

(2000) 02 RAJ CK 0052
In the Rajasthan High Court
Case No : Civil Spl. Appeal No. 149 of 2000

Birla Cement Works and Another	Vs	APPELLANT
State of Rajasthan and Others		RESPONDENT

Date of Decision : 24-02-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 11
Constitution of India, 1950 — Article 14 , 226
Rajasthan Motor Vehicles Taxation Act, 1951 — Section 14, 4

Citation : AIR 2000 Raj 251 : (2000) 2 RLW 1152 : (2001) 4 WLC 500

Hon'ble Judges : Rajesh Balia, J; Mohd. Yamin, J

Bench : Division Bench

Advocate : B.L. Maheshwari, for the Appellant; Vineet Kothari, for the Respondent

Judgement

1. This appeal is against the order of the learned single Judge dated 28-1-2000 in S.B. Civil Writ Petition No. 180/2000.

2. The petitioners carry on the business of manufacturing and selling of cement and for the purpose of their business they have also been granted mining lease for lime stone in respect of the land situated in village Bharda Jai, Surjna, Nagri in tehsil Chittorgarh. According to the petitioners they have installed crusher in the mining area itself for crushing lime stone excavated from the mines and there is public road in the mining area of the petitioners, which is in the exclusive possession and control of the petitioners. For the purpose of carrying lime stone from mines to the crusher within that area they have acquired heavy earth moving equipments known as Dumpers. The total number of such machines acquired from time to time is 27. In the petition, out of which this appeal arises, demand notices Annexure 4/1 to 4/27, raised under the Rajasthan Motor Vehicles Taxation Act, 1954, are under challenge. All these notices relate to demand for tax under the Act for the period commencing from 1-4-1997 to 31-3-2000 and have been raised by notices dated 11th Jan. 2000. The petitioners have challenged the said demand notices on the ground that machines/dumpers are

not "motor vehicle" within the meaning of Rajasthan Motor Vehicles Taxation Act, 1951 for the purpose of levying tax thereon though they are registrable under the Motor Vehicles, Act, 1988 and that the demand notices have been issued without first assessing the liability of the petitioners to tax. without affording any opportunity of hearing, demand notices have been issued directly without preceding assessment of tax.

3. The learned single Judge in the first instance upheld the preliminary objection on behalf of the respondents that the present petition is not maintainable because of the principle enshrined in the provisions of Order 2, Rule 2 of the CPC as well as on the principle of constructive res judicata. The learned Judge also upheld the preliminary objection of the respondents that as appeal was provided against the demand notice, there was an alternative remedy available to the petitioners for raising the issue raised in the petition. While upholding the objections of Order 2, Rule 2 CPC and constructive res judicata, it was noticed by the learned single Judge that the petitioners have earlier filed S.B. Civil Writ Petition No. 3579/99 raising the same issue which has been dismissed by the Court on 9-12-1999, against which though appeal has been filed by the petitioners as D.B. Civil Special Appeal No. 1540/99 but the same is pending and an interim order has been passed therein in favour of the petitioners and that the petitioners ought to have raised additional grounds raised in earlier petition which they now want to raise in this petition. Because of their failure to do so, principle of constructive res judicata applies.

4. It is not in dispute that the notices which are under challenge in this case have been issued after the judgment was delivered in S.B. Civil Writ Petition No. 3579/99 on 9-12-1999. Obviously, the petitioner could not have challenged the notices that have been issued subsequent thereto already challenged in the earlier petition, therefore, the question of applicability of principle enshrined in Order 2 Rule 2, CPC does not arise in the present case. Order 2 of the CPC deals with frame of suit. Rule 2 of Order 2 envisages that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action as on the date of filing suit or instituting proceedings. The principle underlying the provisions of Order 2, Rule 2 is that the plaintiff is not allowed to split relief arising out of the same cause of action by filing separate suits. No one should be vexed twice by splitting the claims and splitting the remedies. However, it is not envisaged that a suit should include also the reliefs in the first instance in respect of cause of action which arises subsequent to the filing of the suit, giving foundation for new proceedings. If subsequent cause of action gives rise to new reliefs or for additional reliefs, which he can claim, the filing of subsequent proceedings in respect of subsequent cause of action claiming similar reliefs, along with additional reliefs or on additional grounds is not barred. We are, therefore, of the opinion that the preliminary objection raised on the principle of Order 2, Rule 2 was misconceived in respect of the challenge to the demand notices issued subsequent to the decision of the earlier writ petition. It is obvious that the cause of action for present proceedings has not arisen not

even during the pendency of earlier writ petition where the petitioners could have incorporated the challenge to subsequent notices by seeking amendment. In such event also the suit or is not under obligation to seek amendment necessarily. He is free to file fresh suit on fresh cause of action. Only inhibition in such event may be about trial of an issue, which has been directly and subsequently in issue in the earlier lis, and which has been FINALLY decided between the parties. That finding becomes binding on the parties to earlier suit. The principle will be illustrated. If we assume that instead of dismissing the earlier petition had this Court allowed the same; and the impugned notices had come in existence thereafter. Notwithstanding decision of earlier petition, the only mode by which the petitioner could have got extricated itself from effect of such notice, was to have recourse to remedial forum. Had the earlier decision by this Court become final, the assessing officer or the other remedial forum, inferior to High Court would have been bound by earlier decision. However, the revenue authority would have been precluded from raising contention to sustain its action on other grounds, not decided earlier. But the notices could not be ignored automatically because decision of the Court was against the revenue. The cause of action in respect of demands raised in the subsequent orders had arisen afresh after the decision of the earlier writ petition. The right of the petitioners to challenge, the subsequent notices is independent to the earlier cause of action, which was the subject matter of the earlier writ petition and he cannot be estopped by the principle analogous to the one envisaged under Order 2, Rule 2, CPC or Section 11, CPC. It is to be noticed that the order passed in S.B. Civil Writ Petition No. 3579/99 has since been set aside by a Division Bench in D.B. Civil Special Appeal No. 1540/99 on 10th Feb. 2000 which was filed by the present petitioners and that matter has been sent back to the assessing authority giving opportunity to the assessee to file reply to the Impugned notices within a period of 3 weeks, raising all the contentions that are available to it, thus, the order passed in Writ Petition 3579/99 cannot come in the way of the appellants in any manner whatsoever.

5. So also we are satisfied that the preliminary objection sustained on the principle of constructive res judicata is not well founded. In order to raise the plea of res Judicata or constructive res Judicata. the essential pre-condition is that the matter which directly and subsequently is required to be decided in subsequent proceedings must have been decided finally between the parties in earlier proceedings. From the narration of facts in the order under appeal, it is clear that the decision dated 2-12-1992 has not attained finality and all findings given in the earlier petition were subject matter of an appeal which was pending when the order under appeal was made. In the order under appeal before the Division Bench, the parties were free to agitate all grounds decided against him and could also raise additional ground in support of his plea, which he now seeks to raise in this petition. If that is so he could not be debarred from raising such pleas in other proceedings which too await adjudication. Unless the findings have attained finality between the parties, they cannot operate as res judicata much

less as constructive res judicata, where an appeal is filed against an order, or Judgment or decree, the finality of decision of the lower Court is destroyed, and the matter again becomes sub-judice. The Privy Council in *Annamalay v. Thornhill*, AIR 1931 PC 263 expressed the effect of appeal on operation of principle of res judicata in following words.

"Where an appeal lies, the finality of decree on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form res judicata as between the same parties."

6. In the present case, on the facts noticed in the order under appeal, the order passed in CW No. 3599/999 on 9-12-1999 has been made subject matter of Special Appeal No. 1540/99, which was pending. Thus, the matter which was in Issue in the Writ Petition No. 3579/99 again became sub-judice and there was no final decision which could operate as res judicata in subsequent proceedings that too relating to new cause of action that has arise subsequently.

7. There is yet another reason for us not to sustain this reason given by the learned single Judge for dismissing the petition. The order, in which the findings are held to be operating as res judicata between the parties, in our opinion, does not give the clue as to what controversy has been reached by the Court in the previous decision. The order passed in Writ Petition No. 3579/99 only reads as under :--

This petition is dismissed in view of the Judgment passed in S.B. Civil Writ Petition No. 164S/99 dated 19-8-1999."

8. The Writ Petition No. 1645/99 to which reference has been made was filed by Rathi Travels against the State of Rajasthan and others. The order impugned in S.B. Civil Writ Petition No. 1645/99 also reads as under:--

"In view of the Judgment passed by this Court in S.B. Civil Writ Petition No. 2311/99 *Ambika Crushers v. Union of India* on 7-8-1999, this petition is rejected."

9. It would be pertinent to notice following the ratio in S.B. Civil Writ Petition No. 1645/99, the petition filed by the petitioners was dismissed. By reading the two judgments, we are left with only guess work as to what were the controversy and what findings of fact have been arrived at between the parties in the petition filed by the petitioners. Even, we are not any wiser from the order passed in S.B. Civil Writ Petition No. 1645/99 as to what controversy has been decided therein by reading the two orders. We are able to infer that the petition has been dismissed on account to the ratio of decision rendered in S.B. Civil Writ Petition No, 2311/99 *Ambika Crushers v. Union of India* on 7-8-1999. It is quite one thing to say that the petition has been decided following the ratio laid down in other case not between the same parties then saying that the Court has reached a finding between the parties about the facts in his own case. The ratio in another case may be binding as a precedent, however, it cannot operate as res judicata.

To satisfy ourselves, we had also looked into the decision in *Ambika Crushers v. Union of India* along with a group of c cases. In that case, the controversy was about the inclusion of excavator In the definition of "motor vehicle" by issuing notification dated 19-6-1992. The Court was examining whether the excavator was "motor vehicle" or not. While deciding the issue that the excavator was a "motor vehicle" or not, the learned single Judge, deciding the issue in *Ambika Crushers* case, has referred to few decisions of the Supreme Court and reached his own conclusion. Obviously decision was In respect of a different article, and in the context of a notification issued specifically to cover such article. Such are not the facts of the present case. In the aforesaid circumstances, when the petition has been dismissed with reference to an earlier decision, which itself has been dismissed with reference to another decision, the findings given in the case are not clear on the merits of the controversy.

10. There is yet another reason that makes us think that rule of constructive res judicata in the facts and circumstances of the present case cannot be invoked. The well settled principle in connection with taxing statute is that tax liability is determined for a period which constitute independent proceedings. The findings reached in respect of one period does not generally operate as res judicata, so as to debar either party from raising same or additional ground in respect of respective stands taken by the revenue or the tax payer as the case may be, in respect of determination of liability for subsequent period. Nor it is appropriate to apply rule of constructive res judicata so as to debar a party of raising same or additional plea for different periods. Though general principle of res judicata, including that of constructive res judicata may apply to proceedings for the same assessment periods, subject to other conditions for invoking such bar being shown to exist. This position has since long been settled by Supreme Court.

11. In this connection it will be apt to notice decisions of Supreme Court in *The Amalgamated Coalfields Ltd. and Another Vs. The Janapada Sabha, Chhindwara*, and *In Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others*,

12. *Amalgamated Coalfield's* case concerned about coal tax for coal manufactured at mines and sold for export or otherwise by rail. The question about applicability of constructive res Judicata was considered to somewhat similar circumstances as in the present case before a Bench of five Judges of the Apex Court. In the first instance notices for levy of coal tax were Issued on Aug. 23. 1958 for raising demand of tax assessed for the period 1-1-1958 to 30-6-1959. The notices were challenged before Supreme Court, and the Court held the notices to be valid. That judgment was reported in *The Amalgamated Coalfields Ltd. and Others Vs. The Janapada Sabha, Chhindwara*, Thereafter on 13-9-1960 and 2-3-1961, again notices were issued for subsequent periods for half year ending on 30th June. 1958, 31st Dec. 1958, 30th June, 1959. 31st Dec. 1959, 30th June 1960, and 31st Dec. 1960. The validity of notices was challenged before Madhya Pradesh High Court. Apart from raising grounds, raised

earlier, new additional grounds were also raised in support of their contentions by the petitioners. During pendency of that writ petition in respect of these notices, another writ petition was filed challenging the validity of notice dated 9-6-1959 demanding tax for the anterior period between 1-4-1931 to 31-12-1957. The Madhya Pradesh High Court discussed the plea of the petitioners in these writ petitions as barred by *res judicata* in view of earlier decision in respect of assessment period 1-1-1958 to 30-6-1958 *The Amalgamated Coalfields Ltd. and Others Vs. The Janapada Sabha, Chhindwara*, On appeal before Supreme Court, the plea of *res judicata* was not upheld by the Apex Court. The Court in first instance noticed that the question raised in the subsequent petitions were about tax for different periods. Gajendragadkar, J. speaking for the Court said (Para 18 of *The Amalgamated Coalfields Ltd. and Another Vs. The Janapada Sabha, Chhindwara*,

The question in the present appeals, however, is somewhat different. The notices which are challenged by the appellants in the present proceedings are in respect of the tax levied for a period different from the period covered by the notices issued on August, 23, 1958 which were the subject matter of the earlier writ proceedings (*The Amalgamated Coalfields Ltd. (2)*). Where the liability of a tax for a particular year is considered and decided, does the decision for that particular year operate as a *res judicata* in respect of the liability for a subsequent year? In a sense, the liability to pay tax from year to year is a separate and distinct liability, it is based on a different cause of action from year to year, and if any points of fact or law are considered in determining the liability for a given year, they can generally, be deemed to have been considered and decided in a collateral and incidental way. The trend of the recent English decisions on the whole appears to be, in the words of Lord Radcliffe, "that it is more in the public Interest that tax and rate assessments should not be artificially encumbered with estoppels (I am not speaking, of course, of the effect of legal decisions establishing the law, which is quite a different matter), even though in the result, some expectations may be frustrated and some time wasted." (*vide Society of Medical Officers of Health v. Hope Valuation Officer (1960 AC 551)*). The basis for this view is that generally, questions, of liability to pay tax are determined by Tribunals with limited Jurisdiction and so it would not be inappropriate to assume that if they decide any other questions incidental to the determination of the liability for the specific period of the decisions of those incidental questions need not create a bar of *res judicata* while similar questions of liability for subsequent years are being examined.

13. Thus noticing the principles that each period of assessment of tax has to be treated distinct and independent cause of action, the Court considered the applicability of principle of constructive *resjudicata* to proceedings arising from dispute relating to different assessment periods. The Court expressed.

"In the present appeals, the question which arises directly for our decision is does the principles of constructive *resjudicata* apply to petitions under Article 32

or Article 226 where the dispute raised is in respect of a year different from the year involved In a prior dispute decided by this Court ? It is significant that the attack against the validity of the notices in the present proceedings is based on grounds different and distinct from the grounds raised on the earlier occasion. It is not as if the same ground which was urged on the earlier occasion is placed before the Court in another form. The grounds now urged are entirely distinct, and so, the decision of the High Court can be upheld only if the principle of constructive res Judicata can be said to apply to writ petitions filed under Article 32 or Article 226, in our opinion, constructive res judicata which is a special and artificial form of res Judicata enacted by Section 11 of the CPC should not generally be applied to writ petitions filed under Article 32 or Article 226. We would be reluctant to apply this principle to the present appeals all the more because we are dealing with cases where the impugned tax liability is for different years.

It may be noticed that Court was considering a case in which the earlier decision was by the highest Court of land, yet the same was not considered to create bar of res judicata.

14. The question again came to be considered by Supreme Court in *Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others*, in respect of another tax matter. The assessee had challenged validity of Sales Tax Imposed upon him for a particular period under Article 226. The petitions were rejected on merits by the High Court of Madhya Pradesh. Appeals against the same too were dismissed by the Supreme Court. The assessee sought to raise additional points before Supreme Court which were refused to be raised because the same were not earlier raised before High Court. Subsequently the assessee again challenged the very same assessment order before High Court by filing another petition under Article 226, raising the additional grounds. The petition was dismissed by the High Court. The Supreme Court upheld the applicability of principles of res Judicata Including that of constructive res judicata, where the subject matter was the orders relating to same period as were subject matter In previous proceedings. However, the Court clearly emphasised the distinction between the cases where the same order is being challenged again in successive proceedings by raising one or two new grounds on the one hand and the cases relating to levy of tax for different periods. In the former, the general principles of res judicata as well as of constructive resjudicata was held to be applicable but not in the latter case. Hon"ble Gajendragadkar CJI speaking for the five Judges Bench said, reiterating the position stated in *The Amalgamated Coalfields Ltd. and Another Vs. The Janapada Sabha, Chhindwara*,

"Civil Appeal No. 506 arises from the decision of the High Court of "Madhya Pradesh dismissing the writ petition filed before it by the appellant, the Central Provinces Syndicate (P) Ltd. By its writ petition the appellant had challenged the validity of the notice served by the respondent calling upon it to pay arrears of

the tax amounting to Rs. 20,776/88 np. being arrears from April, 1, 1951 to June 30, 1959. It appears that for the said period, the appellant had been taxed by the respondent, but the said tax was not Imposed on coal which had been transported by the appellant outside the limits of the State of Madhya Pradesh. The respondent now sought to reopen the assessment levied against the appellant for that period by including a claim for tax in respect of coal sold by the appellant outside the limits of the State. The High Court has rejected the writ petition and that decision, has given rise to Civil Appeal No. 506 of 1962."

15. The above statement of law makes it abundantly clear that rule of res judicata, much less of constructive res judicata is not operative in subsequent proceedings relating to tax proceedings for different periods and relating to different orders that then were subject matter of earlier decision,

16. For the reasons stated above, we are unable to sustain the rejection of petition on the score of applicability of principle of Order 2, Rule 2 of CPC or on the ground of constructive res judicata.

17. The other contention which has been raised by the learned counsel for the respondents is that there is an alternative remedy of filing appeal against the impugned notices under the Rajasthan Motor Vehicles Taxation Act, 1951 which the petitioner have availed and therefore this appeal ought not to be entertained.

18. In the facts and circumstances of the present case, we are unable to sustain this ground also.

19. It is true that u/s 14 of the Taxation Act an appeal has been provided to any person aggrieved by an order relating to the determination of recovery of tax. In the present case there is no order relating to determination of recovery. It has been urged that considering the demand notice an order relating to the determination of recovery of tax, the same could be appealed against under the Act.

20. We are not impressed by the contention of learned counsel for the respondents that no separate assessment order is envisaged and the assessing officer is not required to hear the owner of the vehicle before determining the tax to be recovered from him by treating the vehicle to be Motor Vehicle for the purposes of the Taxation Act. The fact that the Act does not make any elaborate provision for making an assessment before raising a demand as has been provided in many other taxing statutes like Income Tax or the Sales Tax, or the Central Excise Duty Act, it cannot be gain said that before recovery is to be made, an order relating to determining the tax to be recovered has to be made. Firstly we may examine the scheme of the Act as to right to appeal. Section 14 of the Act of 1951 provides for appeal which reads as under :--

14. Appeal. -- (1) Any person aggrieved by an order relating to the determination of recovery of tax may within a period of thirty days from the date of such order prefer an appeal to the Appellate Authority appointed by the State

Government in this behalf.

(2) Every order in appeal passed by the said Appellate Authority shall be final:

Provided that the Commissioner may on his motion or on the application of a person aggrieved by the order of the Appellate Authority made in the prescribed manner and filed within a period of ninety days, call for and examine the record of any proceeding under this Act and revise any such order and may reverse or vary the same :

Provided further that no appeal shall be entertained unless it is accompanied by satisfactory proof of payment of 50% of the amount due under the order against which appeal has been preferred, or such other amount as is admitted by the appellant to be due from him whichever is, higher or of such instalment thereof, as might have become payable and further that the Appellate Authority shall not stay the recovery of tax :

Provided also that if the owner of the motor vehicle has preferred an appeal or revision under this section, the Commissioner may, on an application In writing from the owner of such vehicles, stay the recovery of the disputed amount of tax or penalty or any part thereof during the pendency of the appeal or revision if the owner furnishes sufficient security to his satisfaction in such form and in such manner as may be prescribed :

Provided also that if recovery of tax or any part thereof is stayed under the preceding proviso, the amount of such tax shall be recoverable with interest at such rate as may be prescribed on the amount from the date the tax first became due.

No tax can be levied or collected except in accordance with law authorising such levy and collection, that is requirement of Article 265 of the Constitution. Levy of tax on the motor vehicles for use of roads is authorised by Section 4 of the Act which reads as under:--

4. Imposition of Tax.-- (1) Save as otherwise provided by this Act or by rules made thereunder or by any other law for the time being in force there shall be levied and collect on all motor vehicles used or kept for use in the State:

(a) A tax in respect of such vehicles which are not covered by Clause (b) (c) or (d) at such rates as may be specified by the State Government by notification in official gazette which shall not exceed 5% of the cost of the chassis/vehicle per annum :

Provided that where the rates are not specified on quarterly or monthly basis, by the State Government, by notification in the official gazette and if the tax is permissible to be paid quarterly or monthly the amount payable shall be equivalent to the one forth or one twelfth respectively of the annual rate of tax.

(b) A one time tax in the case of non-transport vehicles at such rates as may be notified by the State Government by notification in the official gazette which shall

not exceed 10% of the cost of the vehicle:

Provided that in addition to one time tax there shall be paid by the owner or person having possession or control of a motor vehicle on which one time tax is payable, any tax or penalty as was payable under this Act for any period prior to the coming into force of the provisions of the Chapter V of the Rajasthan Finance Act, 1997 (Rajasthan Act No. 9 of 1997) at such rates as were applicable to such vehicles from time to time.

(c) A tax in respect of vehicles registered outside the State using roads in Rajasthan or under temporary permits, at such rates as may be notified by the State Government by notification in the official gazette which shall not exceed Rs. 200/- per day per seat in case of the passenger vehicles and shall not exceed Rs. 250/- per thousand Kg. of GVW/ RLW or part thereof for 30 days or part thereof in case of goods vehicle; and

(d) A tax on dealers in or manufacturers of motor vehicles in respect of such vehicles as are in their possession in the course of his business as such manufacturers or dealer under the authorisation of a Trade Certificate granted or deemed to be granted under the Motor Vehicles Rules for the time being in force in the State of Rajasthan, at such rates as may be specified by the State Government by notification in the official gazette which shall not exceed rupees ten thousand for every 50 vehicles or part thereof in respect of three or four wheeled vehicles and shall not exceed Rs. 10,000/- for every 100 vehicles or part thereof in respect of two wheeled vehicles.

(2) A tax shall be payable under this section by the owner of motor vehicle except for the period during which the owner surrenders the certificate of registration to the Taxation Officer, in the prescribed manner that the vehicle has remained out of use for such reasons as may be prescribed, or satisfies the Taxation Officer that vehicle has not been used due to the following reasons:

(i) that the motor vehicle was restrained from plying by the Competent Court or Authority;

(ii) that the motor vehicle was involved in an accident and a report to this effect was made to the police and because of accident it remained out of use;

(iii) that the motor vehicle was attached for the recovery of tax under the Rajasthan Land Revenue Act. 1956 (Act No. 15 of 1956) by the Competent Authority or attached under the warrant of attachment issued by the Competent Authority or Court and during the period of attachment the vehicle did not remain in his possession :

Provided that the period of such surrender of the period of such non-use as the case may be, shall be for a period of not less than one month :

Provided further that if the vehicle is found plying after the certificate of registration has been surrendered, the owner shall pay the Tax for the entire

period during which the certificate of registration remained surrendered.

Explanation.-- (1) The cost of the chassis/vehicle for the purpose of computation of Tax shall include purchase price and such other elements as may be prescribed by the State Government.

(2) For determining the vehicle kept in possession of a dealer or manufacturer, the number of vehicles declared by them likely to be in their possession or the vehicles sold by them during the preceding year, whichever is higher, shall be taken into consideration.

There is no impost of tax unless facts necessary for such levy are established before raising demand.

21. The charging Section informs us that the facts which are necessary for levying and collecting tax under the Act are that there must be a motor vehicle in existence and secondly such motor vehicle should be used or kept for use in the State and that such user must relate to use of public roads, within the State Inasmuch as the tax is compensatory tax for use of public roads within State in accordance with authorisation under Entry 57 of the II List. Subsection (2) of Section 4 makes it amply clear that for the period during which the owner surrenders the certificate of the registration in the prescribed manner for satisfying the taxation officer that the vehicle has not been used due to the reasons stated in Sub-Section (2). tax is not payable, provided such non-user Is for a period of not less than one month. This provision makes consideration of actual user a relevant factor in determination of tax amount to be recovered. The provision also envisages the determination of tax at different rates on different type of vehicles i.e. to say the amount which may be levied under tax has to be determined on the basis of the type of vehicle, which again requires enquiry Into the facts about the nature of vehicle and other relevant facts as is evident from the provision itself. Explanation to the charging section further requires determination of the fact that the vehicle was kept in possession of the dealer or a manufacturer by the competent authority.

22. The provision of appeal u/s 14 also reads that any person aggrieved by an order relating to recovery of tax may within a period of 30 days from the date of such order may prefer an appeal to the appellate authority appointed by the State Govt. In this behalf. This provision also clearly envisages a determination of tax prior to proceeding with the recovery of tax and an order about such determination. Where there is a provision envisaged for making of an order determining certain facts, on the basis of which alone a recovery can be made, affording of an opportunity of hearing before determining such facts, to the affected party with such order, who has a right of appeal, is inherent. There is no presumption under law that all facts necessary for determining liability exist, dehors any such determination. If there is any presumption about existence of all facts necessary for levy of a charge, there will be no need of appeal either. The mere fact that no procedure has been prescribed for determining necessary facts

and decide objections by the assessing officer, does not obviate necessity of adoption of a fair procedure before determining such liability. A fair procedure inheres in its adherence to principles of natural justice. Affording adequate opportunity of hearing before determination against a person is an essential ingredient of natural justice. It is inherent in the fair procedure, adherence to which is required of every State authority in discharge of its every Governmental function whether quasi Judicial or administrative. There cannot be any doubt that the determination of a liability arising on account of levy of tax is a proceeding which is quasi judicial in nature. A fair and adequate opportunity of hearing to the affected party is necessary concomitant of every State action affecting any person, unless expressly or by implicit implication it is excluded by the statute. One need not elaborate on it. It is so well ingrained in the scheme of our constitutional administration. If the contention of the learned counsel for the respondents is to be accepted, it would mean that the assessing officer is never called upon to decide the foundational facts necessary for levy of tax and he can without determining the levy embark upon proceedings of collection of tax may be within his competence or without his competence and the tax payer exercise his right of hearing only before appellate authority without having any chance to urge before the original authority and convince him not to make the impugned order at all, because no tax is leviable. There is no explicit exclusion of natural justice. We do not find any such exclusion by necessary implication either from the provisions of the Motor Vehicles Taxation Act, 1951. Making an order determining liability, where it is not admitted by the assessee, is a sine qua non before proceeding to collect the tax. It is order of such determination only that has been made appealable and not merely the recovery notice.

23. In the present case, no order has been made determining the tax before resorting to recovery proceeding by calling upon the petitioners to pay the tax against which appeal could be filed.

24. Assuming that the petitioners could have filed an appeal against the impugned demand notices, treating them to be order of determination itself, still in our opinion, petition ought not to have been dismissed on the ground of alternative remedy. It is well settled that where the orders have been passed by statutory authorities in violation of principles of natural justice, where it has a duty to act in accordance with the principles of natural justice, the alternative remedy cannot be held as a bar to the maintainability and entertainability of the petition under Article 226 of the Constitution and grant of relief in exercise of extraordinary jurisdiction. The ordinary rule is that when there is an equally efficacious alternative remedy, petition under Article 226 of the Constitution ought not to be entertained. One of the well known exception to the ordinary rule is where there is breach of principles of natural justice in making the impugned order. Reference in this connection may be made to the case of A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, in which a Constitution Bench of the Supreme Court enunciated the principle as under:--

". . . .We must, however, point out that the rule that the party who applies for the issue of a high prerogative writ should, before he approaches the Court, have exhausted other remedies open to him under the law, is not one which bars the Jurisdiction of the High Court to entertain the petition or to deal with it, but is rather a rule which Courts have laid down for the exercise of their discretion.The wide proposition is that existence of an alternative remedy is a bar to the entertainment of the petition under Article 226 of the Constitution of India unless (1) there was a complete lack of jurisdiction in the officer or official authority to take action impugned or (2) where the order prejudicial to the writ petition has been passed in violation of the principles of natural justice and could, therefore, be treated as void or non est, in all other cases Courts should not entertain petition under Article 226 of the Constitution and prayer for granting relief cannot be accepted."

Thus, the two well known exceptions to the entertainability of the petition under Article 226 of the Constitution of India in the face of alternative remedy are; (i) where there is lack of complete jurisdiction on the part of authority making the order, and (2) the order being prejudicial to the writ petitioner is made in violation of the principles of natural justice. The principle has since not been departed from.

25. In the present case, it is not in dispute that before raising demand vide Annex. 4/1 to 4/27, no notice was issued to the assessee for considering any objection as to the liability to be assessed to tax, nor an opportunity has been offered to the petitioners to show to the assessing authority even after proposing to raise a demand to raise objection to it, if he has any.

26. We are, therefore, of the opinion that the petition filed by the petitioners could not have been rejected on either of the preliminary objections raised by the learned counsel for the revenue in the present circumstances.

27. It may be pertinent to notice that the petitioners have not filed appeal against the impugned demand notices before filing the petition. They filed appeal only after their petition had been dismissed by the order under appeal in which the Court has observed on the assurance given by the learned counsel for the respondents that if the petitioners present memo of appeal within a period of two weeks from the date of the order under appeal, the appellate authority shall decide the appeal within a period of two weeks thereafter. The learned counsel is not correct in his statement that since the petitioners have availed the alternative remedy, this petition should not be entertained. The facts remain that the appeals were not filed when the petition was filed invoking extraordinary jurisdiction but the appeals have been filed after their petitions have been dismissed on the ground of alternative remedy under the directions of the Court in order to save the limitation for filing such appeals. Because of the directions of the Court they do not forfeit their right to challenge the order in question through appeal.

28. The learned counsel for the revenue urged that all the grounds, which have been raised by the petitioners on the merit of his case in this appeal, be raised before the appellate authority. Learned counsel for the appellants have urged that since the question is of leviability of the tax on the machines in question which is claimed by the petitioners not to be falling within the definition of "motor vehicle" and is not otherwise liable to be taxed under the Rajasthan Motor Vehicles Taxation Rules, 1951, is to be decided by the assessing authority in terms of the directions Issued by this Court in D. B. Civil Special Appeal No. 1540/99 referred to above. If the appellate authority is allowed to continue with the proceedings as a result of the directions issued in the order under appeal, it would mean that the appellate authority would be deciding the facts which are required to be decided by the assessing authority as directed by Division Bench of this Court after hearing the party. In respect of earlier period, the exercise of jurisdiction by the original authority shall be preempted by the appellate authority and the direction shall become redundant. Therefore if the matter is to be remanded, the same must be remanded to the original assessing authority. Instead of directing the appellate authority to continue with the proceedings of the appeal. Learned counsel further states that the orders being made in this behalf by this Court he shall withdraw the appeal filed by him before the appellate authority which has only been filed because of the observations made by the learned single Judge.

29. In the facts and circumstances, we are of the opinion that the contention of learned counsel for the appellant has merit. We have already come to the conclusion above that it is for the assessing officer in the first Instance to determine the questions relating to recovery of demand and make a demand by passing an order before he can actually resort to recovery. For filing an appeal before the appellate authority such an order is sine qua non and an appellate authority cannot be directed in the first instance to decide the questions of fact and allowed to act as first authority without the assessing authority ever been called upon to decide those questions. In the present case. It is also apparent that while the directions of this Court are to the original authority to decide the disputed questions of fact, it would be inappropriate if for the proceedings for the subsequent year the appellate authority were to be allowed to continue with the proceedings of appeal for deciding those very questions in the first Instance so as to affect the authority of the assessing authority to come to his own conclusions after hearing the affected party. The adoption of proposal by respondent shall render the earlier direction of this Court providing an effective hearing by the taxation officer infructuous. Moreover ordinarily, defect of non-hearing by the original authority is not cured by affording hearing by the appellate authority. In such circumstance ordinary rule in such cases is also that appellate authority remands the matter to original authority to afford such opportunity before making the order. The cases in which post decisional hearing is considered adequate, too requires such post-decisional hearing by the authority making the order in first Instance.

30. Learned counsel for the Revenue vehemently urged that really there are no disputed questions of fact. There has been amendment in the definition clause of the Rajasthan Motor Vehicles Taxation Act, 1951 and thereafter the alleged machines have been registered under the Motor Vehicles Act, therefore, the dispute no more exists about the facts which need to be determined viz. whether the machines in question are motor vehicles or not. He also urged that no useful purpose will be served by remanding the matter inasmuch matter of taxability of dumpers now stand concluded by two decisions of Supreme Court in M/s. Central Coal Fields Ltd. and Others Vs. State of Orissa and others, and Union of India and others, Vs. Chowgule and Co. Pvt. Ltd., etc. etc., He invited our attention to the Sub-clause (e) of Section 2 of the Act of 1951 which reads as under :--

(e) Words and expressions used but not defined in this Act and defined in Motor Vehicles Act, 1988 (Central Act 59 of 1988) and Central Motor Vehicles Rules, 1989, shall have the meaning assigned to them in that Act and Rules as amended from time to time.

The Rajasthan Motor Vehicle Taxation Act, 1951 which came into force in 1951 as originally enacted, had adapted words and expressions used in the Act of 1951 but not defined therein, but were so defined in the Motor Vehicles Act, 1939 by reference to the provisions of Motor Vehicles Act, 1939. The original clause, before it came into existence in the present form, read :

"Words and expressions used but not defined in this Act and defined in the Motor Vehicles Act. 1939 (Central Act CIV of 1939); have the meanings assigned to them in that Act."

Thereafter it was substituted by Section 2 of Rajasthan Act No. 20 of 1982 published in the Rajasthan Gazette Part 1VA of extraordinary Gazette of 30th Sept., 1982 with the following:

"(e) Words and expressions used but not defined in this Act and defined in the Motor Vehicles Act. 1939 (Central Act IV of 1939) shall have the meaning assigned to them in that Act as amended from time to time."

Thereafter when 1939 Act was repealed with the commencement of the Motor Vehicles Act, 1988 the definition was further substituted vide Rajasthan Act No. 14 of 1990 and the clause (e) reads now as under:--

"(e) Words and expressions used but not defined in this Act and defined in Motor Vehicles Act, 1988 (Central Act 59 of 1988) and Central Motor Vehicles Rules, 1989, shall have the meaning assigned to them in that Act and Rules as amended from time to time."

31. Learned counsel, therefore, submits that the vehicles having been registered under the Motor Vehicles Act, about which there is no dispute, the levy of tax on the vehicles in question as motor vehicle is automatic. It is not open for the appellants now to dispute that the dumpers in question are not motor vehicles within the meaning of Motor Vehicles Act, 1988 as per the definition that exists

during the relevant period since 1982. Prior to the amendment by making the applicability of the definitions of the Motor Vehicles Act as amended from time to time, the Court has taken the view that by making a reference to the Motor Vehicles Act, 1939, at the time of enactment of the Act, the legislature had adopted the well known method of legislating by incorporating the provisions of the Motor Vehicles Act by reference. Therefore, for the purposes of Motor Vehicles Act, the definitions as it existed on the date the Act came into force, is to be considered as if enacted in the Act of 1951 itself and subsequent amendments in the Motor Vehicles Act, 1939 would not affect the definitions for the purposes of Motor Vehicle Taxation Act, 1951. The decision of Supreme Court in *Bolani Ores Ltd.*, as followed by this Court in 1980 WLN 375 in the case of this very petitioner does not assist the petitioner. The dumpers which have been registered under the Motor Vehicles Act 1988 or 1939 as motorvehicles have to be treated motor vehicles for the purposes of the taxation also.

32. As discussed above that the demand notices in question have been made in breach of principles of natural justice, ordinarily we would not have gone into the question raised by the learned counsel for the respondent and leave it to be decided by the assessing authority, however, considering the fact that the issue raised by learned counsel is of considerable importance and affects the contours of enquiry required to be held by an assessing officer for the purpose of effecting levy under the Act of 1951 by determining the recoveries to be made from the owner of a vehicle, we deemed it proper to analyse the scheme of the Act at this Juncture.

33. We have already reproduced hereinabove the provisions of Section 4 of the Rajasthan Motor Vehicles Taxation Act, 1951 which is a charging section and have noticed the requirement of existence of two material facts before the levy is attracted namely; (1) existence of motor vehicle and (2) it being used or being kept for use within the State by the owner thereof. The taxation of motor vehicles falls within the exclusive competence of the State legislation under Entry 57 of the II List of the Seventh Schedule of the Constitution of India. Article 265 of the Constitution of India ordains that no tax shall be levied and collected except by authority of law. Schedule Seventh of the Constitution defines the legislative fields within which the different legislatures of the country can operate. List I enumerates the subjects on which the Parliament has the exclusive powers to legislate. List II enumerates the subjects on which the State legislature have exclusive powers to legislate and the List III enumerates the fields on which Parliament as well as the State Govt. has concurrent authority to legislate. Taxation on vehicles falls within Entry 57 of List II which reads as under :--

57. Taxes on vehicles, whether mechanically propelled or not suitable for use on roads including tramcars subject to the provisions of Entry 35 of List III.

34. There is no dispute about the fact that the Act of 1951 with which we are concerned, has been enacted by State legislature in exercise of this power. Ambit

and scope of this entry is no more res integra. The Supreme Court held in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, that taxation of motor vehicles in exercise of Entry 57 of II List is compensatory in nature to compensate the State who is responsible for maintaining public roads, for use of public roads maintained by it by the users thereof. The Court while examining challenge to validity of such taxation being violative of Articles 301 and 304, held that-

"the taxes imposed under the Act are compensatory and regulatory in character and therefore does not impede freedom of trade but amounts to reasonable restriction."

Commenting upon the Rajasthan Motor Vehicles Taxation Act. the Court said :

"It will be noticed that tax imposed is really a tax for use of roads in Rajasthan State."

It was further observed by S.K. Das, J. speaking for the majority-

"It seems to us that a workable test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying patently not much more than what is required for providing the facilities."

Thus to sustain a compensatory tax nexus between the levy and service for which tax is levied become an Integral part of the levy. The Court also expressed that where such link is not established or broken, the levy may be open to challenge.

35. Thereafter, the Apex Court in *Bolani Ores Ltd.*, while considering the nature of levy of tax under Entry 57, held as under (Paras 15 and 29) :--

The Motor Vehicles Taxation Acts are enacted in exercise of the powers conferred on the State Legislatures under Entry 57 of List II of the Seventh Schedule to the Constitution, while the Motor Vehicles Act is enacted by the Parliament in exercise of the concurrent legislative power in Entry 35 of List III of the Seventh Schedule to the Constitution. Entry 57 of List II empowers legislation in respect of taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of Entry 35 of List III. The power exercisable under Entry 57 is the power to impose taxes which are in the nature of regulatory and compensatory measures. The regulatory and compensatory nature of the tax is that the taxing power should be exercised to impose taxes on motor vehicles which use the roads in the State or are kept for use thereon either throughout the whole area or parts thereof and are sufficient to make and maintain such roads."

The Taxation Act is a regulatory measure imposing compensatory taxes for the purpose of raising revenue to meet the expenditure for making roads, maintaining them and for facilitating the movement and regulation of traffic. The

validity of the taxing power under Entry 57, List II of the Seventh Schedule read with Article 301 of the Constitution depends upon the regulatory and compensatory nature of the taxes. It is not the purpose of the Taxation Act to levy taxes on vehicles which do not use the roads or in any way form part of the flow of traffic on the roads which is required to be regulated. The regulations under the Motor Vehicles Act for registration and prohibition of certain categories of vehicle being driven by persons who have no driving licence, even though those vehicles are not plying on the roads, are designed to ensure the safety of passengers and goods etc. etc. and for that purpose it is enacted to keep control and check on the vehicles. Legislative power under Entry 35 of List III (Concurrent List) does not bar such a provision. But Entry 57 of List II is subject to the limitations referred to above, namely, that the power of taxation thereunder cannot exceed the compensatory nature which must have some nexus with the vehicles using the roads, viz. use the roads, notwithstanding that they are registered under the Act, they cannot be taxed. This very concept is embodied in the provisions of Section 7 of the Taxation Act as also the relevant sections in the Taxation Act of other States, namely, that where a motor vehicle is not using the roads and it is declared that it will not use the roads for any quarter or quarters of a year or for any particular year or years, no tax is leviable thereon and if any tax has been paid for any quarter during which it is not proposed to use the motor vehicle on the road, the tax for that quarter is refundable.

36. This question again came up before the Court in Travancore Tea Estates Co. Ltd. and Others Vs. State of Kerala and Others, The Court reiterated the ambit and scope of taxing under the Motor Vehicle Taxation Act while dealing with the Kerala Motor Vehicles Taxation Act No. 24 of 1963. The Court was concerned with the expression used in the charging section "used or kept for use in the State". After quoting the principle referred to above from Bolani Ores case, the Court said (Para 6):

"If the words "used or kept for use in the State are construed as used or kept for use on the public roads of the State, the Act would be in conformity with the powers conferred on the State legislature under Entry 57 of List II."

Thus, tax under the Taxation Act can be, nay has to be, confined to vehicles used or kept for use on the public roads within the State. Tax cannot be delinked from the use of the public roads by the vehicle which are being considered for subjection to tax.

37. Pausing here, it may be reiterated that this part of the consideration whether the dumpers in question are used or kept for use in the State even if they are considered to be motor vehicles within the meaning of definition given in the Motor Vehicles Act, 1988. in the context of limits on the legislative power under the Constitution, the enquiry has to be made whether the dumpers as motor vehicles were used or kept for use in the State and the contours of enquiry has to be within the ambit of the Constitutional limit of the legislative competence as

laid down by the Supreme Court in the aforesaid decision to construe the words "used or kept for use in the State" in the Taxation Act as "used or kept for use on the public roads in the State."

38. It may be equally important to notice that under Sub-section (2) of Section 3 of the Kerala Motor Vehicles Taxation Act, 1963 a deeming provision was made that registered owner or any person having possession or control of a motor vehicle of which certificate of registration is current, shall be deemed to use or deemed to keep such vehicle for use in the State except for any period for which Regional Transport Authority has certified in the prescribed manner that the motor vehicle has not been used or has not been kept for use. We do not find any such legal fiction laying down the rule of evidence raising presumption about the use of vehicle which is registered under the Motor Vehicles Act and the registration of which is current in use within the State during the period for which notices have been served. Therefore it has to be established as a fact, when this part of the condition of levy is disputed by the person against whom the tax is proposed to be levied and from whom it is to be recovered, to determine whether the thing registered as motor vehicle in the State is used or kept for use on the public roads of the State in order to bring the levy in conformity with the powers conferred on the State legislation under Entry 57 of the List II notwithstanding that it can be deemed to be adopted "for use upon roads" within the meaning of M. V. Act, 1988, the essential condition of such vehicle being "used or kept for use in the State" in the Taxation Act has to be read so as to keep the levy within constitutional limits, as held in Travancore Tea Estates Co. Ltd. and Others Vs. State of Kerala and Others, Therefore, where any person, against whom a demand for tax under the Act of 1951 is sought to be raised, objects to the levy on the ground that the article in question namely the dumpers though registered as motor vehicles under the Motor Vehicles Act, 1988 or Motor Vehicles Act, 1939 but are not subject to levy because they are not used or not kept for use of public roads within the State and that the vehicles are exclusively plied and used within the mining area under his control, the question does need determination on the evidence before tax can be levied.

39. Sub-section (2) of Section 4 deals with contingencies where a vehicle owner is entitled to claim reduction in tax liability for its actual non-user for certain period (not less than one month) because of its non-user or his liability to use the vehicle at all. This provision has reflection on the importance of nexus between the user of public road by the vehicle in question or its potentiality of using public roads in the State by the owner. This question begs answer for another question, "when an owner of vehicle can be said to use or keep the vehicle for use on public roads in the State." In this connection decision of the Supreme Court in Goodyear India Ltd. Vs. Union of India and others, throws some light. Undoubtedly, the Court was not dealing with the levy of tax under the Motor Vehicles Taxation Act but with levy of Excise Duty on tyres, but the controversy was very much similar in constructing the meaning of "motor vehicle" in the identical terms as in the Motor Vehicles Act so far as the present

controversy is concerned. The commodity on which the levy was to be considered was tyres. The relevant entry in the tariff under the Excise Act levying duty on tyres was 16 which is in respect of the tyres in three categories viz. (1) tyres for motor vehicles, (2) for cycles other than motor cycles and (3) all other vehicles. Thus tyres for Motor Vehicles were treated differently. Question that arose was. whether tyres on which dumpers were loaded, were used in motor vehicles. Entry 34 of the tariff prescribed duty on motor vehicles. That entry reads as under :--

Item No. 34 - Motor Vehicles

Item No.

Tariff Description

Rate of duty

34. Motor vehicles ?

(Motor Vehicles" means all mechanically propelled vehicles adapted for use upon roads, and Includes a chassis and a trailer, but does not Include a vehicle, running upon fixed rails-

(1) Auto-cycles, motor-cycles, scooters, auto-rickshaws and any other three wheeled motor vehicles

10%

ad valorem

(2) Motor vehicles of not more than 16HP by Royal Automobile Club (RAC) rating

25%

ad valorem

(3) Motor cars of more than 16HP by Royal Automobile Club (RAC) rating constructed or adapted to carry not more than 9 persons

40%

ad valorem

(3A) Tractors, including agricultural tractors

15%

ad valorem

(4) Motor vehicles, not otherwise specified

15%

ad valorem

Explanation - For the purposes of this item, where a motor vehicles is mounted, fitted or fixed with any weight lifting, earth moving and similar specialised material handling equipment, then such equipment, other than the chassis, shall not be taken into account.

40-41. The Court on considering the definition of "motor vehicle" under Entry No. 34 which was in like form as under the Motor Vehicles Act, 1988. but for considering the expression "adapted for use on roads", laid emphasis on dominant use of the vehicle on roads and to ignore Incidental use and said :

"A close reading of the definition "motor vehicle" in Item 34 reveals that the striking Ingredient thereof is that it should have been "adapted for the use upon roads". Merely because the areas on which such heavy movers traverse might sometimes include roads also is not enough to hold that they were adapted for use upon roads. Such use of the heavy movers on the road may only be ancillary or incidental to the main use of it. Emphasis in the definition must be on the words "use upon road" as those, words would denote the principal or dominant use and not where it may move incidentally."

42. The basic ingredient on which the revenue relies on in the present case too is about determining whether the machine in question can be considered to be a motor vehicle or not for the purpose of Taxation Act is that once the dumper machine is mounted on tyres it becomes a vehicle adapted for use upon roads. He relies upon the decisions of the Supreme Court in M/s. Central Coal Fields Ltd. and Others Vs. State of Orissa and others, and Union of India and others, Vs. Chowgule and Co. Pvt. Ltd., etc. etc.,

43. A close look at the aforesaid decisions leads us to conclude that the controversy which need to be determined by the Assessing Officer is to be viewed from two fold angles. Firstly, where the dumpers in question fall within the definition of "motor vehicle", secondly whether they are used or kept for use on public roads within the State. The decision in Bolani Ores Ltd., had considered the question on two fold grounds namely whether the dumpers in question with which the Courts were dealing could be classified as "motor vehicle" within the meaning of the definition adopted by the Taxation Act.

44. In Bolani Ores Ltd., the Taxation Act of Orissa State was considered as it was existing prior to 1975- The provisions in Orissa Act at that time had not adopted the definition of "motor vehicle" of the Motor Vehicles Act, 1939 as amended from time to time but had only adopted the definition in the Motor Vehicles Act, 1939 simplicitor at the time of its enactment. The Court answered the question by invoking the doctrine of legislation by incorporation. "Motor Vehicle" at the time of the enactment of the Orissa Act defined "motor vehicle" as under (Para 8) :--

"motor vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and

a trailer; but does not include a vehicle running upon fixed rails or used solely upon the premises of the owner.

45. For considering that the enquiry for determining whether the propelled vehicle is a motor vehicle adapted for use Upon roads, it has also to take into consideration that the definition has excluded all vehicles running upon fixed rails or used solely upon the premises of the owner. Therefore, the question in Bolani Ores case rested not on determination of question Vehicle adapted for use upon roads" but on exception "does riot Include the vehicle which run upon railssolely upon the premises of the owner". Section 2 was amended by amendment Act of 1956 which reads as under :--

Section 2(18) (after amendment by Act 100 of 1956)

"motor vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only In a factory or in any other enclosed premises.

46. The difference in the phraseology for the purpose of determining whether a vehicle is a "motor vehicle" is apparent whereas under the unamended provision actual user of the vehicle by the owner at his own premises excluded it from the purview of the "motor vehicle". After amendment it was only such special type of vehicle which has been adapted for use only in factory and other enclosed area was excluded from the definition of "motor vehicle". Its actual user simplicitor within the premises of the owner was not relevant, if it is not a vehicle of special type adapted for use only in factory or any other enclosed premises. The second contention which the Supreme Court dealt with in Bolani Ores case was ambit of levy under the Taxation Act under Entry 57 of List II of the Seventh Schedule of the Constitution of India under which the Taxatlon Act has been enacted.

47. The question again cropped up before the Supreme Court whether the dumpers and rockers run on rubber tyres are adapted for use on roads under the M/s. Central Coal Fields Ltd. and Others Vs. State of Orissa and others, and Union of India and others, Vs. Chowgule and Co. Pvt. Ltd., etc. etc., In Central Coal Fields Limited, the Court noticed that anticipating a spate of refund applications as a result of Bolani Ores Ltd., the Governor of the State of Orissa promulgated an Ordinance on 11-2-75 by defining the "motor vehicle" under the Taxation Act with retrospective effect bringing it in conformity with the definition given in the Motor Vehicles Act by the amendment of 1956 referred to above. Considering that the plain and clear object of the amendment was to legislate retrospectively on the subject directly Instead of by incorporation, as done earlier, so as to bring uniformity in the post amendment effect of Section 2(18) of the Act and therefore, the effect of Bolani Ores case to the extent the vehicles of any kind used solely on the premises of the owner were not treated motor vehicles, was nullified by amending the provisions of the Act Itself. The Court in

Central Coal Fields case was dealing with the amended provisions of the Orissa Act where the actual user did not exclude the dumpers in question before the Court from the definition of motor vehicle" if other wise it can be held that they are adapted for use on public roads. It is relevant to notice that the decision in Central Coal Fields Limited was rendered only on facts of the case but did not lay down that in all cases and in all circumstances the dumpers or rockers are vehicles. The Court said (Para 8 of M/s. Central Coal Fields Ltd. and Others Vs. State of Orissa and others,

On the facts situation, we have no hesitation in holding that the High Court was right in concluding that Dumpers and rockers are vehicles adapted or suitable for use on roads and being motor vehicles per se. as held in Bolani Ores case, were liable to taxation on the footing of their use or kept for use on public roads; the network of which the State spreads, maintains it and keeps available for use of motor vehicles and hence entitled to a regulatory and compensatory tax,

48. This decision in M/s. Central Coal Fields Ltd. and Others Vs. State of Orissa and others, was followed in Union of India and others, Vs. Chowgule and Co. Pvt. Ltd., etc. etc., arising under the Motor Vehicles Taxation Act, 1965 as was made applicable to Union Territories of Goa, Daman and Diu with effect from 1-1-65. In both the cases, the Court on facts found that the dumpers in question were adapted for use on public roads. The question whether the dumpers in question are of special type adapted for use in factory or any other enclosed premises, the Court was not called upon to determine in either of the cases.

49. The other controversy that the tax is leviable only in case of vehicles used or kept for use on public roads within the State as envisaged under Entry 57 to construe the Act in consonance with the ambit and scope of legislative competence of the State Legislature was neither raised nor decided in the two later decisions by the Supreme Court on which the learned counsel for the respondent relies. We further notice that this question has directly cropped up as to what is the meaning in the Taxation Act of the expression "used or kept for use within the State", interpretation directly in Travancore Tea Estates Co. Ltd. and Others Vs. State of Kerala and Others, and the Court construed it to mean as "used or kept for use on the public roads of the State". The decision in Union of India and others, Vs. Chowgule and Co. Pvt. Ltd., etc. etc., rested on interpretation of the words on the expression in the Motor Vehicles Act "adapted for use upon roads". The decision in Travancore Tea Company's case, therefore, did not find a mention in M/s. Central Coal Fields Ltd. and Others Vs. State of Orissa and others, and the Chowgule's case which followed the Central Coal Fields Limited's case inasmuch as the controversy was not before the Court.

50. But the fact remains that even where the vehicle is considered to be a vehicle adapted for use on roads does not ipso facto bring within the purview of being used or kept for use of public roads in the State nor it prohibits the taxpayer from raising plea that it is a vehicle of special type adapted for use only in a factory or In any other enclosed premises. In this connection, it becomes

further relevant to consider the ambit and scope of the meaning "adapted for use upon roads" for the purposes of taxation, as that expression in identical language has been interpreted by the Supreme Court by a larger Bench in *Goodyear India Ltd. Vs. Union of India and others*, without deviating from the view expressed in the *Central Coal Fields case* and *Chowguley and Company's case* to mean "the dominant use of the vehicle" is the determining factor. The Court said that merely because, the areas on which such heavy movers traverse might sometimes include roads also is not enough to hold that they were "adapted for use upon roads". Such use of the heavy mover on the road may only be ancillary or incidental to the main use of It. Emphasis In the definition must be on the words "use upon road" as those words would denote the principal or dominant use and not where it may move incidentally. This enunciation makes it imperative in the context of the controversy which is to be decided when the levy of tax is disputed by the tax payer before, the assessing authority under the Taxation Act.

51. Firstly, it is to be determined whether it is a "motor vehicle/which would include an enquiry whether the vehicle is adapted for use upon the roads and if so claimed by the assessee, whether it is a special type of vehicle adapted for use only in a factory or any other enclosed premises for their purpose dominant use shall be decisive of the issue.

52. In the case, a claim to special type of vehicle adapted for use within the limited areas where crushers operate is laid on the basis of its being adapted for use only in factory or any other enclosed premises. On the principle of harmonious construction, commensurating with the scheme of legislative bounds of the State Legislation, we are of the opinion that in such circumstances, for deciding whether the vehicle is of special type adapted for use only in factory or any other enclosed premises, for the purposes of levy of tax under the Taxation Act, it becomes a relevant enquiry to find what is the principle or dominant use for which adaptation has been made and not the incidental movement of the vehicle on roads. Where the claim is that a vehicle which is mechanically propelled and adopted for use in factory or the premises of the owner only the dominant movement will be decisive factor to determine whether it is "motor vehicle" falling in the general definition of motor vehicle or it comes within special type of vehicles falling in the exclusion clause.

53. The question about determining the claim as has been raised by the petitioners in the present case that it is a machine of special type designed for use on owner's premises only for particular purpose requires establishment of facts necessary in the light of principles laid down by the Supreme Court as discussed above. This question has not been considered in any of the decided cases referred to us by both the learned counsel.

54. As we have found that the orders under challenge Exs. 4/1 to 4/27 have been made In breach of principles of natural justice and without deciding essential questions of fact arising from the objections raised by the petitioners and such questions being questions of fact cannot be determined by this Court

for the first time to make determination of liability to tax, it is only appropriate that the demand raised by Exs. 4/1 to 4/27 Is set aside and the notices are treated as notices to show cause against the demand proposed to be raised vide those notices and the assessee is given an opportunity of hearing, if he has any objection to such demands by raising necessary objections and is given opportunity to lead evidence, if any, in support of his plea. This course has also been adopted by this Court while allowing the earlier appeals filed by the present appellant in D.B. Civil Special Appeal No. 1540/99 wherein the Court has directed in respect of demands raised in earlier orders to appear before the assessing officer and raise all the objections within stipulated time.

55. We have deemed it necessary to discuss in detail the scheme of the Act about the ambit and scope of enquiry to be held by the assessing officer for the purposes of determining the questions on which liability to tax under charging provisions depends.

56. Accordingly, we allow this appeal as well as the petition filed by the petitioners, set aside the demand raised vide Annexures 4/1 to 4/27 by treating the same to be the show cause notices against proposed levy of tax under the Act of 1951. The appellants petitioners shall be free to file objections if any to the aforesaid notices within a period of six weeks. On filing such objections, the assessing officer shall decide those objections after affording the petitioner opportunity to lead any evidence as they want to and the taxation officer shall also be free to bring evidence on record which he wants and decide upon such objections and determine the demand, if any, recoverable from the petitioners within a further period of six months In accordance with the observations made above. During this period, the amount deposited by the assessee shall not be refunded but shall remain as security for the demands proposed to be raised vide the impugned notices, to be adjusted against the amount, if any, that may be found recoverable on the final outcome of the proceedings. The appellants shall further furnish a security to the satisfaction of the Taxation Officer for the balance amount proposed to be assessed against him. There shall be no orders as to costs.