
(1995) 03 PAT CK 0008

In the Patna High Court

Case No : C.W.J.C. Nos. 3717, 3781, 3807 of 1993 (R) and 1637 of 1994 (R)

Bharat Coking Coal Ltd. and Another

APPELLANT

Vs

Coal Mines Area Development Authority and Others

Tata Iron and Steel Co. Ltd. Vs State of Bihar and Others

RESPONDENT

Date of Decision : 31-03-1995

Acts Referred:

Citation : (1995) 03 PAT CK 0008

Judgement

R.N. Sahay, J.

1.The constitutional questions in dispute in these group of writ applications under Articles 226 and 227 of the Constitution of India necessitate a consideration:

(1) Whether Section 89(1) of the Bihar Coal Mining Area Development Authority Act, 1986 (Bihar Act 9 of 1986) (hereinafter to be referred to as the "Bihar Act" wherein "cess" is levied on annual despatches of coal and coke, is null and void being ultravires the Bihar Legislature since by virtue of Mines & Minerals (Regulation & Development) Act, 1957 (Central Act 67 of 1957), the Union has assumed complete control over regulation of mines and minerals leaving no space for the State Legislature to legislate on the said subject.

(2) Whether Section 90(4) of the Act wherein water charges are realised from colliery owners for supply of water at the rate to be determined by the State Government, is void since it suffers from vice of unconstitutional delegation of legislative power.

2. The assessee-petitioners have applied for a writ of mandamus prohibiting Bihar Mineral Area Development Authority, the 2nd respondent, from enforcing the impugned provisions of the Act and proceeding under the Bihar & Orissa Public Demand Recovery Act for recovery of arrear of cess and water charges.

3. The petitioners in C.W.J.C. 3807/93R; M/s. Bharat Coking Coal Ltd. and Eastern Coal field Ltd. are Government companies within the meaning of Section 617 of the Indian Companies Act, 1956. Petitioner in C.W.J.C. 3781/93R is M/s.

Bharat Coking Coal Ltd. In C.W.J.C. 3717/93R and 1637/94R, the petitioner is M/s. Tata Iron & Steel Co. Ltd. a public: limited company having its registered office at 24, Homi Modi Street, Fort, Bombay.

4. M/s. Bharat Coking Coal Ltd. (in short to be referred as "BCCL") and Eastern Coal fields Ltd. own various collieries in the State of Bihar nationalised under the provisions of Coking Coal Mines (Nationalisation) Act, 1972 and Coal Mines Nationalisation Act, 1973. The mining activities of the petitioners are regulated by the provisions of Mines & Mineral (Regulation & Development) Act, 1957 (in short to be referred to as "MMRD Act, 1957").

5. M/s. Tata Iron & Steel Co. Ltd. (in short to be referred to as "TISCO") is primarily engaged in the manufacture and sale of iron and steel products which is carried on in the petitioner's steel plant at Jamshedpur in the district of East Singhbhum. The petitioner is also owner of several collieries situated in the district of Dhanbad which are being captively used for supplying coal to the petitioner's steel plant.

6. In 1914, the Provincial Legislature enacted Jharia Water Supply Act (Bihar & Orissa Act 3 of 1914) with the object of construction of water works for supply of water to the Jharia coal field and for constitution of water Board. The Act was extended to coal bearing areas included within Jharia, Katras and Nawagar Parganas in the then district of Manbhum and portion of the district of Hazaribagh.

7. Section 54 of the aforesaid Act provides for levy of tonnage cess on the annual despatches of coal and coke from each coal mines; payable by the owners of the mines. Section 56(A) and 56(E) thereof provides for levy of water charges for supply of water for domestic and other purposes. Jharia Water Board was constituted under the said Act. The colliery owners, including the writ petitioners, who have been deriving benefits of the provisions of Jharia Water Supply Act were assessed in tonnage cess and water charges.

8. The Jharia Mines Board of Health was created under the Bihar and Orissa Mining Settlement Act, 1920 which was responsible for water supply, sanitation, health, epidemic control etc. in the Jharia Coalfield area for last more than 70 years.

9. In 1983, Bihar Mineral Area Development Ordinance was promulgated which was followed by four successive Ordinance. In 1986, the impugned Bihar Act 9 of 1986 was enacted which received the assent Of the President of India on 30.9.1986. By Section 132 of the Act, from the date of constitution of the Authority under this Act, the Acts mentioned in the Section including the Jharia Water Supply Act, 1914; Bihar & Orissa Mining Settlement Act, 1920, mentioned therein ceased to operate within the area notified u/s 3 of the Act.

10. The object of the impugned Act is to provide for the growth and development of coal mining area in the State and matters ancillary thereto. It would be

appropriate at this stage to have an idea of the Scheme of this Act.

Section 3 of the Act provides for declaration of the coal mining development area by the State Government by notification in the official gazette.

Section 5 provides for constitution of Coal Mining Area Development Authority for the said area. The Authority constituted u/s 5 is a body corporate with perpetual succession and a common seal. The authority so established consists of several members including a representative of Ministry of Central Govt. dealing with coal as well as representative of Town and Country Planning organization of the Govt. of India. It includes two representatives of the entrusted coal mining development area to be nominated by the Central Govt.

Section 8 lays down the functions and powers of the Coal Mining Area Development Authority constituted u/s 5 of the Act.

Chapter IV of the Act deals with development plan. Chapter V relates to control, development and use of land. Chapter VI relates to development schemes. The schemes contemplated under Chapter VI, inter-alia, provides for:

1. Water Supply.
2. Lighting.
3. Drainage.
4. Safety, health and welfare of person within the mining settlements.

Chapter VII relates to levy, assessment and recovery of development charges, tonnage cess. etc.

11. Section 89 of the Act (prior to amendment by Amendment Act 24 of 1992) read as follows:

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

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

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

(2) Royalty cess: (i) An additional cess at the rate of five per cent shall be levied and realised on the amount of royalty to be received by the State Govt. (ii) Additional cess realised under Sub-clause (i) shall be transferred to the Authority for the fulfilment of its object.

12. In the present writ application we are concerned with the vires of Section

89(1) of the Act. Sub-section (2) of Section 89 is not under challenge since no demands have been raised against the petitioner for realization of royalty and cess.

13. Section 90 of the Act is as follows:

Charges for water supply (1): The Authority shall cause mains to be laid down and water to be brought to the boundary of every colliery situated in the area of supply paying the tonnage cess u/s 89 and shall provide at least one connection and may on the request and at the cost of the owner of any such colliery provide additional connections between its main and connection pipes laid down by or for any such colliery.

(2) On the application of the owner of any premises situated in any part of the area of the Authority other than the colliery, the Authority may, subject to such rules as the Government may make in this behalf, supply water to such premises on such conditions as may be agreed upon between the Authority and the owner of such premises.

(3) The Authority may provide the supply of water through stand pipes or any other source to any town, village or place within the area of supply:

(a) on its own notion, if it considers that such supply is necessary for the preservation of public health.

(b) on application from the citizens of such area, village or place; or

(c) on application from any local authority charged with administration of or empowered to make provision or the supply of water to such town, village or place on such conditions and in such manner as the Government may prescribe by rules made from time to time in this behalf.

(4) For water supply to its mains and pipes as mentioned under this Section the Authority shall be entitled to charge:

(i) the owner of a colliery supplied at such rate not being less than Rupees Four per thousand gallons subject revision by the Government from time to time.

(ii) the owner of premises supplied at such rates as may be determined by the Government in this behalf but not exceeding Rupees Four per thousand gallons.

14. By the Bihar Coal Mining Area Development Authority (Amendment) Act, 1992, the existing Section 89 has been replaced by the following provisions:

Levy of tax on use of land for other than agricultural and residential purposes:

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

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

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

15. Sub-section (4) of Section 90 of the original Act has been amended as follows:

(i) In Clause (i) for the word "Four" the word "Sixteen" shall be substituted ;

(ii) In Clause (ii) for the word "Four" the word "Sixteen" shall be substituted;

16. Section 96 of the impugned Act, *iriter-alia*, provides:

(1) The Authority shall maintain its own fund to which shall be credited.

(a) all money received by the Authority from the Government by way of grants, loans, advances, or otherwise;

(b) all Development charges or other charges or costs, fees received by the Authority under this Act or rules or regulations thereunder.

(c) the proceeds of the tonnage cess on the annual despatches of coal and coke from mines;

(d) the proceeds of the sale of water to consumers.

(e) all sums borrowed by the Authority u/s 123;

(f) all receipts in respect of any school or institution or work vested in or under the control and administration of the Authority;

(g) contribution from such local Authority/Authorities of the area included in the Coal Mining Development Area of the Authority;

(h) contribution from Panchayat funds, agricultural market yards and other sources such as irrigation tax, water tax etc. as approved by the State Government from time to time.

17. The petitioner BCCL and Eastern Coalfield Ltd. paid the tonnage cess and water charges without demur till financial year 1988-89. After 1989, they stopped submitting returns and payment of tonnage cess. The petitioner in C.W.J.C. 1637/94(R) TISCO have stopped payment of cess after 1993. They stopped payment of cess by reason of the fact that this Court by judgment dated 6.11.90 in C.W.J.C. 368/90R struck down the Bengal Cess Act, 1980 on the ground that the State Legislature lacked legislative competence to impose cess and royalty in respect of minerals. The decision was upheld by the Supreme Court in *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, . The said decision actually inspired the petitioner to challenge the constitutionality

of the impugned Act.

18. Sri Basudev Prasad, Senior Advocate appearing for BCCL and Eastern Coalfield Ltd. and Sri K.D. Chatterjee Sr. Advocate appearing for the TISCO contended that after the declaration made by the Parliament in terms of entry 54 list I in Section 2 of the MMRD Act, 1957, the Parliament occupied the whole field of control and regulation of mines and development of minerals. Consequently the State Legislature ceased to have power to enact the impugned Section 89(1) which fell in pith and substance under entry 23 list II and not under entry 68 list II of the Constitution although it incidentally affects the land. It was submitted that vires of Section 89(1) of the impugned Act is concluded by the decision of the Supreme Court in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, followed by *Orissa Cement*. (Supra).

19. Since we are called upon to decide the vires of Section 89(1) of the Act, on the basis of *Orissa Cement* case, we proceed to decide the writ petitions at the admission stage itself.

20. The provisions of the impugned Bihar Act under consideration has a striking similarity with *Orissa Mining Area Development Fund Act, 1952*, the vires of which came up for consideration by the Supreme Court in the leading case of *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, . The Orissa Act was passed for constituting a mining area development fund in the State of Orissa. The Act contained provisions for amenities like communication, water supply and electricity for better development of any area in the State of Orissa wherein any mine was situated. Section 4 of the Act provided for imposition and collection of cess which shall not exceed 5% of the valuation of the minerals at the pit's mouth.

21. The Constitutional competence of Orissa State Legislature to levy cess under the Act was attacked on two main grounds. In the first place, it was urged that the cess was in pith and substance a duty of excise under item No. 84 of List I of the 7th Schedule and, therefore, the levy of such a cess was beyond the competence of Orissa State Legislature. In the second place, it was urged that even if cess is a fee, in view of the *MMRD Act, 1948* and the *Industries Development and Regulation Act, 1952*, the Orissa State Legislature was not competent to pass the Act.

22. The cess levied went into special fund ear-marked for carrying out the purposes of the Act. The Hon''ble Supreme Court held that the scheme of the Orissa Act clearly showed that cess was levied against the class of persons owning mines in the notified area to enable the State Govt. to render specific services to the said class by developing the notified mineral area. There was an element of quid pro quo in the scheme. The cess collected was constituted into a specific fund and it did not become a part of the consolidated fund. These features of the Act impressed upon the levy, a character of a fee being distance from a tax, relatable to entry 23 list 2. It was further observed by the Supreme

Court that the legislature when decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want any service and, therefore, they should be exempted from payment of cess. Though there is an element of quid pro quo between the tax-payer and the public authorities, there is no option to the taxpayer in the matter of receiving the service determined by the public authorities/with regard to fee and there must always be no relation between fee collected and the service intended to be rendered. Whether or not a particular cess levied by Statute amounts to a fee or tax would always be question of fact to be determined by circumstances of each case.

23. The Orissa Act escaped invalidation although the field covered by the MMRD Act, 1948 was substantially the same as the field covered by the impugned Act. As the declaration made by Section 2 of the Central Act did not. constitutionally amount to the requisite declaration by the Parliament and so the limitation imposed by entry 54 did not operate.

24. The same Orissa Act was again impeached in State of Orissa Vs. M.A. Tulloch and Co., after the enactment of MMRD Act, 1957. The MMRD Act contained the declaration in terms of what is required by entry 54 of the Union List, that it is expedient in the public interest that the Union should take control of regulation of mines and development of minerals to the extent provided under the Act.

25. The hurdle which prevented the Supreme Court from considering the provision of 1948 Act is Hingir Rampur's case as a bar to the levy of cess was, therefore, out of the way. The Constitution Bench analysed in detail the provisions of the impugned Orissa State Act as well as the two Central Acts (1948 Act and 1957 Act). It referred to the decision in Hingir Rampur's case that the field covered by the impugned Orissa State Act was covered by MMRD 1948 Act and observed that this fully applied to State Act vis-a-vis 1957 Act also.

26. Ayenger, J speaking for the Constitution Bench said that MMRD Act, 1957 covered the entire field of mineral development having regard to Section 18(1) of the Act which laid a duty upon the Central Government to take all such steps as is necessary for the conservation and development of minerals in India.

27. It was urged in Tulloch's case (Supra) that even if the Union can levy a fee under the Central Act, it would not affect or invalidate a State Legislature imposing a fee for a similar service. Rejecting the arguments, the Supreme Court observed:

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

28. It was further held that there is express provision for power to levy a fee u/s 13 of the MMRD Act of 1957 & the Orissa Act was held to be invalid.

29. A Constitution Bench of the Supreme Court consisting of seven Hon'ble Judges in *India Cement Ltd. (Supra)* the constitutional validity of Sections 115 and 116 of the Tamil Nadu Panchayat Act, 1958. Under the impugned, provision local cess was levied in every Panchayat development block, @ 45 ps. on every rupee of land revenue payable to Government in respect of any land for every Fasli. The question for consideration by the Supreme Court was whether levy of cess was tax on royalty and hence beyond the competence of the State Legislature because Section 9 of the MMRD Act, 1957 covers the field and the State Legislature was denuded of its competence under entry 23 of List II of Schedule VII of the Constitution. It was further held that in any event cess on royalty cannot be sustained under entry 49 of List II as being tax on land. It was further held that the levy could not be justified either under 49 or entry 50 of List II. It was observed that no tax can be levied under the impugned Act, if no minor activities are carried on, hence it was not related to land as an unit which is the only method of valuation of land under entry 49 of List II, but is related to mineral extracted. The impugned legislation in its pith and substance therefore was tax on royalty and not tax on land.

30. The Supreme Court in *India Cement* case overruled its earlier decision in *H.R.S. Murthy Vs. Collector of Chittoor and Another*, , in which it was held that cess on royalty is tax on land within entry 49 of State List and, therefore, within the competence of the State Legislature to impose cess.

31. The next important decision is the *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, , in which all the cases referred to above were analysed in detail by Ranganathan, J while examining the Constitutional validity of Orissa Cess Act, 1962, Bengal Cess Act, 1880 and M.P. Kardhan Adhiniyam, 1982. The levy of cess in the aforesaid legislations was similar to the levy which was struck down in the *India Cement* case (*Supra*).

32. In *Orissa Cement Case*, (*Supra*) Hon'ble Supreme Court considered entries 52 and 54 of the Union List and Entries 18, 23, 45, 49 and 50 of the state List. It traced the earlier controversy in the subject from *Hingir Rampur* to *India Cement*. The impugned cess Acts were examined with reference to earlier

decisions.

33. Section 5 of the Orissa Cess Act, 1962, provides for assessment of cess on the annual valuation of land (as defined in Section 7) @ 25% turn of the annual value of the land. u/s 6, Cess was payable by a person for the land he holds for carrying mining operation. In case of land for carrying mining operation, the annual value is the royalty or the dead rent payable to the Government. u/s 10 proceeds of the cess is to be credited to the consolidated fund of the State to be utilised for primary education as well as contribution to Gram Panchayat and Samittees.

34. Section 6 of the Bengal Cess Act, 1880 provides for imposition of cess on the annual value of the lands and until provision to the contrary is made by the Parliament on the royalty of mines and quarries etc., the rate of royalty is left to be determined by the State Government from time to time, but it cannot exceed the amount of royalty.

Section 9 of the Act deals with application of the proceeds of cess. The proceeds of the local cess and all sums levied or recovered as interest or otherwise is to be paid in the district fund at such rate as may from time to time be determined by the State Government in the case of local cess of annual value of land and at such rate from time to time was to be determined by the State Government subject to maximum of 20% in case of local cess on royalty of mines and quarries or value of mineral bearing land, sale value of other immovable properties, forest produce, annual net profit of tramways or railways and the remaining amount is to be deposited in the consolidated fund of the State for construction and maintenance of other works of public utility.

35. M.P. Kardhan Adhiniyam, 1982 was enacted by the State Legislature to provide for levy of school building cess, forest development cess and mineral area development cess and matters incidental thereto. u/s 9 of the Act, there is provision of levy of mineral area development cess on land held under mining lease for undertaking mining operation for major mineral @ 100 percentum of the rental value thereof.

36. u/s 10, State Government is to decide from time to time the manner in which the amount of cess collected is to be utilised for development of mining lease area.

37. Dealing with Orissa Act, the Hon"ble Supreme Court held that royalty for carrying on mining operation or tax thereon cannot be equated to land revenue. Thus imposition of cess under the impugned Act cannot be tax on minerals. Imposition of cess cannot, therefore, be (a) justified by taking recourse to entry 50 of list II; (b) Sub-section 3 of Section 9 of MMRD Act, 1957 is a clear bar on the State Legislature Taxing royalty so as, in effect, to amend the second schedule of the Central Act and if the cess under the Orissa Act is taken to be a "tax" falling under entry 50, it will be ultravires in view of the provisions of the Central Act. (c) Considering the provisions of Section 10 of the Orissa Act levy

under the Act cannot be treated as fee falling under Entry 66 of List II. The levy cannot be co-related to any services rendered or to be rendered by the State, to the class of persons from whom the levy is collected. Whether royalty is a tax or not; cess is only a tax and cannot be properly described as a fee, and assuming it is a fee, the State Legislature can impose a fee only in respect of any of the matters in the State List. Assuming that the fee is covered under Entry 23, but the same is "subject to the provision of List I with respect to regulation and development" as mines and minerals development is in the field of Parliamentary legislation "to the extent which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest". Such a declaration is contained in Section 2 of the MMRD Act, 1957. It, therefore, follows that any State legislation to the extent it encroaches on the field covered by MMRD Act, 1957 will be ultravires. The imposition of cess under the Orissa Act is beyond the purview of the State Legislature by reason of the enactment of MMRD Act.

38. As regards the Bihar Act, it was held that though Section 6 refers also to the value of the mineral bearing land that furnishes only maximum up to which a cess based on royalty could go. In other words, the cess is levied directly on royalties on mines and quarries. The said Act was therefore, indistinguishable from India Cement. It was further held that there is no clear enactment in the Act that the amounts are collected by way of fee and not tax. Section 9 of the Act indicates that only a small percentage goes to the district fund and remaining portion would go to the consolidated fund of the State for construction and maintenance of other works of public utility. But the proviso to Section 9 requires that at least 10% has to be spent for the purposes relating to mineral development. It was held that it was a clear case of levy of royalty than in Orissa Act and for the reasons stated to declare the Orissa Act invalid, was applicable to Bihar Act also. Bihar Act was sought to be sustained by relying on Article 277 of the Constitution in view of the fact that cess was being levied since 1880. This contention was rejected outright because the levy that was challenged u/s 6 as amended in 1975 i.e. post-constitutional levy and Section 6 on its own language, is operative only until provision to the contrary is made by the Parliament and the field is covered by MMRD Act, 1957.

39. Similar contention was advanced by Sri Kapil Sibbal who argued for a brief spell. He contended that cess was being levied under Jharia Water Supply Act, 1914, a pre-Constitution law. The same provision having been re-enacted in the impugned Bihar Act cannot be challenged, in view of Article 277 of the Constitution of India.

40. Dealing with M.P. Act, the Hon^{ble} Supreme Court held that under the impugned Act, cess is not imposed on all land and that it is not dependant either on the extent of the land held in connection with mineral rights or on value thereof. The subject matter of tax is major mineral raised from the land held in connection with mineral rights. If no minerals are raised, tax is not leviable. The

tax is not dependant on the extent of the land held in connection with mineral rights. Thus the quantity of major mineral produced from the land would determine the liability as to the tax. The M.P. Act was declared invalid for the above reasons.

41. Section 89(1) of the Bihar Act under attack is analogous to the West Bengal Rural Employment and Production Act, 1976, the validity of which was considered in *Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others*, . This decision was relied upon by Sri K.D. Chatterjee, Sr. counsel for TISCO. The impugned provision West Bengal Act provided levy of cess in respect of tea estate at such rate not exceeding Rs. 6/- on each kilogram of tea on the despatches from such tea estate of tea grown therein. The status also provides that in calculating the despatches of tea for the purpose of levy of rural employment cess, the despatches for sale made at such tea auction centres as may be recognised by the State Government shall be excluded. The Supreme Court held that in substance, the impugned levy was levy in respect of despatches of tea and not in respect of tea estate. It was then pointed out that the question of legislative competence also turned on this issue. It was observed that if the impugned legislation were to be treated as levy in respect of tea estate, it would be referable to entry 49 of list II in the 7th Schedule of the Constitution which speaks about tax on land and building. But if the legislation is in substance legislation in respect of despatches of tea, legislative authority must be found for it with reference to some other entry. It was observed that no such entry under List II or List III had been brought to its notice and further that u/s 2 of the said West Bengal Act, 1953, control over the tea industries been assumed by the Parliament within the meaning of entry 54 of List I. The court, therefore, upheld the challenge to the competence of the State Legislature to levy the impugned cess. The ratio in *Buxa Doors Tea Co. Ltd.* case applies with full force to the impugned Bihar Act.

42. The following propositions emerge from the decision in *Orissa Cement Case* (Supra):

1. The State Legislature can impose a fee only in respect of any of the matters in the State List. The legislation under consideration was referable to entry 23 of the State List which is subject to the provision of List I with respect to regulation and development of mines and minerals under the control of the union.

2. Under Entry 54 of List I regulation of mines and mineral development is in the field of Parliamentary legislation "to the extent to which such regulation and development under the control of the Union is declared by Parliament by a law to be expedient in public interest." Such a declaration is contained in Section 2 of the MMRD Act, 1957. It, therefore, follows that such legislation to the extent it encroaches on the field covered by MMRD Act, 1957 will be ultra vires;

3. If cess is taken as a tax then unless it can be described as land revenue or a tax on land or a tax on mining right, it cannot be upheld under entries 45, 49 or

50. Levy, therefore, could not be justified under any of these entries of List.

43. Sri Kapil Sibbal followed by Sri Gadodia appearing for the second-respondent strongly pleaded that India Cement case (Supra) and Orissa Cement case (Supra) have absolutely nothing to do in determining the vires of Section 89(1) of the Bihar Act because in those decisions levy of cess on royalty was declared to be beyond the competence of State Legislature which is not the subject matter for adjudication in the present writ applications. It was submitted that in Orissa Cement Case (Supra) it was held that cess on royalty contravenes Section 9 of the MMRD Act, 1957 and was, therefore, invalid. In the present case, we are not concerned with cess on royalty.

44. The respondents contend that character of the impost u/s 89(1) of the Act is in the nature of "fee" relatable to following Entries of List II of VIIth Schedule readwith entry 66:

Entry 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.

Entry 6: Public health and sanitation, hospitals and dispensaries.

Entry 13 : Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I. Municipal tramways; ropeways Inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

Entry 17 : Water, that is to say, water-supplies, irrigation and canals, drainage and embankments water storage and water power subject to the provisions of entry 56 of List I.

Entry 27 : Production, supply and distribution of goods subject to the provisions of entry 33 of List III.

Entry 28 : Markets and fairs.

45. It was submitted that priority of power of Parliament over that of Legislature is to be invoked as last resort when it is not possible to reconcile the enumerated powers of the two Legislatures. Learned Counsel relied on the observation of Lord Wright in *Zem v. Common Wealth of Australia* 1936 AC 578 that "construction must not be considered in any narrow or pedantic sense and that construction must be beneficial and to the widest possible amplitude of its power must be adopted." The Hon^{ble} Supreme Court in the *Indian Aluminium Company Limited and another Vs. Karnataka Electricity Board and others*, adopted the dictum propounded by Lord Wright in the aforesaid case.

46. The respondents submit that in the instant cases neither Entry 56 of List I nor Entry 33 of List II is applicable which is evident and obvious from those

entries especially because admittedly the respondent-Authority is supplying drinking water to the petitioners after filtration and purification of extremely polluted raw water of river Damodar through a very complicated and complex procedure.

47. The object of the Act is development of mineral areas in the State of Bihar and has nothing to do with regulation of Mines and Minerals covered by MMRD Act, 1957.

48. Sri Gadodia in his attempt to defend the vires of the Act highlighted the following facts extracted from the counter affidavit filed on behalf of the second respondent:

Analysis of different type of services clearly demonstrate that various municipal services are being provided by the respondent-authority including civic amenities, public health and sanitation; prevention of food adulteration, epidemic control as well as control of infectious diseases. For providing these services huge expenses are incurred by the respondent-authority and huge establishment is also maintained in which Engineers, Health Overseers, Sanitary Inspectors Medical Officers etc. are employed.

Supply of drinking water by the respondent-Authority is one of the very important direct services provided to the collieries of the petitioners which are situated in far flung areas in the district of Dhanbad. It is pertinent to note that there is no or even little underground water available in the coalfields area because of geophysical conditions of the area. Therefore the water has to be conveyed the citizens of the area and the collieries through a massive network of major pipe lines, booster pumps, reservoirs etc. by the Authority after processing in main treatment plants. It is noteworthy that a massive network of water supply system has been created by the Authority spread over vast areas of Dhanbad district. In the first two decades of the century, Topchanchi Dam tunnel etc. were completed. The installed capacity of the system is million gallons per day. The water is carried through underground tunnels for about 30 kms, after filtration through a complex system of reservoirs filtration plants, booster pumps to supply of Katras area including the coalfields of the petitioners. The Authority has also created massive network of major pipe-lines on that area.

Similarly, from Jamadova. the water is supplied from Damodar river. Firstly it is lifted to the Water Processing Plant through a series of high power motors and pumps. It is processed and made fit for drinking in the Treatment plants whose installed capacity is 21 million gallons per day. A very close monitoring of water quality is maintained through a system of Public Health Laboratories maintained by the Authority. This is essential because one is never sure as to what pollutants may be discharged by the industries/coal washeries in river Damodar. After processing, the water is. carried to several towns, panchayats, petitioner's collieries etc. through a complex system of main pipe-lines, reservoirs, pumping stations, sumps, booster stations, overhead tanks etc. spread all over the area.

The major pipe-lines alone have been laid in more than 100 kms specially to cater to the collieries of the petitioners. One of the petitioners has admitted in writ petition No. 3781/93R that CMADA is the sole supplier of drinking water to them.

Because the capital investments by the Authority and its predecessors have been made during the last 70-80 years from time to time, if the present day value of the total capital establishment is taken, it will be well over Rs. 100 crores. The pipe-lines spread in the recent times alone has costed the Authority Rs. 21 crores, the present value will be much higher. The Authority has to spend crores of rupees every year on maintenance of the supply system. Further the average expenditure on the operations of water supply comes to more than Rs. 8 crores.

The Authority has to spend Rs. 2 crores on the energy bill alone. The Authority has erected its own electric sub-stations for water supply and has spent heavily on these installations of water supply operations, besides the cost of chemicals etc.

The Authority has made heavy capital contribution to the water supply schemes in other areas also in its jurisdiction. The average per capita availability of drinking water in the region is very low as compared to the State and the National levels and the Authority has formulated a number of new schemes besides completion of the pending schemes despite severe financial crisis. The Authority has to pay about Rs. 2.5 crores to M/s. IISCO alone for purchase of pipes for new major pipe-lines for on going schemes besides payments for completion of 9 MGD Plants, electrical sub-station etc. The new schemes would require a further investment of Rs. 40 crores and the major beneficiaries will be the coal companies only besides general public at large. The Authority does not get any grant from the Government for all these water supply managements. The Authority has to spend out of its own funds only. The Authority is faced with a serious financial crisis due to non-payment of dues by the coal companies and has reached virtually at a point of financial collapse. Despite this, the Authority is trying to complete water supply schemes through its meagre resources to ameliorate the difficulties of public and the collieries.

In respect of supply of drinking water it is also mentioned that the respondent-Authority is also maintaining Public Health Laboratory in which the quality of water of the collieries including pit water is tested from time to time which has been mentioned in various sub-paragraphs of paragraph 5 of the reply by the respondent to the rejoinder filed by the petitioners.

In respect of supply of drinking water, the respondent-Authority further submits that the water of river Damodar is very much polluted as the said river is the most polluted river in our country primarily due to discharge of polluted materials by the industries and collieries in the said river. Under the circumstances, the respondent-Authority has to incur very heavy expenses for purification and filtration of the said water and also for carrying drinking water to various

collieries. It is further submitted that expenses in respect of supplying of drinking water to the collieries can be divided into two broad categories namely; (1) Expenses incurred in the preparation of the Schemes and implementation thereof; construction of filtration plants, laying of pipes; maintenance of infrastructure and other major expenses for maintaining continuous supply of drinking water to the collieries through a very complicated/complex system; and (2) Expenses incurred on electricity, various inputs including chemicals, staff/employees and many other similar expenses. At this stage, it is also relevant to mention that the respondent-Authority has to run various filtration plants and reservoirs in which most polluted water of Damodar has to be filtered and purified through the use of various chemicals and thereafter, drinking water is produced which is being supplied to the petitioners. For providing such services, Tonnage cess was being charged which was calculated/quantified on the basis of quantity of coal/coke despatched from the collieries. Moreover, for actual supply of water to each colliery, which was measured through meters, additional nominal charges/sale price was also charged.

49. It was submitted that declaration under entry 54 of List I cannot divulge the State Legislature of competence to make laws, the pith and substance of which falls within the entries in List II. It was submitted that the fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-a-vis the States, does not mean that the States are mere appendages of the Centre. Within the sphere allotted to them, the States are Supreme and the Centre cannot tamper with their powers. Counsel placed reliance on *Western Coalfields Limited Vs. Special Area Development Authority, Korba and Another*, ; *Ishwari Khetan Sugar Mills (P) Ltd. and Others Vs. State of Uttar Pradesh and Others*, and *State of Haryana and Another Vs. Chanan Mal and Others*, and submitted that the Supreme Court has consistently held that the jurisdiction of the State Legislature to enact law under entry 23 or entry 50 of List 1 is restricted only to the extent the field is occupied by Parliamentary legislation under Entry 54 List I.

50. Learned Counsel made special reference to *Western Coalfield's case* (Supra) which undoubtedly supports his contention.

51. In *Bajinath Kadio Vs. State of Bihar and Others*, the Hon'ble Supreme Court following its earlier decisions in *Hingir Rampur Coal Company's case* (supra) and *Tulloch's case* (supra) held that after the declaration made by the Parliament (in terms of entry 54 List I) in Section 2 of the MMRD Act, 1957, the Parliament occupied the whole field of control and regulation of mines and development of minerals. Consequently, the State Legislature ceased to have power to enact the impugned Section 10(2) of the Bihar Land Reforms Act, 1950 which fell in pith and substance under Entry 23 List II and not under Entry 18 of List II (lands), although it incidentally affected land.

52. The decision in *Baidyanath's case* was distinguished in *Western Coalfields Limited Vs. Special Area Development Authority, Korba and Another*, . In this case property tax imposed by Section 69-D of the M.P. Nagar Tatha Gram Nibesh

Adhiniyam 1973 was impugned on the ground that the Act was void. Applying the ratio in Baidyanath Kedia's case (supra). Chandrachud C.J. following Murthy's case in State of Haryana v. Chandmal AIR 1976 SC 1684, held that impugned Act had nothing to do with the development of mines and minerals, or their regulation. It was further held that functions, powers, and duties of Municipalities did not become part of the occupied field by virtue of declaration u/s 2 of the MMRD Act, 1957 and "competence of the State to enact laws will remain unaffected by the declaration."

53. Sri Gadodia submitted that the vires of the impugned Section 89(1) of the Bihar Act deserves to be upheld on the ratio of Western Coalfield case, since the provisions of M.P. Act and the Bihar Act are identical.

54. Sri Gadodia, in fact, adopted the argument of the counsel for State of Orissa before the Supreme Court in Orissa Cement case (supra). It was submitted before the Supreme Court that the impugned Orissa Cess Act was not vitiated by reason of MMRD Act, 1957. It was submitted that Tulloch and Western Coalfields (supra) represent two lines of cases which need reconciliation and this task was not attempted at all in India Cement (supra). The Hon'ble Supreme Court in Orissa Cement analysed the effect of the decisions in Western Coalfield (supra); Ishwari Khetan (supra); State of Haryana v. Chananmal (supra) in determining the vires of the impugned cess Act. The Supreme Court in paragraph 50 of the Report observed as follows:

It is clear from a perusal of the decisions referred to above that the answer to the question before us depends on a proper understanding of the scope of M.M.R.D. Act, 1957, and an assessment of the encroachment made by the impugned State Legislation into the field covered by it. Each of the cases referred to above turned on such an appreciation of the respective spheres of the two legislations. As pointed out in Ishwari Khetan Sugar Mills (P) Ltd. and Others Vs. State of Uttar Pradesh and Others, , the mere declaration of a law of Parliament that it is expedient for an industry or the regulation and development of mines and minerals to be under the control of the Union under Entry 52 or Entry 54 does not denude the State Legislature of their legislative powers with respect to the fields covered by the several entries in List II or List III. Particularly, in the case of a declaration under Entry 541 this legislative power is eroded only to the extent control is assumed by the Union pursuant to such declaration as spelt out, by the legislative enactment which makes the declaration. The measure of erosions turns upon the field of the enactment framed in pursuance of the declaration. While the legislation in The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, and Pooran Chand Vs. Motilal and Others, was found to fall within the pale of the prohibition, those in State of Haryana and Another Vs. Chanan Mal and Others, Ishwari Khetan Sugar Mills (P) Ltd. and Others Vs. State of Uttar Pradesh and Others, and Western Coalfields, were general in nature and traceable a specific entries in the State List and did not encroach on the field of the Central enactment except by way of incidental

impact. The Central Act considered in Chanan Mal, seemed to envisage and indeed permit State legislation of the nature in question.

55. It was further observed in paragraph 52 "the nature of the incursion made into the fields of the Central Act in other cases were different. The present legislation, traceable to the legislative power under Entry 23 or Entry 50 of the State List which stands impaired by the Parliamentary declaration under Entry 54 can hardly be equated to the law for land acquisition or municipal administration which were considered in the cases cited and which are traceable to different specific entries in List II or List HI.

56. Sri Gadodia contended that the object and purpose of the impugned Bihar Act are quite distinct and different from the objects and purposes of MMRD Act with the result that two enactments quite variedly co-exist since they do not cover the same field. It was argued that the impugned Act was concerned with the development of mineral areas and raising of funds to enable the Mineral area development authority to discharge its responsibility of local administration and take steps for proper development of the areas; whereas the Central Act was concerned not with any social purpose, but merely with the development of mineral resources of the country and as such the State Legislation in this regard could easily be treated as referable to Entry No. 5 of the State List as held in Western Coalfields Limited Vs. Special Area Development Authority, Korba and Another, . This was precisely the argument of Sri Iyer, counsel for the State of Orissa before the Supreme Court. Hon"ble Supreme Court in paragraph 54 of the report rejected the argument observing "Reliance on entry 5 of list II is plainly too tenuous".the object of levy of fee may be to strengthen the functions of local bodies but the Act has nothing to do with Municipal or local administration"

57. The observations quoted above effectively cut the argument of Sri Gadodia. In India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, it was observed by the Constitution Bench that entry should not be so construed as to make any one entry redundant. In the instant case, the provision in the Act under consideration is directly relatable to entry 23 List II. If argument of Sri Gadodia is accepted that the Act can be sustained by reference to other entries relied by him, it would render entry 23 List II redundant, which is not permissible. The ingenious argument of Sri Gadodia to rescue the impugned legislation with reference to the entries relied upon by him and on the basis of services rendered by the authority highlighted in his argument is futile exercise.

58. The legal position is so settled that there was no scope for any argument from the side of the respondents, but since the matter was argued at great length by Sri Gadodia, we took the trouble of citing almost all the decisions on the subject under consideration where his argument has to be dealt with. As a result of the discussion above, there can be no escape from the conclusion that imposition of tonnage cess u/s 89(1) of the Act is beyond the legislative competence of the Bihar Legislature. Bihar Legislature by enacting the impugned Act in the face of MMRD Act, 1957, attempted to legislate on a field expressly

forbidden to it. The field is wholly occupied by the Central Act. Therefore, Section 89(1) of the Act, offends Section 9 of the MMRD Act, 1957. The said provision is declared unconstitutional and therefore unenforceable.

59. It may be stated that the Bihar Legislation anticipating attack on vires of Section 89 of the Act, as amended by Section 89 by Amendment Act, 1992 whereby imposition of tonnage cess has been replaced by tax on use of land. In one of the writ applications, the amendment has also been challenged, but in this application, we refrain from deciding the vires of amended Section 89 in view of the fact that some writ applications challenging the said provision are already pending.

60. Recently, a Division Bench of the Orissa High Court in Mahanadi Coalfields Ltd. and Another Vs. State of Orissa and Others, , declared an identical provision in Orissa Rural Employment, Education and Production Act unconstitutional being beyond the competence of the State Legislature, since it was found that the impugned tax is really a tax on coal or land bearing coal and not a tax on land. It was further held that the impugned provision was hit by Section 9-A of the Mines & Mineral (Regulation & Development) Act.

61. Sri Basudeo Pd. The learned senior counsel for the petitioners have also submitted that in Section 89 of the Act, no machinery is provided for making the assessment of tonnage cess. Sri Basudeo Pd. submitted that Section 89(1) is not a charging Section and it cannot operate unless a notification is made by the State Government as required by Sub-section (1) of Section 89. In our opinion, we cannot express any final opinion on this point since foundational fact for raising this plea is absent in the pleading. However, we would like to express our tentative opinion on this point. No notification under the present Act was placed before us. Counsel for the second respondent relied upon notification issued under 1984 Ordinance, which was replaced by 1985 Ordinance. 1986 Ordinance was repealed by Sub-section (4) of Section 132 of the Act, but is provided that "notwithstanding such repeal, anything done or any action taken in exercise of the powers by or under the said Ordinance shall be deemed to have been done or taken in exercise of the powers conferred by or under this Act, as if this Act were in force on the day on which such thing or action was done or taken". It is, therefore, doubtful whether notification issued under 1985 Ordinance which remained in force under 1986 Ordinance, will survive after repeal of 1986 Ordinance. Counsel for the 2nd respondent was not able to satisfy us on this question. In any view of the matter, we refrain from expressing any further opinion on this point. In our opinion, the contention that Section 89 is unworkable for the reason that no method is provided for making assessment of tonnage cess, is not correct for the reason that the assessment was being made under the Act and the petitioners were paying tonnage cess since long.

62. (1) C.W.J.C. Nos. 3781/93R

(2) C.W.J.C. 3717/93R

In these applications, the prayer is for quashing the demand notice calling upon the petitioner to pay water charges at the rate of Rs. 50/- per thousand gallons u/s 94 of the Act. The petitioners have also prayed for quashing of the notification dated 8.7.93 issued by the Deputy Secretary Government of Bihar whereby the State Government in exercise of power u/s 90(1) of the Act raising water charges from Rs. 16/- per thousand gallons to Rs. 50/- per thousand gallons.

63. The decisions turn on vires of Section 90(1) of the Act. This section requires the authority to cause mains to be laid for supply of water to the collieries paying tonnage cess u/s 91. The facility of supply of water is leviable only to those colliery owners who pay tonnage cess. The authority constituted under the Act cannot refuse to carry out the obligation under the Act nor the colliery owners can refuse to avail the benefit. This was so held in Hingir Rampur's case (*supra*). It is to be noticed that the Legislature has prescribed minimum rate of water charges which shall not be less than Rs. 4/-per thousand gallon. It is subject to revision by the State Government as per the last revision, the water rates have been raised to Rs. 50/- per thousand gallons. Sub-section (4) of Section 90 is applicable to owners of other premises. Here the maximum rate has been prescribed which shall not exceed Rs. 4/- per thousand gallons.

64. It was contended by Sri Basudeo Prasad, senior counsel appearing for the BCCL that Section 90(1) under which the second respondent purports to realise water charges is unconstitutional as the provision suffers from the vice of excessive delegation of power on the executive in the matter of fixing water charges. He submitted that the delegation is not canalised and vagrant. No maximum ceiling has been fixed unlike similar Statutes with regard to fixing of water charges and it is entirely left to the satisfaction of the Government to fix water charges without adopting any rational guidelines. He submitted that conferment of such unbridled power on the executive is arbitrary and unconstitutional, particularly, when water charges for drinking purposes has been abruptly raised from Rs. 16/- to Rs. 50/- per thousand gallons. He further submitted that a monopolistic Govt. agency is not entitled to act arbitrarily to the detriment of the citizen is discharging its statutory duties for providing essential services such as drinking water. The provision has been challenged on another ground. It is submitted that provision for imposition of water charges at higher rates for colliery owners vis-a-vis owners of other premises, including factories etc. in the area with unlimited power of enhancement is in highly discriminatory and unreasonable. The said provision is liable to be struck down as violative of Article 14 of the Constitution of India.

65. It was next argued that there is no rational basis for enhancement of water charges since the element of quid pro quo is wholly absent in the levy which is nothing but the charge for ordinary Municipal services rendered by the 2nd respondent.

66. Mr. K. D. Chatterjee appearing for TISCO in C.W.J.C. 3717/93R, however, adopted argument of least resistance. According to him initial rate i.e. Rs. 16/-

per thousand gallons can be said to be reasonable and the petitioners will have no objection if the water rates are charged at the said rate. It is submitted that enhancement from Rs.16/- to Rs.50/- is clearly arbitrary and the provision itself suffers from vice of excessive delegation. It is further submitted that respondent No. 2 is vested with exclusive control for supply and distribution of water for drinking and other domestic purposes which is important municipal function to be discharged under the provisions of the Act. It may be stated that when the authority was constituted, the charges of water was fixed @ Rs. 4/- per thousand gallon. Subsequently, the rates have been revised up to Rs.16/- by means of notification issued by the Govt. By last revision vide Annexure-2 rates have been drastically enhanced w. e. f. 8.7.93. In pursuance of the aforesaid notification, the petitioner has been issued with several demands for water charges @ Rs. 50/- per thousand gallon vide Annexure-1.

67. Sri K.D. Chatterjee appearing for the TISCO (C.W.J.C. 3717/93R), however, adopted the argument of his resistance. According to him, the initial rate of Rs.16/- per thousand gallon can be said to be reasonable Mr. Chatterjee submitted that in comparison to payment of water charges levied in respect of other mining areas and municipalities in other parts of this State, the rates under the impugned provision are excessive and unreasonable. Consequent to enhancement of rate, the petitioner's liability will increase from two crores to nearly Rs.8 crores per annum.

68. The question for consideration is whether State Legislature is abdicated its essential legislative function by delegating to the State Government the power to fix water charges, to be charged from the factories under the Act. The topic of delegated legislation is a controversial branch of the Constitutional law.

69. The position in the Indian Constitution is now settled since the decision of the Supreme Court in *Delhi Laws Act*, AIR 1951 SC 332, that Indian Legislature has got an unlimited power of delegation of power like the British Parliament. It was observed:

There are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to abdication and self-effacement.

What is meant by abdication and self-effacement on the part of the Legislature may be gathered from the following observation in the *Delhi Laws Act* case (*supra*):

what constitutes abdication and what class of cases will be governed by that expression will always be a question of fact, and it is by no means easy to lay down any comprehensive formula to define it.

The majority of the Judges in the *Delhi Laws* case concur on certain general principles which may be treated as established. These general principles are:

1. The legislature has power of delegation;

2. The power of delegation is not of plenary character but can only be exercised within certain limits.

3. The Legislature cannot delegate powers in regard to essential matters or matters relating to policy.

It was held in *Mohmedalli and Others Vs. Union of India (UOI) and Another*, that majority Judges in the *Delhi Laws Act* case conceded to the proposition that Legislature can take assistance of other bodies in the State in subsidiary matters.

70. Sri K.D. Chatterjee appearing for TISCO and Sri Basudeo Prasas appearing for the BCCL placed strong reliance on Constitution Bench decision in *Debi Dayal v. State of Punjab* AIR 1967 SC 1985 . In this decision, Section of the Punjab General Sales Tax Act, 1948 was under challenge. Section 5 of the said Act provided that subject to the provision of that Act, there shall be levied on the taxable turnover every year of a dealer a tax at such rate as the Provincial Government may by notification direct. Subba Rao, C.J. speaking for the Constitution Bench observed that principle of excessive delegation is well settled. He relied on the following passage in *Vasantlal Maganbhai Sanjanwala Vs. The State of Bombay and Others*, :

The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature.

Section 5 of the Punjab Act was struck down on the ground that the Legislature practically effaced itself in the matter of fixation of rates and it did not give any guidance either under the said Section or under any other provision of the Act. The Legislature had not laid down under the Act a clear legislative policy or guidelines.

71. In the earlier decision of the Constitution Bench of the Supreme Court in the case of Corporation of Calcutta and Another Vs. Liberty Cinema, , the validity of the provision of Section 548(2) of the Calcutta Municipal Act, 1951 was impugned on the ground of excessive delegation. Under the said provision, licence fee was chargeable "at such rate as may from time to time be provided". The Corporation increased the fee from Rs. 400/- to Rs. 6,000/- per year. Sarkar, J. speaking for the Constitution Bench rejected the argument that the impugned provision was bad on account of excessive delegation, in the following words:

26. No doubt when the power to fix rates of taxes is left to another body, the legislature must provide guidance for such fixation. The question then is was such guidance provided in the Act? We first wish to observe that the validity of the guidance cannot be tested by a rigid uniform rule; that must depend on the object of the Act giving power to fix the rate. It is said that the delegation of power to fix rates of taxes authorised for meeting the needs of the delegate to be valid, must provide the maximum rate that can be fixed, or lay down rules indicating that maximum. We are unable to see how the specification of the maximum rate supplies and guidance as to how the amount of the tax which no doubt has to be below the maximum is to be fixed. Provision for such maximum only sets out a limit of the rate to be imposed and a limit is only a limit and not a guidance.

It seems to us that there are various decisions of this Court which support the proposition that for a statutory provision for raising revenue for the purposes of the delegates as the Section now under consideration is, the needs of the taxing body for carrying out its functions under the statute for which alone the taxing power was conferred on it, may afford sufficient guidance to make the power to fix the rate of tax valid. We proceed now to refer to these cases.

As noticed earlier, the contention of the counsel for the petitioner that by not fixing the maximum rate, Bihar Legislature has abdicated its legislative function. This contention must be negated in view of observations of Sarkar, J quoted above.

72. This decision also meets the argument of the counsel for the petitioner that increase of water rate from Rs. 16/- to Rs. 50/- per thousand gallons amounts to expropriation.

73. The decision in Liberty Cinema (supra) and Debi Dayal's case (supra) have been considered in later decision of the Supreme Court which I shall presently refer. Debi Dayal's case is probably the only case in which the Supreme Court struck down the provision of the taxing Statute on the ground of excessive delegation.

74. In the Constitution law of India, 3rd edition page 1870 it is stated that in order to resolve the conflict between Debi Dayal's case and Liberty Cinema case the case of Municipal Corporation of Delhi v. Birla Cotton Spinning & Weaving Mills Ltd. reported in AIR 1967 SC 1903 was referred to a Bench of seven Judges.

Learned Author having analysed the decision in Bihar Cotton MiUs case observed that the Supreme Court in this case impliedly held that Debi Dayal's case was wrongly decided and that in order to ascertain as to whether the law is void for impermissible delegation of legislative power, it is not necessary to search for policy, safeguards and guidelines.

75. Seervai says that unanimous judgment of nine Judges in M.K. Papiiah and Sons Vs. The Excise Commissioner and Another, shows that after 25 years the Supreme Court of United States has come round to the view expressed by the Privy Council in R. v. Baorah's case reported in 1877 (5) IA. 178 but the result is couched in language which disguises radical departure made by the Supreme Court. The decision in Papiiah's case (Supra) and Liberty Cinema (supra) have been heavily relied by Sri Gadodia counsel for the 2nd respondent. In Papiiah's case, Section 22 of the Karnataka Excise Act was impugned on the ground of impermissible delegation of legislative power. Section 22 conferred on Govt. a power to fix rates of excise duty. In an unanimous judgment, Mathew J. held that Section 22 did not provide an impermissible delegation of legislative power.

76. The next important decision which may be noticed in Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills, Delhi and Another, . In this case, a Bench of seven Hon'ble Judges of the Supreme Court considered the earlier decision on a delegated legislation. In that case, Section 150 of the Delhi Municipal Corporation Act was under challenge. The question for consideration was whether Section 150 of the Act transgressed limits of permissible delegation. According to that Section, the Municipal Corporation was empowered to pass a resolution for the levy of any of the taxes specified in Sub-section (2) of Section 113 defining the maximum rate of tax to be levied, class of classes of persons, or the description of articles and properties to be taxed, the system of assessment to be adopted and the exemptions if any to be granted. Such a resolution was required to be sanctioned by the Central Government and, thereafter, the Corporation had to pass a second resolution determining subject to the maximum, the actual rate of tax. By a majority decision of five to two the validity of the above Section was upheld. It was observed that the question as to limits of permissible delegation of legislative power by a Legislature to a subordinate authority has come before this Court in a large number of cases and the law is laid down by the Court is not in doubt now. Considering the complexity of modern life, it is recognised on all heads that legislature cannot possibly have time to legislate in every minute detail. That is why it has been recognised that it is open to the legislature to delegate to subordinate authorities the power to make ancillary rules for the purpose of carrying out the intention of the legislature indicated in the law which gives power to frame such ancillary rules. Referring to Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others, , it was held that there was no conflict between Liberty Cinema's case and Debi Dayal's case. What was held there (in Debi Dayal's case) was that there can be no general principle that merely the needs of the delegate can necessarily and always be a guideline. It was further held that each Statute has

to be examined to find out whether there are guidelines therein which prevent delegation from being excessive.

77. The decision in *Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others*, was followed. Wanchoo CJ observed in para 27 of the report that "there is a clear distinction between delegation of fixing the rate of tax like sales tax to the State Government and delegation of fixing rates of certain taxes for purposes of local taxation. The needs of the State are unlimited and the purposes for which the State exists are also unlimited. The result of making delegation of a tax like sales tax to the State Government means a power to fix the tax without any limit even if the needs and purposes of the State are to be taken into account. On the other hand in the case of a municipality, however, large may be the amount required by it for its purposes it cannot be unlimited, for the amount that a Municipality can spend is limited by the purposes for which it is created. A Municipality cannot spend anything for any purposes other than those specified in the Act which creates it. Therefore in the case of a municipal body, however, large may be its needs, there is a limit to those needs in view of the provisions of the Act creating it. In such circumstance there is a clear distinction between delegating power to fix rates of tax like the sales tax, to the State Govt. and delegating a power to fix certain local taxes for local needs to a municipal body".

78. The above observation of the Supreme Court in *Birla Cotton Mill case* (supra) is extremely significant in determining the issue before us.

79. The Supreme Court examined the entire Act and found that the Act provided several safeguards and guidelines and, therefore, the impugned section was valid. In paragraph 36 of the Report, it was observed:

Then there is the provision in Section 150 itself which says that the maximum rates fixed by the Corporation at its meeting by a resolution. have to be submitted to the Government for its sanction and without such sanction there can be no imposition of tax. As we have already stated the legislature has made Government the watch-dog to control the actions of the Corporation in the matter of fixing rates and other incidents of the taxes and that is also a check to see that reasonable rates are fixed by the Corporation when it proceeds to impose taxes u/s 150. We have a parliamentary system of government in which the Government is responsible to the legislature. That is also a circumstance which may be taken into account in considering the check imposed by the Act upon the taxing power of the Corporation, namely, that the rates fixed by it have to be sanctioned by Government which in its turn is responsible to Parliament. It stands to reason that Government which is responsible to the legislature would act with care and circumspection when exercising its function as the watch dog on behalf of the legislature on the taxing power conferred by the legislature on the Corporation. Under these circumstances we do not think that it can be said that there are no guidelines limits, controls or safeguards provided by the legislature in the matter of the exercise of the power of taxation u/s 150 of the Act by the Corporation. The legislature cannot in the circumstances be said to

have abdicated its power for it has indicated the taxes which the Corporation can impose.

80. In *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. Vs. The Asstt. Commissioner of Sales Tax and Others*, , the Constitution Bench of the Supreme Court again review the earlier decisions of the Supreme Court on delegating legislation. Paragraph 4 of the report is very important for our purpose, wherein it was observed:

The question with which we are concerned is whether the Parliament in not fixing the rate itself and in adopting the rate applicable to the sale or purchase of goods inside the appropriate State has not laid down any legislative policy and has abdicated its legislative function. In this connection we are of the view that a clear legislative policy can be found in the provisions of Section 8(2)(b) of the Act. The policy of the law in this respect is that in case the rate of local sales tax be less than 10 per cent, in such an event the dealer, if the case does not fall within Section 8(1) of the Act should pay central sales tax at the rate of 10 percent., If, however, the rate of local sales tax for the goods concerned be more than 10 per cent, in that event the policy is that the rate of the Central sales tax shall also be the same as that of the local sales tax for the said goods. The object of law thus is that the rate of the Central sales tax shall in no event be less than rate of local sales tax for the goods in question though it may exceed the local rate in case that rate be less than 10 per cent.

81. Section 90 of the Bihar Act also fixes minimum rate of water rates though maximum ceiling has been provided. The Legislature thus laid down a policy that water rate shall not be less than Rs. 4/- per thousand gallon. It is crystal clear from the decision in *Gwalior Rayon Mill* that a definite legislative policy can be discerned in such a law, the policy being that rate of central sales tax would in no event be less than the rate of local sales tax. The legislature therefore cannot be said to have indulged in self-effacement. The decision in *Debi Dayal's* case was discussed in paragraph 15 of the report. The Supreme Court summed up the legal position in paragraph 22 thereof as follows:

It would appear from the above that the view taken by this Court in a long chain of authorities is that the legislature in conferring power upon another authority to make subordinate or ancillary legislation must lay down policy, principle or standard for the guidance of the authority concerned. The said view has been affirmed by Benches of this Court consisting of seven Judges. Nothing cogent in our opinion has been brought to our notice as may justify departure from the said view. The binding effect of that view cannot be watered down by the opinion of a writer, however, eminent he may be nor by observations in foreign judgments made in the context of the statutes with which they were dealing.

The Court referred to Colley's *Constitution Limitations* Vol. I 8th Edition; Willoughby on the *Constitution of the United States* 2nd edition and *Corpus Juris Secundum* Vol. 73 page 324.

82. Regarding subject of delegation it has been observed by Cooley:

The maxim that power conferred upon the legislature to make laws cannot be delegated to any other authority does not preclude the legislature from delegating any power not legislative which it may itself rightfully exercise. It may confer an authority in relation to the execution of a law which may involve discretion but such authority must be exercised under and in pursuance of the law. The legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative officer or body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularise they would miss sufficiency both in provision and execution.

In *Corpus Juris Secundum* Vol. 73 page 324, the matter has been dealt as follows:

It is stated that the law making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly in delegating powers to an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto and a statute or ordinance which is deficient in this respect is invalid. In other words, in order to avoid the pure delegation of legislative power by the creation of an administrative agency, the legislature must set limits on such agency's power and enjoin on it a certain course of procedure and rules of decision in the performance of its function; and, if the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity.

83. Mathew J. in his separate judgment observed:

the dilution of Parliamentary watch dog of delegate legislation may be deplored but in complications and complexities of modern life, it cannot be held so.

84. In *Ram Bachan Lal Vs. The State of Bihar*, , Section 112 of the Bihar & Orissa Municipal Act, 1922 which left it to the discretion of the Commissioners and to the Govt. respectively to enhance the rate of tax to be levied, the maximum rate having been specified in the Act was upheld as not involving any impermissible delegation of legislative power on the ground that Legislature had laid down the policy and made it a binding rule on conduct and had given sufficient guidance in the provisions of the Act. The decision in *Liberty Cinema's* case was follows.

85. In view of the decisions of the Supreme Court, referred to above, the attack on Section 90(4) of the Act being void for excessive delegation, must fail. The revision of rate is entrusted to the Government which is expected to revise it not arbitrarily but reasonably and fairly having regard to the exigency of situation.

The decision in Delhi Municipal Corporation case (supra); Gwalior Rayon's case (supra) effectively and completely demolishes the arguments advanced on behalf of the petitioner. The supposed apprehension that in absence of any guideline, the power of revision of rates may be abused and that drastic enhancement from Rs. 16/- to Rs. 50/- per thousand gallon has been done to augment the resources of the authority to meet other financial burdens, which has nothing to do with the services rendered, is not substantiated on the materials on record. The validity of Section 90 of the Act cannot be judged on the assumption that the State Govt. will act arbitrarily in exercise of powers conferred upon it. The possibility of abuse of power cannot invalidate Section 90(4). This position is clear from the decision of the Supreme Court in D.K. Trivedi and Sons and Others Vs. State of Gujarat and Others, . The power of revision is entrusted to the State Government and that itself constitutes safeguard. As held in Delhi Municipality case, (supra) that "nature of the body to which settlement is made is also a factor to be taken into consideration in determining whether there is sufficient guideline in the matter of delegation". In the Bihar Act there are clear guidelines discernible from the Act. The authority constituted under the Act consists of representatives of collieries and Central Government and as such interest of the petitioner is well protected.

86. It has been contended that the Act makes arbitrary discrimination between colliery owners and non-colliery owners in the matter of rates-in the case of non-colliery maximum rate is prescribed; whereas for collieries no such ceiling is prescribed. It is not possible to accept this contention in absence of adequate materials on record in this regard. There cannot be comparison between unequals i.e. between colliery owners and non-colliery owners as they constitute two distinct classes. Fixing lower rate for ordinary citizen cannot be said to be violative of Article 14 of the Constitution.

87. Sri K.D. Chatterjee, counsel for the BCCL in course of argument has also submitted that in the matter of levy of "fee", the principle of quid pro quo has to be established and it must be proved that positive/direct services have been rendered to the petitioner and over all activities of respondents in performing their statutory duties cannot justify levy of fee as there must be direct relationship between the services rendered and the fee charge. Sri Chatterjee cited decision in The Government of Andhra Pradesh and Another Vs. Hindustan Machine Tools Ltd., and submitted that the sum total of the activities of a public body like Gram Panchayat cannot be taken into account to seek justification for the fees imposed by it and the expenses incurred in discharging its obligatory functions which are generally made by imposition of variety of taxes. He also placed reliance on a Constitutional Bench decision in Kewal Krishan Puri and Others Vs. State of Punjab and Another, .

88. Sri Gadodia Counsel for the second respondent submitted that the decisions relied upon by Mr. Chatterjee have no application to the facts and circumstances of the case. Referring to the averments in the counter affidavit and he submitted

that the respondents have been rendering services to the petitioner which has not been seriously disputed. In such a situation the decisions support the contention of the respondents justifying the levy of fee by the respondent-Authority. Sri Gadodia relied on Municipal Corporation of Delhi and Others Vs. Mohd. Yasin, and in a recent decision of the Supreme Court in Dhenkanal Municipal Council and another Vs. A. Raja Rao and others, . In the later decision, it has been held that though the fee must have a relation to the services rendered but such a relation need not be direct; mere casual relation may be enough. He laid emphasis on paragraph 6 of the report quoted here under:

It is not necessary for us to go into the question as to whether the levy u/s 295(2) of the Act is a "fee" or "tax". Assuming the levy to be "fee" we are of the view that the High Court fell into patent error in reaching the finding that no services were being rendered for the benefit of the traders in the market area of "Darbar Hat". We are at a loss to understand how the laying of roads, levelling of ground, constructing boundary wall and providing electricity etc. are not the services rendered for the benefit of the traders.

89. In my opinion, there is force in the contention of Mr. Gadodia. The contention of Sri Chatterjee cannot be accepted in view of overwhelming material placed before the court on behalf of the second respondent.

90. In C.W.J.C. 1637/94R apart from vires of Section 89(1), the petitioner has impugned the certificate proceeding initiated under the provision of Bihar & Orissa Public Demand Recovery Act, 1914 for realisation of Rs. 10,63,06,332.40 being arrears of Tonnage cess. During the pendency of the application, the Certificate Officer decided to proceed against the BCCL and TISCO and ordered for recovery of arrears of cess. The proceeding was virtually ex parte. The petitioners by amendment have challenged the legality of the final order on the ground that the entire certificate proceeding is invalid because the procedure adopted by the Certificate Officer is contrary to the provision of the Bihar & Orissa Public Demand Recovery Act. Reliance was placed on the decision of the Judicial Committee in ILR 1896 Cal. 775 that the for required by the Act are matter"s of substance and should be complied with as per requirement of the Act because certificate is to take Extraordinary effect of a decree. In the instant case, Section of the Bihar & Orissa Public Demand Recovery Act, 1914 was application which reads as follows:

Requisition for certificate in other cases (1) when any public demand payable to any person other than the Collector is due such person may send to the Certificate Officer a written requisition in the prescribed form:

Provided that in the case of an order framed by a liquidator under the Co-operative Societies Act, 1912(2 of 1912), the written requisition shall be sent by the Registrar of Co-operative Societies/Bihar and Orissa.

(2) Every such requisition shall be signed and verified in the prescribed manner and except in such cases as may be prescribed, shall be chargeable with a fee of

the amount which would be payable under the Court fees Act. 1870(VII of 1870) in respect of a plaint for the recovery of a sum of money equal to that stated in the requisition as being due.

91. The prescribed form is Form No. 2 of the Schedule of the Act and actual requisition has been made in form I which pertains to proceeding for public demand payable to the Collector. The requisition has been issued in the name of the General Manager of the petitioner which is also not proper. The certificate proceeding is, therefore, bad so far as it relates to realization of Tonnage cess.

92. In the result, C.W.J.C. Nos. 3807/93R and C.W.J.C. 1637/94R which relate to Tonnage cess, are allowed and respondents are prohibited to realize tonnage cess since Section 89(1) is void on account of legislative incompetence as held earlier. C.W.J.C. 3781/93R relates to water charges. This application is dismissed in view of conclusion that Section 90(4) of the Act is valid and does not suffer from excessive delegation. C.W.J.C. 3717/93R which relate to water rates which is dismissed. In this application, the petitioner also challenged the vires of amended Section 89 under which use of land tax has been introduced by 1992 amendment. We have not considered the vires of amended section in view of the fact that several writ applications are pending disposal.

93. Sri Gadodia learned Counsel lastly argued that in case Section 89(1) of the Act is held to be unconstitutional, it should be so declared prospectively following India Cement and Orissa Cement.

94. Here is a converse case. The assessee-petitioners have withheld the cess in the wake of Orissa Cement case. The cess having been declared unconstitutional, they cannot be directed to pay the cess already collected to the authority as contended by Sri Gadodia. Sri Gadodia contended that High Court is competent to declare an Act unconstitutional prospectively and in this respect the power of the High Court is Co-extensive with powers of the Supreme Court.

95. In Orissa Cement case, the power of the Supreme Court to declare a law prospectively was considered. It was argued on behalf of the assessee that doctrine of prospective overruling particularly in context of an issue regarding the validity of a tax levy would run counter to specific provision contained in Articles 246 and 265 of the constitution. Where the courts find that a legislation is beyond legislative competence of the legislature, it stands uprooted altogether because Articles 246 and 265 say so.

96. The Supreme Court in paragraph 71 of the report refused to enunciate any principle in this respect but followed India Cement (1990) 1 SCC 12 and held "invalidity of levy need not automatically result in a direction for a refund of all-collections thereof made earlier".

This is not the case here . The Orissa High Court in one case, following India Cement declared Orissa Cess Act unconstitutional prospectively. The said decision is under challenge before the Supreme Court in SLP 1990 & SLP 1939 of

1990.

97. In any view, the High Court has no power to declare a law unconstitutional prospectively. The plea of Sri Gadodia that cess collected by the assessee should be handed over to the Development Authority has no merit and must be rejected. The petitioners are directed to refund the cess collected by them to respective purchasers from whom it was realised.

98. We had finalised the draft judgment in these cases and we would have delivered the judgment on 27.3.1995. On 22.3.1995, Sri Gadodia Sr. Counsel appearing on behalf of Mineral Area Development Authority, mentioned that he may be permitted to make further argument in view of a recent decision of the Supreme Court in *Goodricke Group Ltd. v. State of West Bengal* reported in 1994 (4) 1138 in which decision his argument before us that the decision of the supreme Court in *India Cement* and *Orissa Cement* are distinguishable and have no application in the instant cases, has been accepted by the Supreme Court. We permitted the learned Counsel to make further submission, on 27.3.1995.

99. We have gone through the decision in *Goodricke* case (1994 (4) Scale 1138) and in our opinion, this decision does not touch the questions involved in C.W.J.C. 1637/94R and C.W.J.C. 3807/93R. The decision in *Goodricke* case may be relevant when the vires of amended Section 89 of the Bihar Mineral Area Development is taken up for consideration.

100. Sri K.D. Chatterjee, counsel for the petitioner, had placed reliance on *Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others*, which we have noticed in paragraph 41 of this judgment. In *Buxa Dooars* case, the West Bengal Rural Employment and Production Act, 1976 was declared to be unconstitutional by the Supreme Court on the ground of legislative incompetence as also infringement of Articles 14 and 301 of the Constitution. The West Bengal legislature intervened to remedy the situation created by the Supreme Court judgment aforesaid and enacted West Bengal Taxation Laws (Amendment) Act, 1989 amending the offending provision of the Bengal Acts declared ultra vires by the Supreme Court. The vires of the Amended Act was challenged before the Supreme Court in *Goodricke* case. The validity of the Act was upheld on the ground that the impugned levy is a levy upon land covered by entry 49 List II of the VII Schedule of the Constitution. The Hon'ble Supreme Court held that merely because the taxation on land or building is imposed with reference to its income or yield, it does not cease to be tax on land or building. Thus it was open to the legislature to adopt such formula as it thinks appropriate for levying tax so long as the character of the levy remains the one contemplated by entry 49 list II.

101. It is the definite case of the respondent that the impugned provision in the Bihar Act is relatable to other entries and not entry 49 List II. Sri Gadodia referred to paragraphs 29 to 39 and paragraph 48 of the judgment. Now Sri Gadodia contends that levy of tonnage cess in the impugned Bihar Act is

relatable to entry 49 of List II of the Constitution.

102. In our opinion, the ratio in Goodricke's case (supra) has no consequence so far as vires of Bihar Act is concerned. Following the ratio in India Cement and Orissas Cement, we have come to the conclusion that the impugned Section 89(1) of the Bihar Mineral Area Development Authority Act is referable to entry 23 of the State list, which is subject to the provision of list I with respect to regulation and development of mines and minerals under the control of the Union. The subject matter of the tax is major mineral raised from the land held in connection with the Mineral rights. If no minerals are raised, tax is not leviable. Tax is not dependant on the extent of the land held in connection with the mineral rights. The quantity of major mineral produced from the land determine the liability as to the tax.

103. The field of major mineral is entirely covered by the Parliamentary legislation under Entry 54 List I, namely, MMRD Act, 1957. The said provision is, therefore, ultra vires. We therefore, reject the contention of Sri Gadodia that the decision in Goodricke's case supports his contention.

104. All the applications are accordingly disposed of. There shall be no order as to costs.