IN THE SUPREME COURT OF INDIA

(CIVIL APPELLATE JURISDICTION)

CIVIL APPEAL NO. 4056-4064 OF 1999

IN THE MATTER OF :

Mineral Area Development Authority	….	Appellant
Versus		
M/s Steel Authority of India & Others.	…	Respondents

VOLUME-I

(WRITTEN SUBMISSION ON BEHALF OF THE STATES/ AUTHORITY)

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WRITTEN SUBMISSIONS OF STATES / AUTHORITES

I N D E X

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(CIVIL APPELLATE JURISDICTION)

CIVIL APPEAL NO.4056-4064 of 1999

IN THE MATTER OF :

Mineral Area Development Authority ……. Appellants

Versus

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

CIVIL APPEAL NO.4722-4724 of 1999

IN THE MATTER OF :

Mineral Area Development Authority ……. Appellants

Versus

Tata & Steel Company Ltd. & Others. ….. Respondents

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

FACTUAL BACKGROUND

1. Civil Appeal No. 4056-64 of 1999, arises out of common Judgment dated 22.03.1999 passed in 5 writ petitions filed by SAIL C.W.J.C. No. 1885/94(R); Industries and Commerce Association CWJC No. 178/1994(R); Hindustan Malleables and Forging Ltd. CWJC No. 1783/1994(R); Dhanbad Brickfield Owners Association CWJC No. 3113/1993(R); Kumardhabi Metal Casting CWJC No.2915/1994(R). They are non mining industries and are not covered by the MMRD Act.

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

3. After judgment of India Cement Ltd. Vs. State of T.N. case (1990) 1 SCC-12 and AIR 1991 Patna 27 (dated 06.11.1990) Central Coalfields Ltd. Vs. State of Bihar, declaring cess on royalty under then Bengal Cess Act to be ultra vires, the State Legislature on its own amended Section 89 of MADA Act. "Tonnage Cess" and Cess on royalty" were repealed and Tax on land was enforced. Present batch of petitions question validity of amended Section 89.

Provisions :

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

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

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

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

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

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

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

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

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

Questions raised before the High Court : -

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

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

Findings of High Court.
Point 1 :

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

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

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

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

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

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

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

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

Relied on : ***(1997) 8 SCC 360, State of Bihar Vs. Indian Aluminium Co.***

1990(1) SCC 12 India Cement Ltd. Vs. State of T.N.

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

Relied on : ***(1997) 8 SCC-360, State of Bihar Vs. Indian Aluminium***

(viii). The taxing event is the use of land. The measure of tax at flat rate and exclusion of land paying holding tax by the proviso to Section 89 would not change the nature

of tax which is clear from the caption and sub-section (1). Caption is consistent with the section. (Pr. 20).

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

QUESTIONS REFERRED TO NINE JUDGE BENCH

8. A three Judge bench in M.A.D.A Vs Steel Authority (2011) 4 SCC 450 has referred the following questions :

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

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

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

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

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

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

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

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

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

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

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

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

ISSUES NO. I & 4 : ROYALTY

9. "Royalty" imposed by Section 9 of MMRD Act or empowered by Rule making provisions would have to be ascribed the normal or ordinary connotation of consideration price for parting with right to work the mine which is owned by government or even private person and it cannot be understood as a tax of any kind. Observations in India Cement Ltd. Vs. State of T.N. 1990(1) SCC 12, saying that "Royalty is tax" involved a self-contradiction and has been rightly explained and clarified by Constitution Bench in State of West Bengal Vs Kesoram Industries Ltd. (2004) 10 SCC 201.

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

State of H.P. Vs Mahendra Pal (1999) 4 SCC 43 (Pr 12-14)

Inderjeet Singh Sial Vs Karam Chand Thapar (1995) 6 SCC 166(Pr 2)

State of Orissa Vs Titagarh Paper Mills Co Ltd 1985 Suppl SCC 280 (Pr 102 & 103)

D.K. Trivedi & Sons Vs State of Gujarat 1986 Suppl SCC 20

State of W.B. Vs. Kesoram Industries Ltd. 2004(10) SCC 201 (Pr 58-71)

Dictionary meanings of royalty

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

- Words and Phrases

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

1986 Supp SCC-20, D.K. Trivedi & Sons Vs. State of Gujrat

2000(8) SCC-655, Quarry owners Assn.Vs.State of Bihar

"Constitutional Law of India" by H.M.Seervai

4th Edn. (Silver Jubilee), Vol 3, Pg. 2467-69,2471,2577-79.

ISSUE NO. 2& 6 : SCOPE OF ENTRY 49 LIST II

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

1990(1) SCC 109,(7 JJ), Synthetics & Chemicals Ltd. Vs. State of U.P.(Pr. 57)

12. This Court has construed "land and building" in Entry 49 List II widely.

AIR 1962 SC-1563=1963(1) SCR-220, (5 JJ), Raja Jagannath Baksh Singh Vs. State of U.P. (Holding Tax)

1975(2) SCC-175, (4 JJ) Anant Mills Co. Ltd. (Conservancy tax on underground Strata).

1975 (2) SCC 274, (3 JJ), The Government of A.P. Vs. Hindustan Machine Tools Ltd. (factory building)

2004(10) SCC-201, State of W.B. Vs. Kesoram Industries Ltd.

(Cess)

Municipal Corpn of Greater Mumbai Vs Property Owner's Association (2023) 3 SCC 258
Ahmedabad Municipal Corpn Vs GTL Infrastructure Ltd. (2017) 3 SCC 545

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

(2017) 12 SCC 1 Jindal Stainless Vs State of Haryana

1996(3) SCC-709, State of A.P. Vs. McDowell & Co.
(Pr. 19,28,29,37-39 (Entry 8 List II).

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

1962 Supp (3) SCR-1,Calcutta Gas Co. Vs. State of W.B.

15. "Tax on land" - Entry 49 List II involves a tax which is directly on land as a unit and is normally not concerned with the division of interest or ownership in the units of lands / buildings which are sought to tax. Such tax must bear a definite relation to land.

1969(1) SCR-108, at 110 & 111, S.C.Nawn Vs. Wealth Tax Officer, Calcutta

1969(2) SCC-55, Asstt. Commr. Of Urban Land Tax. Vs. Buckingham & Carnatic Co. Ltd.(Pr.4)

1970(1) SCC-749 at Page. 753, Second Gift Tax Officer Vs. D.H.Nazareth (Pr. 10)

1975(2) SCC-175, Anant Mill Vs. State of Gujarat
Tax was on actual occupier

16. The aforesaid judgments were referred to with approval in India Cement Ltd. [(1990) 1 SCC 12 Para 22 & 23]. In India Cement, this Court was considering a cess which was considered to be a cess on royalty. It was held that "royalty being that which is payable on the extraction from the land and cess being on additional charge on that royalty can not by parity of the same reasoning be considered to be a tax on land..".

> ".…….There is a clear distinction between tax directly on land and tax on income arising from land" In the present case also the tax has been levied irrespective of who owns and uses the land. The tax is directly on land and even the measure of tax shows that tax has a definite relation to land.
>
> Another seven Judges been in UOI Vs. H.S. Dhillon – 1971 (2) SCC-779, while upholding the Wealth Tax Act of Parliament by a majority of 4:3 approvingly referred to SC Nawn V. Wealth Tax Officer, ASSTT. Commr. Of Urban Land Tax V. Buckingham & Carnatic Co. Ltd. Calcutta and Second Gift Tax Officer Vs. D.H. Nazareth and summarized the requirements of a tax under Entry 49 List II as under : " The requisites of tax under entry 49, List II may be summarized thus:
>
> (1) It must be a tax on units, that is lands and buildings separately as units.
>
> (2) The tax cannot be a tax on totality, i.e., it is not a composite tax on the value of all lands and buildings.
>
> (3) The tax is not concerned with the division of interest in the building or land. In other words, it is not concerned whether one person owns or occupies it or two or more persons own or occupy it.

They said this tax is not a personal tax but a tax on property. In a concurring Judgment, Mitter J also referred to the previous SC Judgments mentioned above and observed:

> "Even assuming Entry 49 of List II envisages imposition of tax on lands and buildings adopting a mode of a certain percentage on their capital value, lands and buildings must still be subject to taxation as units and no aggregation is possible in possible."

17. The dissenting judgment of Shelat J differs only the aspect of inclusion of agricultural land for imposing Wealth Tax (Para 111 & 112).

18. "Tax on land" in Entry 49 List II involves a tax on land as a unit. Here the legislature has chosen that land which is "being used" for mining, commerce and industry. There is no intention to tax land which is "being used" otherwise or which is not being used at all. The Respondents placed much emphases on expression "being used" in Section 89 to submit that that tax levied was either a use tax imposable only by Parliament or that the tax was not directly on land. It is settled that legislature need not tax all in order to tax something. It has wide latitude in selecting objects, manner and rate of tax.

1981(4) SCC-675, R.K.Garg (5 J.J) (Pr. 8 & 16).

AIR 1964 SC-925 Khyerbari Tea Co.(5 JJ) Pr.44

1997(5) SCC-536,(9 JJ) Mafatlal Industries Ltd. (Pr. 343).

1970(1) SCC-189, Twyford Tea Co. (5 JJ) Pr. 38)

1989 (3) SCC-634, Federation of Hotel & Restaurant Assn. (5 J.J) (Pr. 46-48).

19. Here the measure of tax is "per acre" which also indicates that tax is on land as a unit. Measure does throw light about nature of tax.

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

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

AIR 1965 SC-1561=1965(3) SCR-47,49-51, Ajoy Kumar Mukherjee

AIR 1968 SC-599=1968(1) SCR-705,716-717, Andhra Sugars Ltd. Vs. State of A.P.
"Required for use in Sugar Factory"

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

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

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

23. High Courts' reliance on Indian Aluminium, ignoring above cases, is misplaced. Moreover, in this case Bihar Forest Restoration and Improvement of Degraded Forest Land Taxation Act, 1992 was challenged. This Act imposed a tax for mechanical and biological reclamation of forest land. This court held that in substance the tax was levied on the absence of land and squarely on the activity of mining or removal of earth. It was not a tax directly on land (Para 15-20). Significantly the court observed "the forest land which is being used is not subjected to tax" (Para 15(d) and again "the existing land or trees are not taxed….." [Para 16(g)]. Further, distinguishing the case of Goodricke it was observed "there education cess and rural employment cess were levied on certain land and building in the State of West Bengal. The estates were carved out as a separate category and a different rate was prescribed thereof". They said that the fundamental difference in Goodricke was that 'the tax, in other words, was on the existing tea estate…. Thus Indian Aluminium has no bearing to the present case as MADA Act does not impose any tax on the absence of land or on the activity of mining or removal of earth. The tax is imposed on lands which are in existence. In (Pr.18) of Indian Aluminium it is said that one of the facets of tax on land is that primary responsibility of payment is on the owner of land but in the taxation act liability was on the person who uses it or occupies it.

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

24. High Courts over emphasis on Marginal Note to understand character of tax is incorrect. Marginal Notes cannot be deployed where main provision is clear.

(1990) 1 SCC-400, Frick India Ltd. Vs. UOI (Pr.8)

2004(2)SCC-783, Karnataka Rare Earth & Anr.Vs.Senior Geologist,Deptt. of Mines & Geology

2004(4) SCC-766, Raichuramatham Prabhakar Vs. Rawatmal Dugar

ISSUE NO. 5 : Whether Kesoram could be read as departing from India Cement

25. India Cement is rendered by a bench of 7 Hon'ble Judges and it pertained to the validity of cess on royalty. As against that, Kesoram dealt with Cess Act, 1880; West Bengal Primary Education Act; W.B. rural employment and production Act, 1976 which purported to levy and collect road cess and public work cess; education cess; and rural employment cess respectively. The provisions concerned provided for the assessment of cesses for determination of the quantum of cess with regard to mines and quarries ; coal mines and mines other than coal mines and quarries and in addition to other lands including tea estates. These Acts were amended by the W.B. Taxation Laws Amendment Act, 1992 w.e.f. 01.04.1992 which sought to levy education cess in respect of land, and in respect of coal bearing land at certain rate in relation to annual value. This was the position in relation to State of West Bengal. With regard to tea matters, the main issue was whether the judgment of this court in ***Goodricke*** runs counter to the judgment in India cement and stands whittled down by the judgment in ***Orissa Cement*** and ***Mahanadi Coal fields***. There were also challenges to the Minor Mineral provisions of U.P. Special Area Developments Act.

26. In India Cement, Section 115 of the Madras Panchayat Act was challenged as being beyond legislative competence. It charged local cess @ 45 paise per rupee of land revenue as royalty. The Explanation to Section 115 defined 'land revenue' to mean and include water cess, royalty , lease amount or other sum payable in respect of land to the government. Further, Section 116 enabled every Panchayat Union Council to levy a local cess surcharge on every person liable to pay land revenue as an addition to the local cess

at Rs 2.50 on every rupee on land revenue. The High Court relied upon the judgment of this Court in ***HRS Murthy*** and dismissed the writ appeal. In para 11 of India Cement, the Court observed '*the question, therefore, which arises is, is cess of royalty a demand of land revenue or additional royalty*?'. In para 12, it said the question about Constitutional validity of Section 115 (1) is involved 'in so far as it sought to levy as local cess @ 45 nai paise on every rupee of the land revenue payable to the Government, the meaning of land revenue being artificially expanded by the Explanation so as to include royalty payable under the mining lease. This Court further noted that royalty is payable under the lease deed as per Section 9 of the MMRD Act. It proceeded to determine the competence of State Legislature of Entry 49, 50 and 54 of List II. It reiterated that the court was ' concerned with cess on royalty' (Pr 19).

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

28. Importantly, in para 22 while dealing with Entry 46 and 49 List II of VIIth Schedule, this Court said that, royalty was not agricultural income. It said ' but in the instant case, royalty being that which is payable on the extraction from the land and cess being an additional charge on that royalty, cannot by the parity of the same reasoning be considered to be a tax on land. There was no entry like entry 46 empowering State to impose tax on royalty. It said that there was clear distinction between tax on land and tax on income arising from land. The court said that royalty was indirectly connected with

land and hence cannot be said to be a tax directly on land as a unit (Pr 23). In support of the conclusion, the court adverted to there being no liability to pay cess in absence of mining activity, which showed that tax was relatable to minerals extracted. It concluded that in pith and substance, it is a tax on royalty and not a tax on land.

29. While dealing with entry 50 List II in paras 24-30, this court observed that it deals with taxes on mineral rights and observed that mineral rights being expressly covered under Entry 50 List II cannot be brought under Entry 49 List II as it would render Entry 50 List II redundant. It also said that with reference to entry 50 List II, the State Legislature cannot override provisions of MMRD Act, 1957. Section 2 and Section 9 of MMRD Act would pro tanto override State legislation. Having earlier held, that royalty is a return received from the produce of land (Pr 21) and that the royalty is payable on a proportion of the minerals extracted (Pr 23) , the court referred to the Mysore High Court judgment in Laxmi Narayan Vs Taluk Dev AIR 1972 Mys 299, where the High Court held that royalty under Section 9 was really a tax. The Court criticised the approach of the Constitution Bench in HRS Murthy, and stated that Section 9 was a clear bar on the State Legislature taxing royalty so as to in effect amend Second Schedule of the Central Act. Hence, tax on royalty cannot be tax on land. The Court also noted the judgments of Punjab, Orissa, Gujarat, Rajasthan High Court which held that royalty is not a tax (Pr 31).

30. In para 33, this court iterated that royalty is relatable only to minerals extracted and would be relatable to Entry 23 and 54 of List II and not entry 49 of List II. But without any further discussion, or any decision of its own with regard to the correctness of the judgments of 4 High Courts noted in para 31 and without examining the correctness of Mysore High Court, this court recorded its opinion that royalty is a tax. In the first sentence it observes that royalty is a tax and as such cess on royalty being a tax on royalty

is beyond competence of State Legislature because Section 9 covers the field. However, the last sentence of the same para 34, this court observed that royalty on mineral right is not tax on land but a payment for the user of land.

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

referred to dictionary meaning and judgments of this Court and other High Courts to conclude that royalty is consideration for parting with the right and privilege of the owner and it was not a tax (See para 59-71).

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

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

34. It is submitted that there is no conflict between India Cement and Kesoram, except for the observations in para 34 of India Cement where without any discussion about the nature of royalty and correctness of 4 High Court judgments, the court in its opinion recorded that royalty was tax. In view of the conflict with the last sentence of para 34, Kesoram discussed the nature of royalty and clarified thar royalty was not tax and ignored the apparent error in India Cement. The judgment of India Cement should be confined and limited to the holding that the State was not competent to impose a tax on royalty as there

was no entry empowering it. Royalty was merely a price/ consideration of owner of land and mineral for parting with its privilege to do the mining and take away the minerals.

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

ISSUES NO. 3,7,8,10 & 11 Entry 50 List II :

36. Entry 50 List II has a peculiar structure. It is not made completely subject to Entry 54 List 1. Instead it is made subject to limitations which may be imposed by Parliament by law relating to mineral development, i.e., Entry 54 List 1. Thus by inserting provisions in MMRD Act, 1957 the Parliament can limit the states power to tax mineral rights, but it cannot thereby arrogate to itself the power to impose that tax.

2004(10) SCC 210, State of W.B. Vs. Kesoram Industries Ltd.

37. This is something like Entry 57 List II, i.e., field relating to tax on vehicles which is subject to Entry 35 List 3, i.e., principles on which taxes on such vehicles can be imposed . Likewise Entry 35 List 3 cannot be used by Parliament to itself impose a tax on vehicles.

38. Again Article 286(3) empowers Parliament to impose restrictions and conditions on states power to impose a tax on sale or purchase of goods declared by Parliament to be of special importance to inter-state trade or commerce. This would not empower Parliament to impose sales tax which is covered by Entry 54 List II.

39. Thus even if the tax is considered to be a tax on mineral rights it would be valid. And High Court is not right in saying that Entry 49 and 50 List II cannot be used by State Legislature to tax on mining land.

ISSUE NO. 9

40. Entry 23 List II and Entry 54 List 1 deal with general subjects and they do not cover tax. The scheme of distribution in the 3 lists of 7th Schedule to the Constitution is carefully crafted and taxing field is separately provided for.

AIR 1958 SC 468, M.P.V. Sundaramier & Co. (Pr.20)

1983 (4) SCC-45, M/s Hoechst Pharmaceuticals Ltd.

1991 (4) SCC-139, State of U.P. Vs. Synthetics & Chemicals Ltd.(Pr. 31-33,38,44,45)

41. It follows that since MMRD Act 1957 is a law made with reference to Entry 54 List 1 and so its provisions cannot be understood as empowering imposition of tax, especially those taxes with respect to which State legislatures have been given competence. This includes both Entry 49 and 50 of List II.

Entry 5 List II

42. The Coal Mining Authority under the Act is like a Municipal Authority, and such legislation refers to Entry 5 List II.

1975(1) SCC-531, S.K.Roy (Pr. 3-4).
(MADA is a Municipal Authority)

1982(1) SCC-125=AIR 1982 SC-697, Western Coalfields Ltd. Vs.Special Area Development Authority.(Pr.24-25)

1995 (5) SCC 251 Municipal Commr. Dum Dum (pr-34-35)
(land of Union of India vested in corporations can be taxed)

K.K. Poonacha Vs State of Karnataka (2010) 9 SCC 671

Bhanumati Vs State of U.P. (2010) 12 SCC 1

Girnar Traders Vs State of Maharashtra (2011) 3 SCC 1

Juxtaposing with old Section 89 :

43. High Court has failed to construe the Amended Section 89 in juxtaposition to the old Section 89 which imposed a tonnage Cess and a Cess on royalty.

Severability :

44. Doctrine of severability would apply if the High Court reasoning is accepted only on point 1, as writ petitions covered by Civil Appeal Nos. 4056-64 do not relate to mining land. They are cases where land is being used for commerce and industry. Section 89 specifies the three categories separately and hence even if "mining land" is beyond competence, the other two categories of commerce and industry would remain. In those cases Entry 54 List 1 and MMRD Act are not attracted.

1957 SCR-930, RMD Chamarbaugwalla

1996(3) SCC-105, Lt. Col. Sawai Bhawani Singh

1990(2) All ER-836, 845(HL) DPP vs. Hutchinson

Dated : 05.12.2023

Filed by

Sansriti Pathak
Advocate for the Appellant

In the Supreme Court of India

(Civil appellant jurisdiction)

Civil appeal 5682 of 2007

In the matter of
M/S Hindalco Industries Limited ... Petitioner

Vs

State of Uttar Pradesh and Others … Respondents

Written Argument/ Submissions on behalf of Zila Panchayat Sonbhadra through its adhyakchh (Respondent No. 3 & 4)

(S.P. Singh Sr. Advocate assisted by

Ms. Sheenu Chauhan Adv.)

M/S Hindalco Industries Limited is petitioner in this civil appeal and Zila Panchayat Sonbhadra has been argued as respondent No.3 & 4.

The following question of law was framed in the SLP No. 21975 of 2007 by the SLP petitioner M/S Hindalco Industries Limited.

Weather the state legislature has legislative competence to enact a law imposing transportation fee on minerals coal in view of the specific provisions of parliamentary enactment viz mines and minerals (Development and Regulations) Act 1957 (MMRD Act 1957) fully and exclusively occupying the field.

Whether Section 239 read with sections 142, 143 and other provision in UP Kshetra samiti Panchayat and Zila panchayat Adhiniyam 1961 entitle the Zila Panchayat to frame the impugned by law and levy the impugned fee/ toll tax?

Whether in "pith and substance" the impugned levy in the mineral only in as much as the under the impugned by laws truck carrying minerals alone were made subject to impugned levy and no levy whatever was payable if the same truck using the same road in carrying any material other than mineral ?

That initially the petitioners company (Hindalco) filed a writ petition numbered as W.P. No.589 of 2007 challenging the validity of impugned by laws and the levy interalia on the ground of lack of legislative competence of the state legislature in respect of impugned levy which is pith and substance was on coal which field was fully occupied by parliamentary legislature named MMRD Act, the coal bearing (Acquisition and Development) Act 1957 and the coal mine legislation , that the provisions of UP Kshetra samiti Panchayat and Zila Panchayat Adhiniyam 1961 do not authorized the Zila Panchayat to impose levy on coal.

At the point of time there was already a judgment of D B of Allahabad High court reported on Okhla sand supply company vs. state of UP 2001 (1) AWC. 803. where in paragraph number 6 of the judgment it has been laid down that the state cannot levy toll tax on minerals in view of provisions of MMRD Act and MCR.

The said writ petition of the petitioner which pertained to major mineral coal was heard along with other writ petitions pertaining to minor minerals. The petitioner writ petition was also referred to full bench on the basis of reference order passed in the cases of minor minerals. In the said case a division bench of the High court.

(Comprising of Hon’ble Mr. Justice M. Katju and Hon'ble Mr. Justice R. S. Tripathi) did not agree with the view taken by another coordinate bench of the High court (Comprising of Chief justice SK Sen as he then was and Hon'ble Mr. Justice S.R. Alam)

in Okhlas sand supply company Vs. state of UP 2001 (1) AWC 803 and wide order dated 22/05/2003 referred the following two questions of law for consideration by larger a bench.

Whether the view taken in paragraph 6 of the judgment of division bench in Okhla sand supply company Vs State (supra) lays down the correct legal position?

Whether section 239 read with sections 142,143 and other provisions in UP Kshetra Panchayat and zila Panchayat adhiniyam 1961 entitle the zila panchayat to frame the impugned by laws and levy the impugned fee / toll Tax?

In the case of Okhla sand (Supra) division bench of Allahabad High court which considering the similar notification issued by the zila Panchayat Gautam Budh Nagar held that by laws were beyond the purview and ambit of the provisions of UP Kshetra Panchayat and zila panchayat adhiniyam 1961 (here in after reference) to as the zila Panchayat act) and that such tax could not be imposed by the state legislature.

The referring order is being quoted here in below

"It appears to us that the impugned notification does not relate to toll tax on vehicles, pack animals of porters bringing goods to sell in the market and as such, Section 145 (b) has no application in the facts and circumstances of the case. The notification relates to imposition of toll tax in respect of mines and minerals pertaining to U.P. Minor Minerals (Concession) Rules, 1963 and the Mines and Minerals (Regulations and Development) Act, 1957. In our considered view, it is not permissible for the Zila Panchayat to impose such tax relating to transportation of sand being a part of mines

and minerals falling within the purview of the Mines and Minerals (Regulation and Development) Act, 1957, as well as U.P. Minor Minerals (Concession) Rules, 1963."

The referring order has been made in Writ Petition No. 18035 of 2003, Civil Misc. Writ Petition No.587 of 2003 (Tax) was also filed for quashing the aforesaid bye-laws framed by the Zila Panchayat and the said petition was also connected with Civil Misc. Writ Petition No. 18035 of 2003 and on 22.5.2003 the same order as in Civil Misc. Writ Petition No. 18035 of 2003 was passed in the said petition. The notification dated 5.12.1994 containing the bye-laws that had been framed by the Zila Panchayat, Sonebhadra was published in the P. Gazette on 10.12.1994, Clause 1 of the bye-laws state the bye-laws shall be called the bye-laws empowering the Zila Panchayat, Sonebhadra to levy fee on trucks and tractors engaged for transporting 'gitti, stone. boulders, 'surkhi', lime, coal and coal dust collected from the mining places situated within the rural areas of Zila Panchayat, Sonebhadra to places within or outside the district. Clause 3 provides that every person who on his own or through laborers collects gitti, stone, boulders, lime, coal and coal dust from the mining places of rural areas falling within district Sonebhadra and transports them by land from the rural areas by tractor or truck shall pay the prescribed fee to the Zila Panchayat, Sonebhadra and that such fee shall be paid at the place fixed by the Zila Panchayat, Sonebhadra to such officers or contractors authorized by the Zila Panchayat. Clause 4 stipulates that the fee per trip per tractor shall be Rs.10/- while fee per trip per truck shall be Rs.20/-. These fees were subsequently enhanced to Rs.15/- and Rs.30/- respectively by the notification dated 23.8.1999. Clause 11 of the Bye-laws provides that if there is any default of payment of fee while taking the aforesaid minerals for the personal use or sale the

mineral shall be confiscated and Clause 12 provides that in case the fee is not paid within a period of 15 days, then the mineral shall be sold for realization of the fees.

The sand of zila Panchayat before full bench of Allahabad High court is that the constitution provides the legislative competence of the state for enacting laws in respect of the local self governments and fees on lands and those the bylaws framed by the zila Panchayat under the state act are valued as the bylaws are well within the province of the zila panchayat Act and within the statutory powers conferred under section 142 of the Act read with section 239(1). It is wrong to say that the state legislative would have no authority to legislate or anything which even touches the subject which is covered by the declaration made by the mines act that as the levy imposed by the impugned by laws has nothing to do either with the development of minerals or regulations of mines but only provide for levy of fees for use of public roads constructed and maintained by the zila Panchayat, and the same cannot be termed as levy on the goods of minerals that by providing for the seizure of minerals for the realization of fee and not the vehicle would not mean that the levy is on minerals as the changing provision clearly shows that the fee is on the vehicle use for transportation and the method of recovery cannot determine the validity of the fee. The imposition of fee on vehicles carrying minerals cannot be said to be discriminatory or arbitrary as the matter of fiscal legislation, the authority has wide discretion to decides the items and persons who are to be subjected to such levy and the fee charged by the impugned by laws is perfectly justified and legal in accordance with law.Distribution of legislative powers provided in the constitution is important, the seventh schedule is being coated here in blow.

"SEVENTH SCHEDULE"

(Article 246)

List I-Union List

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

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

96. Fees in respect of any of the matters in the List but not including fees taken in any court.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

List II-State List

5. Local Government, that is to say, the constitution and powers of municipal corporation, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-Government or village administration.

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

49. Taxes on lands and buildings.

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

66. Fees in respect of any of the matter in the List, but not including fees taken in any court."It needs to be mentioned that the fountain source of legislative power is Article 245 of the Constitution. It provides that subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Article 246 of the Constitution provides that Parliament has the exclusive power to make laws with respect to any of the mattes enumerated in List I in the Seventh Schedule called the "Union List". Subject to the said power of the Parliament, the Legislature of any State has the power to make laws with respect to any of the matters enumerated in List III called the "Concurrent List". Subject to the aforesaid, the Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II called the "State List", Article 248 gives the exclusive power to the Parliament to make any law with respect to any matter not enumerated in the Concurrent List or the State List. This is what is called the residuary power vested in Parliament. While examining the aforesaid principles, the Supreme Court has repeatedly pointed out that the various entries in the three lists are not "powers" of Legislation but "fields" of Legislation and the Constitution effects a complete separation of the taxation power of the Union and State under Article 246 of the Constitution.

Taxation is considered to be e distinct matter for purposes of legislative competence and the powers to tax cannot be deduced from a general legislative entry as an ancillary power. A tax has two elements:- First, the person, thing or activity on which the tax is Imposed, and secondly, the amount of tax. The amount may be measured in many ways; but a distinction between the subject matter may of a tax and the standard by which the

amount to tax is measured must not be lost sight of. These are described respectively as the subject of a tax and the measure of a tax.

It is also necessary to examine the relevant provisions of the Mines Act on which the learned counsel for the respective parties have placed reliance and the same areas under:

2. Declaration as to the expediency of Union Control.- It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided.

"4 (1A). No person shall transport or state or cause to in transported or stated any mineral otherwise that in accordance with the provisions of this Act and the rules made there under.

"13. Power of Central Government to make rates in respect of minerals. (1) The Central Government may, by notification in the Official Gazette, make rules for regulating the grant of reconnaissance permits, prospecting licences and mining leases in respect of minerals and for purposes connected therewith.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all on any of the following matters, namely:

(a).....

.....

the fixing and collection of fees for reconnaissance permits, prospecting licences or mining leases, surface rent, security deposit, fines, other fees or charges and the time

within which and the manner in which the dead rent or royalty shall be payable. (m).

.....

18. Minerals development. - (1) It shall be the duty of the Central Government to take all such steps as may be necessary for the conservation and systematic development of minerals in India and for the protection of environment by preventing or controlling any pollution which may be caused by prospecting or mining operations and for such purposes the Central Government may, by notification in the Official Gazette, make such rules as it thinks fit.

(2) In particular, and without prejudice to the generality of the foregoing power such rules may provide for all on any of the following matters, namely:

(a)……

(p) the procedure for and the manner of imposition of fines for the contravention of any of the rules framed under this section and the authority who may impose such fines; and (q) the authority to which, the period within which, the form and the manner in which application for revision of any order passed by any authority under this Act and the rules made there under may be made, the fee to be paid and the documents which should accompany such applications.

(3) All rules made under this section shall be binding on the Government.

23 (c). Power of State Government to make rules for preventing illegal mining,

transportation and storage of minerals. - (c) regulation of mineral being transported from the area granted under a prospecting hence or a mining lease or a quarrying licence or a permit, in whatever name the permission to excavate minerals, has been given.

(d) inspection, checking and search of minerals at the place of excavation or storage or during transit.

.....

(g) any other matter which is required to be, or may be, prescribed for the purpose of prevention of illegal mining transportation and storage of minerals.

25. Recovery of certain sums as arrears of land revenue.- Any rent, royalty, tax, fee or other sum due to the Government under this Act or the rules made there under or under the terms and conditions of any reconnaissance permit, prospecting license or mining lease may, on a certificate of such officer as may be specified by the State Government in this behalf by general r special order, be recovered in the same manner as an arrear of land revenue.Hon'ble supreme court of India dealt in detail all the issues and other earlier judgments in the matter of Kesho Ram (State of West Bangal & others Vs. Kesho Ram)

Ram Industries Ltd & others)

(JT 2004(1) S.C. 375) considering the earlier judgment of Supreme Court in MA

Tulloch hingur Rampur coal co. , Orissa cement India Ltd.,

Orissa cement India Cement state of Orissa Vs. Mahanadi coal fields etc, JT 1995 (3) SC662 and in good risk group Ltd. And others Vs state of Bangal and others 1995 --- (1) sec 707.

The issue in respect to case of "Kesho Ram". The full bench of Hon'ble Allahabad High court considered the issue raised in Kesho Ram case in detail which are the key point

deciding the issue involved in the case. This part of judgment of full bench are and being quoted here in below Four sets of matters came up for consideration before the Supreme Court in Keso ram. The first was "Coal Matter" in which cess on coal bearing land levied in exercise of the power conferred by the State Legislature was struck down by the Calcutta High Court. The second was the "Tea Matter" where cess levied on coal bearing land was also levied on tea plantation land. The third was the "brick Earth Matter" where cess was levied on removal of brick earth. The fourth was "Minor Mineral Matter" where the constitutional validity on cess levied in State of U.P. on minor minerals was up-held by the Allahabad High Court.

The Supreme Court examined at length whether the general power of "regulation and control would include the power of taxation and observed that it cannot be assumed that the Constitution Bench in the M.A. Tulloch held that under the Mines Act, the Central Government had appropriated to itself the power to levy tax or cess on minerals or mineral bearing land and all that the Court has said is that the Mines Act covers the field of Legislation as to the regulation of mines and the development of minerals. In this connection it was observed:-

As Section 2 (of the Mines Act) itself provides and indicates, the assumption of control in public interest by the Central Government is on (1) the regulation of mines, (ii) the development of minerals, and (iii) to the extent hereinafter provided. The scope and extent of declaration cannot and could not have been enlarged by the Court not has it been done. The effect is than no State Legislature shall have power to enact any legislation touching (i) the regulation of mines, (ii) the development of minerals, and (iii) to the extent provided by Act No.67 of 1957. The Preanible to the Central Act 67 of 1957 itself speaks

"An Act to provide for the development and regulation of mines and minerals under the control of the Union". Tax and fee is not a subject dealt with by Act No.67 of 1967.....

We have three comments to offer on M.A. Tulloch. Firstly, the provisions of the Act No.67 of 1957 did not directly come up for the scrutiny of the Constitution Bench as there was no demand raised after the commencement of this Act which was put in issue before the Constitution Bench, the Constitution Bench was only adjudicating upon the issue whether a liability to pay cess incurred under the previous Act could be enforced under Act No.67 of 1957 of in other words if Act No.67 of 1957 had any castigating effect on the demand validly raised under the previous enactment. Secondly. the extent to which power to legislate by the States was excluded by the Central Act No.65 of 1951 was not a question dealt with in- depth as it was done in Hingir-Rampur Coal Co. Thirdly, M.A. Tulloch, if not correctly read, creates a wrong impression that Act No.67 of 1957 provides for levy of tax and fee, which in fact it does not Section 13(2)(i) cannot be read as empowering the Central Government to levy any tax or fee: The expression "other fees and charges" have to be interpreted ejusdent generis taking colour from other words and phrases employed in the same clause. The word "charges" cannot and does include within its meaning any tax. The expression "other fees or charges" must be assigned such meaning as to include therein only such fees and charges as are meant for regulation or development.

We are clear in our minds that a power to levy tax or fee cannot be spelled out from sections 13, 18 and 25 of the Act No.67 of 1957. It is well-settled that power to tax cannot be inferred by implication; there must be a charging section specifically empowering the State to levy tax, Section 18 (2) (q) speaks of foe to be paid on

applications for revision and not on minerals, mineral rights or mining land. Section 25 speaks of 'recovery of tax and fee' amongst others. Two observations are spontaneous. Firstly, a provision for recovery, being a machinery provision cannot be read as empowering the levy of tax or fee. Secondly, if speaks of tax or fee being due to the Government without defining the same and without qualifying the word 'Government' with Central or State. A perusal of several provisions of the Act and in particular Section 9-A. 15, 15 (1-A) (a) and (g), 15(3), 17(3), 21(5), 25 goes to show that the power of recovery is invariably given to the State Government and obviously the word 'Government in Section 25 refers to the State Government, which only is empowered to recover the sums due as arrears Of land revenue.

.....None of the two Constitution Benches have held that power to regulate and develop with which the Central Act of 1951 was concerned would include the power to levy tax and fee, which power shall have to be traced to some other entry in List 1. List I contains a general entry i.e. Entry 96 for levy of fee in respect of matters in List I but so far as levy of tax is concerned there are separate and specific entries (see Entries 82 to 92B in List I and Entries 45 to 63 in List II). Further in view of Entry 50 of List II. Parliament can by any law relating to mineral development limit or place limitations or the power of the State Legislatures to impose taxes on mineral rights."

The Supreme Court then concluded:-

"A reasonable tax or fee levied by State legislation cannot, in our

opinion, be construed as trenching upon Union's power and freedom to regulate and control mines and minerals."

The Supreme Court also dealt with its earlier with its earlier decisions in India Cement. Orissa Cement Ltd., Mahanadi Coalfields Ltd. and Goodricke and the relevant portions dealing with these decisions are:-

"India Cement is clearly distinguishable so far as the present cases are concerned. As we have already pointed out it was a case of cess levied by State Legislature on royalty and no on mineral rights or land and buildings. That is why the levy was held ultra vies. Seervai's comment and objective criticism on India Cement is noteworthy (See- Ibid, para 22.257 C). Royalty is income and State Legislatures are not competent to tax an income. This single ground was enough to strike down the levy of cess impugned in India Cement. Nothing more was needed. The Orissa Cement Ltd. (supra) also as the very opening part of the report shows, dealt with the levy of a cess by the State bases on the royalty derived from mining lands which was held to be directly and squarely governed by India Cement and, therefore, struck down.

In State of Orissa & Ors. Vs. Mahanadi Coalfields Ltd. and Ors. 1995 Supp. (2) SCC 680, the impugned levy by the State Legislature was a tax of Rs.32 per thousand acre on coal bearing lands. It was sought to be defended as falling under Entry 49 or in the alternative under Entry 23 or Entry 50 in List II. The attack was that the legislation being one on mineral lands and mineral rights and the Parliament having enacted the Mines and Minerals (Development and Regulation) Act, 1957, the field was entirely covered and the State Legislature was incompetent to levy the tax. Reliance was placed on India Cement, Orissa Cement and Buxa Dooars Tea Co. Ltd. (supra). Only mineral bearing land and coal bearing land were the subject of the levy of tax. The three Judges Bench speaking through K.S. Paripornan J., concluded that the charging section of the impugned Act imposed a tax on the minerals also, and was not confined in a levy on

land or surface characteristic of the land. All non-mineral bearing lands and non- coal bearing lands were left out of the levy. The levy was struck down as levying a tax not on land (related to surface characteristic of the land) but on minerals and mineral rights, Goodricke's case (supra) was cited before their Lordships and it was observed that in Goodricke's case that impugned levy was held to be a tax on land and that makes all the difference.

.....

Having made an independent review of several judicial decisions and the several settled legal principles, as dealt with hereinabove, we are satisfied that the Goodricke's case (supra) was correctly decided and the law land down therein is correct and supported by authority in abundance. The distinguishing, features which exclude the applicability of law laid down in India Cement and Orissa Cement to the fact situations like the ones we are called upon to dead with were rightly pointed out in Goodricke and those very reasons additionally explained by us do not permit the cases on hand being ruled by India Cement and Orissa Cement."

The Supreme Court then in paragraph 140 of the judgment summarized the relevant principles:-

> In the scheme of the Lists in the Seventh Schedule, there exists a clear distinction between the general subject of legislation and heads of taxation. They are separately enumerated.
>
> Power of 'regulation and control's separate and distinct from the power of taxation and so are the two fields for purposes of Legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an

extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law. The subject matter of two taxes by reference to two Lists being different simply because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. This is the distinction between the subject of a tax and. the measure of a tax.The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by Legislature for quantification of tax is not decisive of the measure of tax though it may continue one relevant factor out of many for throwing light on determining the general character of the tax.

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

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

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

Two - In which Entry the Impugned legislation falls by finding out the pith and substance of the legislation? and three Having determined the filed of legislation wherein the impugned legislation falls by applying doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

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

(7) To be a tax on land, the levy must have some direct and definite relationship with the land. So long as the tax is a tax on ● land by bearing such relationship with the land, it is open for the legislature for the purpose of levying tax to adopt any one f the

well known modes of determining the value of the land such as annual or capital value of the land or its productivity. The methodology adopted having an indirect relationship with the land, would not other the nature of the tax as being one on land.

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

by reference to Entry 52 or 54, the State would be free to act in the fielld left and from the declaration. The legislative power to tax by reference to Entries in List II is plenary unless the entry itself makes the field 'subject to; any other entry or abstracts the field by any limitations imposable and permissible. A tax or fee levied by State with the object of augmenting its finances and in reasonable limits does not ipso fucto treach upon regulation, development or control of the subject. It is different if the tax or fee sought to be levied by State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue of rendering service is only secondary or Incidental.

(9) The heads of taxation are clearly enumerated in Entries 83 to 92B in List 1 and Entries 45 to 63 in List II, List III, the Concurrent List, does not provide for any head of taxation. Entry 96 in List 1, Entry 66 In List II and Entry 47 in List III deal with fees. The residuary power of legislation in the field of taxation spelled out by Article 248 (2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II. It fellow that taxes on lands and buildings in Entry 49 of List II cannot be levied by the Union. Taxes on mineral rights a subject in Entry 50 of List II can also not be levied by the Union though as stated in Entry 50 itself the Union may impose limitations on the power of the State and such limitations, if any, imposed by the Parliament by law relating to mineral development and to that extent shall circumscribe the States' power to legislate. Power to tax mineral rights is with the States; the power to lay down limitations on exercise of such power, in the Interest of regulation, development or control, as the case may be, is with the Union. This is the result achieved by homogeneous reading of Entry 50 in List li and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for

augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional."

(emphasis supplied) The Supreme Court while dealing with the Minor Minerals Matters relating to levy of cess levied by the State of U.P. which had been upheld by the Allahabad High Court observed:-

"The MMDR Act enables control over the regulation of mines and the development of minerals being exercised by the Central Government through legislation. The High Court has upheld the validity of the SADA Act by relating it to Entry 5 in List II which is 'local government'. Any local government exercising the power of governance over a local area shall have to administer, manage and develop the area lying within its territory which cannot be done without raising funds. It is usual for every piece of legislation giving birth to an Institution of local government to feed it by incorporating provisions conferring power of generating

funds for meeting the expenses of governance, ... The impugned cess can, therefore, be justified as a fee for rendering such services as would improve the infrastructure and general development of the area the benefits whereof would be availed even by the stone crushers. Entry 66 in List II is available to provided protective constitutional coverage to the impugned levy as fee.....As we have pointed out earller, a cess may be tax or fee. So far as the present case is concerned, this distinction does not need any further enquiry by reference to the facts of the case inasmuch as the Impugned cess is constitutionally valid considered whether a tax or a fee.....

As a tax the impugned levy of cess is clearly covered by Entry 6 of List II (as the High Court has held, and we add) read with Entries 49, 50 and 66 of List

II.....What is under challenge is only the levy of cess. There is nothing wrong in the State legislation levying cess by way of tax so as to generate its funds. Although it is termed as a cess an mineral right, the impact thereof falls on the land delivering the minerals. Thus, the levy of cess also falls within the scope of Entry

> 49 of List II. Inasmuch as the levy on mineral rights does not contravene any of the limitations imposed by the Parliament by law relating to mineral development, it is also covered by Entry 50 of List II. The power to levy any tax or fee lying within the legislative competence of the State Legislature can be delegated to any institution of local government constituted by law within the meaning of Entry 5 in List II. The Entries 5, 23, 49, 50 and 66 of List II provide adequate constitutional coverage to the Impugned levy of cess. True it is that the method of quantifying the cess is by reference to the quanturn of mineral produced. This would not alter the character of the levy. There are myriad methods of calculating the value of the land for the purpose of quantifying the tax reference whereto has already beer made by us in the other part of this judgment. .....

As stated earlier also, the impugned cess can be justified as fee as well. The term cess is commonly employed to connote a tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. Depending on the content and purpose of levy, cess may not be tax it maybe a fee or fee as well.

> It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary

that the services rendered by the fee collected should remain confined to the persons from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged. The levy of the impugned cess can equally be upheld by reference to Entry 66 read with Entry 5 of List II." (emphasis supplied)

The preamble to the Zila Panchayat Act states that it was expedient for establishing Kshettra Panchayats and Zila Panchayats in the district of Uttar Pradesh to undertake certain Governmental functions at Kshettra and district levels in furtherance of the principle of democratic decentralization of the Governmental functions and for ensuring proper Municipal Government in rural areas, and to co-relate the powers and functions of Gram Panchayats with Kshettra Panchayats and Zila Panchayats. The statement of objects and reasons is as follows:-

"That with the establishment of Gaon Sabhas and Gaon Panchayats under the U.P. Panchayat Raj Act, 1947, and the recognition of the principles of adult suffrage under the Constitution of India, the question of the future set-up and functions of district boards as units of local government in rural areas of the State was engaging the attention of Government when the Planning Commission recommended to the State Government the scheme of 'democratic decentralisation' embodied in the Report of the Committee on Plan Projects - popularly known as Balvantray Mehta Committee. The U.P. Kshettra Samitis and Zila Parishads Adhiniyam, 1961, is, therefore, outcome of the an recommendations of the Balvantray Mehta Committee. It provides for the decentralisation of Governmental functions and for ensuring proper municipal government in rural areas.

The Act provides for the establishment of Kshettra Samitis and Zila Parishads respectively at the block and the district levels. These bodies will in addition to discharging the local governmental functions at the block and district levels, have the responsibility of preparing plans of development and executing them in their respective areas themselves. The can also be entrusted with the work of other departments of Government. The Act envisages correlation of powers and functions of the Gaon Sabhas with the Kshettra Samitis and Zila Parishads."

It also needs to be mentioned that Article 40 of the Constitution empowers the State to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as unit of self-government. The Seventy Third Constitution Amendment Act, 1992 inserted Part IX in the Constitution which deals with the Panchayats. Article 243 G of the Constitution provides that subject to the provisions of the Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government in matters relating to the implementation of schemes for economic development and social justice as may be entrusted to them Including those matters listed in the Eleventh Schedule. Arnongst others. Article 243 H of the Constitution provides that the Legislature of a State may, by law, authorize a Panchayat to levy, collect and appropriate such taxes, duties tolls and fees in accordance with such procedure and subject to such limits as may be specified in law. A perusal of the Eleventh Schedule Indicates that the matter relates to roads, culverts, bridges, ferries, waterways and other means of communication. In order to give effect to the Seventy Third Constitution amendment, the Zila Panchayat Act was suitably

amended in 1994. The contention of Dr. L.M. Singhvi, learned Senior Counsel for the petitioner that by virtue of the provisions contained in the Mines Act and by virtue of requisite declaration contained in Section 2 of the said Act that it is expedient in the public interest that the Union should take under its control the regulation of mines and development of minerals and such declaration being in the terms contemplated by Entry 54 of List I, the levy of fees by the Zila Panchayat would be clearly repugnant to the power reserved by the Constitution and the Mines Act to be exercised by the Central Government, cannot be accepted.As seen above, the Constitution Bench of the Supreme Court in Kesoram clearly held that tax and fee was not a subject dealt with the Mines Act as would be clear from the provisions of Sections 13, 18 and 25 of the Act and that a State Legislation which makes provisions of levying such a fee for rendering services without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "regulation and control" belonging to the Central Government.The Supreme Court in Kesoram also pointed out that the heads of taxation are clearly enumerated in Entries 83 to 92B in List I and Entries 45 to 63 in List II.

List III does not provide for any head of taxation. Entry 96 in List I, Entry 66 In List II and Entry 47 in List III deal with the fees. The residuary power of legislation in the field of taxation can apply to only subjects as are not included in Entries 45 to 63 in List II. Thus, the tax on land and buildings in Entry 49 of List II cannot be levied by the Union.Power to tax mineral rights is with the States but the power to lay down limitations on exercise of such power, In the interest of regulation, development or control, is with the Union. This is the result of homogeneous reading of Entry 50 In List II and Entries 52 and 54 in List I. So long as a tax or fee on

mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State of a fee for rendering service by the State and it does not impinge upon the regulation of mines and mineral development or upon control of industry by the Central Government. It is not unconstitutional, The Supreme Court further observed that any local Government exercising the power of governance over the local area shall have to administer, manage and develop the area lying within its territory which cannot be done without raising funds and that it is not necessary that the services rendered from out of the fee collected should be directly in proportion to the amount of fee collected or that the services rendered should remain confined to the persons from whom the fee has been collected. The availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fees charged. The levy of the fee can be upheld by reference to Entry 66 read with Entry 5 of List II.The Supreme Court in Kesoram also pointed out that the term 'land' as occurring In Entry 49 of List II has a wide connotation. To be a tax on land, the levy imposed must have some direct and definite relationship with the land. In the present case fees in being levied when the mines owner or any other purchaser of minerals transports the minerals after using the roads which have been specially constructed by the Zila Panchayat for the said purpose. The impact, therefore, falls within the Scope Entry 49 of List II. Thus the levy of fee can also be sustained under Entry 49 of List II read with Entry 66. Learned Senior counset for the petitioner also contended that where the legislative competence is under challenge then what has to be seen is the pith and substance of the impugned fee and in the present case it is clear that the Zila Panchayat has levied

the fees on minerals as the levy is only on those vehicles which are being used for collecting, storing and/or transporting minerals and for non-payment of the impugned fee, the minerals and not the vehicle carrying the minerals is confiscated for realising the impugned levy. This submission cannot also be accepted as the charging provision in the bye-laws clearly shows that the fee is levied on the vehicle used for transportation of the minerals. This apart the Supreme Court in Kesoram, while dealing with coal matters observed that merely because the quantum of coal produced and dispatched or the quantum of mineral produced and dispatched from the land is a factor taken into consideration for determining the value of the land, it does not become a tax on coal or minerals. Even while dealing with the mineral matters, the Supreme Court observed that the method of quantifying the cess by reference to the quantum of mineral produced would not alter the character of the levy. The primary object and essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences as the true test for determining the character of the levy. It cannot, therefore, be said that merely because the levy is imposed on truck or tractor carrying the minerals on land and in the event the levy is not paid, the mineral is confiscated, that the levy in effect encroaches upon the field of "regulation and control" of the mineral. We are unable to find out anything in the bye-laws or the Zila Panchayat Act which may show that there is any intention to regulate and control mines and minerals.

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Kesho Ram also distinguished India cement by pointing out that it was a case of cess levied by state legislature only on royalty and not on mineral rights or land and buildings The division bench which referring the matter to larger bench in

Allahabad High court observed that the main purpose of mines Act is to regulate mines and minerals and it was not basically concerned with transportation of the minerals from mines to main road and therefore the said matter is not subject matter of the Mines Act.Chapter VII of the Zila Panchayat Act containing Sections 119 to Section 146 deals with taxation and levy of fees and tolls. While Sections 119 to 141 deal with taxes, sections 142 to 146 deal with fees and tolls. Section 142 provides that a Zila Panchayat may charge fees to be fixed by bye-law or by public auction or by agreement for the use or occupation (otherwise than under a lease) of any immovable property vested in, or entrusted to the management of the Zila Panchayat including any public road or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise. Such fees may either be levied along with the fees charged under Section 143 of the Act for the sanction, licence or permission or may be recovered in manner prescribed by Chapter VIII. Section 239 of the Act which is contained in Chapter XI deals with the power of the Zila Panchayat to make bye-laws. Sub-section (1) of Section 239 provides that a Zila Panchayat may, and where required by the State Government shall, make bye-laws for its own purposes and for the purposes of Kshettra Panchayats, applicable to the whole of any part of the rural area of the district, consistent with the Act in respect of matters required by the Act to be governed by bye-laws and for the purposes of promoting or maintaining the health, safety and convenience of the inhabitants of the rural area of the district and for the furtherance of the administration of the Act in the Khand and the district. Sub-section (2) of Section 239 provides that in particular and without prejudice to the generality of the power conferred by Sub-section (1), a Zila Panchayat may, in the exercise of the

said power, make any bye-laws described in the list indicated in the sub-section, Section 242 (2) of the Zila Panchayat Act provides that the power of a Zila Panchayat to make bye-laws shall be subject to the conditions of the bye-laws being made after previous publication and of their not taking effect until they have been confirmed by the prescribed authority and published in the Gazette.

Dated 31.01.2024

Filed By

Sanjeev Malhotra, Adv.

IN THE SUPREME COURT OF INDIA

Lead Matter: Mineral Area Development Authority v. SAIL,CA Nos.4056/1999

Matters involving the State of Andhra Pradesh

902.60	SLP C No.3849/2006 - ONGC v. Govt of Andhra Pradesh
902.65	SLP C No.763/2007 - Obulapuram Mining v. State of AP
902.66	SLP C No.15900/2007 - Dakshina Murthy v. State of AP

Outline of Submissions

For the State of Andhra Pradesh

Santhosh Krishnan
Advocate on Record

Background

A. Parliament can make law in respect of regulation of mines and mineral development.[1] This power is to the extent to which "*such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest".* Parliament accordingly made the Mines & Minerals (Development & Regulation) Act, 1957 (MMDRA). Section 9 of the MMDRA deals with royalties in respect of mining leases.

B. Parliament is also empowered to make law in respect of the "*regulation and development of oilfield and mineral oil resources".*[2] Parliament has enacted the Oilfields (Regulation & Development) Act, 1948. Section 6A thereof deals with royalties in respect of mineral oils.

C. The Constitution empowers the State Legislatures to make law in respect of *"regulation of mines and mineral development"*[3] However, this entry has the rider that the power is *"subject to the provisions of List I with respect to regulation and development under the control of the Union".*

[1] Entry 54, List I, 7th Schedule.
[2] Entry 53, List I.
[3] Entry 23, List II.

D. States also have power to make law imposing "*taxes on lands and buildings*"[4] and "*taxes on mineral rights*"[5]. The State's power to impose tax on mineral rights is however subject to *"any limitations imposed by Parliament by law relating to mineral development".*

E. The Andhra Pradesh (Mineral Rights) Tax Act, 1975, was enacted to levy tax in relation to the mineral rights. This legislation came to be struck down in ***KCP Ltd. (Ramakrishna Cements) v. State of A.P.***.,[6] by the High Court. The High Court placed reliance on ***India Cements v. State of Tamilnadu.***[7]

F. In ***State of West Bengal v. Kesoram Industries,***[8] the Court discussed ***India Cements*** to *inter alia* hold that the observation that "*royalty is tax*", as found in ***India Cements*** is an error of inadvertence. The legal meaning of "royalty" was explored to hold that royalty, as under the MMDRA, is not a tax. The State's power to impose tax on mineral rights was not denuded by the MMDRA.

G. Having regard to the ruling in ***Kesoram*** (supra)**,** the State of A.P. enacted the A.P. Mineral Bearing Lands (Infrastructure) Cess Act, 2005

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[4] Entry 49, List II. [5] Entry 50, List II. [6] AIR 1990 AP 314. [7] (1990) 1 SCC 12. [8] (2004) 10 SCC 201.

("**A.P. Act, 2005"**). This Act seeks to levy a cess on mineral produce (major minerals, minor minerals and mineral oils).

H. The validity of A.P. Act, 2005 was subject matter of writ petitions before the A.P. High Court in 2006-07. In relation to non-grant of stay of legislation, SLPs of mining companies were filed before this Hon'ble Court. Interim orders were passed.

I. In 2011, in ***Mineral Area Development Authority v. SAIL,***[9] a three Judge Bench framed 11 questions for consideration by a Nine Judge Bench. The SLPs from Andhra Pradesh are tagged to this batch.

Outline of Submissions

1. "Royalty", in the context of mineral rights, is a share of income from mineral production.[10] As it is a right to a share of income, it is usually determined with reference to the quantity of mineral production.
2. A tax is a compulsory exaction of money by a public authority, the exaction being enforceable by law.[11] A tax is not a "*share of income*" even when the measure of tax is income.

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[9] (2011) 4 SCC 450.
[10] ***DK Trivedi v. State of Gujarat,*** 1986 Supp SCC 20 (pr.39); *HRS Murthy v. Collector of Chittoor,* AIR 1965 SC 177; ***Inderjeet Singh Sial v. Karam Chand Thapar,*** 1995 (6) SCC 166 (pr.2).
[11] ***Ratilal Gandhi v. State of Bombay***, AIR 1954 SC 388; ***Commr., v. Sri Shirur Mutt***, AIR 1954 SC 282.

3. Neither Parliament nor Legislature can adopt a measure of tax that taxes something that is outside its fields of legislation.
4. Royalty and tax are distinct – the power to collect royalty from mineral production is not the power to levy tax on mineral rights. The power to impose royalty on mineral rights is not the same as power to tax mineral rights. Royalty, being the owner's share of the income from their property, is chargeable by and payable to a private person, unlike tax.
5. Power to tax is a distinct substantive power and not ancillary to underlying field of legislation.[12] Tax cannot be imposed under a general entry when specifically demarcated under another entry.[13]
6. There is no power with Parliament to tax mineral rights. The MMDRA does not purport to and cannot be understood as levying a tax (in the name of royalty).
7. The subjection clause in Entry 50, List II means that a State tax is subject to *"limitations imposed by Parliament by law relating to mineral development"*. The reference to the limitation is not to the entry in List

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[12] ***M.P.V. Sundararamier v. State of AP***, AIR 1958 SC 468, at p. 494 (para 51-52); ***UOI v. Harbhajan Singh,*** (1971) 2 SCC 779; ***Hoechst Pharmaceuticals Ltd. v. State of Bihar***, (1983) 4 SCC 45 (para 74).

[13] ***Synthetics & Chenicals v. State of UP,*** (1990) 1 SCC 109.

I, but actual limitation imposed by law made by Parliament. The distinction is evident when contrasted with Entry 23 of List II.

8. The wording of Entry 23 and Entry 50 of List II are different. The former entry is expressly subject to provisions of List I with respect of regulation/development under the control of the Union.

9. The declaration under Entries 53 and 54, List I, renders the State law as a subordinate law but does not efface the State law, *per se.* In case of inconsistency, Parliamentary law will prevail. There is no "denuding" of the State legislature.

10. The power to tax under Entry 50 is distinct from the power to legislate for mineral development under Entry 23, List II. The restriction on Entry 23 does not attach to the power under Entry 50. Unlike Entry 23, the power under Entry 50 is not subject to provisions in List I.

11. The power to tax under Entry 50 is subject only to actual limitations cast by Parliamentary law relating to mineral development. The declaration under Section 2, MMDRA is thus not relevant in relation to tax law made under Entry 50 of List II.

12. "Limitation", under Entry 50, should not be a matter of inference but actual expression. To *infer* a limitation from the scheme of a Parliamentary legislation or general purport is a slippery slope.

13. Unless there is an obvious conflict between the legislations made under List I and II, the subjection clause has no relevance.

14. The subjection clause is not with respect to another entry in List I or List III but with respect to limitation in Parliamentary law. Hence, the doctrine of occupied field and implied exclusion do not apply.[14]

15. The power to regulate an activity, even if exclusively vested with Parliament, does not authorize Parliament to levy a tax in relation thereto.[15]

16. A tax levied by the State cannot *per se* be construed as inhibiting the regulation and development of mineral production.

17. There is no subjection clause in Entry 49, List II. The State's power to tax land or building is not subject to limitations found in other entries. Such limitations ought not to be read in – an entry must be given its widest meaning, to understand the scope of power.[16]

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[14] ***Governor General in Council v. Province of Madras***, AIR 1945 PC 98; ***Ralla Ram v. Province of East Punjab***, AIR 1949 FC 81; ***M.P.V. Sundararamier v. State of AP***, AIR 1958 SC 468, at p. 494-495.
[15] ***Hingir Rampur*** (supra); ***State of Orissa v. MA Tulloch,*** AIR 1964 SC 1284.
[16] ***Synthetics and Chemicals Ltd. v. State of U.P.***, (1990) 1 SCC 109 (at para 67); ***Raja Jagannath Baksh Singh v. State of U.P.***, (1963) 1 SCR 220 (at p. 229)

18. There is no constitutional bar or rationale against adoption of the value of the produce of land as the measure of tax on land[17] or a measure of mineral production, while taxing mineral rights.

19. In ***India Cements***, the State legislation that was held to be beyond competence was a cess on royalty. The State legislature does not have power to tax income. Hence, a tax on royalty was beyond competence. In ***Kesoram***, the various State taxes under challenge were on land or on mineral rights.

20. ***Kesoram*** is not a departure from ***India Cements*** but has correctly clarified ***India Cements***. However, if ***India Cements*** is to be read in the manner understood in ***Orissa Cement v. State of Orissa,***[18] and ***State of Orissa v. Mahanadi Coalfield Ltd.,***[19] then ***India Cements*** should be regarded as *per incuriam.*

SANTHOSH KRISHNAN
Advocate for State of Andhra Pradesh

[17] ***Ralla Ram v. Province of East Punjab***, AIR 1949 FC 81; ***Kunnathat Thathunni Moopil Nair v. State of Kerala***, AIR 1961 SC 552; ***Ajoy Kumar Mukherjee v. Local Board of Barpeta***, AIR 1965 SC 1561.
[18] 1991 Supp (1) SCC 430.
[19] 1995 Supp (2) SCC 686.

IN THE SUPREME COURT OF INDIA

(CIVIL APPELLATE JURISDICTION)

CIVIL APPEAL No.1883/2006

IN THE MATTER OF:

State of Odisha … Appellant

-Versus-

National Aluminium Co. Ltd. & Ors. … Respondents

I N D E X

SUBMITTED BY

(KIRTI R. MISHRA)
Advocate for Appellant/State of Odisha

Dated:21.02.2024

IN THE SUPREME COURT OF INDIA

(CIVIL APPELLATE JURISDICTION)

CIVIL APPEAL No.1883/2006

IN THE MATTER OF:

State of Odisha … Appellant

-Versus-

National Aluminium Co. Ltd. & Ors. … Respondents

WRITTEN SUBMISSION ON BEHALF OF THE APPELLANT/STATE OF ODISSA

The present petition arises out of impugned order/judgment dated 05.12.2005 passed by the High Court of Orissa in a batch of writ petitions challenging the constitutional validity of "Orissa Rural Infrastructure and Socio-Economic Development Act, 2004" [ORISED Act] and "Orissa Rural Infrastructure and Socio-Economic Development Rules, 2005" [ORISED Rules]. Further the Notification dated 25.05.2005 issued by the State fixing the rate of Rural Infrastructure and Socio-Economic Development Tax was also challenged.

I. Factual Background

1. The State of Orissa enacted "Orissa Rural Infrastructure and Socio-Economic Development Act, 2004" [ORISED Act] and "Orissa Rural Infrastructure and Socio-Economic Development Rules, 2005" [ORISED Rules]. Pursuant to the provisions under section 3(2) of the ORISED Act, State fixed the rate on Rural Infrastructure and Socio-Economic Development Tax vide Notification dated 25.05.2005.

2. The respondents who are mining lessees and consumers of coal/other minerals from the mining companies, herein challenged the validity of the said Act, Rules and Notification relying upon the judgement in the matter of India Cements Ltd.

vs. State of Tamil Nadu [1990(1) SCC 12], Orissa Cement vs. State of Orissa [1991 (Suppl.1) SCC 430], State of Orissa vs. Mahanadi Coal Field Ltd. [1995(Suppl.2) SCC 686]. The challenge was further on the ground that afore said Act, Rules and Notification are ultra vires Entry 50 and 23 of the State list read with Entry 97 of the Union List.

3. Vide judgment dated 05.12.2005 the High Court struck down the ORISED Act, ORISED Rules and the afore said Notification dated 25.05.2005. The appellant was further directed to refund the tax collected by the State by virtue of the said Act, Rules and Notification dated 25.05.2005.

II. <u>Questions raised before the High Court</u>

1. Whether the ORISED ACT, ORISED Rules and Notification dated 25.05.2005 are beyond the legislative competence of the State Legislature?
2. Whether the levy under the ORISED Act, ORISED Rules and Notification dated 25.05.2005 is in the nature of tax on mineral?
3. Whether the measure of tax under the ORISED Act, ORISED Rules and Notification dated 25.05.2005 is too remote from the land itself to qualify as tax on land under Entry 49 of List II of the Seventh Schedule of the Constitution?
4. Whether the ORISED Act and Rules framed thereunder are based on the law laid down in Kesoram case which is per incuriam as it is against the law laid down in India Cement case?

III. <u>Findings of the High Court</u>

1. To answer the questions raised before the High Court, the High Court held that the issue raised before it was already decided by a 7 Judges' Bench of the Supreme Court in India Cement Ltd. vs. State of Tamil Nadu [1990(1) SCC 12].

2. The High Court observed that the law laid down by the Constitution Bench in State of West Bengal vs. Kesoram Industries Ltd. [2004(10) SCC 201] is per incuriam as it is against the law laid down by the 7 Judges' Bench in India Cement Ltd. case.

3. The High Court held that the tax in question is neither a tax on land nor a tax on mineral rights.

4. The High Court has held that the tax in question is styled as a tax on mineral bearing land but in effect it is sought to be levied on the value of mineral extracted. Such a tax is not covered Entry 49 of the State List.

IV. <u>Questions of law before the Nine Judges' Bench</u>

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

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

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

India? In particular, whether Section 9 of the aforementioned Act denudes or limits the scope of Entry 50 of List II?

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

5. Whether the majority decision in State of West Bengal v. Kesoram Industries Ltd. and Ors, (2004) 10 SCC 201, could be read as departing from the law laid down in the seven Judge Bench decision in India Cement Ltd. and Ors. v. State of Tamil Nadu and Ors., (1990) 1 SCC 12?

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

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

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

9. Whether Entry 50, List II read with Entry 54, List I of the Seventh Schedule to the Constitution constitute an exception to the general scheme of Entries relating to taxation being distinct from other Entries in all the 4 three Lists of the Seventh Schedule to the Constitution as enunciated in M.P.V. Sundararamier & Co. v. State of Andhra Pradesh & Anr., (1958) 1 SCR 1422 at 1481 (bottom)?

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

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

V. Response to the Questions of law before the Nine Judges' Bench

Issue No. 1 and 4 – Royalty

(i) "Royalty" imposed by Section 9 of MMRD Act or empowered by Rule making provisions would have to be ascribed the normal or ordinary connotation of consideration price for parting with right to work the mine which is owned by government or even private person and it cannot be understood as a tax of any kind. Observations in India Cement Ltd. Vs. State of T.N. 1990(1) SCC 12, saying that "Royalty is tax" involved a self-contradiction and has been rightly explained and clarified by Constitution Bench in State of West Bengal Vs Kesoram Industries Ltd. (2004) 10 SCC 201.

(ii) India Cement if understood otherwise would mean that the royalty is a tax even though the Parliament did not intend royalty to be treated as tax under the scheme of the MMRD Act.

Issue No. 2 and 6 – Scope of Entry 49, List II

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

Refer 1990(1) SCC 109,(7 JJ), Synthetics & Chemicals Ltd. Vs. State of U.P.(Pr. 57), AIR 1962 SC-1563=1963(1) SCR-220, (5 JJ), Raja Jagannath Baksh Singh Vs. State of U.P. (Holding Tax), 1975(2) SCC-175, (4 JJ) Anant Mills Co. Ltd. (Conservancy tax on underground Strata), 1975 (2) SCC 274, (3 JJ), The Government of A.P. Vs. Hindustan Machine Tools Ltd. (factory building), 2004(10) SCC-201, State of W.B. Vs. Kesoram Industries Ltd.

(ii) Entry 49 List II is not "subject to" any Entry in List I or III. Wherever framers wanted to limit they have used such expressions.

Refer (2017) 12 SCC 1 Jindal Stainless Vs State of Haryana

1996(3) SCC-709, State of A.P. Vs. McDowell & Co.

(Pr. 19,28,29,37-39 (Entry 8 List II), 1962 Supp (3) SCR-1, Calcutta Gas Co. Vs. State of W.B..

(iii) "Tax on land" - Entry 49 List II involves a tax which is directly on land as a unit and is normally not concerned with the division of interest or ownership in the units of lands / buildings which are sought to tax. Such tax must bear a definite relation to land.

Refer 1969(1) SCR-108, at 110 & 111, S.C.Nawn Vs. Wealth Tax Officer, Calcutta, 1969(2) SCC-55, Asstt. Commr. Of Urban Land Tax. Vs. Buckingham & Carnatic Co. Ltd.(Pr.4), 1970(1) SCC-749 at Page. 753, Second Gift Tax Officer

Vs. D.H.Nazareth, (Pr. 10), 1975(2) SCC-175, Anant Mill Vs. State of Gujarat, Tax was on actual occupier

(iv) The aforesaid judgments were referred to with approval in India Cement Ltd. [(1990) 1 SCC 12 Para 22 & 23]. In India Cement, this Court was considering a cess which was considered to be a cess on royalty. It was held that "royalty being that which is payable on the extraction from the land and cess being on additional charge on that royalty can not by parity of the same reasoning be considered to be a tax on land..".

(v) "Tax on land" in Entry 49 List II involves a tax on land as a unit. Here the legislature has chosen that land which is "being used" for mining, commerce and industry. There is no intention to tax land which is "being used" otherwise or which is not being used at all.

Issue No.5- Whether the Judgment in Kesoram case is per incuriam

(i) India Cement is rendered by a bench of 7 Hon'ble Judges and it pertained to the validity of cess on royalty. As against that, Kesoram dealt with Cess Act, 1880; West Bengal Primary Education Act; W.B. rural employment and production Act, 1976 which purported to levy and collect road cess and public work cess; education cess; and rural employment cess respectively. The provisions concerned provided for the assessment of cesses for determination of the quantum of cess with regard to mines and quarries ; coal mines and mines other than coal mines and quarries and in addition to other lands including tea estates. These Acts were amended by the W.B. Taxation Laws Amendment Act, 1992 w.e.f. 01.04.1992 which sought to levy education cess in respect of land, and in respect of coal bearing land at certain rate in relation to annual value. This was the position in relation to State of West

Bengal. With regard to tea matters, the main issue was whether the judgment of this court in Goodricke runs counter to the judgment in India cement and stands whittled down by the judgment in Orissa Cement and Mahanadi Coal fields.

(ii) In India Cement, Section 115 of the Madras Panchayat Act was challenged as being beyond legislative competence. It charged local cess @ 45 paise per rupee of land revenue as royalty. In para 12, it said the question about Constitutional validity of Section 115 (1) is involved 'in so far as it sought to levy as local cess @ 45 nai paise on every rupee of the land revenue payable to the Government, the meaning of land revenue being artificially expanded by the Explanation so as to include royalty payable under the mining lease. This Court further noted that royalty is payable under the lease deed as per Section 9 of the MMRD Act. It proceeded to determine the competence of State Legislature of Entry 49, 50 and 54 of List II. It reiterated that the court was ' concerned with cess on royalty' (Pr 19).

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

(iv) While dealing with entry 50 List II in paras 24-30, this court observed that it deals with taxes on mineral rights and observed that mineral rights being expressly covered under Entry 50 List II cannot be brought under Entry 49 List II as it would render Entry 50 List II redundant. It also said that with reference to entry 50 List II,

the State Legislature cannot override provisions of MMRD Act, 1957. Section 2 and Section 9 of MMRD Act would pro tanto override State legislation. Having earlier held, that royalty is a return received from the produce of land (Pr 21) and that the royalty is payable on a proportion of the minerals extracted (Pr 23) , the court referred to the Mysore High Court judgment in Laxmi Narayan Vs Taluk Dev AIR 1972 Mys 299, where the High Court held that royalty under Section 9 was really a tax. The Court criticised the approach of the Constitution Bench in HRS Murthy, and stated that Section 9 was a clear bar on the State Legislature taxing royalty so as to in effect amend Second Schedule of the Central Act. Hence, tax on royalty cannot be tax on land. The Court also noted the judgments of Punjab, Orissa, Gujarat, Rajasthan High Court which held that royalty is not a tax (Pr 31).

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

(vi) So far as judgment in case Kesoram of Constitution Bench is concerned, the cess had not been imposed on royalty. The measure of cess levied was relatable to the product of the land or annual value. It was specifically provided that the annual

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

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

Issues – 3,7,8,10 and 11 – Entry 50, List II

(i) Entry 50 List II has a peculiar structure. It is not made completely subject to Entry 54 List 1. Instead it is made subject to limitations which may be imposed by Parliament by law relating to mineral development, i.e., Entry 54 List 1. Thus by inserting provisions in MMRD Act, 1957 the Parliament can limit the states power to tax mineral rights, but it cannot thereby arrogate to itself the power to impose that tax.

Issue 9

(i) Entry 23 List II and Entry 54 List 1 deal with general subjects and they do not cover tax. The scheme of distribution in the 3 lists of 7th Schedule to the Constitution is carefully crafted and taxing field is separately provided for.

Refer AIR 1958 SC 468, M.P.V. Sundaramier & Co. (Pr.20), 1983 (4) SCC-45, M/s Hoechst Pharmaceuticals Ltd., 1991 (4) SCC-139, State of U.P. Vs. Synthetics & Chemicals Ltd.(Pr. 31-33,38,44,45).

(ii) It follows that since MMRD Act 1957 is a law made with reference to Entry 54 List 1 and so its provisions cannot be understood as empowering imposition of tax, especially those taxes with respect to which State legislatures have been given competence. This includes both Entry 49 and 50 of List II.

VI. <u>Submissions</u>

1. The primary issue before this Hon'ble Court is whether the Cess imposed under the ORISED Act is an incidence of levy on the holder of the land? In other words, the cess under the said Act is not a levy on the lessees who have got the mining leases and consequent right to extract minerals from the land.

2. The levy under the ORISED Act has nexus with the land within the meaning of Entry 49 of the State List and not with the mineral right contained in Entry 50 of the same list. The said Act seeks to levy cess on mineral bearing land only. The State has competence to levy cess of mineral bearing land as well under Entry 49 of the State List.

3. Since the minerals under the surface of the land is a part of land, there is sufficient nexus with the subject of tax on mineral bearing land. The measure of tax is only the value of the land which has sufficient nexus with the character of the levy.

4. Under the ORISED Act tax was imposed on the holders of the mineral bearing land and not on the mining leases. There is no attempt to tax the mineral as such. There is not even any quid pro quo between the amount of levy and any service to be rendered. Therefore, the levy is not in the nature of the fee also.

5. A private owner of the land has ownership of the land including what is beneath the surface of the land. The MMDR Act was enacted for the purposes of development and regulation of the mines. The Parliament introduced the mechanism of charging royalty to regulate extraction of minerals.

6. The levy in question is on the land and not on the quantity of mineral extracted from the mineral bearing land.

7. The royalty on mineral rights is not a tax on land but a payment for the user of the land for extracting mineral from the land.

8. The High Court erred by holding that the incidence of the tax in question falls squarely on the value of the minerals extracted and it does not bear any direct relationship with land as a unit and hence it is not a tax on land within the meaning of Entry 49 of the State List.

SUBMITTED BY

Dated: 21.02.2024

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