quantity of mineral produced, then by this definition,
20 should be duty of excise. I'm not saying this is the correct definition, possibly it's wrong,
21 because this confuses. This is missing the distinction between measure and subject matter.
22 But his first part of his logic was, that it must be different from a duty of excise. “That difference
23 can be understood if one sees, that before minerals are extracted and become liable to duties
24 of excise, somebody has got to work the mines. The usual method of working them, is for the
25 owner of the mine to grant mining lease to those who have got the capital to work the mines.
26 There should be no difficulty in holding that taxes on mineral rights are the taxes on”, please
27 mark the words “the right to extract minerals and not the taxes on the minerals actually
28 extracted. Thus, taxes on mineral rights would be confined, for example, to taxes on leases or
29 mineral rights, and on the premium or royalty for that, taxes on such premium and royalty
30 would be a tax on mineral rights, whereas taxes on minerals actually extracted would be duty
31 of excise”. Now, the fallacy in this is, that a royalty itself is on extracted mineral. I mean, the
32 whole line of reasoning, with respect, is wrong, with respect to Justice Wanchoo, and it is a
33 minority. What *India Cements* said is, and with respect, correctly says, that if a tax on
34 extracted mineral and excise duty, then a tax on royalty can be a tax on mineral rights. Because
35 royalty itself is on extracted mineral. It is not on the right to extract a mineral. That is what
36 *India Cements* said in this context.

37

1 **JUSTICE B. V. NAGARATHNA:** The basis for levying royalty is on the mineral extracted.

2

3 **HARISH SALVE:** Exactly. Now if that according to Justice Wanchoo's logic is an excise duty,
4 then royalty itself is an excise duty. Where are we getting with these? So, it is not... his first
5 part of his reasoning is clearly minority, and with all respect to him, it is wrong. It's against
6 the run of authority before and after.

7

8 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We go to the next authority now in the trilogy?

9

10 **HARISH SALVE:** Yes. This is the only bit. But he's the only judge who has dealt with Entry
11 50 ever. The next is *Tulloch*. 64(4) SCR 461. And in this very bundle Your Lordship will find
12 it at 278.

13

14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 64(4) SCR.

15

16 **HARISH SALVE:** 461. All these SCRs are being put in soft form now.

17

18 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And they are absolutely up to date.

19

20 **HARISH SALVE:** Oh, I see.

21

22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And we now have not only the e-SCR, which is
23 in the PDF form, but Digi-SCR, which is like a book. So, you can have the joy of actually flipping
24 the pages as well from the Digi-SCR. Really speaking, we have to go to the practice of citing
25 SCR...

26

27 **HARISH SALVE:** In this court we never cited anything other than SCRs till the SCRs went
28 off.

29

30 **CHIEF JUSTICE D. Y. CHANDRACHUD:** SCR was way behind schedule, almost four
31 years behind schedule, but now it's absolutely up to date.

32

33 **HARISH SALVE:** By end 80s it went off the rails. We always found it makes much softer
34 reading. The old SCRs' broad print.

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Print was much bigger.

37

1 **AK GANGULY:** Headnotes were being [UNCLEAR] by the Hon'ble Judges.

2

3 **TUSHAR MEHTA:** It was more authentic. Headnotes were authentic.

4

5 **AK GANGULY:** That was the reason why this...My Lord, the kind of situation we came in
6 ***India Cement*** with regard to the so-called error, printing error et cetera, all this would not
7 have happened if someone would had taken the trouble of looking at the parchment.

8

9 **COUNSEL:** We didn't have para numbers. It was a big problem.

10

11 **AK GANGULY:** No, there were no para numbers.

12

13 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And we also have neutral citations now.

14

15 **COUNSEL:** SCR [UNCLEAR] para numbers.

16

17 **AK GANGULY:** At that time.

18

19 **HARISH SALVE:** We used it forever My Lord. I don't think there was any...

20

21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We should be now using neutral citation at all,
22 because all of us should be using neutral citations, because now it's across the spectrum.
23 Whatever journal you are citing, there's one neutral citation for all judgments from 1950.

24

25 **HARISH SALVE:** Sorry. I'm a little out of date on this.

26

27 **CHIEF JUSTICE D. Y. CHANDRACHUD:** As in the US reports you have 349 US 22.

28

29 **HARISH SALVE:** Yes. You can always cross refer.

30

31 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We have now neutral citation for every
32 judgment of the Supreme Court from 1950.

33

34 **HARISH SALVE:** Very convenient. My Lord this Iyengar J...

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** What page is it?

37

1 **HARISH SALVE:** Page 272. Sorry. 278. This is My Lord, a follow up. The same Orissa Act
2 upheld by the court was struck down by the High Court post '58. And that, Your Lordship gets
3 at para 4. I shall now proceed to set out briefly the grounds on which the learned judges of the
4 High Court allowed the petition of the Respondents. Stated shortly the contention with the
5 learned judges of the High Court accepted was the Orissa Act has been rendered ineffective,
6 should be superseded by a central enactment, the Mines and Minerals Act '57. Orissa Act had
7 been enacted by virtue of 23 of List I, which reads thus. The legislative entry under which the
8 latter Central Act is enacted as 54 which ran thus. The Central Act carried in its second section
9 a declaration envisaged by the last words of the entry. Based on these facts, the argument to
10 which the learned judges acceding was, that on coming into force of the Central Act, the Orissa
11 Act ceased to be operative by a reason of the withdrawal of the legislative competence by force
12 of the entry of the State List being subject to Parliamentary declaration and the law enacted
13 by Parliament. They had that for this reason, the Orissa Act should be deemed to be non-
14 existent as and from June 1st, 1958, and for every purpose of the consequence, there was lack
15 of power to enforce and realize demands, for the payment of fee at the time when the demand
16 were re-issued. It's the correctness of the judgment challenge before us. Before proceeding
17 further, it is necessary to specify briefly the legislative power on the relevant topic, for it is on
18 the precise wording of entries in 7th Schedule of the Constitution and scope and effect of the
19 state and central legislation, which we have referred to. Article then My Lord 246(1) is set out.
20 Then 246(3) is set out. And just below that, it's coming now to the 7th Schedule. Entry 13 of
21 the State List vests in the State Legislature, the power to enact laws on the subject of regulation
22 in mines and mineral development... it should be 23 My Lords. Development, subject to the
23 provisions of List I with respect to regulation and development under the control of the Union.
24 It would be seen that the subject to the provisions of List I, the power of a state to enact
25 legislation on the topics of mines and minerals development is plenary. The provision in List
26 I is, as is already noticed in Entry 54 of the Union List. May be mentioned that this scheme of
27 the distribution of legislative power between the Centre and the states is not new, but merely
28 a continuation of a state of affairs, which prevailed under the GOI Act 1935, which included a
29 provision on the lines of Entry 54 of the Union List, which then bore the number of 36 to the
30 Federal List and the entry corresponding Entry 23 of the State List which bore the same
31 number in the Provincial Legislative List. There is no controversy, that the Central Act has
32 been enacted by Parliament in exercise of the legislative power contained in Entry 54 or as
33 regards Central Act containing the declaration, of what is required by Entry 54, for it enacts in
34 Section 2 and then the declaration is set out. It does not need much argument to realize, that
35 to the extent to which the Union Government has taken under its control, the regulation and
36 development of minerals, so much was withdrawn from the ambit of the power of the State
37 Legislature under Entry 23 and the Legislature of the State, which had rested on the existence

1 of the power and the entry, would to the extent of the control be superseded or rendered
2 ineffective. For here we are not a mere case, not of mere repugnancy between the provisions
3 of the two enactments, but of a denudation or deprivation of state's legislative power by the
4 declaration, which Parliament is empowered to make, and has made. It would be, however,
5 apparent that the state should lose legislative competence only to the extent to which the
6 regulation and development under the control of the Union has been declared by Parliament
7 to be expedited in public interest. The crucial inquiry, therefore, has to be to ascertain this
8 extent, for beyond it, the legislative of the power of the state remains unimpaired. As the
9 legislation by the State in this case before earlier one in point of time, it would be logical to
10 first analyse the State Act and determine its purpose, width and scope and the area of the
11 operation, and to consider what extent the Central Act cuts into it or trenches into it. The object
12 of the Orissa Act as disclosed by its Preamble of the Constitution of mining areas and the
13 creation of a Mining Area Development Fund in the State. Section 3 empowers the state to
14 constitute and alter the limit of the mining areas. The object of these mining areas was *inter*
15 *alia* the provision of amenities like communications, water supply, electricity, and the better
16 development of areas, where any mine was situated, as well as to provide for the welfare of
17 residents or the workers. 4 is the provision empowering the state to levy a cess or fee, for all
18 extracted minerals from any mines in any mining area with a limit, however, that the rate
19 should not exceed 5% of the value of the minerals. And then that Section 5 is set out. Para 8
20 onwards is at page 281 foot of the the page. We shall now turn to the Central Act. The long title
21 of the Act specifies, the twin purposes are the regulation of mines and the.... just one minute...
22 and the development of minerals. Both under the control of the Union. Section 2, we have
23 already extracted. 3, contains definition of the terms and may be omitted. 4 to 10 form a group
24 under 'General Restrictions on Undertaking, Prospecting and Mining', and relate to the rules
25 and regulations under which prospecting license and mining leases might be granted. The
26 period for which they may granted or renewed, the royalties and fees that would be payable.
27 The next group consists of 10 to 12, which deals with procedure for obtaining prospecting
28 licenses or mining leases. 13 to 17 are grouped under the caption which reads 'Rules for
29 Regulating the Grant of Prospecting License'. 13 which starts empowering the Government by
30 notification to make rules for regulating the grant, et cetera". And then all these sections are
31 done. Then comes Section 18, which is the provision for other objects of the Act, the
32 development of minerals. It will be necessary to set out some details. Then 18 is set out. Para
33 9. The question for consideration is whether the extent of control and regulation by the Central
34 Act takes within its fold, the area subject to the Orissa Act. Counsel for the Appellant raised
35 four points, that the object of the Act... May I come straight to the discussion? The discussion
36 starts from paragraph 12, page 286.

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

2

3 **HARISH SALVE:** Before referring to the judgment dealing on this aspect, it will be
4 convenient to refer to the Central Act of '48, on the basis of which, the Constitutional validity
5 of the Orissa Act was impugned. Then that Act is set out. Mr. Justice Gajendragadkar's
6 judgment is set out, which I've just read. So, My Lord, I don't need to read it from here. Yes.

7

8 **CHIEF JUSTICE D. Y. CHANDRACHUD:** After the quotation.

9

10 **HARISH SALVE:** Page 288. Immediately after extracting it. "It's only necessary to add the
11 validity of the impost to the firm. However, for the reason whereas the Orissa Act was a post
12 Constitution enactment and the Central Act of '41 was a pre-Constitution law in terms of Entry
13 54, Parliament did not make the requisite declaration, but only the previously existing Central
14 Legislature. It will held, not within the meaning of 54, and the State enactment continued to
15 be operated. Since the Central Act '67 contains the requisite declaration by Union Parliament
16 under Entry 54, and that Act covers the same field as the Act of '48, in regard to the mines and
17 minerals. We consider the decision the Court concludes the matter, unless there were any
18 material differences between the scope and ambit of 54 of the Act... of Act '48 and that of '47.
19 The learned Counsel was not able to point out any matter of substance in which there is
20 difference between the two enactments. It was suggested, whereas Section C empowered for
21 rules to be made in taxes, there was no specific power. It is not necessary to discuss the
22 materiality of the point, because what we are concerned with, is the power to levy a fee, and
23 there is an express provision in Section 30, apart from the implication of 25, which says, any
24 rent, royalty, fee, tax or sum due to the Government under the terms of the prospecting license,
25 under the certificate, et cetera, may be recovered. We ought to add..." Section 25 was referred
26 to. That's very important. "We ought to add, that besides, we see considerable force in Mr.
27 Setalvad's submission, that 1 and 2 of 18 are wider in scope and amplitude and confer larger
28 powers in Central Government, than the corresponding provisions of the Act of '48. The
29 second part heard by the Appellant, is based on, that Section 18 of the Central Act merely lays
30 a duty... the second point heard by the Appellant is based on the fact that Section 18 of the Act
31 mainly lays a duty of the Central Government to take steps for ensuring the conservation and
32 development of the mineral resources. The submission is that, even assuming under the
33 powers conferred, there are in conjunction with 13 or the Act, it would be competent for the
34 Central Government to frame rules on the line of the Orissa Act for the development of mining
35 areas, and for that purpose, to provide for the imposition of fees and for the constitution of a
36 fund. Still, no such rules have been framed, and until the rules are made, Central Act would
37 not cover the field. And if the Orissa Act would continue to operate in support of this

1 submission, reliance was placed on the decision of this Court in ***Tika Ramji and State of***
2 ***UP***". That's the sugarcane case. Para 14, "We'll consider the submission in relation to the Act
3 before us without force, besides being based on a misapprehension of the true legal position.
4 In the first place, the point is concluded in the earlier decision, in ***Hingir-Rampur***, where
5 this Court said that in order that the declaration is effective, it is not necessary that the rules
6 should be made or enforced. All this is necessary. It is a declaration by Parliament that it was
7 expedient in the public interest to take the regulation of development of mines under the
8 control. In such a case, the test must not be whether the Legislative declaration covers the field
9 or not. But even if the matter was less integral, the argument cannot be accepted. Repugnancy
10 arises when two enactments, both within the competence of the two Legislatures collide, and
11 when the Constitution expressly or by necessary implication, provides that the enactment of
12 one Legislature has superiority over the other, then to the extent of repugnancy one supersedes
13 the other. But two enactments may be repugnant to each other, even though the obedience to
14 each of them is possible without disobeying the other. A test of two legislations containing
15 contradicting provisions is not however, the only criteria for repugnancy. For if a competent
16 legislature with a superior efficacy expressly or impliedly evens its intention with an intention
17 to cover the whole field. The enactments of the other legislature whether passed before or after
18 would be overborne on the ground of repugnancy. Where such is the position, the
19 inconsistencies demonstrated not by a detailed comparison of the provisions of two statutes,
20 but by the mere existence of two pieces of legislation, herein having regard to the terms of 18
21 when it appears to us that the intention of the Parliament was to cover the entire field and thus
22 to leave no scope for the argument that until rules were framed, there was no inconsistency
23 and no supersession of the State Act. They said 18 covers everything. Your Lordship may only
24 mark and I'll develop this tomorrow when I'm dealing with Entry 50, that it is expressly or by
25 necessary implication. It was next urged that the scheme of the legislative entries under the
26 Constitution as previously under the Government of India Act, the power to levy fee was an
27 independent head of legislative power under each of the legislative fields, and not merely
28 incidental power flow from the grant of power of the subject matter. It was sought to be
29 established, even if the Union could levy a fee under the Central Act, it would not affect or
30 invalidate a state legislation imposing a fee for a similar service. The argument again, proceeds
31 on a fallacy. It is no doubt true that, technically speaking, the power to levy a fee under the
32 entries in the three lists is treated with the subject matter of an independent grant of legislative
33 power. Whether it is incidental power related to a legislative head or an independent
34 legislative power, it is beyond dispute that in order that a fee may validly be imposed, the
35 subject matter of the main head of legislation in connection with which the fee is imposed is
36 in the legislative power. The material words are fees in respect of any of the matters in this list.
37 It is therefore a prerequisite for the valid imposition of fee, that it is a matter in respect to the

1 list. If by reason of the declaration of Parliament, the entire subject matter of conservation of
2 development of minerals has been taken over or being dealt with Parliament, thus depriving
3 the state of power to which it is possessed, it follows that the matter in the state is to the extent
4 of the declaration is subtracted from the scope of Entry 23. Therefore, they would, after the
5 Central Act, be no matter in the list to which the fee could be related in order to render it valid.
6 This is a very important piece of reasoning. It empties out the list as it were. And this is perhaps
7 why *Kannadasan* said if Entry 50 is denuded, it shifts to Entry 97. So, it's not that 23 is still
8 available, just that Parliamentary legislation prevails.

9

10 **JUSTICE B. V. NAGARATHNA:** So, it's eclipsed.

11

12 **HARISH SALVE:** It's gone. To borrow the words of the court, it is subtracted from the scope
13 and ambit of Entry 20. One more paragraph. Although it is in the context of Section 6 of the
14 General Clauses Act, the further discussion in paragraph 19, page 292.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

17

18 **HARISH SALVE:** Para 19 at page 292. Before proceeding further, it will be convenient to
19 clear the ground by adverting to two matters. One, the effect of a Central Act under its exclusive
20 legislative power, which covers the field of an earlier state act, which was competent and valid
21 when enacted, is not open to doubt. The Parliamentary enactment supersedes the state law
22 and thus virtually effects a repeal. That's how Your Lordships looked at it and then applied the
23 Section 6 principle. And thirdly, last, in the trilogy, is *Baijnath Kedia 69(3) SCC 838* and
24 it's at page 412 of Bundle 4. Bundle 5, Sir.

25

26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 41?

27

28 **HARISH SALVE:** 412 of Bundle 5. Volume V, Sir. Page 414. The second paragraph of the
29 judgment. One Jyoti Prakash Pande, obtained on March 23rd, from Babu Bijan Kumar Pande
30 and Shrimati Anila Devi, acting on our behalf, et cetera, et cetera, registered leases to quarry
31 stone, ballast boulders and chips from block, so and so. The leases were to commence, and
32 that is to say, they were for so and so period. Para 2 is important My Lord. On passing of the
33 Bihar Land Reforms Act 1950, the ex-landlord ceased to have any interest from the date of the
34 vesting in that place, the State of Bihar became the lessor and under Section 10, under the
35 Land Reforms Act. The section of Section 10 were given below. After the vesting of the estate
36 of the intermediaries, the State of Bihar as the next lessor, recognized the lease of quarrying
37 stone on the remaining period and the Deputy Commissioner, Santhal Paraganas, asked for

1 the rent, et cetera, et cetera. So, that's how the Land Reform laws worked. Contention is to be
2 found... the demand was raised... just above paragraph 3 at page 416. The contention is that
3 the amendment of Section 10 to the Bihar Land Reforms Act is *ultra vires* the Constitution
4 and 22 does not legally entitle the recovery of debt and royalty in the schedule, so the Bihar
5 miner mineral concession rules. To understand fully the argument on behalf of the Appellants,
6 a resume of the legislation on the subject to mines and minerals necessary under the
7 Government. Then My Lord, the Government of India Act, Entry 35, et cetera. Your Lordship
8 has seen all this. And the federal word would change... para 4 gives the 1948 Act. Your Lordship
9 have seen that already. Para 5 at page 418, says, the leases of the Appellants' predecessors were
10 granted in '55. During the subsistence of the Act of '48 and the rules of '49, it is also to be
11 noticed that a fresh declaration was made by Parliament as required by Entry 54, List 1, Union
12 List of the 7th Schedule. The existing laws, however, continued without a declaration by
13 Parliament. The field of legislation might have been open to the State Legislatures under Entry
14 23 of List 2, State list of the Constitution, but no law was made, except what was enacted by
15 the Bihar in the Land Reforms Act about vesting of mines in the State, and the exertions of the
16 state of the lessor in place of the lessors". Then My Lord, para 7, Your Lordships start dealing
17 with the '57 Act. The whole discussion continues. Section 16 is noted, Section 17 is noted,
18 Section 18 is noted, and para... I'm sorry, para 10 at page 421. "It may be pointed out here, that
19 the rules made under Section 13, do not apply to minor minerals and beyond the provisions of
20 Section 14. The state of Bihar has not made any rules under the Bihar Minor Mineral
21 Concession Rules. The modification of the terms of the existing mining leases are provided for
22 on Section 16, but that provision applied to minor leases granted before October '49. The
23 provision of mining leases modification or terms did not apply to minor minerals, because the
24 definition of existing mining lease excluded a lease of minor minerals. The power to modify
25 lease, in the case, had to be found elsewhere. The argument of the Appellant is that, apart from
26 the provision of the second *proviso* to Section 10, added to the Land Reforms Act in '64 by Act
27 4, and the second rule added by Rule 20 of the Bihar Minor Mineral Concession Rules, there
28 was no power to modify the terms. The provision of law is said to be outside the competence
29 of the State Legislature and the Bihar Government. With regard to the State Legislature, it is
30 contented that, the scheme of the relevant entries in the Union of the State List is, that to the
31 extent to which the regulation of mines and minerals development is declared by Parliament
32 to be expedient, the subject of legislation is withdrawn from the jurisdiction of the State
33 Legislature. And therefore, Act 67 leaves no legislative field to the Bihar Legislature to enact
34 Act 4 of '55, amending the Land Reform Act". Now, My Lord, the discussion begins.

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Para 30?

37

1 **HARISH SALVE:** Para 30, 3rd line. “Therefore, it is necessary to address ourselves to the
2 first argument, that the legislative competence to enact the amendment after the Act ’67, we
3 have to consider the position in relation to it. Entry 54 of the Union List, speaks both of
4 regulation of mines and minerals, development and Entry 23, subject to Entry 54. It is open
5 to Parliament to declare it is expedient in the public interest, that the control should rest in
6 the Central Government. To what extent the declaration goes is for Parliament to determine,
7 and this must be commensurate with public interest. Once the declaration is made and the
8 extent laid down, the subject of the legislation, to the extent lays down, becomes an exclusive
9 subject for legislation by Parliament. Any legislation by the state after the declaration
10 entrenching upon the field disclosed in the declaration, must necessarily be unconstitutional,
11 because the field is abstracted from the legislative competence of the State Legislature. The
12 proposition is also self-evident that no attempt was made, rightly, to contradict it. There are
13 also two decisions of the court in *Hingir-Rampur* and *Tulloch*, in which the matter is
14 discussed. The only dispute, therefore, can be to what extent the declaration leaves scope for
15 any legislation by the State Legislature. If the impugned legislation falls in the ambient of such
16 scope, it will be valid. If outside, it must be declared invalid. The declaration is contained in
17 Section 2 of Act 67 of ’57, and speaks of taking under control of the Central Government, the
18 regulation of mines and the development of minerals to the extent provided in the Act. We
19 have thus to look, not to look outside Act 67 of ’57, to determine what is left within the
20 competence of the State, but have to work it from the terms of that Act. In this connection, we
21 may notice what was decided in the two of the cases. In *Hingir-Rampur’s* case”, then, My
22 Lord, *Hingir-Rampur* is discussed. *Tulloch* is discussed. Paragraph 16 Your Lordship may
23 see, “These two cases bind us and apply here. Since the Bihar State Legislature amended the
24 Land Reforms Act after coming into the force of Act 67 or ’57, the declaration to the latter Act
25 would carve out a field to the extent provided in the Act, and to the extent than 23 would stand
26 out down. To sustain the amendment, the State must show the matter is not covered by the
27 Central Act. The other side must, of course, show that the matter is already covered and there
28 is no room. We have already analysed Section 67. The Act takes over the regulation of mines
29 and development of minerals to the Union, of course, to the extent, provided. It deals with
30 minor minerals separately from other minerals. In respect of minor minerals, it provides in
31 14, that Section 413 of the Act do not apply to prospecting license in minerals. It goes on to
32 state in Section 15, the State Government may, by notification in the official gazette, make
33 rules for regulating the grant of prospecting license and mining leases in respect of minerals,
34 and for the purposes connected, and that until the rules are made, the rules made by the
35 Government regulating grant of prospecting license and mining leases of the minor minerals
36 to immediately in force would continue. It is admitted that no such rules are made by the state.
37 It follows that the subject of the legislation is covered in respect of minor minerals by the

1 express words of 15. That's very important. So, although the rules are to be made by the State,
2 it is under the Union Legislation. Parliament has undertaken and laid down that the regulation
3 and grant of prospecting licenses and mining leases of minor minerals and for that purpose
4 must be by rules made by the State Government. Whether the rules are made or not, the topic
5 is covered by Parliamentary legislation and to that extent, the power of the State Legislature
6 are wanting. Therefore, there is no room for state legislation. This answers at least one point
7 where it said the state may due to that extent, 23 is preserved. That's not correct. Whether
8 state is acting as a delegate of Parliament, it is still, 23 gets denuded. Then para 18 is also very
9 important. Shri Lal Narayan Sinha argued that the topic of legislation concerns land and
10 therefore falls under Entry 18 of the State List and he drew attention to provisional on the
11 subject of Mines and the Land Reforms Act as originally passed. The abolition of the rights of
12 intermediaries in mines and vesting of these rights in the lessors of the State Government was
13 the topic connected with land and land tenures. But after the mining leases stood between the
14 State Government and the lessees, any attempt to regulate those mining leases will not fall in
15 Entry 18, but in Entry 23, even though the regulation incidentally touches land. The pith and
16 substance of the amendment of Section 10 of the Reforms Act falls in Entry 23, although it
17 incidentally touches land and not vice versa. Therefore, the amendment was subject to the
18 overriding power of Parliament declared in Section 67 of the Act of 57 in Section 15. Entry 18
19 of the State List has got no help. Mr. Lal Narayan Sinha has contended that the provision of
20 Section 414 do not envisage control of the Union, which is a condition precedent to the ousting
21 jurisdiction of Entry 23. Obviously Mr. Lal Narayan Sinha reads Union as equivalent to Union
22 Government. This is erroneous. Union consists of three limbs, namely Parliament, Union
23 Government and Union Judiciary. Here, the control is being exercised by Parliament, the
24 Legislative organ of the Union, and that is also controlled by the Union. By giving the power
25 to the State Government to make rules the control of the Union is not negated. In fact, it
26 establishes the Union has exercising control in view of the two rulings of the court referred to
27 earlier we must hold that by enacting 15 of Act 67 of '57, the Union has taken all the power to
28 itself and authorized the State Government to make rules for regulation of leases by the
29 declaration in enactment of Section 15. The whole of the field relating to minor minerals came
30 within the jurisdiction of Parliament and no scope was left for the enactment of the second
31 proviso. The enactment of proviso was without jurisdiction. This leave for consideration the
32 second sub rule added. It will be noted that the rule as stood previously applied prospectively
33 and came into fruit after the regulation of the rules. The second sub rule made applicable to
34 those provision to all leases subsisting on the date.

35

1 **JUSTICE HRISHIKESH ROY:** You have described your argument as the building block
2 towards Section 50 but tempting as they may be, these arguments don't have any connection
3 with Entry 50.

4
5 **HARISH SALVE:** They do My Lord.

6
7 **JUSTICE HRISHIKESH ROY:** So, should I say that these are all cheese argument, whereas
8 we are looking at staring at chalk argument.

9
10 **HARISH SALVE:** They do. I have to get there. I have to first start because there were two or
11 three basic points which I need to get past. What is the extent of Parliamentary legislation?
12 What is the nature of Parliamentary legislation? What is the run of the entries? What is the
13 interaction between the entries? And because 54 and 23 are directly connected, 54 and 50 are
14 directly connected and how 54 operates is a very important element of my argument. When
15 one considers what are limitations, what is the approach brought to bear in interpreting Entry
16 54 and the Act of '57.

17
18 **JUSTICE HRISHIKESH ROY:** If you come to a case which deals directly with 50, you will
19 be at least my concern... You'll be able to assuage my concern, on whether, where we are
20 heading with the arguments that you are advancing.

21
22 **HARISH SALVE:** Let me tell Your Lordships. Except the High Courts and *India Cement*
23 and *Kesoram* or nobody has dealt with 50 squarely. Let's be clear. Nobody has. I'm going to
24 be showing My Lord, the Patna High Court, the Mysore High Court, in my favour, the Punjab
25 and the Rajasthan High Court against, but ultimately the High Court judgement, nine of Your
26 Lordships are considering it. My interpretation of Entry 50, of what is the true meaning of
27 limitations imposed by law, by Parliament. I have to clear the ground. And one of the
28 important aspects, my learned friend said, is, look, so much is left to the State, all mines and
29 minerals are left to the State. That's not right.

30
31 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Actually, Mr. Salve, when you are operating
32 squarely within the field of Entry 23 of List II, *vis-a-vis* Entry 54 of List I, once there is a
33 declaration made by law enacted by Parliament, which is referable to Entry 54 of List I, the
34 entirety of the field gets abstracted or subtracted, as the judgment said, from the field of the
35 State Legislature, and therefore, Parliament alone is then the exclusive legislating body on that
36 subject, which forms the subject matter of declaration.

37

1 **HARISH SALVE:** Yes.

2

3 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We are here in a situation where that principle
4 would apply to tax on mineral rights. Now, even if there is a declaration under the Central Law,
5 the MMDR Act, notwithstanding that declaration, Parliament cannot take upon itself the
6 power to impose a tax on mineral rights because that doesn't fall within the scope of legislative
7 competence of Parliament. The only then question is this. That's a distinction between these
8 cases, the only question which then surmises is, whether the declaration by Parliament,
9 completely denudes, the authority of the state legislature to legislate in the area of mineral
10 rights, because any such legislation would impede the field of regulation and development.

11

12 **HARISH SALVE:** My Lord, I do not put it on that ground.

13

14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Unless you say that, look, taxation per se is
15 barred because it will impede completely.

16

17 **HARISH SALVE:** No, My Lord. I'm sorry I put it on a very different basis. There are three
18 or four building blocks now to Entry 50 and since My Lord, quite...

19

20 **CHIEF JUSTICE D. Y. CHANDRACHUD:** One thing we are very clear now, is that
21 Parliament does not govern the legislative domain of taxation on mineral rights. This is not
22 assigned to Parliament at all. Now does a legislation by the State, gets affected merely because
23 of the fact that there is a declaration by Parliament under Entry 54 of List II?

24

25 **HARISH SALVE:** I am not relying on the declaration. I don't rely on the declaration. That's
26 why I said...

27

28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** If you are not relying on the declaration. All
29 these cases, the three cases which deal with Entry 54 and 23 are really of no relevance.

30

31 **HARISH SALVE:** My Lord, may I? These cases are relevant for the purpose...

32

33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The broad consequence...

34

35 **HARISH SALVE:** Yeah, exactly.

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37 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But they don't answer the question for us.

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HARISH SALVE: But this is the... if I may say so, this is the canvas in which this question has to be now addressed. May I tell My Lord, may I formulate my point and then develop. I now come to Entry 50 squarely.

CHIEF JUSTICE D. Y. CHANDRACHUD: How do you formulate it, so that we talk about ...?

HARISH SALVE: entry 50. It's there in my submission. But let me My Lord, formulate it orally. My case is, that Entry 50 is *sui generis*. It's a kind itself. The Seventh Schedule does not follow a fixed pattern of distribution of fees. There are different ways in which legislative fields are distributed, and each kind has its own nuance. My Lord, it might be helpful if... in fact, I'm going to give a skeleton tomorrow morning in writing. But broadly, this is what it is. And for interpreting Entry 50, My Lord, Your Lordship, will have to see the different ways in which these powers are distributed between the Union and State, in order to give content and meaning to the expression 'subject to any limitations imposed by Parliament by law, relating to mineral development'.

CHIEF JUSTICE D. Y. CHANDRACHUD: To give content and meaning to the expression?

HARISH SALVE: 'Limitations imposed by Parliament by law, relating to mineral development'. Your Lordships will also have to examine the subject matter of the tax; taxes on mineral rights. And it is on an analysis of these two elements of Entry 50, that Your Lordship will have to consider the validity of a State Law imposing a tax on royalty. Where these cases would be of assistance to the Court, is in understanding in the Constitutional concept or in Constitutional sense, the nature of the Act of 1957, not just the declaration. So, My Lord, let me be clear what the Chief Justice was pleased to put to me. Declaration is not the basis of limiting 50, unless I am able to make good that the '57 Act, in its different avatars starting from '57 and as amended, over and over again, considered the fiscal implications of State exactions, as an essential element of development of mineral rights. And by Section 9, exhaustively defined what a State could exact for mineral rights.

JUSTICE J.B. PARDIWALA: Just kindly repeat this submission, sir. Section 9, exhaustively...

HARISH SALVE: Exhaustively defines,

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JUSTICE J.B. PARDIWALA: Defines?

HARISH SALVE: What a state can exact for mineral rights.

JUSTICE J.B. PARDIWALA: Correct.

HARISH SALVE: To the exclusion of any other kind of exactions. I would not be able to bring it within the limitations. I mean I put my point negatively, that's what I have to show.

JUSTICE B. V. NAGARATHNA: To the exclusion of?

JUSTICE HRISHIKESH ROY: Any other kind of...

JUSTICE B. V. NAGARATHNA: Any other...

JUSTICE HRISHIKESH ROY: In course of your submission, you spoke about those precious metals, gold and this thing and you said, it was the edict of the Raja. Can we have a bit of research on whether Rani also has something to do with that?

TUSHAR MEHTA: Raja, you must be holding My Lord, in trust. My Lord, for and on behalf.

HARISH SALVE: Mr. Parasaran used to always tell us this. He said the most misunderstood notion, is the male female. He said we forget that the women is the ardhangini.

JUSTICE HRISHIKESH ROY: Yes.

HARISH SALVE: And when you say the man, totally half of the whole.

JUSTICE HRISHIKESH ROY: So, Rani would have a...

HARISH SALVE: My Lord, in today's world it's lucky if the Raja gets some say. The Rani occupies the field. To the exclusion of the Raja.

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END OF DAY'S PROCEEDINGS