
(2007) 07 AHC CK 0095
In the Allahabad High Court

B. Agarwal Stone Product Limited

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 20-07-2007

Acts Referred:

Constitution of India, 1950 — Article 245, 246, 248, 40
Mines Act, 1952 — Section 13, 15, 17, 18, 2

Citation : (2007) 4 AWC 3470

Hon'ble Judges : Vikram Nath, J; Dilip Gupta, J; B.S. Chauhan, J

Bench : Full Bench

Judgement

B.S. Chauhan, Dilip Gupta and Vikram Nath, JJ.—A Division Bench of this Court, while examining the validity of the bye-laws framed by the Zila Panchayat, Sonebhadra relating to levy of fee on tractor and truck used for collecting "gitti", stones, boulders, "surkhi", coal and coal dust from the mining areas situated within the rural areas of Zila Panchayat Sonebhadra and transporting or storing the said minerals within or outside the district, expressed its inability to agree with the view taken in paragraph 6 of the judgment of another Division Bench of this Court in Okhla Sand Supply Co. and another Vs. State of U.P. and others, and has, therefore, referred the following two questions of law to the larger Bench:

(1) Whether the view taken in paragraph 6 of the judgment of the Division Bench in Okhla Sand Supply Co. v. State (supra) lays down the correct legal position?

(2) Whether Section 239 read with Sections 142, 143 and Ors. provisions in the U.P. Kshetra Panchayat and Zila Panchayat Adhiniyam, 1961 entitle the Zila Panchayat to frame the impugned bye-laws and levy the impugned fee/toll tax

2. In the case of Okhla Sand (supra), a Division Bench of this Court, while considering a similar notification issued by the Zila Panchayat, Gautam Budh Nagar held that the bye-laws were beyond the purview and ambit of the provisions of the Uttar Pradesh Kshetra Panchayats and Zila Panchayats Adhiniyam, 1961 (hereinafter referred to as the "Zila Panchayat Act") and that

such tax could not be imposed by the State Legislature. The relevant paragraph 6 of the said judgment is quoted below:

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

3. The referring order has been made in Writ Petition No. 18035 of 2003. Civil Misc. Writ Petition No. 587 of 2003 (Tax) was also filed for quashing the aforesaid bye-laws framed by the Zila Panchayat and the said petition was also connected with Civil Misc. Writ Petition No. 18035 of 2003 and on 22.5.2003 the same order as in Civil Misc. Writ Petition No. 18035 of 2003 was passed in the said petition.

4. The notification dated 5.12.1994 containing the bye-laws that had been framed by the Zila Panchayat. Sonbhadra was published in the U.P. Gazette on 10.12.1994 Clause 1 of the bye-laws states that the bye-laws shall be called the bye-laws empowering the Zila Panchayat, Sonbhadra to levy fee on trucks and tractors engaged for transporting "gitti", stone, boulders, "surkhi", lime, coal and coal dust collected from the mining places situated within the rural areas of Zila Panchayat, Sonbhadra to places within or outside the district. Clause 3 provides that every person who on his own or through labourers collects gitti, stone, boulders, lime, coal and coal dust from the mining places of rural areas falling within district Sonbhadra and transports them by land from the rural areas by tractor or truck shall pay the prescribed fee to the Zila Panchayat, Sonbhadra and that such fee shall be paid at the place fixed by the Zila Panchayat, Sonbhadra to such officers or contractor authorised by the Zila Panchayat. Clause 4 stipulates that the fee per trip per tractor shall be Rs. 10/- while fee per trip per truck shall be Rs. 20/-. These fees were subsequently enhanced to Rs. 15/- and Rs. 30/- respectively by the notification dated 23.8.1999. Clause 11 of the Bye-laws provides that if there is any default of payment of fee while taking the aforesaid minerals for the personal use or sale, the mineral shall be confiscated and Clause 12 provides that in case the fee is not paid within a period of 15 days, then the mineral shall be sold for realisation of the fees.

5. We have heard Dr. L.M. Singhvi and Sri V.B. Upadhyaya, learned senior Counsel for the petitioners duly assisted by learned Counsel Sri V.K. Upadhyaya and Sri Shahid Rizvi. Sri S.M.A. Kazmi, learned Advocate General assisted by learned Standing Counsel Sri. C.S. Singh has appeared for the State of U.P. while Sri Ravi Kiran Jam, learned Senior counsel assisted by Sri. J.H. Khan has

appeared for the Zila Panchayat.

6. Dr. L.M. Singhvi, learned senior Counsel for the petitioner-M/s. Hindalco Industries Ltd. submitted that the field relating to regulation, and development of mines and minerals is completely occupied by the Parliamentary legislation Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as the Mines Act") and the Rules framed thereunder and, therefore, the State Legislature is precluded from enacting any Act for regulation and control of minerals; that since the Mines Act is a special Act dealing with development and regulation of mines and minerals, the same will prevail over the Zila Panchayat Act which is a general Statute dealing with the administration of Kshetriya and Zila Panchayats on the principle of "generalia specialibus non derogant", and no fee can be charged by the Zila Panchayat; that the impugned bye-laws are even otherwise beyond the powers of Zila Panchayat as the development of mineral area and transportation of minerals is not contemplated by Sections 142, 143 and 239 of Zila Panchayat Act; that no fee can be imposed by Zila Panchayat for passing and re-passing of vehicles on roads, that the fee charged is on the goods i.e. minerals and not on the use of the road which is not permissible; that the impugned bye-laws are without jurisdiction, illegal and ultra-vires the provisions of Zila Panchayat Act and that even otherwise when a duty is cast by the Statute on the Zila Panchayat to maintain roads, no fee can be charged for its use.

7. Learned Counsel for the respondents have vehemently opposed the contentions of the petitioners and have submitted that the Constitution provides for legislative competence of the States for enacting laws in respect of the local self government and fees on lands and thus the bye-laws framed by the Zila Panchayat under the State Act are valid; that the impugned bye-laws are well within the province of the Zila Panchayat Act and are within the statutory powers conferred u/s 142 of the Act read with Section, 239(1); that it is wrong to say that the State Legislature would have no authority to legislate on anything which even touches the subject which is covered by the declaration made by the Mines Act; that as the levy imposed by the impugned bye-laws has nothing to do either with the development of minerals or regulations of mines but only provides for levy of fees for use of public roads constructed and maintained by the Zila Panchayat the same cannot be termed as levy on the goods or minerals; that by providing for the seizure of minerals for the realization of fee and not the vehicle would not mean that the levy is on the minerals as the charging provision clearly shows that the fee is on the vehicle used for transportation and the method of recovery cannot determine the validity of the fee; that the imposition of fee on vehicles carrying minerals Cannot be said to be discriminatory or arbitrary as in the matter of fiscal legislation, (imposing tax, fee or toll) the authority has wide discretion to decide the items and persons who are to be subjected to such levy and that the fee charged by the impugned bye-laws is perfectly justified, legal and is in accordance with law.

8. We shall first deal with the submission advanced by the learned Senior

Counsel for the petitioner that the State Legislature has no jurisdiction to impose the levy by bye-laws as the field relating to regulation and development of mines and minerals is fully occupied by the Mines Act and the Rules framed thereunder.

9. In order to appreciate the contentions advanced by learned Counsel for the parties it would be useful to refer to the distribution of legislative powers between the Parliament and the State Legislature as contained in Part XI of the Constitution. Learned Counsel for the parties have placed reliance upon Entries 52, 54, 96 and 97 in List I and Entries 5, 23, 49, 50 and 66 in List II of the Seventh Schedule to the Constitution as also the extent and purport of the residuary power of Legislation vested in the Union of India, These entries in the Seventh Schedule are as follows:

SEVENTH SCHEDULE (Article 246)

List 1 - Union List

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

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

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

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

List 11-State-List

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

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

49. "Taxes on lands and buildings.

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

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

10. It needs to be mentioned that the fountain source of legislative power is Article 245 of the Constitution, it provides that subject to the provisions of the "Constitution, Parliament may make laws for the whole or any part of the

territory of India, and the Legislature of a State may make laws for the whole of any part of the State. Article 246 of the Constitution provides that Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule called the "Union List". Subject to the said power of the Parliament, the Legislature of any State has the power to make laws with respect to any of the matters enumerated in List III called the "Concurrent List". Subject to the aforesaid the Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II called the "State List". Article 248 gives the exclusive power to the Parliament to make any law with respect to any matter not enumerated in the Concurrent List or the State List. This is what is called the residuary power vested in Parliament.

11. While examining the aforesaid principles, the Supreme Court has repeatedly pointed out that the various entries in the three lists are not "powers" of Legislation but "fields" of Legislation and the Constitution effects a complete separation of the taxation power of the Union and State under Article 246 of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence and the power to tax cannot be deduced from a general legislative entry as an ancillary power. A tax has two elements:-first the person, thing or activity on which the tax is imposed, and secondly, the amount of tax. The amount may be measured in many ways; but a distinction between the subject matter of a tax and the standard by which the "amount of tax is measured must not be lost sight of. These are described respectively as the subject of a tax and the measure of a tax.

12. It is also necessary to examine the relevant provisions of the Mines Act On which the learned Counsel for the respective parties have placed reliance and the same are as under:

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

4(1A). No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder.

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 reconnaissance permits", prospecting licences and mining leases in respect of minerals and for purposes connected therewith.

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

(a)

....

(i) the fixing and collection of fees for reconnaissance permits, prospecting licences or mining leases, surface rent, senility deposit, fines, other lees or charges and the time within which and the mania in which the dead rent or royalty shall be payable;

(m)....

....

18. Mineral development.- (1) It shall teethe duty of the Central Government to take all such steps as may be necessary for the conserve on and systematic development of minerals in India and for the protection of environment by preventing 01 controlling any pollution which may be caused by prospecting or mining operations and for such purposes the Central Government may notification in the Official Gazette, make such rules as it thinks fit.

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

(a)....

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

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

23(c). rower of State Government to make rules for preventing illegal mining transportation and storage of minerals. - (c) regulation of mineral being transported from the area granted under a prospecting licence or a mining lease or a quarrying licence or a permit, in whatever name " the permission to excavate minerals, has been-given-(d) inspection, checking and search of minerals at the place of excavation or storage or during transit;

....

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

25. Recovery of certain sums as arrears of land revenue.- Any rent, royalty, tax, fee or other sum due to the Government under this Act or the rules\\made thereunder or under the terms and "conditions of any reconnaissance permit, prospecting licence or mining lease may, of a certificate of such officer 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.

13. Elaborating his submissions, Dr. L.M. Singhvi, learned Senior Counsel for the petitioner submitted that the Parliament enacted the Mines Act under Entry 54 List 1 of the Seventh Schedule to the Constitution and the effect of the "declaration made in Section 2 of the Mines Act and the various other provisions of the said Act denudes the State Legislature of its powers to make any-law imposing levy with regard to the regulation and development of mines and minerals. In support of this contention, he has placed reliance upon the Constitution Bench decisions of the Supreme Court in *State of Orissa Vs. M.A. Tulloch and Co.*, and *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*,

14. In *M.A. Tulloch* (supra) the Supreme Court observed:

15. ...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 enactment 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 suppression of the State Act....

15. The Supreme Court, in connection with the submission that fee could be imposed by the State Legislature under Entry 66 of List II observed:

16... it was sought to be established that even if the Union could levy a fee under the Central Act it would not affect or invalidate a State legislation imposing a fee for a similar service. This argument again proceeds on a fallacy. It is, no doubt, true that technically speaking the power to levy a fee is under the entries in the three lists treated as a subject matter of an independent grant of legislative power, but whether it is an incidental power related to a legislative head or an independent legislative power, it is beyond dispute that in order that a fee may validly be imposed the subject matter or the main head of legislation in connection with which the fee is imposed is within legislative power. The material words of the Entries are : "Fees in respect of any of the matters in this List". It is therefore a pre requisite 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 power which it therefore possessed, it would follow that the "matter" in the State List is, to the extent of the declaration, substrate from the scope and ambit of Entry 23 of the State List. There, would, therefore, after the Central Act of 1957, be "no matter in the List" to which the fee could be related in order to render it valid....

(emphasis supplied)

16. In *India Cement Ltd.* challenge was to the levy of cess on royalty and the issue that arose before the Supreme Court was whether such cess on royalty is within the competence of the State Legislature. The Company was required to pay local cess under the Madras Panchayats Act, 1958 at the rate of 45 paise per rupee of the royalty already being paid. The Supreme Court examined whether cess on royalty was a demand of land Revenue or additional royalty. Royalty was payable by the company as prescribed under the lease deed and the rates of royalty were fixed under the Mines Act which is a Central Act passed under Entry 54 in List I by which the control of mines and minerals has been taken over by the Central Government. The State Legislature sought to justify and sustain the levy by reference to Entries 49, 50 or 45 on List II. The levy was sought to be justified under Entry 45 in List II by including it within the meaning of land revenue and in the alternative under Entry 49, in List II as tax on land. The challenge to the constitutional validity was upheld. The Supreme Court clarified the distinction between royalty and land revenue. The Supreme Court found that "land revenue" is connotative of the share in the produce of the land which the King or the Government is entitled to receive while "Royalty" was a charge payable on the extraction of the minerals from the land and, therefore, a cess on royalty cannot be called additional land revenue and as such the State was disabled from imposing tax on Royalty. The levy was also not sustained under Entry 50 in List II which deals with taxes and minerals rights subject to limitation imposed by Parliament relating to minerals development. The relevant portions of the judgment are as follows:

The Act was passed by virtue of the power of the parliament under entry 54 of List I of the Seventh Schedule. Since the control of mines and the development of minerals were taken over by Parliament, the question that arises here is whether the levy or the impost by the State legislature imposed in this case can be justified or sustained either under entry 49, 50 or 45 of List II of the Seventh Schedule.

....

On the other hand, learned Attorney of General submitted that it should be held to be a fee, then the source of power of the State legislature is under Entry 66 read with Entry 23 of List II. Here also the extent to which regulation of mines and mineral development under the control of the Union is declared by Parliament by law to be expedient in the public interest, to the extent such legislation makes provisions will denude the State legislature of its power to override the provision under Entry 50 of List II. In view of the parliamentary legislation under Entry 54, List I and the declaration made u/s 2 and provisions of Section 9 of the Act, the State legislation would be overridden to that extent. Section 2 declares that it is expedient in the public interest that Union should take under its control the regulation of mines and the development of minerals to the extent provided therein. In this connection, reference may be made to the decision of this Court

in Hingir-Rampur Coal Co. Ltd. v. State of Orissa. See also the observations in State of Orissa v. M.A. Tulloch & Co. and Baijnath Kadia v. State of Bihar.

....

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.

17. Dr. Singhvi further placed reliance upon the provisions of Section 2, 4(1A) 9, 13, 18 23(c) of the Mines Act and the Mineral Concession Rules 1960 to show that the development of mines and regulation of minerals necessarily includes its storage and/or transporting from the mining area. He, therefore, submitted that the regulatory fee on mineral or on its transportation can be levied only under the provisions of the Mines Act as the power to regulate carries with it full power over the thing subject to regulation and in the absence of restrictive words, the power must be regarded as plenary over the entire subject. His contention, therefore, is to its transit of minerals and/or transportation of minerals and all activities for facilitating transit and transportation of minerals like construction and development of roads fall within the impact of "mineral development which is an integral part and within the exclusive domain of the Mines Act. In this connection he placed reliance "upon the decisions of the Supreme Court in K. Ramanathan v. State of Tamil Nadu AIR 1955 SC 660 ; U.P. Co-operative Cane Unions Federations Vs. West U.P. Sugar Mills Association and Others etc. etc., ; The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, ; Orissa Cement v. State of Orissa 1991 Supp (J) SCC 430.

18. In K. Ramanathan (supra), the Supreme Court observed

...power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words the power must be regarded, as plenary over the entire subject.

19. In U.P. Cooperation Cane Union (supra), the Supreme Court observed:

Regulate means to control or adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold, the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context of in which it has been used and the purpose of the Statute....

20. In Hingir Rampur Coal Co. Ltd. (supra), the Supreme Court observed:

The mineral development of the State, therefore requires that provisions should

be made for improving the communications by constitution 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 in the area....

21. In *M.A. Tulloch* (supra) the Supreme Court observed:

11. On the other banc Mr Setalvad, learned Counsel for the respondent urged that the Central Act covered the entire field of mineral development, that being the "extent" which Parliament had declared by law 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 the 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 provisions of amenities to workmen employed in the mines which was necessary in order to stimulate and maintain the working of the 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 provisions was made by the Orissa Act and if the central government had imposed a fee to defray the expense 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 or 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 learned Counsel for the respondent, and this 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 this Court in *Hingir. Rampur. Coal Co. Ltd. v. State of Orissa*....

22. In *Orissa Cement* (supra), the Supreme Court observed:

53 ...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 in connected and on the other, that, the nature of the things 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, can not mean such amenities only in the mines but take in also the areas leading to and all around the mines. The development of minerals areas is implicit in them. Section 25 implicitly authorizes 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 MMRD 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....

23. Dr. I.M. Singhvi learned Senior Counsel for the petitioner further submitted that coal is a major mineral which is called a scheduled mineral under Mines Act and, therefore, it has to be dealt with separately as the legislation has made a clear distinction between minor and major minerals in the Mines Act. The regulations and development of major minerals has been exclusively reserved with the Central Government whereas the regulation and development of minor mineral has been left with the State Government as a delegate of the Central Government. His contention is that in view of the Scheme of the Act and in view of the provisions of the Mineral Concession Rules, 1960 which has been framed under s 13 of the Mines Act in respect of major minerals, the field of regulation and development of major minerals is exclusively occupied by the Parliamentary Legislation and there is no scope of interference by the State Government.

24. It was also submitted by the learned Senior Counsel for the petitioner that on a challenge being made to the legislative competence of the Legislature in pith and substance of the impugned levy has to be seen and from a perusal of the impugned bye-laws it is clear that the levy in question, in pith and substance, is for the development of mineral area only. This is so because according to the respondents they have developed the area for facilitation of movement of minerals from the mines to the metal road and, then-fore, they are charging the levy for providing service of developing the area or facilitating transportation of minerals. In this connection, he further submitted that a perusal of the bye-laws clearly establishes that the impugned levy has been imposed on minerals as only vehicles used for collecting, storing, and/or transporting minerals are subjected to levy and it is not a levy on the use of road or on transportation. He also placed reliance upon Clauses 11 and 13, of the bye-laws which provide that if the levy is not paid then the minerals are confiscated and disposed for realization of levy. He, therefore, contended that the impugned levy cannot be saved by taking recourse to Entry 5 of List II.

25. Dr. L.M. Singhvi learned Senior Counsel for the petitioner further submitted that the Mines Act is special statute dealing exclusively with the development and regulations of mines and minerals and matters connected therewith and incidentally thereto while the Zila Panchayat Act is a general statute dealing with general administration of Kshettriya Samiti Panchayat and Zila Panchayat and, therefore, on the principle of "generalia specialibus non derogant", the Mines Act will prevail.

26. The learned Advocate General for the State of U.P. and Sri Ravi Kiran Jain learned Senior Counsel appearing for the Zila Panchayat, however, submitted that the submissions advanced by Dr. Singhvi learned Senior Counsel for the petitioner have been considered and repelled by the Constitution Bench of the

Supreme Court in *State of West Bengal and Anr v. Kesoram Industries Ltd. and Anr.* JT 2004 (J) SC 375 after considering the earlier judgments of the Supreme Court in *State of Orissa and others Vs. Mahanadi Coalfields Ltd. and others*, and in *Goodricke Group Ltd. and Others Vs. State of W.B. and Others*, It was also submitted by the learned Counsel for the respondents that the levy of fees was for the use of the roads which facility is provided by the Zila Panchayat and has nothing to do with the regulation of mines or the development of minerals and that this fact is evident from the perusal of the bye-laws.

27. The Supreme Court in *Kesoram* has dealt with these issues after considering its earlier judgments on which reliance was placed by the learned Senior Counsel for the petitioner. It has, therefore, become necessary for us to refer to *Kesoram* in detail as it covers practically almost all the issues raised by the learned Senior Counsel for the petitioner. It is for this reason that Dr. L.M. Singhvi, learned Senior Counsel for the petitioner also urged that we should not follow the Constitution Bench decision of five Hon''ble judges in *Kesoram* as it does not follow the decision rendered by a larger Constitution Bench of seven Hon''ble Judges in *India Cement*.

28. Four sets of matters came up for consideration before the Supreme Court in *Kesoram*. The first was "Coal Matter" in which cess on coal bearing land levied in exercise of the power conferred by the State Legislature was struck down by the Calcutta High Court. The second was the "Tea Matter" where cess levied on coal bearing land was also levied on tea plantation land. The third was the "Brick Earth Matter" where cess was levied on removal of brick earth. The fourth was "Minor Mineral Matter" where the constitutional validity of cess levied in State of U.P. on minor minerals was up-held by the Allahabad High Court.

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

...As Section 2 (of the Mines. Act) itself provides and indicates, the assumption of control in public interest by the Central Government is on (i) the regulation of mines, (ii) the development of minerals, and (iii) to the extent hereinafter provided. The scope and extent, of declaration cannot and could not have been enlarged by the Court nor has it been done. The effect is that no State Legislature shall have power to enact any legislation touching (i) the regulation of mines, (ii) the development of minerals, and (iii) to the extent provided by Act No. 67" of 1957. The Preamble to the Central Act 67 of 1957 itself speaks --"An Act to provide for the development and regulation of mines and minerals under the control of the Union". Tax and fee is not a subject dealt with by Act No. 67 of

1957.

....

We have three comments to offer on M.A. Tulloch. Firstly, the provisions of the Act No. 67 of 1957 did not directly come up for the scrutiny of the Constitution Bench as there was no demand raised after the commencement of this Act which was put in issue before the Constitution Bench; the Constitution Bench was only adjudicating upon the issue whether a liability to pay cess incurred under the previous Act could be enforced under Act No. 67 of 1957 or in other words if Act No. 67 of 1957 had any castigating affection the demand validly raised under the previous enactment. Secondly, the extent to which power to legislate by the States was excluded by the Central Act No. 65 of 1951 was not a question dealt with in-depth as it was done in Hingir-Rampur Coal Co., Thirdly, M.A. Tulloch, if not correctly read, creates a wrong impression that Act No. 67 of 1957 provides for levy of tax and fee, which in fact it does not.

Section 13(2)(i) cannot be read as empowering the Central Government to levy any tax or fee. The expression "other fees and charges" have to be interpreted ejusdem generis taking colour from other words and phrases employed in the same clause. The word "charges" cannot and does include within its meaning any tax. The expression "other fees or charges" must be assigned such meaning as to include therein only such fees and charges as are meant for regulation or development.

We are clear in our minds that a power to levy tax or fee cannot be spelled out from Sections 13, 18 and 25 of the Act No. 67 of 1957. It is well-settled that power to tax cannot be inferred by implication; there must be a charging section specifically empowering the State to levy tax. Section 18(2)(q) speaks of fee to be paid on applications for revision and not on minerals, mineral rights or mining laud. Section 25 speaks of "recovery of tax and fee" amongst others. Two observations are spontaneous. Firstly, a provision for recovery, being a machinery provision, cannot be read as empowering the levy of tax or fee. Secondly, it speaks of tax or fee being due to the Government without defining the same and without qualifying the word "Government" with Central or State. A perusal of several provisions of the Act and in particular Sections 9-A, 15, 5(1-A) (a) and (g), 15(3), 17(3), 21(5), 25 goes to show that the power of recovery is invariably given to the State Government and obviously the word "Government" in Section 25 refers to the State Government, which only is empowered to recover the sums due as arrears of land revenue.

...None of the two Constitution Benches have held that power to regulate and develop with which the Central Act of 1951 was concerned would include the power to levy tax and fee, which power shall have to be traced to some other entry in List I. List I contains a general entry i.e. Entry 96 for levy of fee in respect of matters in List I but so far as levy of tax is concerned there are separate and specific entries (see Entries 82 to 92B to in List I and Entries 45 to

63 in List II). Further in view of Entry 50 of List II, parliament can by any law relating to mineral development limit or place limitations on the power of the State Legislatures to impose taxes on mineral rights.

The Supreme Court then concluded:

A reasonable tax or fee levied by State, legislation cannot, in our opinion, be construed as trenching upon Union's power and freedom to regulate and control mines and minerals.

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

India Cement is clearly distinguishable so far as the present cases are concerned. As we have already pointed out it was a case of cess levied by State Legislature on royalty and not on mineral rights or land and buildings. That is why the levy was held ultra vires. Seervai's comment and objective criticism on *India Cement* is noteworthy (See *ibid*, para 22.257 C) Royalty is income and State Legislatures are not competent to tax an income. This single ground was enough to strike down the levy of cess impugned in *India Cement*. Nothing more was needed. The *Orissa Cement Ltd.* (*supra*) also, as the very opening part of the report shows, dealt with the levy of a cess by the State based on the royalty derived from mining lands which was held to be directly and squarely governed by *India Cement* and, therefore, struck down.

In *State of Orissa and others Vs. Mahanadi Coalfields Ltd. and others*, the impugned levy by the State Legislature was a tax of Rs. 32 per thousand acre on coal bearing lands. It was sought to be defended as falling under Entry 49 or in the alternative under Entry 28 or Entry 50 in List 11. The attack was that the legislation being one on mineral lands and mineral rights and the parliament having enacted the Mines and Minerals (Development and Regulation) Act, 1957, the field was entirely covered and the State Legislature was incompetent to levy the tax. Reliance was placed on *India Cement*, *Orissa Cement* and *Buxa Dooars Tea Co. Ltd.* (*supra*). Only mineral bearing land and coal bearing land were the subject of the levy of tax. The three-Judges Bench speaking through K.S. Paripoornan, J., concluded that the charging section of the impugned Act imposed a tax on the minerals also, and was not confined to a levy on land or surface characteristic of the land. All non-mineral bearing lands and non-coal bearing lands were left out of the levy. The levy was struck down as levying a tax not on land (related to surface characteristic of the land) but on minerals and mineral rights. *Goodricke's case* (*supra*) was cited before their Lordships and it was observed that in *Goodricke's case* the impugned levy was held to be a tax on land and that makes all the difference.

....

Having made an independent review of several judicial decisions and the several

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

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

(1) In the scheme of the Lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation. They, are separately enumerated.

(2) Power of "regulation and control" is separate and distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law. The subject matter of two taxes by reference to two Lists being different simply because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. This is the distinction between the subject of a tax and the measure of a tax.

(3) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by Legislature for quantification of tax is not decisive of the measure of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax

(4) Entries 25, 53 and 54 in List I are not heads of taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of Union having enacted laws by reference to Entries 52, 53, 54 in List I. It is for the Union to legislate and impose limitations on States otherwise plenary power to levy taxes in mineral rights or taxes on lands (including mineral bearing lands) by reference to Entry 50 and 49 in List II and lay down the limitations on State's power, if it chooses to do so, and also to define the extent and sweep of such limitations.

(5) The Entries in List I and List II must be so construed as to avoid any conflict.

If there is no conflict, an occasion for deriving assistance from non-obstante clause "subject to" does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:

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

Two - In which Entry the impugned legislation falls by finding out the pith and substance of the legislation?

and

Three - Having determined the field of legislation where in the impugned legislation falls by applying doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

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

(7) To be a tax on land, the levy must have some direct and definite relationship with the land. So long as the tax is a tax on land by bearing such relationship with the land, it is open for the legislature for the purpose of levying tax to adopt any one of the well known modes of determining the value of the land such as annual or capital value of the land or its productivity. The methodology adopted, having an indirect relationship with the land, would not alter the nature of the tax as being one on land.

(8) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy cannot be said to have encroached upon the field of "regulation and control" belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods. Entry 23 in List II speaks of regulation of mines and mineral development subject to the provisions

of List I with respect to regulation and development under the control of the Union. Entries 52 and 54 of List I are both qualified by the expression "declared by Parliament by law to be expedient in the public interest". A reading in juxtaposition shows that the declaration by Parliament must be for the "control of industries" in Entry 52 and for regulation of mines or for mineral development" in Entry 54. Such control, regulation or development must be "expedient in the public interest". Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming subject matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament. In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the declaration. The legislative power to tax by reference to witness in List II is plenary unless the entry itself makes the field "subject to" any other entry or abstracts the held by any limitations imposable and permissible. A tax or fee levied by State with the object of augmenting its finances and in reasonable limits does not ipso facto trench upon regulation, development or control of the subject. It is different if the tax or fee sought to be levied by State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental.

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

(emphasis supplied)

32. The Supreme Court while dealing with the Minor Minerals Matters relating to levy of cess levied by the State of U.P. which had been upheld by the Allahabad

High Court observed:

The MMDR Act enables control over the regulation of mines and the development of minerals being exercised by the Central Government through legislation. The High Court has upheld the validity of the SADA Act by relating it to Entry 5 in List II which is "local government". Any local government exercising the power of governance over a local area shall have to administer, manage and develop the area lying within its territory which cannot be done without raising funds. It is usual for every piece of legislation giving birth to an institution of local government to feed it by incorporating provisions conferring power of generating funds for meeting the expenses of governance.... The impugned cess can, therefore, be justified as a fee for rendering such services as would improve the infrastructure and general development of the area the benefits whereof would be availed even by the stone crushers. Entry 66 in List II is available to provide protective constitutional coverage to the impugned levy as fee.

....

As we have pointed out earlier, a cess may be tax or fee. So far as the present case is concerned, this distinction does not need any further enquiry by reference to the facts of the case inasmuch as the impugned cess is constitutionally valid considered whether a tax or a fee....

As a tax the impugned levy of cess is clearly covered by Entry 5 of List II (as the High Court has held, and we add) read with Entries 49, 50 and 66 of List II.... What is under challenge is only the levy of cess. There is nothing wrong in the state legislation levying cess by way of tax so as to generate its funds. Although it is termed as a cess on mineral right, the impact thereof falls on the land delivering the minerals. Thus, the levy of cess also falls within the scope of Entry 49 of List II. Inasmuch as the levy on mineral rights does not contravene any of the limitations imposed by the Parliament by law relating to mineral development, it is also covered by Entry 50 of List II. The power to levy any tax or fee lying within the legislative competence of the State Legislature can be delegated to any institution of local government constituted by law within the meaning of Entry 5 in List II, The Entries 5, 23, 49, 50 and 66 of List II provide adequate constitutional coverage to the impugned levy of cess. True it is that the method of quantifying the cess is by reference to the quantum of mineral produced, This would not alter the character of the levy, There are myriad methods of calculating the value of the land for the purpose of quantifying the tax reference where to has already been made by us in the other part of this judgment....

....

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

a fee or fee as well. It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary that the services rendered by the fee collected should remain confined to the persons from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged. The levy of the impugned cess can equally be upheld by reference to Entry 66 read with Entry 5 of List II.

(emphasis supplied)

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

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

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

34. It also needs to be mentioned that Article 40 of the Constitution empowers the State to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as unit of self-government. The Seventy Third Constitution Amendment Act, 1992 inserted Part IX in the Constitution which deals with the Panchayats. Article 243G of the Constitution provides that subject to the revisions of the Constitution the

Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government in matters relating to the implementation of schemes for economic development and social justice as may be entrusted to them including those matters listed in the Eleventh Schedule. Amongst others, Article 243H of the Constitution provides that the Legislature of a State may, by law, authorise a Panchayat to levy collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits as may be specified in law. A perusal of the Eleventh Schedule indicates that the matter relates to roads, culverts, bridges, ferries, waterways and other means of communication. In order to give effect to the Seventy Third Constitution amendment, the Zila Panchayat Act was suitably amended in 1994.

35. The contention of Dr. L.M. Singhvi, learned Senior Counsel for the petitioner that by virtue of the provisions contained in the Mines Act and by virtue of requisite declaration contained in Section 2 of the said Act that it is expedient in the public interest that the Union should take under its control the regulation of mines and development of miner is and such declaration being in the terms contemplated by Entry 54 of List, the levy of fees by the Zila Panchayat would be clearly repugnant to the power reserved by the Constitution and the Mines Act to be exercised by the Central Government, cannot be accepted

36. As seen above, the Constitution Bench of the Supreme Court in Kesoram clearly held that tax and fee was not a subject dealt with the Mines Act as would be clear from the provisions of Sections 13, 18 and 25 of the Act and that a State Legislation which makes provisions of levying such a fee for rendering services without any intention of regulating and controlling the Subject of the levy, cannot be said to have encroached up on the field of regulation and control" belonging to the Central Government.

37. The Supreme Court in Kesoram also pointed out that the heads of taxation are clearly enumerated in Entries 83 to 92B in List I and Entries 45 to 63 List II. List III does not provide for any head of taxation. Entry. 96 in List I, Entry 66 in List 11 and Entry 47 in List III deal with the fees. The residuary, power of legislation in the held of taxation can apply to only subjects as are not included in Entries 15 to 63 in List II. Thus, the tax on land and buildings in Entry 49 of List II cannot be levied by the Union. Power to tax mineral rights is with the States but the power to lay down limitations on exercise of such power, in the interest of regulation, development or control, is with the Union. This is the result of homogeneous reading of Entry 50 in List II and Entries 52. and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering service by the State and it does not impinge upon the regulation of Spines and mineral development or upon control of of industry by the Central Government, it is not unconstitutional. The Supreme Court further observed that any local Government exercising the power of governance over the local area shall have to

administer, manage and develop the area lying within its territory which cannot be done without raising funds and that it is not necessary that the services rendered from out of the fee collected should be directly in proportion to the amount of fee collected or that the services rendered should remain confined to the persons from whom the fee has been collected. The availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fees charged. The levy of the fee can be upheld by reference to Entry 66 read with Entry 5 of List II.

38. The Supreme Court in *Kesoram* also pointed out that the item/"land" as occurring in Entry 49 of List II has a wide connotation. To be a tax on land, the levy imposed must have some direct and definite relationship with the land. In the present case fees are being levied when the mines owner or any other purchaser of minerals transports the minerals after using the roads which have been specially constructed by the Zila Panchayat for the said purpose. The impact therefore falls within the scope Entry 49 of List II. Thus the levy of fee can also be sustained under Entry 49 of List II read with Entry 66.

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

40. At this stage the submission of Dr. L.M. Singhvi, learned Senior Counsel for

the petitioner that the judgment of the Supreme Court in Kesoram in so far as it deals with Ram Dhani's case, is in respect of minor minerals and can have no application where major minerals are involved can also be dealt with. The Supreme Court in Kesoram while dealing with the general power of "regulation and control" has referred to the various provisions of the Mines Act including Sections 13, 18 and 25 which do not relate to minor minerals but major minerals and after taking into consideration these section has held that the power to levy the fees cannot be spelt out in the Mines Act. It needs to be mentioned that in Kesoram coal matters were also under consideration. This contention cannot, therefore be accepted.

41. Faced with this difficulty, learned Senior Counsel for the petitioner contended that we should not follow the Constitution Bench decision of five Hon'ble Judges in Kesoram in view of the earlier Constitution Bench decision of the Supreme Court of seven Hon'ble Judges in India Cement. He also submitted that the Supreme Court in Kesoram has relied upon certain decisions, which in fact, have overruled in India Cement In this connection reliance has also been placed upon the decision of the Orissa High Court in Writ Petition No. 7991 of 2005 connected with many other matters (National Aluminium Co. Ltd. v. State of Orissa and Ors.) rendered on 5.12.2005. Reliance has also been placed upon the decision of the Madhya Pradesh High Court in Writ Petition No. 2228 of 2003 (Hindalco. Industries Ltd. and Anr. v. Union of India and Ors.) decided on 14th May, 2007.

42. Kesoram has dealt with and explained India Cement at length. It has also explained the error attributable "either to a Stenographer's devil or to sheer inadvertence" that had crept into the majority judgment and, therefore, found itself duty bound to correct the error so hat it may not cause embarrassment and have adverse affect on subsequent judicial pronouncements-which would follow India's Cement. Kesoram also distinguished India Cement by pointing out that it was a case of cess levied by State Legislature on royalty and not on mineral rights or land and buildings. It is, therefore, clear that India Cement was explained and distinguished in the subsequent judgment in Kesoram. The Orissa High Court noticed this fact but fell in error in observing the Kesoram did not explain or distinguish India's Cement. With respect to the learned Judges constituting the Division Bench, we express our inability to subscribe to the view taken by the Orissa High Court. The challenge before the Madhya Pradesh High Court was to the demand notices issued under the provisions of M.P. Transit (forest Produce) Rules, 2000 and the notification dated 28th May, 2001 issued by the State of Madhya Pradesh. In order to find out whether the fee impinges upon the regulation of mines and mineral development, the Court referred to the judgment of the Supreme Court in Kesoram and distinguished it by holding that in the case before them, the unit of mineral was taken into consideration for determining the levy at the rate of Rs. 7/- per tonne of the coal extracted. The Court found from the notification that the levy of fee was not on the land but on minerals and therefore, the notification ran counter to the rules. The said decision is therefore, not applicable as in the present case we have held that

under the bye-laws the levy is not on the minerals but on the trucks that carry the minerals by land.

43. It is in the light of the discussion made above that the first question of law, namely, whether the view taken in paragraph 6 of the judgment of the Division Bench in Okhla Sand Supply Co. (supra) lays down the correct legal position has to be examined.

44. The Division Bench in Okhla Sand Supply Co. was considering the validity of the notification dated 20.3.1999 by which toll tax was imposed by Zila Panchayat, Clautam Budh Nagar on trucks carrying sand which is a minor mineral under the provisions of the Mines Act. The Zila Panchayat contended that the main purpose for imposition of toll tax. was to recover the cost of construction and maintenance of the Bridge. The Court found that the Bridge/road had not been constructed by the Zila Panchayat. The Court then considered the other submission advanced by the counsel for the Zila Panchayat that the toll tax was imposed for taking sand by road and the same was permissible u/s 145(b) of the Zila Panchayat Act. The Division Bench observed that the notification did not relate to toll tax on vehicles, pack animals or pullers bringing goods to sell in the market and as such Section 145(b) of the Zila Panchayat Act had no application. The Division Bench also held that the notification in question related to imposition of toll tax in respect of mines and minerals covered by the Mines Act and the Rules framed thereunder and therefore it was not permissible for the Zila Panchayat to impose such tax. This finding has been recorded by the Division Bench without any discussion and as seen above, it is clearly contrary to the decision of the Supreme Court in Kesoram.

45. The Division Bench while referring the matter to the Larger Bench observed that the main purpose of the Mines Act is to regulate mines and minerals and it was not basically concerned with transportation of the minerals from the mines to the main road and, therefore, the said matter is not the subject matter of the Mines Act. It also observed that where roads are constructed with the principle object of facilitating of transportation of minerals then a fee can be levied by the Zila Panchayat for the said facilities as the pith and substance of the matter has to be seen.

46. Thus, for all the reasons stated above, we hold that the decision of the Division Bench of this Court in Qkhla Sand Company (supra) does not lay down the correct law.

47. This brings us to the second question of law that has been referred to the larger Bench, namely, whether Section 239 read with Sections 142, 143 and Other provisions of the Zila Panchayat Act entitles the Zila Panchayat to frame the impugned bye-laws and levy the impugned fee.

48. Dr. L.M. Singhvi learned Senior Counsel for the petitioner submitted that the impugned bye-laws are beyond the powers of the Zila Panchayat as the transportation of mineral is not contemplated by Sections 142, 144 and 239 of

the Zila Panchayat Act. Elaborating his submission, he contended that Section 142(1) of the Act is not attracted inasmuch under this Sections the Zila Panchayat can charge fee to be fixed by the bye-laws for use and occupation of any immovable property vested in, or entrusted to the management of the Zila Panchayat including any public road or place by which it allows the use or occupation whether by allowing a projection thereon or otherwise but the use or occupation which fall under the expression "or otherwise" are specifically provided for under the provisions of Section 239 and do not provide for framing bye-laws for imposing fees for passing of vehicles on public roads. His contention, therefore is that the scope of ""OR otherwise" mentioned in Section 142 of the Act is defined in Section 239 and for the purposes of the present Case is u/s 239(2)C namely Streets but this does not contemplate the imposition of fee by Zila Panchayat merely on passing of vehicles on public road and, therefore, the levy of fees is without jurisdiction.

49. Learned Advocate General Sri S.M.A. Kazmi and Sri Ravi Kiran Jain, learned Senior Counsel for the Zila Panchayat on other hand, submitted that Section 142(1) of the Zila Panchayat Act is an independent provision which authorises the Zila Panchayat to levy fee for use or occupation of immovable property of Zila Panchayat including public roads or places and Section 239(2) has no application since bye-laws under this sub-section are framed without prejudice to the generality of the power conferred on the Zila Panchayat by Sub-section (1) of Section 239. They further contended that u/s 239(1) the Zila Panchayat could make bye-laws applicable to the whole or any part of the rural area of the district in respect of matters required by the Act to be governed by bye-laws and since u/s 142, the Zila Panchayat could charge fees to be fixed by bye-laws for use or occupation of any immovable property vested in or entrusted to the management of the Zila Panchayat including any public load, the Zila Panchayat had validly framed the bye-laws. It was also contended by the learned Senior Counsel for the respondents that in view of the definition of public road in Section 2(37) of the Zila Panchayat Act, the Zila Panchayat was competent to levy fees even if a person had enforceable right to use the road.

50. Chapter VII of the Zila Panchayat Act containing Sections 119 to Section 146 deals with taxation and levy of fees and tolls. While Sections 119 to 141 deal with taxes, Sections 142 to 146 deal with fees and tolls Section 142 provides that a Zila Panchayat may charge fees to be fixed by bye-law or by public auction or by agreement for the use or occupation (otherwise than under a lease) of any immovable property vested in, or entrusted to the management of the Zila Panchayat including any public road or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise. Such fees may either be levied along with the fees charged u/s 143 of the Act for the sanction, licence or permission or may be recovered in manner prescribed by Chapter VIII. Section 239 of the Act which is contained in Chapter XI deals with the power of the Zila Panchayat to make bye-laws. Sub-section (1) of Section 239 provides that a Zila Panchayat may, and where required by the State Government shall,

make bye-laws for its own purposes and for the purposes of Kshettra Panchayats, applicable to the whole or any part of the rural area of district, consistent with the Act in respect of matters required by the Act to be governed by bye-laws and for the purposes of (sic) or maintaining the health, safety and convenience of the inhabitants of the rural area of the district and for the furtherance of the administration of the Act in the Khand and the district. Sub-section (2) of Section 239 provides that in particular and without prejudice to the generality of the power conferred by Sub-section (1) a Zila Panchayat may, in the exercise of the said power, make any bye-laws described in the list indicated in the sub-section. Section 242(2) of the Zila Panchayat Act provides that the power of a Zila Panchayat to make bye-laws shall be subject to the conditions of the bye-laws being made after previous publication and of their not taking effect until they have been confirmed by the prescribed authority and published in the Gazette.

51. The contention of Dr. Singhvi, learned Senior Counsel for the petitioner is that the Zila panchayat can impose fee u/s 142 of the Act only on such use of occupation as are prescribed u/s 239(2) of the Act. In this connection he pointed out that the limitations are prescribed under "C-Streets" contained in Section 239(2) of the Act and mere passing or repassing of the vehicles on public road is not covered under this. In our opinion, Section 142(1) is an independent section which empowers the Zila Panchayat to charge fee to be fixed by the bye-laws for use and occupation of the public road. Section 239(1) of the Zila Panchayat Act clearly empowers the Zila Panchayat to make bye-laws for its own purposes in respect of matters required by this Act to be governed by bye-laws. Thus, in view of Section 142(1) of the Zila Panchayat Act read with Section 239(1) of the Zila Panchayat Act, the Zila Panchayat can frame bye-laws without prejudice to the generality of the power public road Section 239(1) of the Zila Panchayat Act. In such circumstances Panchayat to make bye-laws without prejudice to the generality of the power conferred by Section, 239(1) of the Zila Panchayat, Act. In such circumstances the contention of the learned Senior Counsel for the petitioner that the power to frame bye-laws u/s 142(1) of the Zila Panchayat Act is circumscribed by the conditions contained in Section 239(2) of the Act and in particular to "C-Streets" cannot be accepted.

52. Learned Senior Counsel for the petitioner further contended that in view of the decisions of this Court in U.P. Udyog Vyapar Pratinidhi Mandal and Others Vs. State of U.P. and Others, and in view of the decision of the Supreme Court in Nagar Mahapalika Varanasi Vs. Durga Das Bhattacharya and Others, , the Zila Panchayat cannot charge fees for use of road since providing this facility is a statutory function of the Zila Panchayat. This contention, cannot also be accepted since "Public Road" in Section 2(37) of the Zila Panchayat Act has been defined to mean any road over which the public in general have a legally enforceable right to way and it is vested in or maintained by a Government or local authority.

53. Learned Senior Counsel for the petitioner further contended that fee is not

chargeable as the coal is not coming to the factory from any of the areas of Sonebhadra district and the trucks transporting coal from outside the State of Uttar Pradesh in the petitioner's site do not use the said service roads linking the mines to the metal roads but ply only on the metal roads which have not been built or maintained by Zila Panchayat. These and other factual aspects have not been dealt with as we have to answer the two questions of law that have been referred to us and these matters may be considered by the appropriate Division Bench hearing the petitions.

54. Our answers, therefore, to the two questions of law are as follows:

1. The view taken in paragraph 6 of the judgment of the Division Bench in Okhla Sand Supply Co. and Anr. v. State of U.P. and Ors. does not lay down the correct legal position.
2. Section 142(1) of the Zila Panchayat Act read with Section 239(1) of the Zila Panchayat Act entitles the Zila Panchayat to frame the bye-laws and levy the impugned fee.

55. Let the writ petitions be now placed before the appropriate Division Bench along with our answers.