(1991) 04 SC CK 0012

Supreme Court of India

Case No: Civil Appeal No's. 4353-54 of 1983

M/s. Orissa Cement Ltd. and Others		APPELLANT
	Vs	
State of Orissa and others		RESPONDENT

Date of Decision: April 4, 1991

Acts Referred:

- Constitution of India, 1950 - Article 19[1](f)], 136, 141, 226, 245, 246, 265, 277, 301, 301(a), 304(b), Section 9, 13, 18(1)
- Bombay Sales Tax Act, 1953 - Section 21(4)
- Orissa Mining Areas Development Fund Act, 1952 - Section 2, 3, 4, 5, 5(5), 13, 18(1), 18(2), 25
- Madras District Boards Act 1920 - Section 78, 79, 112
- Madras Panchayats Act, 1958 - Section 115(1), 115(2), 115(3), 115(4), 116
- Madhya Pradesh General Clauses Act, 1957 - Section 24A
- Finance Act (Northern Ireland), 1934 - Section 3
- Orissa Cess Act, 1962 - Section 4, 10
- MINES AND MINERALS (DEVELOPMENT AND REGULATION) ACT, 1957 - Section 2, 16, 17, 25
- Madhya Pradesh Municipalities Act, 1961 - Section 123, 124

Citation: AIR 1991 SC 1676 : (1991) 2 JT 439 : (1991) 1 SCALE 617 : (1991) 1 SCC 430 Supp : (1991) 2 SCR 105

Hon'ble Judges: S. Ranganathan, J; S. C. Agrawal, J; N. M. Kasliwal, J

Bench: Full Bench

Advocate: A.K. Ganguli, G. Ramaswamy, T.S. Krishnamurthy Iyer, L.M. Singhvi and Shanti Bhushan, for the Appellant;

Final Decision: Disposed Of

Judgement

@JUDGMENTTAG-ORDER

S. Ranganathan, J.

These are connected batches of civil Appeals and Special Leave Petitions. We grant special leave to appeal in all the petitions (condoning the delay in the filing of the unnumbered one referred to below) and proceed to dispose of all the appeals by this common judgment. The details of the appeals and petitions are, for sake of convenient reference, tabulated below:

High Court	Date of judgment	Civil Appeal/ SLP Nos.	Name of Appellant
1. Orissa	17-4-1980	C.A. 2053-2080/80	Tata Iron & Steel Co. Ltd.
	7-3-1983	C.A. 4353-4354/83	Orissa Cement Ltd.
	22-12-1989	S.L.P. 1479/90	State of Orissa
	22-12-1989	S.L.P./90	Orient Paper & Industries Ltd. & Anr.
	13-7-1990	S. O. P. 11939/90	- do-
2. Bihar	10-2-1986	C.A. 592/86	Tata Iron & Steel Co. Ltd.
3. Madhya Pradesh	28-3-1986	C.A. 1641-1662/86	State of M. P.

2. We shall discuss later the manner in which these appeals and petitions have arisen.

THE ISSUE

3. The validity of the levy of a "cess", based on the royalty derived from mining lands, by the States of Bihar, Orissa and Madhya Pradesh is challenged in these petitions and appeals. A seven-Judge Bench of this Court in India Cement [1990] 1 S.C.C. 12 struck down a similar levy under a Tamil Nadu Act as beyond the legislative competence of the State Legislature. The assessees, in the matters now before us, claim that the issue here is directly and squarely governed by the above decision. The States, on the other hand, claim that the nature and character of the levies imposed by them is totally different from that of the Tamil Nadu levy and that they are entirely within the scope of the States'' Legislative powers under the Constitution. This is the issue to be decided in these matters. As the impugned enactments of Bihar, Orissa and Madhya Pradesh mutually differ from one another in some respects, they will need separate consideration. However, the basic issue being the same, all these matters have been heard together and it is found convenient to dispose of them all by this common judgment. We may mention in passing that, initially, these matters were listed before a Bench of two Judges of this Court. It referred the matters on 17.8.1990 to the learned Chief Justice for the Constitution of a larger Bench. The matters have come up before us in pursuance of the directions of the Hon''ble Chief Justice.

THE LEGISLATIVE ENTRIES

4. It will be convenient, at the outset, to refer to the various entries of the Union and the State Lists in the Seventh Schedule to the Constitution which have a bearing on the issues to be discussed. These are:

List I-(Union List)

Entry 52:

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

Entry 54:

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

List II-(State List)

Entry 18:

Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of

agricultural land; land improvement and agricultural land; colonization.

Entry 23:

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

Entry 45:

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

Entry 49:

Taxes on lands and buildings.

Entry 50:

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

Entry 66:

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

EARLIER HISTORY

5. Before proceeding to consider the provisions of the enactments impugned, and the issues debated, before us, it is necessary to set out certain earlier controversies that led to India Cement.

Hingir Rampur Case [1961 2 S.C.R. 537]

6. As early as in 1960, this Court had to consider the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952 (Orissa Act XXVII of 1952). Section 3 of the Act empowered the State Government to constitute mining areas whenever it appeared to the Government that it was necessary and expedient to provide amenities like communications, water supply and electricity for the better development of such areas or to provide for the welfare of the residents or workers in areas within which persons employed in a mine or a group of mines reside or work. Section 4 empowered the State Government to impose and collect a cess or fee on the minerals extracted the rate of which was not to exceed 5% of the valuation of the minerals at the pit''smouth. Section 5 provided for the Constitution of the Orissa Mining Areas Development Fund. The proceeds of the cess recovered in pursuance of Section 4 along with other subsidies from Government, local authorities and other public subscriptions were credited to the fund and the expenses for such collection debited thereto. The fund has to be utilised to meet expenditure incurred in connection with such development measures as the State

Government might draw up for the purposes above mentioned as well as for the purposes specified in Clauses (a) to (e) of Section 5(5). The validity of this levy of cess was challenged by the petitioner coal company in the Hingir Rampur case as ultra vires the powers of the State Legislature because (a) the cess was not a fee but a duty of excise on coal which was a field covered by Entry 84 of List I in the Seventh Schedule and repugnant to the Local Mines Labour Welfare Fund Act, 1947 (Central Act XXXII of 1947); and (b) even if it was treated as a fee relatable to Entries 23 and 66 of List II in the Seventh Schedule, it was hit by Entry 54 of List I read with the Mines and Minerals (Development & Regulation) Act, (Central Act LIII of 1948) (''the MMRD Act'' for short) or by Entry 52 of List I read with the Industries (Development and Regulation) Act (''the IDR Act'' for short), 1951 (Central Act LXV of 1951). The first of the above arguments was based on the fact that the cess was fixed at a percentage of the valuation of the mineral concerned at pit''s mouth. This argument was based on two considerations. The first related to the form and the second to the extent of the levy. Repelling the argument, it was held that the extent of levy of a fee would always depend upon the nature of the services intended to be rendered and the financial obligations incurred thereby and cannot by itself alter the character of the levy from a fee into that of a duty of excise except where the correlation between the levy and services is not genuine or real or where the levy is disproportionately higher than the requirements of the services intended to be rendered. So far as the first consideration was concerned, it was observed that the method in which the fee is recovered is a matter of convenience and by itself it cannot fix upon the levy the character of a duty of excise. Though the method in which an impost is levied may be relevant in determining its character its significance and effect cannot be exaggerated. The court, therefore, came to the conclusion that the cess levied by the impugned act was neither a tax nor a duty of excise but a fee.

The second argument turned on the impact of the MMRD Act on the State''s power to levy a fee under Entry 66 read with Entry 23 of List II as a consequence of the declaration contained in Section 2 of the Central Act. The Court agreed that a declaration by Parliament in terms of Entry 54 of List I operated as a limitation on the legislative competence of the State Legislature itself and observed:

If Parliament by its law has declared that regulation and development of mines should in public interest be under the control of the Union, to the extent of such declaration the jurisdiction of the State Legislature is excluded. In other words, if a Central Act has been passed which contains a declaration by Parliament as required by Entry 54, and if the said declaration covers the field occupied by the impugned Act, the impugned Act would be ultra vires not because of any repugnance between the two statutes but because the State Legislature had no jurisdiction to pass the law.

(underlining ours)

However, the answer to the argument was easily found by the Court inasmuch as the declaration on the terms of Entry 54 of List I relied on for the coal company was founded on Act LIII of 1948 which was an Act of the Dominion Legislature and not an Act of Parliament. However, the Court did not stop here. It proceeded to review the provisions of Central Act LIII of 1948 and concluded that, if this Act were held to contain the declaration referred to in Entry 23, there would be no difficulty in holding that the declaration covered the field of conservation and development of minerals, and that the said field was indistinguishable from the field covered by the impugned Act. In coming to this conclusion the Court pointed out that the rule-making powers conferred on the Central Government u/s 6(2) of the Act included the levy and collection of royalties, fees and taxes in respect of minerals, mines, quarried, excavated or collected. The circumstance that no rules had in fact been framed by the Central Government in regard to the levy and collection of any fees, it was held, would not make any difference, The Court observed:

What Entry 23 provides is that the legislative competence of the State Legislature is subject to the provisions of List I with respect to regulation and development under the control of the Union, and Entry 54 in List I requires a declaration by Parliament by law that regulation and development of mines should be under the control of the Union in public interest. therefore, if a Central Act has been passed for the purpose of providing for the conservation and development of minerals, and if it contains the requisite declaration, then it would not be competent to the State Legislature to pass an Act in respect of the subject-matter covered by the said declaration. In order that the declaration should be effective it is not necessary that rules should be made or enforced; all that this required is a declaration by Parliament that it is expedient in the public interest to take the regulation and development of mines under the control of the Union. In such a case the test must be whether the legislative declaration covers the field or not. Judged by this test there can be no doubt that the field covered by the impugned Act is covered by the Central Act LIII of 1948.

The Court then considered the argument based on Entry 52 of List I and the provisions of the IDR Act but came to the conclusion that the vires of the impugned Act could not be successfully challenged on this ground.

7. Wanchoo J., delivered a separate dissenting judgment. He held that the levy was not a fee or a land cess but a duty of excise. He pointed out (at p.579-80) how taxes could be turned into fees on the so-called basis of quantification with the help of the device of creating a fund and attaching certain services to be rendered out of monies in the fund. In this view, he did not consider the question how far the Central Acts of 1948 and 1951 impaired the State''s competence to levy the fees in question. He negatived the State''s attempt to bring the levy in question (treating it as a tax) within the scope of Entry 50 of List II. He was of opinion that the expression "taxes on mineral rights" referred to taxes on the right to extract minerals and not taxes on the minerals actually extracted. He held that the cess in the present case

was not a tax on mineral rights but a tax on the minerals actually produced. It was no different in pith and substance from a tax on goods produced which comes under Item 84 of List I as, duty of excise.

M.A. Tulloch case [1964] 4 SCR 461 .

8. The same issue regarding the competence of the Orissa State Legislature to levy the very same cess came up for consideration again in the Tulloch case. The scenario had changed because the levy now challenged was in respect of the period July 1957 to March, 1958 by which time the MMRD Act, 1957 (Central Act 67 of 1957) had been enacted in place of the earlier MMRD Act (Central Act LIII of 1948). The 1948 Act. which had earlier provided for the regulation of mines and oil fields and for the development of minerals, was now limited only to oil fields and the 1957 Act provided for the regulation of mines and mineral development. Section 2 of the 1957 Act, like the predecessor 1948 Act, contained the following declaration in terms of Entry 54 of List I. It read:

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''.

but unlike the earlier one this was a declaration contained in an Act of Parliament which had the effect of impairing the legislative competence of the State under Entry 23 read with Entry 66 of the State List. The hurdle which prevented the Supreme Court from considering the provisions of the 1948 Act as a bar to the levy of the cess was therefore out of the way. The Court analysed in detail the provisions of the impugned State Act as well as the two Central Acts. It referred to its conclusion in the Hingir-Rampur case that the field covered by the impugned State Act was covered by the 1948 Act and observed that this fully applied to the State Act vis-a-vis the 1957 Act also, particularly as Sections 18(1) and (2) of the 1957 Act were wider in scope and amplitude and conferred larger powers on the Central Government than the corresponding provisions of the 1948 Act. Counsel for the State attempted to distinguish the ambit of the 1957 Act from that of the 1948 Act. But the Court pointed out that the argument could not prevail. Section 13 of the 1957 Act contained an express provision for the levy of a fee. Section 25 though not as categorically as Section 6 of the 1948 Act-clearly implied a power to levy "rent, royalty, tax, fee and other sums" and, besides, Section 18 of the Central Act of 1957 were wider in scope and amplitude and conferred larger powers on the Central Government than the corresponding provisions of the Act of 1948. It was reiterated, referring to Hingir-Rampur and distinguishing Ch. Tika Ramji & Ors. etc. v. The State of Uttar Pradesh & Ors., [1956] S.C.R. 393 that it was incorrect to think that, until rules were made u/s 13 or steps taken u/s 25 to collect fees etc., the Central Act would not cover the field. The Court observed, further:

But even if the matter was res Integra the argument cannot be accepted. Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the other. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation. In the present case, having regard to the terms of Section 18(1) it appears clear to us that the intention of Parliament was to cover the entire field and thus to leave no scope for the argument that until rules were framed, there was no inconsistency and no supersession of the State Act.

Meeting the argument that the power to levy a fee was an independent head of legislative power under each of the three legislative lists and that the levy of tax under the State Act could be traced to this entry, the Court pointed out the fallacy underlying the argument in the following words:

The material words of the Entries are: "Fees in respect of any of the matters in this List". It is, therefore, a prerequisite for the valid imposition of a fee that it is in respect of a "matter in the list". If by reason of the declaration by Parliament the entire subject-matter of "conservation and development of minerals" has been taken over, for being dealt with by Parliament, thus depriving the State of the power which it theretofore possessed, it would follow that the "matter" in the State List is, to the extent of the declaration, subtracted from the scope and ambit of Entry 23 of the State List. There would, therefore, after the Central Act of 1957, be "no matter in the List" to which the fee could be related in order to render it valid.

The result was that Tulloch declared the levy of the cess to be invalid and it was held that, as and from 1.6.1958, the date on which the 1957 Act came into force, the Orissa Act should be deemed to be non-existent for every purpose.

Murthy case [1964-6 S.C.R 666]

9. We now come to the third important case on the topic, Murthy v. Collector of Chittoor, which seems to strike a somewhat different note although in both Tulloch and Murthy the judgments were delivered within a few months of each other by Rajagopala Ayyangar J. on behalf of 5-Judge Benches which were constituted differently.

10. The erstwhile Province of Madras (later State of Tamil Nadu) had been levying, since long, a cess on land revenue under the Madras District Boards Act (Madras Act XIV) of 1920. u/s 78 of the Act, a cess was levied on the annual rent value of all occupied lands on whatever tenure held. It was a tax at two annas in the rupee of the annual rent value of all lands in the district. The annual rent value of the land was to be calculated in the manner prescribed in Section 79 of the Act. The appellant held certain lands under a mining lease (for extraction of iron ore) from the Government which stipulated for the payment of a stipulated amount of dead rent, a royalty on the basis of every ton of ore mined as well as a surface rent per acre of the surface area occupied or used. In the case of such lands, Section 79(i) provided that "the lease amount, royalty or other sum payable to the Government for the lands" shall be taken to be the annual rent value. The appellant was, therefore, called upon to pay a cases based on the royalty paid by him to the State Government (of Andhra Pradesh, which had succeeded to the State of Madras in respect of the territories in question) and it was the validity of this levy which was upheld by the High Court that came up for the consideration of this Court.

11. It was contended, on behalf of the appellant, relying on Hingir Rampur and Tulloch, that the provision imposing land cess quoad royalty must be held to be repealed by MMRD Act of 1948 or, in any event, by the MMRD Act, 1957 (Central Act LXVII of 1957) and that, after the date when these enactments came into force, the land cess that could be levied must be exclusive of royalty under a mining lease. Distinguishing the decisions cited, this Court rejected the contention. It observed:

It will be seen that there is no resemblance, whatever, between the provision of the Orissa Act considered in the two decisions and the provision for the levy of the land cess under Sections 78 and 79 of the Act with which we are concerned. Sections 78 and 79 have nothing to do and are not concerned with the development of mines and minerals or their regulation. The proceeds of the land cess are, u/s 92 of the Act, to be credited to the District fund, into which, under the terms of the Finance Rules in Schedule V to the Act, the land-cases as well as several other taxes, fees and receipts are directed to be credited. This fund is to be used under Ch. VII of the Act with which Section 112 starts "for everything necessary for or conducive to the safety, health, convenience or education of the inhabitants or the amenities of the local area concerned and everything incidental to the administration" and include in particular the several matters which are mentioned in those sections. It will thus be seen that there is no connection between the regulation and development of mines and minerals dealt with in the Central Acts and the levy and collection of land-cess for which provision is made by Sections 78 and 79 of the Act. There is therefore no scope at all for the argument that there is anything in common between the Act and the Central Acts of 1948 and 1957 so as to require any detailed examination of these enactments for discovering whether there is any over-lapping.

A second contention raised before the Court was that, as the impugned land-cess was payable only in the event of the lessee winning the mineral and not when no minerals were extracted, it was in effect a tax on the minerals won and, therefore, on mineral rights. Rejecting this contention, the Court observed:

We are unable to accept this argument. When a question arises as to the precise head of legislative power under which a taxing statute has been passed, the subject for enquiry is what in truth and substance is the nature of the tax. No doubt, in a sense, but in a very remote sense, it has relationship to mining as also to the mineral won from the mine under a contract by which royalty is payable on the quantity of mineral extracted. But that does not stamp it as a tax on either the extraction of the mineral or on the mineral right. It is unnecessary for the purpose of this case to examine the question as to what exactly is a tax on mineral rights seeing that such a tax is not leviable by Parliament but only by the State and the sole limitation on the State''s power to levy the tax is that it must not interfere with a law made by Parliament as regards mineral development. Our attention was not invited to the provision of any such law enacted by Parliament. In the context of Section 78 and 79 and the scheme of those provisions it is clear that the land cess is in truth a "tax on lands" within Entry 49 of the State List.

(emphasis added)

The Court proceeded to explain why the land cess before it was nothing else except a land tax falling within Entry 49:

Under Section 78 of the Act the cess is levied on occupied land on whatever tenure held. The basis of the levy is the "annual rent value" i.e., the value of the beneficial enjoy ment of the property. This being the basis of the Tax and disclosing its true nature, Section 79 provides for the manner in which the "annual rent value" is determined i.e, what is the amount for which the land could reasonably be let, the benefit to the lessor representing the rateable value "or the annual rent value". In the case of ryotwari lands it is the assessment which is payable to the Government that is taken as the rental value being the benefit that accrues to the Government. Where the land is held under lease it is the lease amount that forms the basis. Where land is held under a mining lease, that which the occupier is willing to pay is accordingly treated as the "annual rent value" of the property. Such a rent value would therefore, necessarily include not merely the surface rent, but the dead rent, as well as the royalty payable by the licensee, lessee or occupier for the user of the property. The position then is that the rent which a tenant might be expected to pay for the property is, in the case of lease-hold interests, treated as the statutory "annual rent value". It is therefore not possible to accept the contention, that the fact that the lessee or licensee pays a royalty on the mineral won, which is in excess of what he would pay if his right over the land extended only to the mere use of the surface land, places it in a category different from other types where the lessee uses the surface of the land alone. In each case the rent which a lessee or licensee

actually pays for the land being the test, it is manifest that the land-cess is nothing else except a land tax.

12. The judgment of the Supreme Court in the Murthy case (supra) held the field from 1964 to 1990.

Murthy followed:

The above type of levy was not peculiar to the State of Tamil Nadu. In fact, a cess on royalty was bound to be very remunerative to States having a wealth of mineral resources. We are informed that similar cess is being levied in several States. We have already referred to the cess levied in Orissa which came to be considered by this Court as early as 1961 and 1964 in the Hingir-Rampur and Tulloch cases. Further cases came up for consideration, on the same lines: in Bihar, Associated Cement Co. Ltd. v. State of Bihar [1979] 27 B.L.J.R. 64 and Tata Iron & Steel Co. v. State (C.W.J.C. 30/1978 decided on 15.5.84, the subject matter of C.A. 592/86 before us); in Orissa, Orissa, Laxmi Narayan Agarwala v. State, A.I.R. 1983 Ori. 210 ; in Rajasthan, Bherulal v. State, A.I.R. 1965 Raj. 161 in Punjab, Sharma v. State, A.I.R, 1969 P & H 79 in Gujarat, Saurashtra Cement & Chemical Industries Ltd. v. Union, A.I.R. 1979 Guj. 180 ; and Madhya Pradesh, Hiralal Rameshwar Prasad v. State, (M.P. 410/83 decided on 28.3.1986) and M.P. Lime Manufactures' Association v. State of M.P., A.I.R. 1989 M.P. 264 and, except for the last two cases from Madhya Pradesh, the others upheld the levy of a cess which depended on royalties, following Murthy.

India Cement case [1990] 1 S.C.C. 12

13. The correctness of the above line of decisions came to be tested in India Cement Ltd. v. State. The Government of Tamil Nadu had granted a mining lease on 19.7.1963 to the appellant for extraction of limestone and kankar for a period of twenty years. The lease deed, which was in accordance with the Mineral Concession Rules, stipulated for the payment of royalty, dead rent and surface rent and also provided that the lessee was bound to pay all Central and State Government dues except land revenue. At the time the lease was obtained, Section 115(1) of the Madras Panchayats Act, 1958 provided for the levy, in each panchayat development block, of a local cess at the rate of 45 paise on every rupee of land revenue payable to the Government in respect of any land for every fasli. Section 115(2) provided that the local cess will be deemed to be public revenue and all the lands and buildings thereon shall be regarded as security therefore. Section 115(3) and (4) set out the various purposes for which the cess levied and collected u/s 115 could be utilised. Section 116 provided for the levy of a local cess surcharge. The maximum amount of such surcharge was originally left to be prescribed by the Government and was in 1970 limited to Rs. 1.50 on every rupee of land revenue and in 1972 to Rs. 2.50 on every rupee of land revenue. Apparently inspired by the decision in Murthy, the Tamil Nadu Panchayats (Amendment and Miscellaneous Provisions) Act (Tamil Nadu Act 18 of 1964) added, with full retrospective effect, the following Explanation to

Section 115(1):

Explanation: In this section and in Section 116, ''land revenue'' means public revenue due on land and includes water cess payable to the government for water supplied or used for the irrigation of land, royalty, lease amount or other sum payable to the government in respect of land held direct from the government on lease or licence, but does not include any other cess or the surcharge payable u/s 116, provided that land revenue remitted shall not be deemed to be land revenue payable for the purpose of this section.

The appellants'' challenge in the High Court to this levy-which was consequent on the 1964 amendment-was unsuccessful. The High Court upheld it as a "tax on land" measured with reference to land revenue, royalty or lease or other amount as mentioned in the Explanation. The challenge based on Entry 54 of List I read with Entry 23 of List II and the provisions of the MMRD Act, 1957 was also repelled, applying the decision in Murthy. The appeal to this Court was referred to a Bench of seven Judges who came to the conclusion that Murthy was wrongly decided and upheld the appellants'' objection to the validity of the levy of the cess. It may be necessary to refer, in greater detail, to some passages in the judgment later but it will be convenient, for the present, to summarise the salient conclusions of the Court. These were:

1. The levy could not be supported under:

(a) Entry 45 of List II: as it is not land revenue, an expression which has a well defined connotation. ''Land revenue'' is separate and distinct from ''royalty''. The Explanation to Section 115(1) itself proceeds on the basis that royalty cannot be land revenue properly so called or conventionally so known.

(b) Entry 49 of List II: as it is not a tax on land. A tax on land can only be levied on tax as a unit, must be imposed directly on land and must bear a definite relationship to it. There is a clear distinction between a tax directly on land and a tax on income arising from land. The cess is not a tax directly on land as a unit but only a tax on royalty which is indirectly connected with land. In the words of Oza. J. it is a tax not only on land but on labour and capital as well. It could have been treated as a tax on land if it had been confined to ''surface rent'' instead of ''royalty''.

(c) Entry 50 of List II: as a tax on royalty as it is not a tax on mineral rights and so is outside the purview of Entry 50. Even otherwise, Entry 50 is subject to the provisions of List I and is, therefore, subject to the declaration contained in, and the purview of, the MMRD Act 1957.

2. Even if the cess is regarded as a fee, the State''s competence to levy the same can, if at all, only be justified with reference to Entry 23 and Entry 50 of List II but this recourse is not available as the field is already covered by Central Legislation referable to Entry 54 of List I.

3. Murthy was not rightly decided. The view of the Rajasthan, Punjab, Gujarat and Orissa decisions was overruled. In the view taken by the Court, i.e. Madhya Pradesh ruling was not examined in detail, particularly as it was said to be pending in appeal before the Supreme Court.

14. In issue before us now are the levies of cesses based on royalty from lands containing minerals by the States of Orissa, Bihar and Madhya Pradesh. Since the relevant statutes vary in detail and the parties concerned have also taken different stands, emphasising different aspects, the arguments have to be considered and dealt with separately, We may, however, mention that the appeals before us include those in the cases of Laxmi Narayan Agarwalla (Orissa), and Harilal Rameshwar Prasad (Madhya Pradesh) noticed earlier.

THE VARIOUS ENACTMENTS

ORISSA

15. The invalidation in 1961 of Orissa Act XXVII of 1952 in Hingir Rampur apparently rendered it necessary for the State to bring in fresh legislation. The Orissa enactment with which we are now concerned is the Orissa Cess Act (Orissa Act II of 1962) as amended by Act 42 of 1976. According to the Statement of Objects and Reasons accompanying the bill, the primary objective of the legislation is to condense and simplify the existing law on the subject by consolidating the different enactments, customs and usages relating to the levy of cess in the State, to cure defects and deficiencies therein and to introduce uniformity in the levy of cess throughout the State. The Act proposed to adopt a uniform rate of 25 paise in the rupee of the annual rental value and distribute the entire gross collection among the zilla parishads, panchayat samithis (referred to as ''samithis'' in the Act) and grama panchayats in the ratio 5:8:12 respectively thus providing them with enhanced revenues to enable them to discharge their statutory responsibilities more efficiently by taking up development works and providing better amenities to the people of the State. Its principal provisions are as follows:

(i) u/s 4, from and after the commencement of the Act, all lands (other than lands which were not liable to payment of rent or revenue before 1.4.77 and lands which were subject to a tax on land holdings under a 1950 Municipal Act) are made liable to the payment of cess (in addition to any land revenue, tax, cess, rate or fee otherwise payable in respect thereof) determined and payable "as herein provided". A 1976 amendment makes it clear that "lands held for carrying on mining operations" are not exempt from the cess.

(ii) The "rate of cess, assessment [and] fixation of cess year" are dealt with by Section 5 which originally read thus:

5.(1) The cess shall be assessed on the annual value of all lands on whatever tenure held calculated in the manner hereinafter appearing.

(2) The rate per year at which such cess shall be levied shall be twenty five percentum of the annual value of the land.

(3) x x x

Sub-section (2) was amended by Act 13 of 1970 by substituting of 50% in place of 25% but a 1982 amendment inserted Section 5A to provide that, for the period 1.4.1977 to 31.3.1980, the cess would be levied at 25% of the annual value in respect of lands held for carrying on mining operations. Section 5 was again amended by Act 15 of 1988 w.e.f. 26.10.1988 to read thus:

(2) The rate at which such cess shall be levied shall be-

a) in case of lands held for carrying on mining operations in relation to any mineral, on such percentum of the annual value of the said lands as specified against that mineral in Schedule II; and

b) in case of other lands fifty percentum of the annual value.

Clause (a) was again amended by Act 17 of 1989 to read thus:

(a) in the case of land held for carrying on mining operations in relation to any mineral, such percentum of the annual value as the State Government may, by notification, specify from time to time in relation to such mineral.

It will thus be seen that, in place of a fixed rate, an elasticity was provided for, initially, by requiring the rates to be specified in the Schedule differently for different minerals. Schedule II prescribed the percentages which the cess was to bear to the annual value: the percentages varied from 650% in the case of sand, to 300% in the case of coal, 200% in respect of certain minerals such as iron ore, limestone, manganese ore (except those meant for export or cement manufacture), 150% in the case of certain other minerals and 100% in respect of the rest. Further elasticity was provided for in 1989 by leaving it to the Government to vary the rates by a simple notification. In consequence of this amendment, Schedule II has been omitted and a notification has been issued prescribing the percentage of the royalty or the dead rent (as the case may be) that is to be levied as the cess in respect of various items of specified minerals. The rates specified are 650%, 400%, 300%, 200% and 150%. In respect of all minerals not specified in the notification, the rate of cess is to be 100% of the royalty or dead rent.

(iii) Section 6 specifies the person by whom the cess is payable. In so far as is material for our present purposes, it directs that the cess is payable "(c) by a person for the lands he holds for carrying on mining operations and shall be paid by him to the Government". This clause was inserted in Section 6 simultaneously with the amendment of Section 5 by Act 42 of 1976.

(iv) "Annual value" is defined in Section 7 thus:

7. Annual Value-(1) The annual value of lands held by a raiyat shall be the rent payable by such raiyat to the landlord immediately under whom he holds the land:

x x x x x x

(2) In the case of lands held as an estate the annual value shall be the aggregate of-

(a) the amount which the intermediary is entitled to receive on account of revenue or rent less the amount pay able by such intermediary as revenue to the intermediary immediately superior to him or to the Government, as the case may be; and

(b) the rent, if any, payable in respect of lands in the khas possession of (the) intermediary.

(3) In the case of lands held for carrying on mining operations, the annual value shall be the royalty or, as the case may be, the dead rent payable by the person carrying on mining operation(s) to the Government.

The Explanation to the section defines "dead rent" and "royalty" in terms of their definitions in the MMRD Act, 1957. It also states that "royalty" would include "any payments made or likely to be made to the Government for the right of raising minerals from the land which shall be calculated on every tonne of such minerals despatched from the land at the same rate as prescribed under the said Act or such other rate as may be fixed by the Government but not exceeding the amount which would have been otherwise payable as royalty under the said Act". Act 17 of 1989 also amended Section 7(3) to read thus:

(3) In the case of lands held for carrying on mining operations, the annual value shall be the royalty or, as the case may be, the dead rent payable by the person carrying on mining operation(s) to the Government or the pit''s mouth value wherever it has determined.

This was apparently intended to regulate the cess on coal in respect of which the pit''s mouth value had been determined. So a notification dated 14.8.89 was issued to provide that the cess in respect of coal bearing lands would be 30% of the pit''s mouth value of the said mineral.

(v) Sections 8 to 9B provide for the assessment of the cess in respect of various cases. Section 9B, inserted by the 1976 amendment, provided:

9B-Assessment of cess on lands held for mining operations:

(1) The cess payable in respect of lands held for carrying on mining operations shall be assessed in the prescribed manner.

(2) Nothing contained in Sections 8, 9 and 9A shall apply in relation to the assessment of cess in respect of the aforesaid lands:

The prescribed manner of such assessment had been already set out in the Orissa Cess Rules, 1963. Rule 6A, inserted in 1977, deals with this but it is unnecessary for us to consider the details except to mention that it is assessed and collected, along with the amount of royalty or dead rent, by the Mining Officer concerned.

(vi) Section 10 also needs to be referred to. It originally read thus:

10. Application of proceeds of the cess: (1) Notwithstanding anything contained in any other law the amount collected as cess shall be credited to the Consolidated Fund of the State and shall be utilised in the following manner, namely :

(a) amounts collected in respect of lands within the local limits of any Municipality or Notified Area constituted under the Orissa Municipal Act, 1950 shall be paid to the concerned Municipal Council or Notified Area Council, as the case may be; and

(b) amounts other than those referred to in Clause (a) shall be distributed in the prescribed manner among the Grama Panchayats, Samitis and Parishads in the ratio of twelve is to eight is to five.

Explanation-In this section "Grama Panchayat" mean a Grama panchayat constituted under the Orissa Grama Panchayats Act, 1948 and "Samiti" and "Parishad" respectively mean the Samiti and Parishad constituted under the Orissa Panchayat Samiti and Zila Parishad Act, 1959.

Orissa Act 13 of 1970 substituted the following section for the above:

10 Application of proceeds of the cess. (1) Notwithstanding anything contained in any other law, the amount collected as cess shall be credited to the Consolidated Fund of the State and shall be utilised for the following purposes, namely:

(a) primary education;

(b) contribution to Grama-Panchayats; and

(c) contribution to Samitis.

Explanation-In this section "Grama Panchayat" means & Grama Panchayat constituted under the Orissa Grama Panchayat Act, 1964 and "Samiti" means a "Panchayat Samiti" constituted under the Orissa Panchayat Samitis Act, 1959.

(2) The proportion in which the amount collected as cess is to be allotted for the said purposes shall be as may be prescribed.

As substituted by Act 42 of 1976, it reads:

10. Application of proceeds of the cess: (1) Notwithstanding anything contained in any other law, all amounts collected as cess shall be credited fifty percentum of those which represent cess collected in respect of lands, other than lands held by carrying on mining operations, shall be utilised for the following purposes, namely:

(a) primary education;

(b) contribution to Grama Panchayats; and

(c) contribution to Samitis.

(2) The allotment of amounts to be utilised for the purposes mentioned in Clauses (a), (b) and (c) of Sub-section (1) shall be made in such proportion as may be prescribed.

BIHAR:

We shall now turn to the relevant provisions of the Bihar Act. Bihar is governed in this respect by the provisions of the Bengal Cess Act (Act IX of 1880). It is sufficient to refer to the provisions of Sections 4 to 6, 9 and to certain notifications.

(i) A definition of ''royalty'' was introduced in Section 4 of the Act by an ordinance of 1975. It was amended by the Bihar Finance Act, 1981 and then by the Bihar Finance Act, 1982. The definition as amended, w.e.f. 1.4.1982, by the latter reads as follows:

Royalty for the purpose of this Act in respect of mines and quarries means payment (which includes dead rent) made or likely to be made to the owner of mines and minerals for the right of working the same on the quantity or value of such produce by a lessee if the land had been under a lease granted under MMRD Act, 1957, and rules made thereunder and includes any amount which Government may demand from the appropriation of mines and minerals belonging to the Government and any amount that may be paid as or in lieu of royalty for the right of working mines and quarries in areas held or acquired under any Act or agreement.

At the end of the section it added the following ''interpretation clause'':

Valuation of mineral bearing land" means with reference to assessment of local cess in any year on land held for working mines and quarries the value at pit''s mouth of all the mineral extracted from the land in that year

and the Explanation, which defines the value at pit''s mouth of a mineral;

(ii) Section 5 provided that, from and after the commencement of this Act, in any district or part of a district, all immovable property situate therein except otherwise in Section 2 provided shall be liable to the payment of a local cess.

(iii) Section 6, again, is a much amended section, As substituted by Ordinance No. 209 of 1975 dated 2.12.75, it read:

6. Cess has to be assessed: The local cess shall be assessed on the annual value of lands and until provision to the contrary is made by the Parliament on the royalty of mines and quarries, sale value of the other immovable properties including forest produce and annual net profits from tramways and railways as contained respectively as prescribed in this Act and the rate at which the local cess shall be

levied for each other shall be-

(a) in the case of royalty, the rate will be determined by the Government from time to time but it will not exceed the amount of royalty;

(b) in the case such annual net profits, fifteen paise on each rupee of such profits;

(c) in the case of annual value of lands, twenty paise per rupee of the annual value; and

(d) in the case of sale value of immovable properties including first produce, the rate will not exceed 10% and the State Government may, by notification, prescribe from time to time the commodities on the sale of which cess would be levied along with the rate at which it would be levied.

It was amended by a series of Bihar Cess (Amendment) Ordinances between 1975 and 1982. It was further amended by the Finance Act., 1982 (w.e.f. 1.4.82), the Finance Act, 1984, the Finance Act, 1985 (w.e.f. 1.8.1985) and the Bihar Cess (Amendment) Ordinance, 1985, After the last of these amendments, the section stood thus:

Section 6. Cess how to be assessed: The local cess shall be assessed on the annual value of the lands and, until provision to the contrary is made by the Parliament, on the royalty of mines and quarries or on value of mineral bearing land as the case may be, sale value of other immovable properties including forest produce and annual net profits from tramways and railways ascertained respectively as prescribed in the Act and the rate at which the local cess shall be levied for each year shall be-

(a) in the case of royalty, the rate will be determined by the Government from time to time but it will not exceed five times the amount of royalty, provided that the local cess payable in any one year shall not be less than the amount arrived at by multiplying the dead rent with the rate of cess determined under Clause (a);

(aa) in the case of value of mineral bearing land, where the local cess payable in any year in respect of any mineral bearing land as assessed in Clause (a) is less than 30 per cent of the value of mineral bearing land in that year, then, notwithstanding anything hereinbefore contained, the State Government may assess the local cess at such percentage of the value of the mineral bearing land, not exceeding [of] 30 per cent, as may be notified in the Official Gazette from time to time although the cess so assessed may exceed five times the amounts of royalty;

(b) in the case of annual net profit, fifteen paise on each rupee of such profits;

(c) in the case of annual value of land, twenty five paise per rupee of the annual value; and

(d) in the case of sale value of immovable properties including first produce, the rate will not exceed 30 per cent and the State Government may, by notification prescribe from time to time the commodities on the sale of which cess would be levied along with the rates at which it would be levied.

The Bihar Cess (Amendment) Ordinance, 1987 (replaced by Act 3 of 1988) substituted 40% for 30% in Clause (aa).

(iv) Section 9 of the Act deals with the application of the proceeds of cess. It has been amended from time to time, inter alia in 1976, 1977, 1978, 1979, 1980, 1981 and 1982. After all these amendments, the section stood thus:

9. Application of the proceeds of cess: The proceeds of local cess and all sums levied or recovered as interest or otherwise shall in each district be paid in the district fund-

(i) at such rate as may, from time to time, be determined by the State Government in the case of local cess on annual value of land; and

(ii) at such rate as may, from time to time, be determined by the State Government, subject to a maximum of twenty per cent in case of local cess on royalty of mines and quarries, or value of mineral bearing land, sale value of other immovable properties, forest produce and annual net profit from tramways and railways, and the remaining amount shall be deposited in the consolidated fund of the State for the construction and maintenance of other works of public utility;

xxx xxx xxx xxx xxx

Provided further that out of the remaining amount not less than ten per cent of the amount of the local cess collected under Clause (a) or Clause (aa) of Section 6 shall be spent for purposes relating to mineral development.

(v) In exercise of the powers conferred by Section 6 above, the State Government issued a notification on 20.11.80 determining the rate of cess on the amount of royalty of all minerals of the State at 100% w.e.f. 1.2.1980. Our attention has also been drawn to, and some point made of, a notification dated 20.4.85 by which the State Government, modifying the earlier notification of 1.10.1981, determined the rate of cess "on the amount of royalty of iron ore which is extracted from manually operated iron ore mines" at 100% w.e.f. 1.10.84 which was followed up by a notification dated 20.11.85 enhancing the rate at 300% on the amount of royalty of iron ore w.e.f. 21.6.85 in respect of mines other than those in which the ore is extracted manually. Other notifications were also issued determining the rate of cess in respect of other minerals as indicated below:

Date of Notifications	Effective Date	Mineral	Rate
20-11-85	21-6-85	Bauxite Ore, sand for stowing	500%
20-11-85	21-6-85	Copper Ore and uranium	300%
20-11-85	21-6-85	Lime stone and kyanite	200%
20-11-85	21-6-85	Coal	30% of pit''s mouth value or 500% on the amount of royalty whichever is greater.

Madhya Pradesh:

In Madhya Pradesh, two statutes have to be considered:

The first is the Madhya Pradesh Upkar Adhiniyam, 1981 (Act 1 of 1982). It provides for the levy of an energy development cess (Part I), an urban development cess (Part II), a cess on transfer of vacant land (Part III), and a cess on storage of coal (Part IV). The Act provided that the cesses levied under Parts I and IV should first be credited to the Consolidated Fund of the State but subsequently withdrawn and credited to a separate Electrical Development Fund [Sections. 3(2)] and Coal Bearing Area Development Fund [Section 12(1)] and that the amounts to the credit of the Funds

as well as the cesses collected under Parts II and III should be utilised for special purposes connected respectively with energy development [Section 3(3)]. development of coal-bearing areas [Section 12(2)], urban development [Section 7(2)] and rural development [Section 9(5)]. Act 21 of 1987 changed Part IV into a part dealing with "cess on land held in connection with mineral rights" with full retrospective effect. Part IV, as now substituted, deals only with "land situate in the State and held under a mining lease for undertaking mining operations in relation to major mineral including operations for raising, winning or extracting coal". Sections 11 and 12 read thus:

Section 11: There shall be levied and collected a cess on land held in connection with mineral rights at such rate as may be notified by the State Government per ton of major mineral raised and the rate of cess prevailing in respect of coal during the period commencing from the date of commencement of the Principal Act and ending on the date of commencement of the Madhya Pradesh Upkar (Sanshodhan) Adhiniyam, 1987, shall be deemed to be the rate of cess notified under this Sub-section in respect of coal:

Provided that subject to the limitation mentioned above the State Government may, by notification, increase or reduce the rate of cess at an interval of not less than one year, where the rate is increased it shall not be in excess of fifty per cent of the rate for the time being in force;

Provided further that every notification under the above proviso shall be laid on the table of the Legislative Assembly and the provisions of Section 24-A of the Madhya Pradesh General Clauses Act, 1957 (No. 3 of 1958) shall apply thereto as they apply to rule.

(2) The rate of cess to be notified for the first time in exercise of the powers conferred by Sub-section (1) shall be effective from the [first of] April, 1987.

(3) The cess levied under Sub-section (1) shall, subject to and in accordance with the rules made in this behalf, be assessed and collected by such agencies and in such manner as may be prescribed.

(4) The agencies prescribed under Sub-section (3) shall for the purpose of assessment, collection and recovery of cess and all matters connected therewith, exercise such of the powers conferred upon the authorities specified in Section 3 of the Madhya Pradesh General Sales Tax Act, 1958 (No. 2 of 1959) for the purposes aforesaid in respect of sales tax under the said Act and the rules made thereunder, as may be prescribed as if such agencies were the authorities specified in the Section 3 and the cess on land held in connection with mineral rights were the tax levied under the said Act.

Section 12: The proceeds of the cess on land held in connection with the mineral rights may be utilised by the State Government for the general development of the

mineral bearing areas.

Section 12 has, however, been omitted by an Amending Act of 1989, again, with full retrospective effect i.e. from 1.10.1982.

It appears, however, that there was in force in Madhya Pradesh w.e.f. 1.11.1982 another statute levying mineral development cess. It was the M.P. Karadhan Adhiniyam, 1982 (Act 15 of 1982) as amended by M.P. Acts 1983 and 13 of 1985 which was challenged before the M.P. High Court in Hiralal Rameshwar Prasad v. State and Ors. connected cases. The Madhya Pradesh Karadhan Adhiniyam, 1982, was enacted by State Legislature "to provide for levy of school building cess, forest development cess and mineral areas development cess and matters incidental thereto". Part II of the Act deals with the school building cess. Section 5 therein requires the holder of every holding of six hectares and above to pay the school building cess as provided therein. The proceeds of the school building cess are required by Section 4 to be credited to a separate Fund supplemented by a State contribution equal to 50% thereof and utilised for construction and furnishing of primary school buildings in non-urban areas. Part III of the Act deals with the forest development cess. Section 7 imposes forest development cess on every sale or supply of forest produce by the Forest Department. The proceeds thereof are to be credited to a separate Fund and utilised for social forestry, afforestation, reforestation, forest rehabilitation and other purposes connected with forest development. Then comes Part IV dealing with the mineral areas development cess, the provisions of which are relevant for the purpose of these appeals and it is the charging provision therefore contained in Section 9 which has been attacked as constitutionally invalid. The Section read thus:
9. Levy of mineral areas development cess on land under mining lease:

(1) There shall be levied and collected on the land held under a mining lease for undertaking mining operation a mineral areas development cess at the rate of twenty five percentum of the rental value thereof.

(2) For the purpose of Sub-section (1), rental value shall be equal to the royalty or dead rent, as the case may be, whichever is higher.

(3) The mineral areas development cess shall be payable by the person to whom the mining lease is granted.

(4) The mineral areas development cess shall, subject to and in accordance with the rules made in this behalf, be collected by such agencies and in such manner as may be prescribed and shall be applied towards development of mineral bearing areas.

The 1983 amendment substituted the following Sub-section (1) in Section 9:

(1) There shall be levied and collected on the land held under a mining lease for undertaking minor operations for a major mineral, a mineral areas development

cess at the rate of one hundred percentum of the rental value thereof.

The 1985 amendment substituted the following Sub-section in place of the above w.e.f. 1.8.1985:

(1) There shall be levied and collected-

(a) on the land held under mining lease for undertaking mining operations for a major mineral other than coal a mineral areas development cess at the rate of one hundred percentum of the rental value thereof;

(b) on the land held under mining lease for undertaking mining operations for coal, a mineral area development cess at the rate of the hundred twenty five percentum of the rental value thereof.

and also made a provision for payment of interest on arrears of cess. Rules have been framed under this Act called "The Madhya Pradesh Mineral Areas Development Cess Rules, 1982". Rule 3 provided for the collection of the cess every month along with the royalty or dividend. Rule 10 thereof is alone relevant for the purpose of these petitions and read as under:

10. Application of cess: The State Government shall decide from time to time the manner in which the amount collected from cess shall be utilized for the development of mining lease areas.

In 1985, an amendment substituted the words "mineral bearing" for the words "mining lease" in this rule. It will be seen that, unlike the cesses referred to in Part I and III, the Act did not provide for the creation of a separate Fund for the mineral areas development cess. The manner of utilisation thereof was also left to the discretion of the State Government though it had to be spent for development of mineral bearing areas.

THE CONTENTIONS

ORISSA

In the historical and statutory context set out above, the attempt of Sri T.S. Krishnamurthy Iyer, leaned Counsel for the State of Orissa to save the impugned legislation of that State is two fold. First, he points out that in India Cement the statute, by Sections 115 and 116, imposed a cess and surcharge on ''land revenue'' and the Explanation to Section 115 defined ''land revenue'' to mean ''royalties''. In other words, that was a clear case of a direct cess or tax on royalties. Here, on the other hand, Section 5 makes it clear that what the legislature has provided for is a tax assessed on the annual value of all lands, on whatever tenure held, calculated at a percentage of the annual value of the land. Section 7, which defines ''annual value'', provides for different measures for determining the annual value in respect of lands held under different kinds of tenures; and, in the case of lands held for mining operations, the measure of such annual value is the royalty or dead rent

paid to the Government. On a proper construction of the statute, he submits, the cess levied is a cess or tax on land and the ''royalty'' is only taken as a measure for determining the quantum of tax. He contends that India Cement only forbids a cess or tax on royalty as such and not a cess or tax on land, which may be measured by reference to the royalty derived from it. He presses in aid of his argument the well-marked distinction between the subject matter of a tax and its measure outlined, amongst others, in Ralla Ram''s case [1948] F.C.R. 207 and Bombay Tyre International v Union, [1984] 1 S.C.C.487 . This argument, Sri Iyer contended, is based on the statutory language used in the Orissa Cess Act, 1962 and should prevail independently of the correctness or otherwise of Murthy. Secondly, he submitted that ''royalty'' is not a tax and the cess on royalty is also not a tax but only a fee. This view is supported, he said, by the limitations imposed in the statute on the modes of its utilisation. Being a fee, the State Legislature''s competence to impose it has to be determined with reference to Entry 23 read with Entry 66 of the State List. So doing, the validity of the levy has to be upheld as, in counsel''s submission, the declaration contained in, and the provisions of, the MMRD Act, 1957 do not, in any way, whittle down or impair this competence.
Basically, it will seen, two questions arise-

(1) Can the cess be considered as "land revenue" under Entry 45 or as a "tax on land" under Entry 49 or as a "tax on mineral rights" under Entry 50 of the State List?

(2) If the answer to question (1) is in the negative, can the cess be considered to be a fee pertaining to the field covered by Entry 23 of the State List or has the State been denuded of the legislative competence under this Entry because of Parliament having enacted the MMRD Act, 1957?

Taking up the first question, the attempt to bring the levy under Entry 45 of the State List proceeds in two steps. First, land revenue is the sovereign''s share of the proceeds of the land belonging to the sovereign and is represented, in the case of land containing minerals, by the payment of royalty to the Government. Second, the cess, being an accretion to royalty, partakes of the same character. This argument, however, must fail in view of the categorical observations of the Supreme Court in India Cement, (vide paras 20 and 21) as to the connotation of the expression ''land revenue''. At least, in India Cement, the statute sought to include royalty within the meaning of ''land revenue'' but there is no such provision in the Orissa Act and, this being so, royalty or the tax thereon cannot be equated to land revenue. The cess here cannot be, therefore, brought under Entry 45.

Turning next to Entry 50, though Murthy left open the question how far a levy of this nature can be considered to be a tax on mineral rights {vide page 676), India Cement has chosen to approve the contrary view of Wanchoo J. in his dissenting judgment in Hingir Rampur (para 30). Actually, it appears that the observations of Wanchoo J. have not been fully examined. The learned Judge held that the tax in the

case before him was not a tax on mineral rights because it was levied on the value of the minerals extracted. If his observations in this context are read as a whole, it would seem that he also was of opinion that a tax on royalty would be a tax on mineral rights, for he observed (at pp. 582-3):

The next contention on behalf of the State of Orissa is that if the cess is not justified as a fee, it is a tax under item 50 of List II of the Seventh Schedule. Item 50 provides for taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development. This raises a question as to what are taxes on mineral rights. Obviously, taxes on mineral rights must be different from taxes on goods produced in the nature of duties of excise. If taxes on mineral rights also include taxes on minerals produced, there would be no difference between taxes on mineral rights and duties of excise under item 84 of List I. A comparison of Lists I and II of the Seventh Schedule shows that the same tax is not put in both the Lists. therefore, taxes on minerals rights must be different from duties of excise which are taxes on minerals produced. The difference can be understood if one sees that before minerals are extracted and become liable to duties of excise somebody has got to work the mines. The usual method of working them is for the owner of the mine to grant mining leases to those who have got the capital to work the mines. There should therefore be no difficulty in holding that taxes on mineral rights are taxes on the right to extract minerals and not taxes on the minerals actually extracted. Thus tax on mineral rights would be confined, for example, to taxes on leases of mineral rights and on premium or royalty for that. Taxes on such premium and royalty would be taxes on mineral rights while taxes on the minerals actually extracted would be duties of excise. It is said that there may be cases where the owner himself extracts minerals and does not give any right of extraction to somebody else and that in such cases in the absence of mining leases or sub-leases there would be no way of levying tax on mineral rights. It is enough to say that these cases also, rare though they are, present no difficulty. Take the case of taxes on annual value of buildings. Where there is a lease of the building, the annual value is determined by the lease-money; but there are many cases where owners themselves live in buildings. In such cases also taxes on buildings are levied on the annual value worked out according to certain rules. There would be no difficulty where an owner himself works the mine to value the mineral rights on the same principles on which leases of mineral rights are made and then to tax the royalty which, for example, the owner might have got if instead of working the mine himself he had leased it out to somebody else. There can be no doubt therefore that taxes on mineral rights are taxes of this nature and not taxes on minerals actually produced. therefore the present cess is not a tax on mineral rights; it is a tax on the minerals actually produced. therefore the present cess is not a tax on mineral rights; it is a tax on the minerals actually produced and can be no different in pith and substance from a tax on goods produced which comes under Item 84 of List I, as duty of excise. The present levy therefore under s. 4 of the Act cannot be justified as

a tax on mineral rights.

However, the conclusion of India Cement is clear that a tax on royalties cannot be a tax on minerals and we are bound thereby. This apart, we shall also advert, while discussing the second question, to another hurdle in the way of the State''s attempt to have recourse to Entry 50, which has also been touched upon by India Cement.

Can, then, the cess be described as a ''tax on land''? The Statute considered in India Cement, as Sri Iyer correctly points out, was differently worded. It purported to levy a cess on land revenue and ''royalty'' was brought within the definition of that expression. It was, therefore, a case where the levy had no reference to land at all but only to the income from the land, in the case of Government lands, got by way of land revenue or otherwise. Here the statute is different. The objective of the Cess Act as set out earlier, is to levy a cess on all land. Indeed, originally the idea was to levy a uniform cess at 25% of the annual value of all land which was subsequently raised to 50%. It is argued that the tax here is, therefore, a tax on land and it is immaterial that this tax is quantified with reference to the income yielded by the land. A tax on land may be levied, inter alia with reference to its capital value or with reference to its annual value. One realistic measure of such capital or annual value will be the income that the land will yield just as, for property tax purposes, the annual value is based on the amount for which the property can reasonably let from year to year. The income from the land may be more or less due to a variety of reasons. In the case of agricultural lands, it may depend on the fertility of the soil, the sources of irrigation available, the nature of crops grown and other such factOrs. Likewise, where the land is one containing minerals, naturally the value (whether annual or capital value) will be more if it contains richer minerals and can be legitimately measured by reference to the royalties paid in respect thereof. The mere fact, it is argued, that the annual value is measured with reference to the royalty, dead rent or pit''s mouth value of the mineral does not mean that it ceases to have the character of a tax on land. In this context, Sri Iyer places strong reliance on the decision of a Constitution Bench of this Court in Ajay Kumar Mukherjea v. Local Board of Barpeta, [1965]3 S.C.R. 47 . There a local Board was authorised to "grant ... a licence for the use of any land as a market and impose an annual tax thereon". The Court held, examining the Scheme and the language of the provision in question, that the tax imposed was a tax on land under Entry 49. The Court indicated the following approach to the issue-before it:

The first question which falls for consideration therefore is whether the impost in the present case is a tax on land within the meaning of Entry 49 of List II of the Seventh Schedule to the Constitution. It is well-settled that the entries in the three legislative lists have to be interpreted in their widest amplitude and therefore if a tax can reasonably be held to be a tax on land it will come within Entry 49. Further it is equally well-settled that tax on land may be based on the annual value of the land and would still be a tax on land and would not be beyond the competence of the

State legislature on the ground that it is a tax on income: see Ralla Ram v. The Province of East Punjab [1948] F.C.R. 207. It follows therefore that the use to which the land is put can be taken into account in imposing a tax on it within the meaning of entry 49 of List II, for the annual value of land which can certainly be taken into account in imposing a tax for the purpose of this entry would necessarily depend upon the use to which the land is put. It is in the light of this settled proposition that we have to examine the scheme of Section 62 of the Act which imposes a tax under challenge.

16. On the other hand, it is contended for the respondents that, whatever may have been the original intention, the true and real impact of the cess is only on the royalties. It is said that, at any rate, after the amendments of 1976, when lands held for mining operations were segregated for levy of separate and steep rates of cess based on royalty, the ostensible appearance of levying a tax on all land with reference to annual value has disappeared and a direct, undisguised tax on royalties from mining lands has taken its place. It is urged that, for deciding whether the tax is really a tax on land as in Murthy or whether it is really a tax on royalties which has been struck down in India Cement, it is not the form or the statutory machinery that matters; one has to look at the real substance and true impact of the levy. If this is done, it is said, there can be no doubt that the cess impugned here suffers from the same vice that vitiated the levy in India Cement.

17. The decision of this Court in Buxa Dooars Tea Co. v. State [1989] 3 S.C.R. 211 was referred to by Sri G. Ramaswamy, leaned Counsel for Orient Paper Mills, in support of this contention. In that case, this Court was concerned with a cess levied annually. Initially Section 4(2) of the relevant statute levied the cess:

(a) in respect of lands, at the rate of six paise on each rupee of development value thereof;

(b) in respect of coal mines, at the rate of fifty paise on each tonne of coal on the annual despatches therefrom;

(c) in respect of mines other than coal mines and quarries, at the rate of six paise on each rupee of annual net profits thereof.

With effect from 1.4.1981, Clause (a) above was amended and Clause (aa) inserted to provide for the levy of cess-

(a) in respect of lands other than a tea estate, at the rate of six paise on each rupee of development value thereof;

(aa) in respect of a tea estate at such rate, not exceeding rupees six on each kilogram of tea on the despatches from such tea estate of tea grown therein, as the State Government may, by notification in the Official Gazette, fix in this behalf:

Provided that in calculating the despatches of tea for the purpose of levy of rural employment cess, such despatches for sale made at such tea auction centers as may be recognised by the State Government by notification in the Official Gazette shall be excluded:

Provided further that the State Government may fix different rates on despatches of different kinds of tea.

Sub-section (4) was added in Section 4 to enable the State Government, if it considers necessary so to do, by notification in the Official Gazette, to exempt such categories of despatches or such percentage of despatches from liability to pay the whole or any part of the rural employment cess or reduce the rate of rural employment cess payable thereon, under Clause (aa) of Sub-section (2), on such terms and conditions as may be specified in the notification. With effect from 1.10.1982, the first proviso to Clause (aa) was omitted. It was contended for the tea estate, inter alia that the above levy violated the provisions of Article 301 of the Constitution and was also beyond the legislative competence of the State Government. Upholding these contentions, the Court observed:

The question then is whether the impugned levy impedes the free flow of trade and commerce throughout the territory of India and, if it does, whether it falls within the exception carved out in Article 304(b). If the levy imposes a cess in respect of tea estates, it may will be said that even though the free flow of trade is impeded in its Government throughout the territory of India, it is in consequence of an indirect or remote effect of the levy and that it cannot be said that Article 301 is contravened. The contention of the petitioners is, however, that it is ostensibly only in respect of tea estates but in fact it is a levy on despatches of tea. If that contention is sound, there can be no doubt that it constitutes a violation of Article 301 unless the legislation is brought within the scope of Article 304(b). To determine whether the levy is in respect of tea estates or is a levy on despatches of tea, the substance of the legislation must be ascertained from the relevant provisions of the statute. It cannot be disputed that the subject of the levy, the nature of which defines the quality of the levy, must not be confused with the measure of liability, that is to say, the quantum of the tax. There is a plenitude of case law supporting that principle, among the cases, being Union of India v. Bombay Tyre International, [1984] 1 S.C.R.347 .

10. But what is the position here?.... Now, for determining the true nature of the legislation, whether it is a legislation in respect of tea estate and therefore of land, or in respect of despatches of tea, we must, as we have said take all relevant provisions into account and ascertain the essential substance of it. It seems to us that although the impugned provisions speak of a levy of cess in respect of tea estates, what is contemplated is a levy on despatches of tea instead. The entire structure of the levy points to that conclusion. If the levy is regarded as one in respect of tea estates and the measure of the liability is defined in terms of the

weight of tea despatched, there must be a nexus between the two indicating a relationship between the levy, on the tea estate and the criteria for determining the measure of liability. If there is no nexus at all it can conceivably be inferred that the levy is not what it purports to be. The statutory provisions for measuring the liability on account of the levy throws light on the general character of the tax as observed by the Privy Council in Re: A Reference under the Government of Ireland Act, 1920 and Section 3 of the Finance Act (Northern Ireland), 1934 [1963] 2 A.E.R. III. In R.R. Engineering Co. v. Zilla Parishad, Barielly, [1980] 3 SCR 1 this Court observed that the method of determining the rate of levy would be relevant in considering the character of the levy. All these cases were referred to in Bombay Tyer International Ltd., [1984] 1 S.C.R. 347 where in the discussion on this point at page 367 this Court said:

Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy.

Applying the above tests to the case before it, the Court reached the conclusion that, in substance the impugned levy was a levy in respect of despatches of tea and not in respect of tea estates. It was then pointed out that the question of legislative competence also turned on this issue:

If the impugned legislation were to be regarded as a levy in respect of the estates, it would be referable to entry 49 in List II of the Seventh Schedule of the Constitution which speaks "taxes on lands and buildings". But if the legislation is in substance legislation in respect of despatches of tea, legislative authority must be found for it with reference to some other entry

Pointing out that no such entry in List II or III had been brought to its notice and further that, u/s 2 of the Tea Act, 1953, control over the tea industry had been assumed by Parliament within the meaning of Entry 54 of List I, the Court upheld the challenge to the competence of the State legislature to levy the impugned cess. It is submitted that, likewise, here the levy is one in substance on royalties and not one on land.

18. There is force in the contention urged by Sri T.S.K. Iyer that there is a difference in principle between a tax on royalties derived from land and a tax on land measured by reference to the income derived therefrom. That a tax on buildings does not cease to be such merely because it is quantified on the basis of the income it fetches is nowhere better illustrated than by the form of the levy upheld in Ralla Ram [1948] F.C.R. 207 followed by Bhagwan Dass Jain, [1981] 2 SCR 808 which illustrates the converse situation. Mukherjea (supra) also supports this line of reasoning. But here the levy is not measured by the income derived by the assessee from the land, as is the case with lands other than mineral lands. The measure of the levy is the royalty paid, in respect of the land, by the assessee to his lessor which is quite a different thing. Moreover, interesting as the argument is, we are

constrained to observe that it is only a reiteration of the ratio in Murthy which has been upset in India Cement. We may point out that this is of significance because, unlike in India Cement, the statute considered in Murthy, as the one here, only purported to levy a cess on the annual value of all land. India Cement draws a "clear distinction between tax on land and tax on income arising from land". The former must be one directly imposed on land, levied on land as a unit and bearing a direct relationship to it. In para 23 of the judgment, the Court has categorically stated that a tax on royalty cannot be said to be a tax directly on land as a unit.

19. Sri Iyer contended that ail the observations and propositions in India Cement stem from the basic conclusion of the Court that the cess levied there was a cess on royalty in view of the Explanation to Section 115. He also submitted that the statute under consideration in India Cement did not provide for any cess in the case of land which did not yield any royalty; in other words, the Act did not use dead rent as a basis on which land was to be valued. He drew attention to the observations of Oza, J. In para 42 of India Cement that if the Explanation to Section 115 had used the words ''surface rent'' in place of ''royalty'' the position would have been different and that, if a cess on such ''surface rent'' or ''dead rent'' is charged, it could be justified as a tax on land falling within the purview of Entry 49. Here, however, the position is different and so, he urged, the nature of the levy is also different. We may have considered these points as furnishing some ground to distinguish the present levy from that in India Cement but for the Court''s specific disapproval of Murthy. We are unable to accept the plea of Sri Iyer that, in spite of Murthy, he can support the validity of the levy, as the statute considered in Murthy contained exactly the same features as are here emphasised by Shri Iyer and the validity of such levy cannot be upheld after India Cement. As to the second contention based on the observations in the judgment of Oza J., we may point out here the levy is not one confined to dead rent or surface rent as suggested by Oza J. but one on royalty which even according to Oza J. cannot be described as a tax on land.

20. Sri Iyer contended that unless the case of the assessees is that the statute is a piece of colourable legislation, it is not possible to construe the levy on mineral lands differently. He pointed out that Section 4 of the Orissa Cess Act, 1962 levies a cess on all land and that, if Sections 7(1) and (2) measuring the cess by reference to the income of other categories of land are valid, there is no reason why Section 7(3) alone should be treated differently and objected to as imposing a tax on royalties particularly when the levy also extends to dead rent.

21. The answer to this contention appears to be that the plea of the assessee need not go to the extent of saying that the levy is a colourable piece of legislation. It is sufficient to restrict oneself to the issue of a proper determination of the pith and substance of the legislation. There is no doubt an apparent anomaly in considering Section 7(1) and (2) as levying a tax on land but construing Section 7(3) as imposing a tax on royalties and this anomaly has been noticed in India Cement (vide para 42).

But the question is, what is it that is really being taxed by the Legislature? So far as mineral-bearing lands are concerned, is the impact of the tax on the land or on royalties? The change in the scheme of taxation u/s 7 in 1976; the importance and magnitude of the revenue by way of royalties received by the State; the charge of the cess as a percentage and, indeed, as multiples of the amount of royalty; and the mode and collection of the cess amount along with the royalties and as part thereof are circumstances which go to show that the legislation in this regard is with respect to royalty rather than with respect to land.

22. Sri Iyer had invited our attention to the decision of this Court in R.R. Engineering Co. v Zila Parishad, [1980] 3 S.C.R. 1 which upheld the validity of a ''circumstances and property tax'' levied by a Zila Parishad. The High Court had held this levy could not be traced to any entry other than the residuary Entry 97 of List I. This Court, on appeal, pointed out the distinction between a tax of this type and a tax on income. It held that the tax was a composite one referable to Entry 49 (tax on lands and buildings), Entry 58 (taxes on animals and boats) and Entry 60 (tax as on professions, trades, callings and employments) of List II. While holding, therefore, that the ceiling of Rs. 250 per annum referred to in Entry 60 would not be applicable to the tax, the Court uttered a "word of caution":

The fact that one of the components of the impugned tax, namely, the component of ''circumstances'' is referable to other entries in addition to Entry 60, shall not be construed as conferring an unlimited charter on the local authorities to impose disproportionately excessive levies on the assessees who are subject to their jurisdiction. An excessive levy on circumstances will tend to blur the distinction between a tax on income and a tax on circumstances. Income will then cease to be a mere measure or yardstick of the tax and will become the very subject matter of the tax. Restraint in this behalf will be a prudent prescription for the local authorities to follow.

While Sri Iyer sought to use this decision in support of his contention that a tax on property can be legitimately measured on the basis of the income therefrom, we think the observations extracted above are very apposite here, The manner in which the levy, initially introduced a uniform cess on all land, was slowly converted, qua mining lands, into a levy computed at multiples of the royalty amounts paid by the lessees thereof seem to bear out the contention that it is being availed of as a tax on the royalties rather than one on the annual value of the land containing the minerals. In the words of Chandrachud J. (as he then was) one can legitimately conclude that royalty has ceased to be a mere measure or yardstick of the tax and has become the very subject matter thereof.

23. For the reasons discussed above, we repel the contention of the State seeking to justify the levy under Entry 45, 49 and 50 of List II of the Seventh Schedule.

24. There has been considerable discussion before us as to whether "royalty" itself is a tax or not. The controversy before us centers round the discussion contained in paras 31 to 34 of the India Cement judgment. Counsel for the assesses-respondents invite attention to the opening sentence of para 34 which runs: "In the aforesaid view of the matter, we are of the opinion that royalty is a tax" and argue that this clinches the issue. On the other hand, Sri Iyer submits that this purported conclusion does not follow from the earlier discussion and is also inconsistent with what follows. He points out that though there is a reference in para 27 to the conclusion of Venkataramiah J. in a judgment of the Mysore High Court that royalty u/s 9 of the MMRD Act is really a tax, and a reference in para 31 to the Rajasthan, Punjab, Gujarat and Orissa decisions to the effect that royalty is not a tax, there is no discussion, criticism or approval of any of the decisions on this point and that, therefore, the first sentence of para 34, relied upon for the respondents, is non-sequitir. He submits that, perhaps, there is a typographical error in the first sentence of para 34 and that the sentence should really read thus:

In the aforesaid view of the matter, we are of opinion that cess is a tax, and as such a cess on royalty being a tax on royalty, is beyond the competence of the State Legislature....

He also points out that the last sentence of para 34 reads thus:

Royalty on mineral rights is not a tax on land but a payment for the use of land.

He submits, therefore, that this issue has not been decided in India Cement. He submits that, before we express any opinion on this issue, we should consider the matter afresh and places before us extracts from various lexicons and dictionaries to show that a royalty is nothing more than the rent or lease amount paid to a lessor in consideration for the grant of a least; to exploit minerals. Reference may also be made to the discussion in this respect in paras 35-40 of Trivedi & Sons v. State of Gujarat, [1986] Supp. S.C.C. 20 . It is therefore, neither a fee nor a tax but merely a price paid for the use of mineral-bearing land.

25. We do not think that it is necessary for us to express an opinion either way on this controversy for, it seems to us, it is immaterial for the purposes of the present case. If royalty itself were to be regarded as a tax, it can perhaps be described properly as a tax on mineral rights and has to conform to the requirements of Section 50 which are discussed later. We are, however, here concerned with the validity of the levy of not royalty but of cess. If the cess is taken as a tax, then, unless it can be described as land revenue or a tax on land or a tax on mining rights, it cannot be upheld under Entry 45, 49 or 50. On the contrary, if it is treated as a fee, the State"s competence to levy the same has to be traced to Entry 23, a proposition the effect of which will be considered later. The question whether royalty is a tax or not does not assist us much in furnishing an answer to the two questions posed in the present case and set out earlier. We shall, therefore, leave this question to rest

here.

26. This takes us to the second question posed by us initially and this turns on the effect of M.M.R.D. Act, 1957 and the declaration contained in Section 2 thereof which has been extracted earlier. This will arise if we treat the levy as a tax falling under Entry 50 of List II or, alternatively, as a fee though it may not affect the State''s competence if it can be attributed to Entry 49 of List II.

27. To take up Entry 50 first, a perusal of Entry 50 would show that the competence of the State Legislature with respect thereto is circumscribed by "any limitations imposed by Parliament by law relating to mineral development". The M.M.R.D. Act, 1957, is-there can be no doubt about this-a law of Parliament relating to mineral development. Section 9 of the said Act empowers the Central Government to fix, alter, enhance or reduce the rates of royalty payable in respect of minerals removed from the land or consumed by the lessee. Sub-section (3) of Section 9 in terms states that the royalties payable under the Second Schedule to that Act shall not be enhanced more than once during a period of three years. India Cement has held that this is a clear bar on the State legislature taxing royalty so as, in effect, to amend the Second Schedule to the Central Act and that if the cess is taken as a tax falling under Entry 50 it will be ultra vires in view of the provisions of the Central Act.

28. Is it possible, then, to treat the levy as a fee which the State legislature is competent to legislate for under Entry 66 of the State List? Sri Iyer contends for this position particularly on the strength of Section 10 of the Orissa Cess Act, 1962. There is one great difficulty in accepting this solution to the State''s problem. Section 10 as it stands now earmarks the purposes of utilisation of only fifty percent of the proceeds of the cess and that, too, is limited to the cess collected in respect of "lands other than lands held for carrying on mining operations". In other words, the levy cannot be correlated to any services rendered or to be rendered by the State to the class of persons from whom the levy is collected. Whether royalty is a tax or not, the cess is only a tax and cannot be properly described as a fee.

29. This consideration apart, even assuming it is a fee, the State legislature can impose a fee only in respect of any of the matters in the State List. The entry in the State List that is relied upon for this purpose is Entry 23. But Entry 23, it will be seen, is "subject to the provisions of List I with respect to regulation and development" of mines and minerals under the control of the Union. Under Entry 54 of List I, regulation of mines and mineral development is in the field of Parliamentary legislation "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". Such a declaration is contained in Section 2 of the M.M.R.D. Act, 1957, which has been set out earlier. It, therefore, follows that any State legislation to the extent it encroaches on the field covered by the M.M.R.D. Act, 1957, will be ultra vires. The assessees contend, in this case, that the legislation in question is beyond the purview of the State legislature by reason of the enactment of the M.M.R.D. Act.

It would appear, prima facie that the contention has to be upheld on the basis of the trilogy of decisions referred to at the outset viz. Hingir-Rampur, Tulloch and India Cement. They seem to provide a complete answer to this question. The argument is, however, discussed at some length, because it has been put forward, mutatis mutandis, in support of the levy of cess by the other States as well.

30. Before dealing with the contentions of the counsel for the State in this behalf, a reference may be made to a difference in wording between Entry 52 and Entry 54 of List I. The language of Entry 52 read with Entry 24 would suggest that, once it is declared by Parliament by law that the control of a particular industry by the Union is expedient in the public interest, the State legislatures completely lose all competence to legislate with respect to such an industry in any respect whatever, Indian Tobacco Co. Ltd. v. Union [1985] Supp. 1 S.C.R. 145. But, even here, there are judicial decisions holding that such declaration does not divest the State legislature of the competence to make laws the pith and substance of which fall within the entries in List II, (see for e.g. Kannan Dewan Hills Co. v. State of Kerala, [1973] 1 S.C.R. 856 and Ishwari Khetan Sugar Mills Ltd. v. State of U.P., [1980] 3 S.C.R. 331 to which reference will also be made later, merely on the ground that it has some effect on such industry. Compared to that of Entry 52, the language of Entry 54 is very guarded. It deprives the States of legislative competence only to the extent to which the law of Parliament considers the control of Union to be expedient in the matter of regulation of mines and mineral development. Emphasising this difference, leaned Counsel for the State of Orissa submits that the intent, purpose and scope of the M.M.R.D. Act is totally different and does not cross the field covered by the impugned Act. It is a law to provide for the proper exploitation and development of minerals and regulates the persons to whom, the manner in which and procedure according to which licences for prospecting or leases for minerals should be granted. That enactment is concerned with the need for a proper exploitation of minerals from lands. The impugned Act, on the other hand, concentrates on the need for development of mineral areas as such and provides for the collection of cess to cater to these needs. The scope of the subject matter of legislation under the two Acts are entirely different and the M.M.R.D. Act cannot be considered to exclude State legislation of the nature presently under consideration.

31. Before considering the above contention, it will be useful to refer to certain earlier decisions of this Court which have a bearing on this issue. State of West Bengal v. Union, [1964] 1 S.C.R. 371 concerned the validity of an Act of Parliament proposing to acquire certain coal bearing areas in the State qua certain areas vested in the State itself. While upholding the general right of Parliament to legislate for the acquisition of even property vested in a State, the Court pointed out that this could be done only if there is some provision in the Central Act, expressly or necessarily implying that the property of the State is to be acquired by the Union. However, the Court held, when the requisite declaration under Entry 54 is made, the power to legislate for regulation and development of mines and minerals under the control of

the Union, would, by necessary implication, include the power to acquire mines and minerals.

32. Baijnath Kedia v. State of Bihar, [1970] 2 S.C.R. 100 was a case arising out of a 1964 amendment to the Bihar Land Reforms Act, 1950. By Section 10 of the 1950 Act, all the rights of former landlords or lessors under mining leases granted by them in their "estates" came to be vested in the State; but the terms and conditions of those leases were made binding upon the State Government. Under a second proviso to this provision and a sub-rule added by virtue of the 1964 amendment, additional demands were made on the lessees, the validity of which was challenged successfully before this Court. The Court, applying Hingir-Rampur and Tulloch held that the whole of the legislative field in respect of minor minerals was covered by Parliamentary legislation and Entry 23 of List II was to that extent cut down by Entry 54 of List I. The old leases could not be modified except by a legislative enactment by Parliament on the lines of Section 16 of the M.M.R.D. Act, 1957.

33. In State of Haryana v. Chanan Mal, [1976] 3 S.C.R., 688 the State Government had declared saltpetre as a minor mineral and auctioned saltpetre mines in the State under the M.M.R.D. Act, 1957 read with the Punjab Minor Minerals Concession Rules, 1964. In a writ petition filed by one of the owners, the High Court held, unless the mineral deposits were specifically mentioned in the wajib-ul-arz of the village as having vested in the State, their ownership would continue to remain vested in the former proprietors according to the record of rights. To meet this difficulty and the difficulties that had been created by haphazard leases created by the erstwhile proprietors, the State legislature passed the Haryana Minerals (Vesting of Rights) Act, 1973 and issued notifications thereunder again acquiring the rights to the saltpetre in the lands putting up certain saltpetre-bearing lands to auction. The High Court upheld the challenge to the validity of the notifications holding that, in view of the declaration contained in Section 2 of the M.M.R.D. Act, the field covered by the impugned Act was already fully occupied by Central legislation and that, therefore, the State Act was void and imperative on grounds of repugnancy. This Court, however, reversed the High Court''s decision. It held that though the stated objects and reasons of the State Act showed that the acquisition was to be made to protect the mineral potentialities of the land and to ensure their proper development and exploitation on scientific lines-and this did not materially differ from that which could be said to lie behind the Central Act-the character of the State Act had to be judged by the substance and effect of its provisions and not merely by the purpose given in the Statement of Objects and Reasons. Analysing the provisions of the Central Act, the Court pointed out that, subject to the overall supervision of the Central Government, the State Government had a sphere of its own powers and could take legally specified actions under the Central Act and rules. In particular, Section 16(1)(b) of the Central Act showed that Parliament itself contemplated State legislation for vesting of lands containing mineral deposits in the State Government, a feature that could be explained only on the assumption that Parliament did not

intend to touch upon the power of State legislatures under Entry 18 of List II read with Entry 42 of List III. Section 17 also showed that there was no intention to interfere with vesting of lands in the States by the provisions of the Central Act. The decision in Hingir-Rampur, Tulloch and Baijnath Kedia were distinguished. In Chanan Mal (supra), the respondents relied upon certain observations in Hingir-Rampur and State of West Bengal v. Union, (supra). The Court, however, distinguished them saying:

In the two cases discussed above no provision of the Central Act 67 of 1957 was under consideration by this Court. Moreover, power to acquire for purposes of development and regulation has not been exercised by Act 67 of 1957. The existence of power of Parliament to legislate on this topic as an incident of exercise of legislative power on another subject is one thing. Its actual exercise is another. It is difficult to see how the field of acquisition could become occupied by a Central Act in the same way as it had been in the West Bengal''s case (supra) even before Parliament legislates to acquire land in a State. Atleast until Parliament has so legislated as it was shown to have done by the statute considered by this Court in the case from West Bengal, the field is free for State legislation falling under the express provisions of entry 42 of List III.

Tulloch and Baijnath Kedia were also considered no longer applicable as Sections 16 and 17 of the M.M.R.D. Act, 1957 had been amended to get over the need for a parliamentary legislation pointed out in Baijnath Kedia.

34. A similar question whether the State legislature was competent to acquire certain sugar undertakings, when the sugar industry had become a "declared" industry under the provisions of Entry 52 of List I read with Section 2 of the I.D.R. Act, arose for consideration in Ishwari Khetan Sugar Mills (P) Ltd. v. State of U.P.,[1980] 3. S.C.R. 331 . Answering this question in the affirmative, the Court observed:

The argument that the State legislature lacked competence to enact the impugned legislation is without force. Legislative power of the State under Entry 24, List II is eroded only to the extent control is assumed by the Union pursuant to a declaration made by the Parliament in respect of a declared industry as spelt out by the legislative enactment and the field occupied by such enactment is the measure of erosion. Subject to such erosion, on the remainder the State legislature will have power to legislate in respect of a declared industry without in any way trenching upon the occupied field. State legislature, which is otherwise competent to deal with industry under Entry 24, List II, can deal with that industry in exercise of other powers enabling it to legislate under different heads set out in Lists II and III and this power cannot be denied to the State.

The contention that the impugned Act is in violation of Section 20 of the Central Act has no merit. The impugned legislation was not enacted for taking over the

management or control of any industrial undertaking by the State undertakings. If an attempt was made to take over the management or control of any industrial undertaking in a declared industry the bar of Section 20 would inhibit exercise of such executive power. The inhibition of Section 20 is on the executive power but if as a sequel to an acquisition of an industrial undertaking the management or control of the industrial undertaking stands transferred to the acquiring authority Section 20 is not attracted. It does not preclude or forbid a State legislature exercising legislative power under an entry other than Entry 24 of List II and if in exercise of that legislative power the consequential transfer of management or control over the industry or undertaking follows as an incident of acquisition such taking over of management or control pursuant to an exercise of legislative power is not within the inhibition of Section 20.

The decisions in the above two cases were, again, applied in Western Coalfields Ltd. v. Special Area Development Authority, [1982] 2 S.C.R. 1 Here the question was whether the enactment of the Coal Mines Nationalisation Act, 1973 and. the M.M.R.D. Act. 1957 precluded the State legislature from providing for the levy of a property tax by the Special Area Development Authority, constituted under a 1973 Act of the State legislature, in respect of lands and buildings used for the purposes of and covered by coal mines. The plea on behalf of the appellant-coalfields was that the State Act was invalid (a) as it encroached on the field vested in the center by reason of the declaration in Section 2 of the M.M.R.D. Act and (b) as it impeded the powers and functions of the Union under the Coal Mines Nationalisation Act, 1973 which had been enacted by Parliament "for acquisition of coal mines with a view to reorganising and restructuring such coal mines so to ensure the rational, coordinated and scientific development and utilisation of coal resources as best to subserve the common good". Rejecting this contention the Court held:

Apart from the fact that there is no data before us showing that the property tax constitutes an impediment in the achievement of the goals of the Coal Mines Nationalisation Act, the provisions of the M.P. Act of 1973, under which Special Areas and Special Area Development Authorities are constituted afford an effective answer to the Attorney General''s contention. Entry 23 of List II relates to "Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union". Entry 54 of List I relates to "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". It is true that on account of declaration contained in Section 2 of the Mines and Minerals (Development & Regulation) Act. 1957, the legislative field covered by Entry 23 of List II will pass on to Parliament by virtue of Entry 54, List I. But in order to judge whether, on that account, the State legislature loses its competence to pass the Act of 1973, it is necessary to have regard to the object and purpose of that Act and to the relevant provisions thereof, under which Special Area development Authorities are given the

power to tax lands and buildings within their jurisdiction. We have set out the objects of the Act at the commencement of this judgment, one of which is to provide for the development and administration of Special Areas through Special Area Development Authorities. Section 64 of the Act of 1973, which provides for the Constitution of the special areas, lays down by Sub-section (4) that: Notwithstanding anything contained in the Madhya Pradesh Municipal Corporation Act, 1956, the Madhya Pradesh Municipalities Act, 1961 or the Madhya Pradesh Panchayats Act, 1962, the Municipal Corporation, Municipal Council, Notified Area Committee or a Panchayat, as the case may be, shall, in relation to the special area and as from the date the Special Area Development Authority undertakes the functions under Clause (v) Or Clause (vi) of Section 68 ceases to exercise the powers and perform the function and duties which the Special Area Development Authority is competent to exercise and perform under the Act of 1973. Section 68 defines the functions of the Special Area Development Authority, one of which as prescribed by Clause (v), is to provide the municipal services as specified in Sections 123 and 124 of the Madhya Pradesh Municipalities Act, 1961. Section 69, which defines the powers of the Authority, shows that those powers are conferred, inter alia for the purpose of municipal administration. Surely, the functions, powers and duties of Municipalities do not become an occupied field by reason of the declaration contained in Section 2 of the Mines and Minerals (Development & Regulation) Act, 1957. Though, therefore, on account of that declaration, the legislative field covered by Entry 23, List II may pass on to the Parliament by virtue of Entry 54, List I, the competence of the State Government to enact laws for municipal administration will remain unaffected by our declaration.

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

The Court pointed out that Murthy provided a complete answer to the above contention. Chanan Mal and Ishwari Khetan, were referred to and Baijnath Kedia distinguished. The decision of the Madhya Pradesh High Court in Central Coalfields v. State of M.P., A.I.R. 1986 M.P. 33 also arose out of similar facts: The question for consideration was whether the functions, powers and duties of Municipalities and Special Area Development Authority (SADA) become an occupied field by virtue of Section 2 of the MMRD Act, 1957 and the powers vested in them to regulate construction activities relating to mining areas was ultra vires. It was found that

SADA had become the local authority to discharge the functions of a municipal administration under a State Act and that the regulation of construction activities was one of the aspects of municipal administration and management. In this situation, the question posed was answered in the negative following Ishwari Khetan, Western Coalfields and Chanan Mal.

35. Placing considerable reliance on the decisions in Chanan Mal, Ishwari Khetan and Western Coalfields, Sri Iyer contended that the State legislation in the present case is not vitiated by reason of the M.M.R.D. Act, 1957. He also pointed out that India Cement also does not consider in detail the reasonings in Hingir-Rampur and Tulloch but only refers to certain observations in the dissenting judgment of Wanchoo J. (as His Lordship then was) in the former case and urged that the entire matter requires careful consideration. He submitted that Tulloch and Western Coalfields represent two lines of cases which need reconciliation and that this task has not been attempted at all in India Cement.

36. On the other hand, leaned Counsel for the respondents submitted that the authority of the Constitution Bench in Western Coalfields-which endorsed Murthy-should be considered weak after India Cement-which has overruled Murthy. The present case, it is submitted, is closer to Baijnath Kedia. It is submitted that the principles of Tulloch have been referred to with approval in a number of cases [Karunanidhi, 1979-3SCR 254 at 277] Hind Stone and are too well settled to need any reconsideration.

37. It is clear from a perusal of the decisions referred to above that the answer to the question before us depends on a proper understanding of the scope of M.M.R.D. Act, 1957, and an assessment of the encroachment made by the impugned State legislation into the field covered by it. Each of the cases referred to above turned on such an appreciation of the respective spheres of the two legislations. As pointed out in Ishwari Khetan, the mere declaration of a law of Parliament that it is expedient for an industry or the regulation and development of mines and minerals to be under the control of the Union under Entry 52 or entry 54 does not denude the State legislatures of their legislative powers with respect to the fields covered by the several entries in List II or List III. Particularly, in the case of a declaration under Entry 54, this legislative power is eroded only to the extent control is assumed by the Union pursuant to such declaration as spelt out by the legislative enactment which makes the declaration. The measure of erosion turns upon the field of the enactment framed in pursuance of the declaration. While the legislation in Hingir-Rampur and Tulloch was found to fall within the pale of the prohibition, those in Chanan Mal, Ishwari Khetan and Western Coalfields were general in nature and traceable to specific entries in the State List and did not encroach on the field of the Central enactment except by way of incidental impact. The Central Act, considered in Chanan Mal, seemed to envisage and indeed permit State legislation of the nature in question.

38. To turn to the respective spheres of the two legislations we are here concerned with, the Central Act (M.M.R.D. Act, 1957) demarcates the sphere of Union control in the matter of mines and mineral development. While concerning itself generally with the requirements regarding grants of licences and leases for prospecting and exploitation of minerals, it contains certain provisions which are of direct relevance to the issue before us. Section 9, which deals with the topic of royalties and specifies not only the quantum but also the limitations on the enhancement thereof, has already been noticed. Section 9A enacts a like provision in respect of dead rent. Reference may also be made to Section 13 and Section 18, which to the extent relevant, are extracted here.

13 Power of Central Government to make rules in respect of minerals-

(1) The Central Government may, by notification in the Official Gazette, make rules for regulating the grant of 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 or any of the following matters, namely:

(i) the fixing and collection of fees for 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;

xxx xxx xxx xxx xxx

(m) the construction, maintenance and use of roads, power transmission lines, tramways, railways, aerial rope ways, pipe lines and the making of passages for water for mining purposes on any land comprised in a mining lease;

xxx xxx xxx xxx

(qq) The manner in which rehabilitation of flora and other vegetation such as trees and the like destroyed by reason of any prospecting a mining operations shall be made in the same area or in any other area selected by the Central Government (whether by way of reimbursement of the cost of rehabilitation or otherwise) by the person holding the prospecting licence or mining lease. Newly inserted by Act 37 of 1986.

Section 18, which originally laid a duty on the Central Government to take all such steps as may be necessary "for the conservation and development of minerals in India" has been amended by Act 37 of 1986 to cover steps "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 the scope of the rule-making power u/s 18(2) has likewise been enlarged. Section 25(1) reads thus:

25(1) Any rent, royalty, tax, fee or other sum due to the Government under this Act or the rules made thereunder or under the terms and conditions of any prospecting licence or mining lease may, on a certificate of such effect as may be specified by the State Government in this behalf by general or special order, be recovered in the same manner as an arrear of land revenue.

and Sub-section (2) provides, further, that all such "rent, royalty, tax, fee" etc. shall be a first charge on the assets of the holder of the prospecting licence or mining lease as the case may be.

39. If one looks at the above provisions and bears in mind that, in assessing the field covered by the Act of Parliament in question, one should be guided (as laid down in Hingir-Rampur and Tulloch) not merely by the actual provisions of the Central Act or the rules made thereunder but should also take into account matters and aspects which can legitimately be brought within the scope of the said statute, the conclusion seems irresistible, particularly in view of Hingir-Rampur and Tulloch, that the State Act has trespassed into the field covered by the Central Act. The nature of the incursion made into the fields of the Central Act in the other cases were different. The present legislation, traceable to the legislative power under Entry 23 or Entry 50 of the State List which stands impaired by the Parliamentary declaration under Entry 54, can hardly be equated to the law for land acquisition or municipal administration which were considered in the cases cited and which are traceable to different specific entries in List 11 or List III.

40. Sri Iyer contended that the object and purposes of the Orissa Act and its provisions were quite distinct and different from the objects and purposes of the Central Act with the result that the two enactments could validly coexist since they do not cover the same field. It was argued that the impugned Act was concerned with the raising of funds to enable panchayats and samithis to discharge their responsibilities of local administration and take steps for proper development of the areas (including mining areas) under their jurisdiction whereas the Central Act was concerned hot with any social purpose but merely with the development of the mineral resources of the country and as such the State legislation in this regard may also be treated as referable to Entry No. 5 of the State last as the statute in Western Coalfields (supra).

41. As to the reliance on Entry 5 of List II, it is plainly too tenuous. As pointed out by Sri Bobde, there is a difference between the ''object'' of the Act and its ''subject''. The object of the levy of the fees may be to strengthen the finances of local bodies but the Act has nothing to do with municipal or local administration. In this context, it may be pointed out that while Section 10 of the Orissa Act, as originally enacted, provided for a distribution of the cess collected among local bodies, an amendment of 1970 restricted the utilisation of the cess partly for primary education and partly for the above purpose. Even this was amended in 1976 whereafter there has been no restriction regarding the cess collected in respect of mining areas which form

part of the consolidated fund of the State. The levy has, therefore, ceased to be capable of being described as a fee. Even if its purpose is only to levy a fee, the fee can be described only as one with respect to ''land'' (Entry 18) if considered generally or with respect to mines and mineral development (Entry 23) if restricted to the nature of the issue before us. We shall discuss the relevance of Entry 18 later but, so far as Entry 23 is concerned, the State''s legislative competence is subject to the field covered by the Central Act. Turning therefore to the distinction sought to be made between the respective areas of operation of the two Acts the answer to this contention is provided by Hingir Rampur. The Constitution Bench first set out the scheme of the impugned Act thus:

The scheme of this Act thus clearly shows that it has been passed for the purpose of the development of mining areas in the State. The basis for the operation of the Act is the Constitution of a mining area, and it is in regard to mining areas thus constituted that the provisions of the Act come into play. It is not difficult to appreciate the intention of the State Legislature evidenced by this Act. Orissa is an underdeveloped State in the Union of India though it has a lot of mineral wealth of great potential value. Unfortunately its mineral wealth is located generally in areas sparsely populated with bad communcations. Inevitably the exploitation of the minerals is handicapped by lack of communications, and the difficulty experienced in keeping the labour force sufficiently healthy and in congenial surroundings. The mineral development of the State, therefore, requires that provision should be made for improving the communications by constructing good roads and by providing means of transport such as tramways, supply of water and electricity would also help. It would also be necessary to provide for amenities of sanitation and education to the labour force in order to attract workmen to the area. Before the Act was passed it appears that the mine owners tried to put up small length roads and tramways for their own individual purpose, but that obviously could not be as effective as roads constructed by the State and tramway service provided by it. It is on a consideration of these factors that the State Legislature decided to take an active part in a systematic development of its mineral areas which would help the mine owners in moving their minerals quickly through the shortest route and would attract labour to assist the excavation of the minerals. Thus there can be no doubt that the primary and the principal object of the Act is to develop the mineral areas in the State and to assist more efficient and extended exploitation of its mineral wealth.

A little later, at page 559, the provisions of Central Act LIII of 1948 which were less far reaching than those of the 1957 Act-as can be seen from the observations at page 476 of Tulloch- were analysed and the Court concluded:

Amongst the matters covered by Section 6(2) is the levy and collection of royalties, fees or taxes in respect of minerals mined, quarried, excavated or collected. It is true that no rules have in fact been framed by the Central Government in regard to the

levy and collection of any fees; but, in our opinion, that would not make any difference. If it is held that this Act contains the declaration referred to in Entry 23 there would be no difficulty in holding that the declaration covers the field of conservation and development of minerals, and the said field is indistinguishable from the field covered by the impugned Act. What Entry 23 provides is that the legislative competence of the State Legislature is subject to the provisions of List I with respect of regulation and development under the control of the Union, the Entry 54 in List I requires a declaration by Parliament by law that regulation and development of mines should be under the control of the Union in public interest. therefore, if a Central Act has been passed for the purpose of providing for the conservation and development of minerals, and if it contains the requisite declaration, then it would not be competent to the State Legislature to pass an Act in respect of the subject matter covered by the said declaration. In order that the declaration should be effective it is not necessary that rules should be made or enforced; all that this required is a declaration by Parliament that it is expedient in the public interest to take the regulation and development of mines under the control of the Union. In such a case the test must be whether the legislative declaration covers the field or not. Judged by this test there can be no doubt that the field covered by the impugned Act is covered by the Central Act LIII of 1948.
The following observations in Tulloch are also apposite in this context:

On the other hand, Mr. Setalvad-learned Counsel for the respondent-urged that the Central Act covered the entire field of mineral development, that being the "extent" to which Parliament had declared bylaw that it was expedient that the Union should assume control. In this connection he relied most strongly on the terms of Section 18(1) which laid a duty upon the Central Government "to take all such steps as may be necessary for the conservation and development of minerals in India and "for that purpose the Central Government may, by notification, make such rules as it deems fit". If the entire field of mineral development was taken over, that would include the provision of amenities to workmen employed in the mines which was necessary in order to stimulate or maintain the working of mines. The test which he suggested was whether, if under the power conferred by Section 18(1) of the Central Act, the Central Government has made rules providing for the amenities for which provision was made by the Orissa Act and if the Central Government had imposed a fee to defray the expenses of the provision of these amenities, would such rules be held to be ultra vires of the Central Government, and this particularly when taken in conjunction with the matters for which rules could be made u/s 13 to which reference has already been made. We consider there is considerable force in this submission of leaned Counsel for the respondent, and thus would require very detailed and careful scrutiny. We are, however, relieved from this task of detailed examination and discussion of this matter because we consider that it is concluded by a decision of the Court in the Hingir-Rampur Coal Co. Ltd & Ors. v. The State of Orissa & Ors., [1961] 2.S.C.R. 537

The above argument was accepted by the Court, vide page 476. Reference may also be made here to the recent decision of this Court in Bharat Coking Coal v. State of Bihar [1990] 2 Scale 256. The question whether the State of Bihar had the authority to grant a lease for lifting coal slurry coming out of the appellants'' washeries and getting deposited on the river bed or other lands was answered in the negative. The Court came to the conclusion that the ''slurry'' was a ''mineral'' and that its regulation was within the exclusive jurisdiction of Parliament. The Court, in coming to the conclusion, held that no rules had been framed u/s 18(1) or 18(2)(k)-disposal or discharge of waste, slime or tailing arising from any mining or metallurgical operations carried out but held that this was immaterial in view of the principles laid down in Hingir Rampur, Tulloch and Baijnath Kedia. These observations establish on the one hand that the distinction sought to be made between mineral development and mineral area development is not a real one as the two types of development are inextricably and integrally interconnected and, on the other, that, fees of the nature we are concerned with squarely fall within the scope of the provisions of the Central Act. The object of Section 9 of the Central Act cannot be ignored. The terms of Section 13 of the Central Act extracted earlier empower the Union to frame rules in regard to matters concerning roads and environment. Section 18(1) empowers the Central Government to take all such steps as may be necessary for the conservation and development of minerals in India and for protection of environment. These, in the very nature of things, cannot mean such amenities only in the mines but take in also the areas leading to and all around the mines. The development of mineral areas is implicit in them. Section 25 implicitly authorises the levy of rent, royalty, taxes and fees under the Act and the rules. The scope of the powers thus conferred is very wide. Read as a whole, the purpose of the Union control envisaged by Entry 54 and the M.M.R.D. Act, 1957, is to provide for proper development of mines and mineral areas and also to bring about a uniformity all over the country in regard to the minerals specified in Schedule I in the matter of royalties and, consequently prices . Sri Bobde, who appears for certain Central Government undertakings, points out that the prices of their exports are fixed and cannot be escalated with the enhancement of the royalties and that, if different royalties were to be charged in different States, their working would become impossible. There appears to be force in this submission. As pointed out in India Cement, the Central Act bars an enhancement of the royalty directly or indirectly, except by the Union and in the manner specified by the 1957 Act, and this is exactly what the impugned Act does. We have, therefore, come to the conclusion that the validity of the impugned Act cannot be upheld by reference to Entry 23 or Entry 50 of List II.

42. An attempt was made to rest the legislation on Entry 18 of List II viz. ''land''. This attempt cannot succeed for the reasons which we have set out to negative the plea that it falls under Entry 49. A similar plea in Baijnath was rejected by Hidayatullah C. J. in the following words:

Mr. L.N. Sinha argued that the topic of legislation concerns land and therefore falls under entry 18 of the State List and he drew our attention to other provisions on the subject of mines in the Land Reforms Act as originally passed. The abolition of the rights of intermediaries in the mines and vesting these rights as lessors in the State Government was a topic connected with land and land tenures. But after the mining leases stood between the State Government and the lessees, any attempt to regulate those mining leases will fall not in entry 18 but in entry 23 even though the regulation incidentally touches land. The pith and substance of the amendment to Section 10 of the Reforms Act falls within entry 23 although it incidentally touches land and not. vice versa. therefore this amendment was subject to the overriding power of Parliament as declared in Act 67 of 1957 in Section 15. Entry 18 of the State List, therefore, is no help.

It will be seen that, if the levy in question cannot be described as a tax on land, it cannot be described as fee with regard to land either.

For the reasons above mentioned, we hold that the levy of cess u/s 5 to 7 of the Orissa Cess Act, 1962 is beyond the competence of the State Legislature.

Bihar:

The relevant provisions of the Bihar statutes have been set out earlier. While Section 5 only lays down that all immovable property shall be liable to a local cess and Section 6 provides fot the levy to be based on the annual value of lands and sale value of other immovable properties, the latter section specifically enacts that the cess will be on royalty from mines and quarries and on the annual net profit of railways and tramways. The further amendments to Section 6 have not changed this basic position. Though the section refers also to the value of the mineral-bearing land, that furnishes only the maximum upto which the cess, based on royalty, could go. In other words, the cess is levied directly on royalties from mines and quarries. The case is, therefore, indistinguishable from India Cement. The notifications place the matter beyond all doubt. The levy is a percentage or multiple of the royalty depending upon the kind of mineral and-in the case of iron ore-the method of extraction and nature of the process employed. There are no clear indications in the statute that the amounts are collected by way of fee and not tax. The provisions of Section 9 extracted earlier would indicate that only a small percentage goes to the district fund and the remaining forms part of the consolidated fund of the State "for the construction and maintenance of other works of public utility". However, the proviso does require at least ten per cent to be spent for purposes relating to mineral development. We shall, therefore, assume that the levy can be treated, in part, as a fee and, in part, as a tax. But even this does not advance the case of the respondents for the reasons already discussed.

Sri Chidambaram submits that, in the original counter affidavit filed on behalf of the State, no case was sought to be made out that it was a tax on land; the case was that

it was a "tax on mineral rights". He urged that, this being out of question because of India Cement. (paras 23 and 30) a belated attempt is made to bring it under Entry 49. We do not need to discuss the contentions here in detail because this is a clearer case of levy on royalty than in Orissa; and, for the reasons we have outlined in our discussion in regard to the Orissa Acts, this levy has also to be declared invalid.

Sri Chidambaram also contended that the State cannot seek sustain the levy by relying on Article 277 of the Constitution, in view of the fact that the cess is being levied since 1880. Article 277 is in these terms:

Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law.

We think, as rightly contended by Sri Chidambaram that a reliance on Article 277 will be misplaced for three reasons:

(a) The levy that is challenged is u/s 6, as amended in 1975, i.e. a post-constitution levy;

Section 6, on its own language, is operative only "until provision to the contrary is made by the Parliament" and, as we have held that the field is covered by the M.M.R.D. Act, it supersedes the effect of Section 6 re: mineral lands; and

(c) Article 277 only saves taxes, duties, and cesses mentioned therein if they continue to be applied for the same purposes and until Parliament by law provides to the contrary and with the enactment of the M.M.R.D. Act, 1957, they cease to be valid. In this context, the following observations of this Court in Ramakrishna Ramanath v. Janpad Sabha [1962] Supp 3 SCR 70 quoted in Town Municipal Committee v. Ramachandra, [1964] 6 SCR 947 are quite apposite:

Dealing next with the import of the words ''may continue to be levied'' the same was summarised in these terms:

(1) The tax must be one which was lawfully levied by a local authority for the purpose of a local area,

(2) the identity of the body that collects the tax, the area for whose benefit the tax is to be utilised and the purposes for which the utilization is to take place continue to be the same, and

(3) the rate of the tax is not enhanced nor its incidence in any manner altered, so that it continues to be the same tax.

It is obvious that if these tests were applied the attempt to sustain the tax on the basis of Article 277 cannot succeed. Indeed, no such attempt was made before us.

We, therefore, hold that the levy of cess has to be struck down. It has also been brought to our notice that a Bench of two Judges of this Court has already allowed an appeal by an assessee from a judgment of the Patna High Court to the contrary viz. CA No. 1521 of 1990. It has been brought to our notice also that the Patna High Court has recently invalidated the levy of the cess in Central Coalfields Ltd. v. State (CWJC 2085/89 and connected cases) in a judgment dated 6.11.90, following India Cement.

Madhya Pradesh:

We now turn to the provisions of Madhya Pradesh Act 15 of 1982. We are concerned only with Part IV which levies a cess not on land in general which could be referred to Entry 18 or Entry 49 but only on land held in connection with mineral rights which, in the State, are principally in regard to coal and limestone. u/s 9 the proceeds are to be utilised only towards the general development of mineral-bearing areas. Although there is no provision for the Constitution of a separate fund for this purpose as is found in relation to the cesses levied under Part II or Part III of the Act this considerations alone does not preclude the levy from being considered as a fee: vide, Srinivasa Traders V. STate [1983] 3.SCR 843 at 873 . The clear ear-marking of the levy for purposes connected with development of mineral areas was considered by the High Court, in our view rightly, sufficient to treat it as a fee. However, the High Court pointed out, such fee would be referable to item 23 and, hence, out of bounds for the State Legislature, after the enactment of the M.M.R.D. Act, 1957. For the reasons which have already been discussed in relation to the Orissa Statute, we uphold this conclusion.

The other statute viz. the Madhya Pradesh Upkar Adhiniyam (Act 1 of 1982) came up for the consideration of a Full Bench of the Madhya Pradesh High Court in M.P. Lime Manufacturer's Association v. State, (and connected cases) in AIR 1989 M.P. 264. The Full Bench held that, in view of Section 12 of the Act having been deleted by the 1989 amendment, the levy u/s 11 of the Act ceased to be a fee and become a tax. It held further that the levy was not covered by Entry 49 or Entry 50 of List II and was, therefore, ultra vires. It observed:

It is significant to note that cess is not imposed on all land and that it is not dependent either on the extent of the land held in connection with mineral rights or on the value thereof. The subject-matter of tax, therefore, is major mineral raised from the land held in connection with mineral right. If no minerals are raised, tax is not leviable. The tax is not dependant on the extent of the land held in connection with mineral rights. It is not a case where all land is liable to payment of cess, that the liability is assessed on the basis of the value of the land and that the measure of the tax in so far as land held under a mining lease is concerned, is the value of the

minerals produced. Under the impugned Act, value of the land or of the minerals produced does not play any part in the levy of cess. The quantity of major minerals produced from the land determines the liability to pay tax. In these circumstances, the impugned levy cannot be held to be a tax on land which is covered by Entry 49 of the State List.

After distinguishing Ajay Kumar Mukherjea v. Local Board, AIR 1965 SC 1561 and referring to Union v. Bombay International Ltd. AIR 1984 SC 420 the Court concluded:

The character of impost in the instant case is that though in form it appears to be a tax on land, in substance, it is a tax on minerals produced therefrom. The subject-matter of tax is, therefore, not covered by Entry 49 of the State List.

As for Entry 50, after referring Hingir Rampur, the Court observed:

Now from a perusal of Section 11 of the Act, it would be clear that in the instant case by the charging section, tax is not imposed on the mineral rights of every holder of mining lease. The tax is levied on minerals produced in land held under mining lease. In these circumstances, the tax levied by the Act cannot be held to be a tax covered by Entry 50 of List II of the Seventh Schedule to the Constitution. In our opinion, therefore, it has not been shown that the State Legislature is competent to levy the impugned cess.

This conclusion is obviously correct in the light of our earlier discussion. The court, however, expressed an opinion, in paras 10 to 12 of the judgment, that in case the levy could be treated as a tax imposable under Entry 49 or 50 of List II in the Second Schedule to the Constitution, such power "has not been taken away by the provisions of the MMRD Act". We think, as already pointed out by us that though the MMRD Act, 1957, unlike Section 6(2) of the 1948 Act, does not contain a specific provision for the levy of taxes, Section 25 of the former does indicate the existence of such power. The above observations of the High Court, therefore, in our view, do not attach sufficient importance to Section 25 of the MMRD Act and the field covered thereby. This aspect, however, is not of significance in view of the conclusion that the tax is not referable to Entry 49 or Entry 50.

We may add that a Bench of this Court has already dismissed the State''s petition for leave to appeal from the judgment of the Full Bench (S.L.P. 10052/89, 12696/84 etc. disposed of on 5.2.90) in limine as squarely covered by India Cement. It is brought to our notice that the Madhya Pradesh High Court, after India Cement, has reaffirming its conclusions in Hiralal and M.P. Lime Manufacturers'' Association in Ankur Textiles and Anr. v. South Eastern Coalfields (M.P. No. 1547 of 1990) in the light of India Cement.

THE REFUND ISSUE

43. Having thus concluded that the levy of cess under the Orissa, Bihar and Madhya Pradesh enactments is invalid, it becomes necessary to consider the logical consequences of such a conclusion. Prima facia it would seem that the levy should be considered bad since its inception and that all cess levied under the impugned provisions should be directed to be refunded to the assessees, particularly in view of Article 265 of the Constitution. For the States, however, reliance is placed on the following observations in para 35 of the judgment in India Cement to contend to the contrary. Towards the conclusion of his judgment, Sabyasachi Mukherjee, C.J. dealt with this issue thus:

Mr. Krishnamurthy Iyer, however, submitted that, in any event, the decision in H.R.S. Murthy case was the decision of the Constitution Bench of this Court. Cess has been realised on that basis for the organisation of village and town panchayats and comprehensive programme of measures had been framed under the National Extension of Service Scheme to which our attention was drawn. Mr. Krishnamurthy Iyer further submitted that the Directive Principles of State Policy embodied in the Constitution enjoined that the State should take steps to organise village panchayats and endow them with power and authority as may be necessary to enable them to function as units of self-government and as the amounts have been realised on that basis, it at all, we should declare the said cess on royalty to be ultra vires prospectively. In other words, the amounts that have been collected by virtue of the said provisions, should not be declared to be illegal retrospectively and the State made liable to refund the same. We see good deal of substance in this submission. After all, there was a decision of this Court in H.R.S. Murthy case and amounts have been collected on the basis that the said decision was the correct position. We are, therefore, of the opinion that we will be justified in declaring the levy of the said cess to be ultra vires the power of the State Legislature prospectively only.

44. Relying on the above observations, it is submitted for the States that they should not be directed to refund a cess which they have been levying for several years in the past on the basis of the law declared by the Supreme Court in Murthy. Certain other circumstances have also been brought to our notice in this connection:

(i) Several States have proceeded on the basis that they are entitled to levy a cess of the nature in question. In addition to the States referred to earlier in the judgment, Rajasthan and Andhra Pradesh have also similar statutes.

(ii) The levy accounts for a substantial part of the States1 finances particularly in States which are rich in minerals. For e.g. State of Madhya Pradesh accounts for a good percentage of this country''s mineral resource. It produces 26.53% of the country''s production in limestone, 36% in dolomite, 28.14% in coal, 21.5% in iron ore, 13% in bauxite, 21.38% in Manganese ore, 14.43% in rock phosphate, 33% in copper ore and so on. The amounts of cess run to several crores. A direction to refund the cess collected thus far will result in crying halt to all developmental

activities initiated and put through and cause irreparable loss to the State.

(iii) As pointed out (for e.g. in paras 5 to 8 in CMP Nos. 31187 to 31196 of 1984 filed in CA Nos. 1640 to 1643, 1645, 1649, 1654, 1655, 1659, and 1662 of 1986) the impact of the cess has already been passed on by the assesses-which are leading industries that can easily bear the brunt of the same-to their customers. A refund granted to them will only result in their unjust enrichment and this should be safeguarded against by applying the principles in U.P. State Electricity Board, Lucknow & Ors. v. City Board, Mussoorie & Ors., [1985] 2 SCR 815 at page 824 and State of Madhya Pradesh v. Vyankatlal & Anr., [1985] 3 SCR 561 .

45. The above request was vehemently opposed by the assessees'' counsel. Presenting their case on this issue, Sri Nariman (appearing for the appellants in C.A. 4353-4 of 1983 and C.A. 2053-80 of 1980) contended that we should ignore the dicta in para 35 of India Cement as per incuriam. He submitted, first, that the Court there has acted on the assumption that a doctrine of prospective overruling had been enunciated in Golaknath, [1967] 2 SCR 762 . Analysing the various judgments delivered in that case, he submitted that, while Subba Rao C.J. and four other judges (pp. 805-813) approved of the applicability of this doctrine in India, five other judges spoke against it (pp. 890, 897, 899-922, 921 and 952) and the eleventh judge was neutral (p. 948). He, therefore, submitted that the judges who decided Golaknath were equally divided on the issue and so there is no ratio decidendi of the Court binding on us. Second, he submitted that the doctrine of prospective overruling was evolved by the Supreme Court of the United States in the absence of any constitutional provision militating against it, vide: Sunburst 11 L.Ed. 310 and Linkletter, 14 L.Ed. (2d) 601 . In India, however, the application of the doctrine, particularly in the context of an issue regarding the validity of a tax levy, would run counter to specific provisions contained in Articles 246 and 265 of the Constitution. Where the Court finds that a legislation is beyond the competence of the concerned legislature, it stands uprooted altogether because Articles 246 and 265 say so. There is no scope for, and no room for the exercise of any discretion by, the Court to say that, these articles of the Constitution notwithstanding, they would treat the legislation to be valid for a certain period or for certain purposes. Third, he submitted that the above objection cannot be "circumvented" by a resort to Article 142. Sri Nariman referred us in this context to the observations in the following decisions of this Court:
Re: Article 246

Pesikaka1955-1 SCR 613 at pp652,654,656

Chamarbaugwala 1857 SCR 930 at p. 940

Sundararamier & Co 1958 SCR 1422 at pp 1468-1474

West Ramnad 1963-2 SCR 747 at p.764

M.L. Jain 1963 Supp. 1 SCR 912

Re: Article 265

Moopil Nayar 1961-3 SCR 77 at p. 89

Balaji 1962-2 SCR 983 at p. 996

Chottachan 1962 Supp. 2 SCR 1 at pp. 29-30

Bakshi Singh 1963-1 SCR 220 at p. 233

Re: Article 142

Garg 1963 Supp. 1 SCR. 896

It is submitted, relying on Mahabir Kishore Ors. v. State of Madhya Pradesh, [1989] 4 SCC 1 that a refund is the automatic and inevitable consequence of the declaration of invalidity and should be granted provided a suit within the period of limitation or a writ for declaration and consequential relief is filed.

46. Supplementing the above arguments, Sri G. Ramaswamy, appearing for some of the assessees, contended that there can be no question of the Court exercising any discretion under Article 142 so as to destroy a fundamental right of the assessees. Leaned Counsel also submitted that considerations of hardship of the States, in case they are called upon to refund huge amounts, can be no relevant consideration at all. He urged, that in some at least of the cases here, there is no averment, much less evidence, of any irreparable hardship that is likely to result if a refund is ordered. He also pointed out that, in the converse situation where a retrospective levy is held to be valid, asses-sees have been held entitled to no relief from payment of back duty on grounds of hardship: vide, Chhotabhai Jethabhai Patel & Co. v. Union of India [1962] 2 Supp. SCR 1 and urged that there cannot be a different rule for the State. Sri B. Sen submitted that the ruling in Murthy could not be invoked to seek prospective invalidation as, at least so far as Orissa was concerned, as the decision in Tulloch had clearly defined the limitations on the State''s power to make such levies.

47. In addition to the above general arguments, reliance had also been placed by the assessees on certain specific interim orders passed in these cases and it has been contended that these orders should be given effect to, or at least taken into account, in deciding the issue of the final relief to be granted. It is, therefore, necessary to refer to these orders:

(i) In C.A. Nos. 4353-4 of 1983, there is no interim order staying recovery of the cess at all except of the arrears for the period from 1.1.1983 to 31.3.1983 and even this was made subject to the furnishing of a bank guarantee by the assessee.

(ii) In C.A. 2053-80 of 1980 there was initially (on 2.2.1981) an order of stay of recovery of cess on the furnishing of bank guarantees. But this was later substituted

by an order of 25.3.1983 by which the amounts of cess were to be deposited in the High Court every quarter and then withdrawn by the State but this was on the undertaking by the State''s Advocate General to refund the amount "if deposited, in the event the appeal succeeds". This continued till 30.1.90 when the Counsel for the State of Orissa undertook, in view of the decision in India Cement, that the levy of the cess for the quarter ending December 1989 onwards will not be enforced until further orders. Presumably, therefore, there has been no collection of cess in Orissa since that period.

(iii) The position in the Orissa case of Orient Paper & Industries Ltd. is somewhat different. It is pointed out that when the levy of cess first came into force w.e.f. 1.4.1977, the Western Coalfields Ltd. who supplied coal to the assessees had challenged the levy of cess by a writ petition and obtained an interim injunction order but eventually withdrew the writ petition. But, simultaneously, the said company wrote to the assessee that the amounts of cess (which were collected from the assessee) would be kept in a suspense account and that, after a decision is rendered by a court of law, it will be decided whether they should be deposited with the State against cess or should be refunded to the assessees. It was made clear that, in case the levy of cess is held invalid, "there will be no hitch in refunding the amount". This arrangement went on between 1977 and 1982.

48. On 21.9.1982, the assessee filed a writ petition challenging the levy as it was enhanced from 25% to 100% from 1.4.1980. An interim stay was granted by the High Court restricted to the enhanced demand but even this was vacated by the High Court on 13.5.1983 in view of the decision in Lakshmi Narain Agarwala v. State AIR 1983 Orissa 210 that the levy was valid. Finally, the High Court by its judgment dated 22.12.1989 followed India Cement and allowed the writ but directed that the collections so far made shall be allowed to be retained by the State as was directed by the Supreme Court in the case of India Cement (supra). This judgment is the subject matter of SLP 1479 of 1990 by the State.

49. The assessee thereupon filed a review petition in regard to the above direction contending; (a) that a High Court had no jurisdiction to declare provision to be unconstitutional only "prospectively"; (b) that the cess in the case had been collected only by Western Coalfields Ltd. and had not been deposited in the State coffers; and (c) that the principle of ''unjust enrichment'' should equally apply to the State which should not be permitted to enrich itself by the levy of an illegal exaction. The application for review was dismissed by the High Court on 13.7.90. Thereupon the assessee has preferred the unnumbered SLP of 1990 and SLP 11939 of 1990 respectively against the original judgment dated 22.12.1989 and the order on the review petition dated 13.7.1990.

It is contended that the High Court, having regard to the circumstances set out earlier, should have directed a refund of the cess collected. It is stated that, subsequently, Western Coalfields have paid over the amounts of cess to the

Government [vide, orders of this Court referred to in sub para (v) below]. It is also submitted that the averments by the State now made that the amounts collected have been utilised by the State on objects enumerated in Part IV of the Constitution are the result of an afterthought and are being put forward to defeat the rightful entitlement of the assessee to the refund.

(iv) In the Bihar case, there was an interim order on 10.2.1986 to the following effect:

On the stay application there will be no stay of recovery of cess but in case appellants succeed in appeal in this Court, the excess amount so recovered will be paid to the appellants with interest at the rate of 12% from the date of recovery

This was modified on 30.1.90 in view of the judgment in India Cement which had been delivered by this time, and it was directed that the State of Bihar should not also enforce any demand for cess for the quarters ending December, 1989 and thereafter until further orders. Presumably, therefore, there has been no levy of cess in Bihar from the last quarter of 1989 onwards. Counsel for the assessees from Bihar-Sri Chidambaram and Sri Shanti Bhushan stated that they seek compliance with the order dated 10.2.86 and would not insist on refund of cess collected earlier to that date.

(v) Turning to the Madhya Pradesh matters, the position is this. The High Court, by its judgment dated 28.3.1986 held the levy to be invalid. In C.A. 1640 to 1662 of 1986, the initial order passed on 2.5.1986 was this:

There will be stay of refund of the cess already collected pending disposal of the appeals. Leaned Counsel for the State states that, in the event of the appeals being dismissed the State is prepared to pay interest at 12% per annum. There will, however, be no stay of operation of the judgment.

As a result of the order, there should have been no collection of cess by the State subsequent to the date of the judgment and the only issue could have been regarding the refund of the cess already collected from 1982 to 28.3.1986.

50. However, the Western Coalfield Ltd. approached the Court with an application in one of the appeals (viz. C.A. 1649/86) praying that, pending disposal of the appeals, it should be permitted to collect the amount of cess and deposit the same in a separate account in the Bank vis-a-vis each of its customers. This application was ordered on 1.8.86. When this order was passed, the State Government moved an application praying that, instead of the monies being kept in deposit in bank account by Western Coalfields Ltd., it will be conducive to public interest if the State is permitted to utilise the moneys "in mineral areas development programs" and that the State would abide by such terms as the Court may impose at the time of final decision. It was, therefore, prayed that the Western Coalfields should be directed to deposit the amounts collected by it to the State Government. The Court found this request reasonable and passed the following order on 15.10.86:

The order dated 1.8.86 passed in the above appeal is modified as follows:

The amount deposited by the Western Coalfields Ltd. in a separate account in the Bank in accordance with the directions issued by this Court on 1.8.1986 shall be paid to the State Government of Madhya Pradesh. In the event of the State Government failing in this appeal, the amount received by the Madhya Pradesh Government under this order shall be refunded by that Government within three months from the date of the judgment to the Western Coalfields Ltd. with interest at 12% per annum to disburse it in favour of those who had paid it, subject to such directions which this Court may give in its judgment. The amount received by the Madhya Pradesh State Government shall be spent in accordance with the provisions contained in the impugned Act.

Fresh applications were filed by the State in a number of the other appeals seeking similar directions as in C.A. 1649/86 but the record does not show that any such orders were passed in appeals other than C.A. 1649/86. However, it seems that, in the case of coal, the cess is being collected by Western Coalfields Ltd. and other like public sector organisations (which are subsidiaries of Coal India Ltd.) from all their customers and passed on to the State not only in Madhya Pradesh but also in Orissa (as indicated in sub-para [iii] above), apparently on the understanding that it should be refunded by the concerned State Government with interest in case the levy is ultimately held invalid. Sri Bobde, appearing for the Western Coalfields, made it clear that this company would abide by the directions of this Court, in so far as the amounts of cess collected by it remain with it or are directed to be refunded by the State Government to it.

51. We have given our earnest consideration to these contentions and we are of opinion that the ruling in India Cement concludes the issue. There the Court was specifically called upon to consider an argument that, even if the statutory levy should be found invalid, the Court may not give directions to refund amounts already collected and the argument found favour with the bench of seven Judges. We are bound by their decision in this regard. It is difficult to accept the plea that, in giving these directions, the Court overlooked the provisions of Articles 246 and 265 of the Constitution. The Court was fully aware of the position that the effect of the legislation in question being found beyond the competence of the State legislature was to render it void ah initio and the collections made thereunder without the authority of law. Yet the Court considered that a direction to refund all the cesses collected since 1964 would work hardship and injustice. The directions, now impugned, were given in the interests of equity and justice after due consideration and we cannot take a contrary view.

52. In our view, we need not enter into a discussion on the principles of prospective validation enunciated by at least some of the Judges in Golaknath (supra) as the direction in'' India Cement can be supported on another well settled principle applicable in the area of the writ jurisdiction of Courts. We are inclined to accept the

view urged on behalf of the State that a finding regarding the invalidity of a levy need not automatically result in a direction for a refund of all collections thereof made earlier. The declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof are two different things and, in the latter sphere, the Court has, and must be held to have, a certain amount of discretion. It is a well-settled proposition that it is open to the Court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice. It will be appreciated that it is not always possible in all situations to give a logical and complete effect to a finding. Many situations of this type arise in actual practice. For instance, there are cases where a Court comes to the conclusion that the termination of the services of an employee is invalid, yet it refrains from giving him benefit of "reinstatement" (i.e. continuity in service) on "back wages". In such cases, the direction of the Court does result in a person being denied the benefits that should flow to him as a logical consequence of a declaration in his favour. It may be said that, in such a case, the Court''s direction does not violate any fundamental right as happens in a case like this where an "illegal" exaction is sought to be retained by the State. But even in the latter type of cases relief has not been considered automatic. One of the commonest issues that arose in the context of the situation we are concerned with is where a person affected by an illegal exaction files an application for refund under the provisions of the relevant statute or files a suit to recover the taxes as paid under a mistake of law. In such a case, the Court can grant relief only to the extent permissible under the relevant rules of limitation. Even if he files an application for refund or a suit for recovery of the taxes paid for several years, the relief will be limited only to the period in regard to which the application or suit is not barred by limitation. If even this instance is sought to be distinguished as a case where the Court''s hands are tied by limitations inherent in the form or forum in which the relief is sought, let us consider the very case where a petitioner seeks relief against an illegal exaction in a writ petition filed under Article 226. In this situation, the question has often arisen whether a petitioner''s prayer for refund of taxes collected over an indefinite period of years should be granted once the levy is found to be illegal. To answer the question in the affirmative would result in discrimination between persons based on their choice of the forum for relief, a classification which, prima facie is too fragile to be considered a relevant criterion for the resulting discrimination. This is one of the reasons why there has been an understandable hesitation on the part of Courts in answering the above question in the affirmative.

53. The above aspect of the matter has been considered in several decisions of this Court. In State of Madhya Pradesh v. Bhailal Bhai & ORs., [1964] 6 SCR 261 the respondents who were dealers in tobacco in the State of Madhya Bharat filed a writ petition under Article 226 of the Constitution for the issue of writ of mandamus directing the refund of sales tax collected from them on the ground that the

impugned tax was violative of Article 301(a) of the Constitution and that they had paid the same under a mistake of law. It was contended on behalf of the State that even if the provision violated the fundamental rights, the High Court should not exercise its discretionary power of issuing a writ of mandamus directing refund since there was unreasonable delay in filing the petition. This contention of the State was rejected by the High Court but on further appeal this Court took a different view. While agreeing that the Courts have the power, for the purposes of enforcement of fundamental rights and statutory rights, to give a consequential relief by ordering repayment of any money realised by the Government without authority of law, the Court said:

At the same time we cannot lose sight of the fact that the special remedy provided under Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking the special remedy and what excuse there is for it. Another matter which can be rightly taken into consideration is the nature of the facts and law that may have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the Court for relief under Article 226 on the allegations that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, if it the Court, finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, it is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule of universal application. It may however be stated as a general rule that if there has been unreasonable delay, the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus.

The Court further pointed out that the delay may be considered unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable. The relief given by the High Court was modified on this basis. In Tilokchand Mothichand v. Munshi [1969] 2 S.C.R., 824 the petitioners had collected sales tax from their customers and paid it over to the State. The Sales Tax Authorities directed a refund but on the condition that the amounts should be passed on to the customers. Since the petitioners did not comply with the condition, the sales tax officer forfeited the sum u/s 21(4) of the Bombay Sales Tax Act, 1953. A writ petition was filed by the petitioners contending that Section 21(4) infringed Articles 19[1](f)] and 265 of the Constitution and, hence, they were not

liable to repay the amount. This was dismissed on the ground that they had defrauded their customers and, therefore, not entitled to any relief even if there was a violation of fundamental rights. An appeal to a Division Bench was also dismissed. Subsequently, when coercive proceedings were taken for recovering the amounts as arrears of land revenue, the petitioners paid the amounts in 1959-60. Much later, there was a decision of this Court striking down the corresponding provision of the Bombay Sales Tax Act 1946 as ultra vires. The petitioners thereupon filed a writ petition under Article 32 of the Constitution claiming a refund of the amounts paid by them in consequence of the recovery-proceedings. It was held by four of the five learned Judges of this Court that the writ petition should be dismissed on the ground of laches. Chief Justice Hidayatullah held that though Article 32 gives the right to move the Court by appropriate proceedings for enforcement of fundamental rights and the State cannot place any hindrance in the way of an aggrieved person, once the matter reached this Court, the extent or manner of interference was for the Court to decide. The learned Chief Justice pointed out that this Court had put itself in restraint in the matter of petitions under Article 32. For example, if a party had already moved High Court under Article 226, this Court would refuse to interfere. Similarly, in inquiring into belated and stale claims, this Court should take note of evidence of neglect of the petitioner''s own rights for a long time or of the rights of innocent parties which might have emerged by reason of the delay. It was not possible for this Court to lay down any specific period as the ultimate limit of action and that each case will have to be considered on its own facts. On the facts of the case before it, the majority found that the petitioner had by his own conduct abandoned his litigation years ago and could not be permitted to resume it several years later merely because some other person had got the statute declared unconstitutional. While Hidayatullah C.J. was of the view that the Court should not, on the facts of the case, apply the analogy of the article in the Limitation Act in cases of mistake of law give relief, Bachawat and Mitter JJ. felt that even for a writ petition the limitation period fixed for a suit would be a reasonable standard for measuring delay. Sikri J. and Hegde J. dissented. Sikri J. was of the view that on the facts of the case there was no delay but that the period under the Limitation Act should not be applied to such cases and that a period of one year should be taken as the period beyond which the claim would be considered a stale claim unless the delay is explained. "Such a practice", the learned Judge observed, "would not destroy the guarantee under Article 32 because the article nowhere lays down that a petition however late, should be entertained. Only Hegde J. was emphatic that laches or limitation should be no ground to deny relief. The learned Judge observed (for brevity, we quote from head note):

Since the right given to the petitioners under Article 32 is itself a fundamental right and does not depend on the discretionary powers of this Court, as in the case of Article 226, it is inappropriate to equate the duty imposed on this Court to the powers of Chancery Court in England or the equitable jurisdiction of Courts in the

United States. The fact that the petitioners have no equity in their favour is an irrelevant circumstance in deciding the nature of the right available to an aggrieved party under Article 32. This Court is charged by the Constitution with the special responsibility of protecting and enforcing the fundamental rights, and hence laches on the part of an aggrieved party cannot deprive him of his right to get relief under Article 32. In fact, law reports do not show a single instance of this Court refusing to grant relief on the ground of delay. If this Court could refuse relief on the ground of delay, the power of the Court under Article 32 would be a discretionary power and the right would cease to be a fundamental right. The provisions contained in the Limitation Act do not apply to proceedings under Articles 226 and 32 and if these provisions of the Limitation Act are brought in indirectly to control the remedies conferred by the Constitution, it would be a case of Parliament indirectly abridging the fundamental rights which this Court, in Golaknath''s case. [1967] 2 S.C.R. 752 held that Parliament cannot do. The fear that forgotten claims and discarded right against Government may be sought to be enforced after the lapse of a number of years if fundamental rights are held to be enforceable without any time limit, is an exaggerated one, for, after all, a petitioner can only enforce an existing right.
The above principles have been applied in several subsequent cases: Ramchandra Shankar Deodhar v. State of Maharastara, [1974] 2 SCR 216 ; Shri Vallabh Glass works Ltd. v. union of India [1984] 3 SCR 180; State of M.P. v. Nandlal Jaiswal, [1986] 4 SCC 566 ; D. Cawasji & Co. v. State of Mysore, [1975] 2 SCR 511 and Salonah Tea Co. Ltd. v. Superintendent of Taxes.[1988] 1 SCC 401 .

54. The above cases no doubt only list situations where directions for refund have been refused, or considered to be liable to be refused, on grounds of unreasonable delay or laches on the part of the petitioners in approaching the Court in the interests of justice and equity. The importance of these cases, however, lies not in the grounds on which refund has been held declinable but because they lay down unequivocally that the grant of refund is not an automatic consequence of a declaration of illegality. Once the principle that the Court has a discretion to grant or decline refund is recognised, the ground on which such discretion should be exercised is a matter of consideration for the Court having regard to all the circumstances of the case. It is possible that a direction for refund may be opposed by the State on grounds other than laches or limitation. To give an instance, in recent years, the question has often arisen whether a refund could be refused on the ground that the person who seeks the refund has already passed on the burden of the "illegal" tax to others and that to grant a refund to him would result in his, "unjust enrichment". Some decisions have suggested a solution of neither granting a refund nor permitting the State to retain the illegal exaction. This issue has been referred to a larger Bench of this Court and it is not necessary for us to enter into that question here. So far as the present cases are concerned, it is sufficient to point out that all the decided cases unmistakably show that, even where the levy of taxes is found to be unconstitutional, the Court is not obliged to grant an order of refund.

It is entitled to refuse the prayer for good and valid reasons. Laches or undue delay or intervention of third party rights would clearly be one of those reasons. Unjust enrichment of the refunded may or may not be another. But we see no reason why the vital interests of the State, taken note of by the learned judges in India Cement should not be a relevant criterion for deciding that a refund should not be granted. We are, therefore, unable to agree with the leaned Counsel for the petitioners that any different criterion should be adopted and that the direction in paragraph 35 of India Cement should not be followed in these cases

55. For the reasons discussed above, we are of opinion that, though the levy of the cess was unconstitutional, there shall be no direction to refund to the assessees of any amounts of cess collected until the date on which the levy in question has been declared unconstitutional. This, in regard to the Bihar cases, will be the date of this judgment. In respect of Orissa, the relevant date will be 22.12.1989 on which date, the High Court, following India Cement declared the levy by the State Legislature unconstitutional. In respect of Madhya Pradesh, the relevant date will be the date of the judgment in Hiralal Ramswarup and connected cases (viz. M.P. 410/83 decided on 28.3.1986) in respect of the levy under State Act 15 of 1982. Though there are the dates of the Judgment of the appropriate High Court, which may not constitute a declaration of law within the scope of Article 141 of the constitution, it cannot be gainsaid that the State cannot, on any grounds of equity, be permitted to retain the cess collected on and after the date of the High Court''s judgment.

Another point that was raised, was that in many of these cases the State or the Coalfield Companies had given an undertaking that in case the levy is held to be invalid by this Court, they would refund the amount collected with interest. It is submitted that the condition imposed, or undertakings given, to this effect and recorded at the time of passing interim orders in the various cases should be given implemented. The interim undertakings or directions cannot be understood in such a manner as to conflict with our final decision on the writ petitions set out above. But we agree that, to the extent refunds of amounts of cess collected after the relevant dates are permissible on the basis indicated by us, the State should refund those amounts to the assessees directly or to the Coalfields from whom they were collected, with interest at the rate directed by this Court or mentioned in the undertaking from the date of the relevant judgment to the actual date of repayment. The Coalfields, when they get the refunds, should pass on the same to their customers, the assessees.

56. The appeals are disposed of accordingly. There will be no order as to costs.