The State of West Bengal and Others Vs Birbhum Brick Field Owners'' Association and Others

F.M.A. No. 420 of 2004 with C.A.N. 9885 of 2008 with C.O.T. 4270 of 1999

Court: Calcutta High Court

Date of Decision: Feb. 17, 2009

Acts Referred:
Mines and Minerals (Development and Regulation) Act, 1957 â€" Section 15

Citation: (2010) 2 CALLT 710

Hon'ble Judges: Debi Prasad Sengupta, J; Debasish Kar Gupta, J

Bench: Division Bench

Advocate: Amal Baran Chatterjee, Mr. Prafulla Kr. Ghosh and Mr. S.N. Hossain, for the Appellant; Asok Kumar Chakraborty, Pinaki Ranjan Chakraborti and Mr. Sakya Maity, for the Respondent

Judgement

Debasish Kar Gupta, J.

The Judgment of the Court was delivered by

1. This appeal is filed assailing the judgment and order dated September 2, 1998 passed in civil order No. 6895(W) of 1990

2. By virtue of the above judgment and order though the provisions of section 15 of the Mines and Minerals (Regulation and Development) Act,

1957 were declared intra vires the constitution, the notification fixing of royalty at a particular rate, in this case @Rs.20/- per 100 cubic feet, for all

regions of the State of West Bengal, was declared ultra vires the Mines and Minerals (Regulation and Development) Act, 1957. Direction was

given to the State of West Bengal to fix royalty in exercise of its statutory power on extraction of brick earth placewise and regionwise having due

regard to the market price of the brick earth of all the places where bricks were manufactured.

3. In the writ petition under reference, the writ petitioners/respondent Nos. 1 to 8 brought the following facts and circumstances on record:

The mines and minerals (Regulation and Development) Act 1957) Act (hereinafter referred to as the said Act, 1957) came into force with effect

from December 20, 1957 to provide for Regulation of mines and development of minerals under the control of Union.

4. In accordance with the provisions of Sub-section (e) of section 3 of the said Act 1957, the ordinary clay and other than sand used for

prescribed purposes and any other minerals Central Government might be, by notification in the official gazette, included in the definition of ""minor

Mineral"s"", amongst others.

5. The Central Government published notification time and again in accordance with the provisions of Sub-section (e) of section 3 of the said Act

1957 declaring brick earth as ""minor minerals"".

6. Sub-section (1) of section 15 of the said Act, 1957 empowered the State Government to make rules for regulating the grant of quarry leases, or

other mineral concessions in respect of minor minerals and for purposes connected therewith provided the State Government should not enhance

the rate of royalty in respect of any minor minerals for more than ones during any period of four years.

7. The West Bengal Minor Minerals Rules, 1973 (hereinafter referred to as the said rules) were framed by the Government of West Bengal in

exercise of powers conferred by Sub-section (1) of section 15 of the said Act 1957, which was applicable only to the territories of West Bengal.

The said Rules 1973 came into force within the State of West Bengal on and from January 13, 1974 by virtue of publishing the said Rules 1973 in

the official Gazette on the above date.

8. Clause (1) of sub-rule 1 of Rule 18 of the said Rules, 1973 provided that the holder of mining lease or any other mineral concession granted on

or after the commencement of the said Rules 1973 should pay royalty in respect of minerals removed or consumed by him or by his agent,

Manager, employee or Contractor at the rate prescribed in Schedule (I) to the said Rules 1973. Provided that the State Government should not

enhance the rate of royalty for more than once during any period of four years.

9. By a notification June 30 1987, published in the official gazette on July 2, 1987, Schedule I to the said Rules, 1973 was amended fixing the rate

of royalty for brick-earth @ Rs. 20/- per 100 cubic feet.

10. The writ application under reference being Company No. 6895 (W) 1990 was filed by the writ petitioners /respondent Nos. 1 to 8 challenging

the aforesaid notification dated June 30, 1987. Prayers were made for declaration of Schedule I to the said Rules ultra vires the provisions of

Article 14, 246, 265 of the Constitution of India, section 9, 15 of the said Act, 1957, and Rule 2 of the said Rules 1973. The above writ

application was disposed of by judgment and order dated September 2, 1998. It was held that the State Government was competent to impose

the royalty on minor minerals in exercise of powers conferred by section 15 of the said Act, 1957. But it was further held by the impugned

judgment and order that the uniform fixation of royalty on a particular rate without making any classification as to places and regions 6f different

parts of West Bengal having regard to the market price of earth of those places, was unreasonable. Direction was given to the State of West

Bengal to fix the royalty in exercise of statutory power for extraction of earth clay for manufacturing bricks areawise and regionwise having regard

to the market price of the earth clay of all places where the bricks were manufactured.

11. After filing of the instant appeal, the respondent Nos. 1 to 8 filed a cross-objection bearing No. C.O.T 4270 of 1999.

12. This appeal and the above cross-objection are taken up for analogous hearing.

13. During pendency of the appeal and the above cross-objection, Shri Purna Lakshmi Mukherjee and Bengal Brick Field Owners Association

were made party respondent Nos. 9 and 10 to this appeal by orders dated January 13, 2003 and February 4, 2004 respectively.

14. It is submitted on behalf of the appellants/state respondents that royalty, as mentioned in the said Act, 1957 read with said Rules, 1973, was a

tax. No legislative policy was laid down in the said Act, 1957 or in the said Rule, 1957 to determine the rate of royalty. Sub-section (1) of Section

15 of the said Act, 1957 empowered the State Government to make Rules for the purposes mentioned therein. In exercise of that statutory power,

the Government of West Bengal made the said Rule, 1973. Rule 18 of the said Rule, 1973 provided that the royalty could be levied in terms of

Schedule 1 to the above Rule. According to the appellants, there was only one condition that the rate of such royalty should not be enhanced for

more than once during any period of four years. The Government of West Bengal while enhancing the rate of royalty by virtue of notification dated

June 30: 1987, followed such restriction. Therefore, the notification dated June 30, 1987 was valid in the eye of law.

15. According to the appellants, the notification was issued to enhance the rate of royalty which was nothing but a tax. Such notification was issued

in exercise of statutory power and well within the scope and ambit of such statutory power and adhering to the restriction imposed by the proviso

to Rule 18 of the said Rule, 1973. As a result the scope of judicial review in respect of enhancing the rate of royalty as a policy matter in exercise

of statutory power was limited. It was open for the learned single Judge to examine whether the irrelevant grounds were taken into consideration

by the statutory authority in enhancing the rate of royalty or such authority failed to take into consideration the relevant factors. But the learned

single Judge overstepped the scope of such judicial review in directing the Government of West Bengal to fix the rate of royalty.

16. It is also submitted on behalf of the appellants that the learned single Judge directed the statutory authority to fix the rate of royalty taking into

consideration the market price of the brick earth regionwise or areawise in the garb of removing the deficiency of the statutory provision.

According to the appellants there was no statutory provision to fix the royalty in the aforesaid manner either in the section 15 of the said Act, 1957

or in Schedule I to Rule 18 of the said Rules, 1973. It is also submitted on behalf of the appellants that section 14 of the said Act, 1957 provided

that the provisions of section 4 to section 13 (inclusive) should not apply to quarry leases, mining leases or mineral concessions in respect of minor

minerals.

17. Reliance is placed on the decision of India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, and on the decision of The Quarry

Owners Association Vs. The State of Bihar and Others, to submit that the royalty is a tax. Reliance is placed on the decision of D.K. Trivedi and

Sons and Others Vs. State of Gujarat and Others, to submit that in view of the above decision the only restriction on the power of the State

Government in imposing royalty on minor minerals is the first provision to Sub-section 3 of section 15 of the said Act, 1957 read with provisions of

first provision to Rule 18 of the said Rules 1973. Reliance is further placed on the decision of Government of Andhra Pradesh and Others Vs. Smt.

P. Laxmi Devi, to submit that economic matters are extremely complicated and as such the state must be left with wide latitude in adopting fiscal or

regulatory measures and the Court should not, unless compelled by the statue or by the constitution, encroach upon into this field or invalid such

law.

18. On the other hand it is submitted on behalf of the writ petitioners/ respondent Nos. 1 to 8 that Entry 54, List 1, Seventh Schedule of the

Constitution of India provided for Regulation of mines and minerals development to the extent to which such Regulation and development under the

control of the union is declared by Parliament to be expedient in public interest. Article 265 of the Constitution of India provided that no tax could

be levied or collected except by the authority of law. The said Act, 1957 was enacted in exercise of the above powers conferred upon the

parliament by the Constitution of India. Section 2 of the said Act, 1957 declared that it was expedient in the public interest that the union should

take under its control, the Regulation of mines and development of minerals to be provided in the said Act, 1957. It is submitted that the State of

West Bengal framed the said Rules 1973 in exercise of power conferred by the provisions of section 15 to the said Act, 1957. Rule 2 of the said

Rule, 1973 prescribed a limitation that nothing in the said Rules should affect the provisions of any Central Act or Regulations or Rules for the

purpose of Regulation and development of mines and minerals.

19. It is further submitted on behalf of the respondent Nos. 1 to 8 that the royalty on brick earth was a rent and not a tax.

20. According to the respondent Nos. 1 to 8, though Sub-section (11 of section 15 empowers the State Government to make rules to impose

such rent by way of fixing the rate of royalty and to enhance such royalty from time to time following the guidelines, no guideline was prescribed in

the said rules, 1973 for imposing royalty. However, according to the respondent No. 1 to 8 in absence of any prescribed procedure in the said

Rules 1973, the provisions of section 4 to 12 were to be followed because the above sections prescribed the procedure.

21. Drawing the attention of this Court towards the provisions of Sub-section (1) of section 9 it is submitted on behalf of the respondent Nos. 1 to

8 that the holder of a mining lease should pay royalty in respect of any mineral removed or consumed by him or by his agent. Manager, Employee,

Contractor or sub-lessee at the rate specified in the second Schedule, in respect of that mineral.

22. Drawing further attention of this Court towards the provision of Entry 43 of the Schedule II to the said Rule, 1973 prescribed that the rate of

royalty on minerals not mentioned in any of the entries therein should be levied @ 10% of the sale price at Pit"s head. Therefore, the Government

of West Bengal was under obligation to impose the royalty by issuing notification for amendment of Schedule I to Rule 18 of the said Rules, 1973

adhering to the provisions of Entry 43 of the second schedule to Sub-section 1 of section 9 of the said Act, 1957. Drawing the attention of this

Court towards the impugned notification dated June 30, 1987 it is submitted on behalf of the respondent Nos. 1 to 8 that the notification was

issued in violation of the above provisions of the said Act 1957 read with the aforesaid provisions of the said Rules. 1973.

23. It is submitted on behalf of the respondent Nos. 1 to 8 that the learned single Judge after declaring the provisions of section 15 of the said Act,

1957 intra vires the Constitution of India, examined as to whether the impugned notification dated June 30, 1987 was adhering to the provisions of

the said Act, 1957 read with the provisions of the said Rule 1973. After examining the decision making process as also the enhanced royalty @

Rs.20 per 100 cubic feet on brick earth as stated in the above notification, the learned single Judge came to a conclusion that fixation of the royalty

on brick earth at the aforesaid rate was imposed dehors the statutory provision of the said Act, 1957 read with provision of the said Rule 1973 as

discussed hereinabove. It is further that the decision making process of the Government of West Bengal in enhancing the rate of royalty by way of

amendment of Schedule I to Rule 18 of the said Rules by introducing the notification dated June 30, 1987 was under challenge in the writ

application. But the enhanced rate was not under challenge.

24. Therefore, it is submitted that, it was well with the scope of judicial review stating in writ application to review the decision making process of

the Government of West Bengal in fixing such rate and not the quantum of royalty imposed by virtue of the impugned notification dated June 30,

1987.

25. Relying upon the decision of State of /H.P. v. Gujarat Ambujya Cement reported in (2005) 6 SCC 499, it is submitted on behalf of the

respondent Nos. 1 to 8 that royalty paid by holder of mining lease does not attract liability to purchase tax. Reliance is placed on the decision of

Tata Iron and Steel Co. Ltd. and Others Vs. State of West Bengal and Others, , to submit that classification in support of areas or regions having a

nexus to the object sought to be achieved by the said Act 1957 imposing of royalty taking into consideration the prices of brick earth area wise or

region wise has to be done even if the said Act, 1957 is a taxing statute. Relying upon the decisions of D.K. Trivadi v. State of Gujarat (supra),

and State of W.B. v. Purulia Dist. Contractor''s Asson. reported in AIR 2000 Cal 163 it is submitted that the legislative policy framed under the

provisions of sections 4 to 12 are to be complied with in imposing royalty on brick earth. Relying upon the decision of Krishnan Kakkanth Vs.

Government of Kerala and ohters, it is submitted that when the statute prescribed one particular procedure to be followed, such procedure had to

be followed strictly and not in breach. Relying upon the decisions of Comptroller and Auditor-general of India, Gian Prakash, New Delhi and

Another Vs. K.S. Jagannathan and Another, , Roshan Deen Vs. Preeti Lal, , G. Gurunadha Reddy Vs. APSRTC, Musheerabad and Another, ,

Sonada Degree College and Ors. v. Deshpad Rai & Ors. reported in (1999) 2 CHN 221 and State Vs. Samar Dutta and Others, , and Jai

Mangal Oraon v. Rita Sinha, reported in AIR SC 2276 it is submitted on behalf of the respondent Nos. 1 to 8 that the Court exercising writ

jurisdiction could direct the authority to follow statute, the provisions of the statute, rules, policy in course of judicial review. Therefore, impugned

judgment of the learned single Judge cannot be challenged on any of the above grounds.

26. While arguing in favour of the cross objection bearing No. COT 427 of 1999 the learned Counsel appearing for the respondent Nos. 1 to 8

submits that the learned single Judge was in error of law in holding that the provisions of sections 4 to 12 of the said Act, 1957, were not

applicable. According to the respondent Nos. 1 to 8, no methodology was prescribed in the said Rules, 1973 to ascertain the rate of royalty on

earth clay. Relying upon the decision of D.K. Trivedi (supra), it is submitted by the learned Counsel that the guidelines and restrictions provided by

sections 13 and 4 to 12 of the said Act, 1957, must be followed by the State Government while framing Rules. Once the above submissions are

accepted, provisions of Sub-section (1) of section 9 read with entry 43 of the Second Schedule to the said Act, 1957 must be taken into

consideration to ascertain the sale price of earth clay at pit''s head for the purpose of determining the royalty in respect of mineral removed or

consumed by the holder of a mining lease.

27. While supporting the submissions of the respondent Nos. 1 to 8, it is submitted by the learned Counsel appearing for the added respondents

that the unequals were treated equally in the matter of realisation of royalty. According to the added respondents, the Government of West Bengal

could realise royalty only in respect of mineral or minerals removed or consumed by the holder of a mining lease. Since the price of earth clay, was

not uniform, fixing uniform rate of royalty through out whole of the State of West Bengal was unreasonable and unrealistic and liable to be set at

nought.

28. Having heard the learned Counsels appearing for the respective parties and after taking into consideration the facts and circumstances of this

appeal and cross objection, we find that in the writ application no challenge was thrown as to the vires of section 15 of the said Act, 1957.

Standing on that footing, the learned single Judge held that the power of the State Government to make Rules under the provisions of section 15 of

the said Act was intra-vires the constitution.

29. The above part of the impugned judgment is not under challenge. Therefore, for the purpose of adjudication of other issues involved in this

appeal and cross objection suffice to observe that the said Act, 1957 is a Central Act which was legislated under Entry 54 in List I of Seventh

Schedule to the Constitution. and the provisions of section 15 of the said Act, 1957 empowered the State Government to make Rules by

notification in the official Gazette, for realisation of royalty in respect of minor minerals subject to restriction of not enhancing rate of such royalty

more than once during any period of four years. The expression ""minor minerals"" as defined in section 3(e) of the said Act, 1957, includes

ordinary clay"" and ""ordinary sand"". Earth used for the purpose of making bricks is included in the above expression ""minor minerals"" within the

meaning of ""any other minerals"". Here we may refer to the relevant portions of the decision of Banarsi Dass Chadha and Brothers Vs. Lt.

Governor, Delhi Administration and Others, as follows:

4. We agree with the learned Counsel that a substance must first be a mineral before it can be notified as a minor mineral pursuant to the power

vested in the Central Government u/s 3(e) of the Act. The question, therefore, is whether brick-earth is a mineral. The expression ""minor mineral

as defined in section 3(e) includes ""ordinary clay"" and ""ordinary sand"". If the expression ""minor mineral"" as defined in section 3(e) of the Act

includes ""ordinary clay"" and ""ordinary sand"", there is no reason why earth used for the purpose of making bricks should not be comprehended

within the meaning of the word ""any other mineral"" which mail be declared as a ""minor mineral"" by the Government. The word ""mineral"" is not a

term of Article. It is a word of common parlance, capable of a multiplicity of meanings depending upon the context. For example the word is

occasionally used in a very wide sense to denote any substance that is neither animal nor vegetable. Sometimes it is used in a narrow sense to mean

no more than precious metals like gold and silver. Again, the word ""minerals"" is often used to indicate substances obtained from underneath the

surface of the earth by digging or quarrying. But this is not always so as pointed out by Chandrachud, J. (as he then was) in Bhagwan Dass v. State

of U.P. where the learned Judge said: (at p. 874) (SCC p. 789, para 13):

It was urged that the sand and gravel are deposited on the surface of the land and not under the surface of the soil and therefore they cannot be

called minerals and equally so, any operation by which they are collected or gathered cannot properly be called a mining operation. It is in the first

place wrong to assume that mines and minerals must always be sub-soil and that there can be no minerals on the surface of the earth. Such an

assumption is contrary to informed experience. In any case, the definition of mining operations and minor minerals in section 3(d) and (e) of the Act

of 1957 and Rule 2(5) and (7) of the Rules of 1963 shows that minerals need not be subterranean and that mining operations cover every

operation undertaken for the purpose of "winning" any minor mineral "Winning" does not imply a hazardous or perilous activity. The word simply

means "extracting a mineral" and is used generally to indicate any activity by which a mineral is secured. "Extracting" in turn, means drawing out or

obtaining. A tooth is "extracted" as much as is fruit Juice and as much as a mineral. Only that the effort varies from tooth to tooth, from fruit to fruit

and from mineral to mineral.

emphasis supplied

That takes us to the nature delegation of powers to the State Government u/s 15 of the said Act, 1957. In order to adjudicate this point, the

provisions of section 15 of the said Act, 1957, are quoted below:

15. Power of State Governments to make rules in respect minor minerals:

(1) The State Government may by notification in the Official Gazette, make rules for regulating the grant of quarry leases, mining leases or other

mineral concessions in respect of minor minerals and for purposes connected therewith.

(2) Until rules are made under Sub-section (1), any rules made by a State Government regulating the grant of quarry leases, mining leases or other

mineral concessions in respect of minor minerals which are in force immediately before the commencement of this Act shall continue in force.

(3) The holder of a mining lease or any other mineral concession granted under any rule made under Sub-section(1) shall pay royalty in respect of

minor minerals removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee at the rate prescribed for the time

being in the rules framed by the State Government in respect of minor minerals:

Provided that the State Government shall not enhance the rate of royalty in respect of any minor mineral for more than once during any period of

four years.

30. It is evident from the provisions of Sub-section (3) of section 15 of the said Act, 1957 that the power to prescribe the rate of royalty is

delegated to the State Government by framing Rules in respect of minor minerals removed or consumed by the holder of a mining lease or his

agent, manager, employee, contractor or sub-lessee.

31. The said Act, 1957 is subordinate legislation which is conditional in nature so far as the realisation of royalty by the State Government was

concerned. The condition is the delegation of powers to the State Government to realise the royalty by framing Rules in respect of the minor

minerals removed or consumed. So the said Act, 1957, was full and complete when it left the legislative chamber, meaning thereby the Parliament,

framing the legislative policy of realisation of royalty in respect of the minor minerals removed or consumed. But operation of the law is made

dependent upon the fulfilment of a condition of realisation of royalty only in respect of minor minerals removed or consumed, and what is delegated

to the State Government is the authority to determine, by exercise of its own judgment whether or not the condition had been fulfilled.

32. The relevant portions of the observations of the Hon''ble Justice Mukherjee, as His Lordship then was, sitting in a constitution bench of the

Hon''ble Supreme Court, in respect of a reference made by the President of India under Article 143(1) of the Constitution of India, in the matter of

In Re: DELHI LAW ACT, 1912, AJMER - MERWARA (EXTENSION of LAWS) ACT, 1947 - and - PART ""C"" STATES (LAWS) ACT,

1950 reported in AIR 1951 SC 332, are quoted below:

302. In a conditional legislation, the law is full and complete when it leaves the legislative chamber, but the operation of the law is made dependent

upon the fulfilment of a condition, and what is delegated to an outside body is the authority to determine, by the exercise of its own judgment,

whether or not the condition has been fulfilled. ""The aim of all legislation,"" said O''Conner, J. in Baxter v. Ah Way 119 ""is to project their minds as

far as possible into the future and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is

not possible to provide specifically for all cases and therefore legislation from the very earliest times, and particularly in more modern times, has

taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied or to

what its operation shall be extended, or the particular class of persons or goods or things to which it shall be applied"". In spite of the doctrine of

separation of powers, this form of legislation is well recognised in the legislative practice of America, and is not considered as an encroachment

upon the anti-delegation rule at all. As stated in a leading Pennsylvania case 32, ""the legislature cannot delegate its power to make a law; but it can

make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To

deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend, which cannot be

known to the law-making power and must, therefore, be a subject of inquiry and determination outside the halls of legislation.

Emphasis supplied

33. Therefore, on the basis of the above discussion, the conclusion is that the learned single Judge was correct in holding that the State

Government was competent to frame the Rules for realisation of Royalty on minor minerals in this case brick earth.

34. Before entering into the issue of the validity of the said Rules, 1973 and the impugned notification, let us resolve the controversy as to whether

royalty is a tax or fee? In this regard the settled principles of law as decided by the majority view of a Constitution bench of the Hon''ble Supreme

Court in the matter of The State of West Bengal Vs. Kesoram Industries Ltd. and Others, are quoted below:

56. We would like to avail this opportunity for pointing out an error attributable either to the stenographer''s devil or to sheer inadvertence, having

crept into the majority judgment in India Cement Ltd. case. The error is apparent and only needs a careful reading to detect. We feel constrained -

rather duty bound - to say so, test a reading of the judgment containing such an error - just an error of one word - should continue to cause the

likely embarrassment and have adverse effect on the subsequent judicial pronouncements which would follow India Cement Ltd. case2, feeling

bound and rightly, by the said judgment having the force of pronouncement by a seven-Judge Bench. Para 34 of the Report reads as under: (SCC

p. 30)

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

the competence of the State Legislature because section 9 of the Central Act covers the field and the State Legislature is denuded of its

competence under Entry 23 of List II. In any event, we are of the opinion that cess on royalty cannot be sustained under Entry 49 of List II as

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

57. In the first sentence the word ""royalty"" occurring in the expression ""royalty is a tax"", is clearly an error. What the majority wished to say, and

has in fact said, is ""cess on royalty is a tax"". The correct words to be printed in the judgment should have been ""cess on royalty"" in place of

royalty"" only. The words ""cess on"" appear to have been inadvertently or erroneously omitted while typing the text of the judgment. This is clear

from reading the judgment in its entirety. Vide paras 22 and 31, which precede para 34 abovesaid, Their Lordships have held that ""royalty"" is not a

tax. Even the last line of para 34 records ""royalty on mineral rights is not a tax on land but a payment for the user of land"". The very first sentence

of the para records in quick succession ""... as such a cess on royalty being a tax on royalty, is beyond the competence of the State Legislature....

What Their Lordships have intended to record is ""... that cess on royalty is a tax, and as such a cess on royalty being a tax on royalty, is beyond

the competence of the State Legislature That makes correct and sensible reading. A doubtful expression occurring in a judgment, apparently by

mistake or inadvertence, ought to be read by assuming that the Court had intended to say only that which is correct according to the settled

position of law, and the apparent error should be ignored, far from making any capital out of it, giving way to the correct expression which ought to

be implied or necessarily read in the context, also having regard to what has been said a little before and a little after. No learned Judge would

consciously author a judgment which is self inconsistent or incorporates passages repugnant to each other. Vide para 22, Their Lordships have

clearly held that there is no entry in List II which enables the State to impose a tax on royalty and, therefore, the State was incompetent to impose

such a tax (cess). The cess which has an incidence of an additional charge on royalty and not a tax on land, cannot apparently be justified as falling

under Entry 49 in List II

Emphasis supplied

35. Therefore, it is now settled principles of law that ""royalty"" is not a tax.

While examining the validity of the said Rules, 1973, we must bear in mind the provisions of section 14 of the said Act, 1957 and the above

provisions are quoted below:

14. Sections 4 to 13 not to apply to minor minerals:-The provisions of sections 4 to 13 (inclusive) shall not apply to quarry leases, mining leases or

other mineral concessions in respect of minor minerals.

36. On a plain reading of the above provisions, we find that the learned single Judge was right in holding that the State Government while exercising

powers u/s 15 of the said Act, 1957 could proceed without adhering to the guidelines of section 9 of the said Act, 1957. In this regard the relevant

portions of the decision of D.K. Trivedi and Sons and Others Vs. State of Gujarat and Others, are quoted below:

33. A provision similar to Sub-section (2) of section 13, however, does not find place in section 15. In our opinion, this makes no difference. What

Sub-section (2) of section 13 does is to give illustrations of the matters in respect of which the Central Government can make rules for ""regulating

the grant of prospecting licences and mining leases in respect of minerals and for purposes connected therewith"". The opening clause of Sub-

section (2) of section 13, namely, ""In particular, and without prejudice to the generality of the foregoing power""; makes it clear that the topics set

out in that Sub-section are already included in the general power conferred by Sub-section (1) but are being listed to particularise them and to

focus attention on them. The particular matters in respect of which the Central Government can make rules under Sub-section (2) of section 13

are, therefore, also matters with respect to which under Sub-section (1) of section 15 the State Governments can make rules for ""regulating the

grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith"". When

section 14 directs that ""The provisions of sections 4 to 13 (inclusive) shall not apply to quarry leases, mining leases or other mineral concessions in

respect of minor minerals"", what is intended is that the matters contained in those sections, so far as they concern minor minerals, will not be

controlled by the Central Government but by the concerned State Government by exercising its rulemaking power as a delegate of the Central

Government. Sections 4 to 12 form a group of sections under the heading ""General restrictions on undertaking prospecting and mining operations"".

The exclusion of the application of these sections to minor minerals means that these restrictions will not apply to minor minerals but that it is left to

the State Governments to prescribe such restrictions as they think fit by rules made u/s 15(1). The reason for treating minor minerals differently

from minerals other than minor minerals is obvious. As seen from the definition of minor minerals given Clause (e) of section 3, they are minerals

which are mostly used in local areas and for local purposes while minerals other than minor minerals are those which are necessary for industrial

development on a national scale and for the economy of the country. That is why matters relating to minor minerals have been left by Parliament to

the State Governments while reserving matters relating to minerals other than minor minerals to the Central Government. sections 13, 14 and 15 fall

in the group of sections which is headed ""Rules for regulating the grant of prospecting licences and mining leases"". These three sections have to be

read together. In providing that section 13 will not apply to quarry leases, mining leases or other mineral concessions in respect of minor minerals

what was done was to take away from the Central Government the power to make rules in respect of minor minerals and to confer that power by

section 15(1) upon the State Governments. The ambit of the power u/s 13 and u/s 15 is, however, the same, the only difference being that in one

case it is the Central Government which exercises the power in respect of minerals other than minor minerals while in the other case it is the State

Governments which do so in respect of minor minerals. Sub-section (2) of section 13 which is illustrative of the general power conferred by section

13(1) contains sufficient guidelines for the State Governments to follow in framing the rules u/s 15(1), and in the same way, the State Governments

have before them the restrictions and other matters provided for in sections 4 to 12 while framing their own rules u/s 15(1)"".

Emphasis supplied

37. The relevant portions of the decision of The Quarry Owners Association Vs. The State of Bihar and Others, are quoted below:

23. In other words, sections 4 to 12, not being applicable to the minor minerals, the figurative restrictions that are contained there could not be

made applicable, but of course they are available as a guideline to the State Government to take note of in other respects, while framing its rules.

So, they are available not as restrictive or limiting guidelines but are available otherwise for its consideration and adoption, wherever it is necessary.

If submission for the appellants is accepted, it would militate against the express mandate of Parliament as contained in section 14 which excludes

sections 4 to 12 from their application to minor minerals.

38. We further find that it was open for a writ Court to examine the decision making process of issuing the impugned notification dated June 30,

1987. Because, by virtue of Sub-section (3) of section 15 of the said Act, 1957 read with the provision to section 15 of the said Act, 1957, the

Parliament laid down the legislative policy. Consequent thereupon the State Government was under obligation to realise royalty on brick-earth

subject to fulfilment of the conditions of the subordinate legislation that (i) the holder of mining lease should pay royalty in respect of minor minerals

removed or consumed, (ii) enhancement in the rate of such royalty should not be done for more than once during any period of four years. In the

instant case no methodology was disclosed before the learned single Judge to show that the condition prescribed in Sub-section (3) of section 15

had been fulfilled in determining the uniform rate of royalty @ Rs. 20/- per 100 cubic feet. No document was placed before the learned single

Judge to show that the price of brick earth removed or consumed is uniform through out the State of West Bengal. Needless to mention that

fixation of the rate of royalty for brick-earth removed or consumed had a reasonable nexus to the price of the brick-earth. Therefore, we are not

inclined to interfere with that part of the impugned judgment by which the notification dated June 30, 1987 was declared ultra-vires the provisions

of section 15 of the said Act, 1957.

39. With regard to the directions given in the judgment to fix the royalty placewise or regionwise, we are of the opinion that though the price of the

brick earth has a nexus to the fixation of royalty on such brick-earth removed or consumed, it required opinion of the experts to ascertain as to

whether such price varied from area to area or region to region. A Writ Court must not subscribe its view in this regard without having such

technical expertise. In the other words, once it was found that the notification under reference was issued de hors the provisions of Sub-section (3)

of section 15 of the said Act, 1957, the writ Court, after declaring the above notification ultra-vires the provisions of the said Act, 1957 as also

setting aside the same, should not have proceeded further to direct the State Government to fix the rate of royalty following a particular

methodology. In this regard, the settled principles of law as decided in the matter of Tata Iron and Steel Co. Ltd. etc. Vs. Union of India and

others and Industrial Development Corporation of Orissa Ltd., are quoted below:

68. At this juncture, we think it fit to make a few observations about our general approach to the entire case. This is a case of the type where legal

issues are intertwined with those involving determination of policy and a plethora of technical issues. In such a situation, Courts of law have to be

very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policy-making, unless the policy is

inconsistent with the Constitution and the laws. In the present matter, in its impugned judgment, the High Court had directed the Central

Government to set up a Committee to analyse the entire gamut of issues thrown up by the present controversy. The Central Government had

consequently constituted a Committee comprising high-level functionaries drawn from various governmental/institutional agencies who were

equipped to deal with the entire range of technical and long-term considerations involved. This Committee, in reaching its decision, consulted a

number of policy documents and approached the issue from a holistic perspective. We have sought to give our opinion on the legal issues that arise

for our consideration. From the scheme of the Act it is clear that the Central Government is vested with discretion to determine the policy regarding

the grant or renewal of leases. On matters affecting policy and those that require technical expertise, we have shown deference to, and followed

the recommendations of, the Committee which is more qualified to address these issues.

40. In view of the above, the directions given the impugned judgment dated September 2, 1998 to fix the rate of royalty on brick-earth area wise

or region wise are liable to be quashed and set aside and the directions are quashed and set aside.

41. In view of the above discussions, we do not find force in the submissions made on behalf of the appellants that the decisions of D.K. Trivedi

(supra) and Quarry Owners Association (supra) come in aid to protecting the notification under reference. We do not find that the decision of

Government of A.P. v. P. Laxmi Devi (supra) helps the appellants to act on the basis of the notification under reference because as discussed

hereinabove, the same was issued in violation of the legislative policy laid down in Sub-section (3) of section 15 of the said Act, 1957. Since, we

have already discussed hereinabove as to whether Royalty on minor minerals is a ""Tax"" or ""Fee"" taking into consideration the decisions of India

Cement Ltd. (supra) and State of West Bengal v. Kesoram Industries, we have no hesitation in holding that the former decision does not support

the case of the appellants.

42. We, however, find on the basis of observations made hereinabove, that the decisions of M/s. Banarsi Dass Chadha (supra) and D.K. Trivedi

(supra) do not help the respondent Nos. 1 to 8 to submit that provisions of sections 4 to 13 are applicable in this case. With regard to the

decisions of Krishnan Kakkanth (supra), The Comptroller and Auditor General of India (supra), Roshan Deen (supra), Sonada Degree College

(supra), State v. Samar Dutta (supra), Secretary, Badruka College of Commerce (supra). State of West Bengal v. Purulia Dist. Contractors

Assocn (supra) and Jai Mangal Oraon (supra) we find that the above decisions support the submissions made on behalf of the respondent Nos. 1

to 8 up to the extent that the scope of judicial review in writ jurisdiction permits the Court to examine the decision making process in this case on

the basis of the legislative policy framed under the statute.

43. In view of the above, the appeal is allowed partially to the extent of setting aside and quashing the directions given in the impugned judgment

and order upon the Government of West Bengal to fix the royalty area wise or region wise. We, however, make it clear that in fixing the rate of

royalty on brick-earth, the Government of West Bengal must follow the legislative policy laid down by the Parliament in Sub-section (3) of section

15 of the said Act, 1957, read with the proviso to section 15 thereto.

44. The appeal is thus disposed of.

45. The cross objection fails on the basis of the observations and discussions made hereinabove.

46. There will be no order as to cost.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the

necessary formalities in this regard.