

(1990) 11 PAT CK 0020

In the Patna High Court

Case No : C.W.J.C. Nos. 2085 of 1989(R) and 368, 369, 370, 371, 372, 373, 374, 376, 377, 378, 389, 1604 and 1605 of 1990(R)

Central Coalfields Ltd. and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 06-11-1990

Acts Referred:

Citation : (1990) 11 PAT CK 0020

Judgement

1. Whether the imposition of cess on various minerals including bauxite, coal and other minerals under the Bengal Cess Act, 1880 (Act IX of 1880) (hereinafter called the Cess Act) as amended from time to time, is valid or not, is the question involved in these writ applications.

2. The fact of the matter lies in a very narrow compass:

The petitioner of C.W.J.C. No. 581 of 1990(R) is a mining lessee in respect of mineral "bauxite". The said mining lease was granted in terms of the provisions of the Mines and Minerals (Regulation & Development) Act, 1957 (hereinafter called as "the 1957 Act") and the Mineral Concession Rules, 1960 (hereinafter called as "the 1960 Rules").

3. The writ petitioners of some other cases, namely, C.W.J.C. Nos. 368, 369, 370, 371, 372, 373, 374, 377, 378, 389, 376 of 1990(R), 2085 of 1989(R), 1605 and 1604 of 1990(R) are Government companies within the meaning of Section 617 of the Companies Act and mining leases in respect of mineral "coal" have been granted in their favour.

The petitioners of C.W.J.C. No. 1604 of 1990(R) and C.W.J.C. No. 1605 of 1990(R) are purchasers of coal from the Government Companies aforementioned.

4. Admittedly, cess is paid by all the petitioners so far as mining lessees are concerned, cess is payable by them to the State of Bihar either on the basis of royalty or on the basis of the annual value of the mineral bearing land.

5. The other petitioners being purchasers of coal from the Government Companies (lessees) have to pay cess together with the price of the coal.

6. According to the petitioners, the power of the State Government to levy cess on a mineral in terms of the provisions of the Cess Act is ultravires in view of the declaration made by the Parliament as contained in Section 2 of the 1957 Act in terms of Entry 54, List I of the VII Schedule of the Constitution of India.

7. The petitioners in this connection have placed strong reliance upon a recent decision of the Supreme Court in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, and a Full Bench decision of the Madhya Pradesh High Court in *M.P. Lime Manufacturers' Association, Katni and Others Vs. State of Madhya Pradesh and Another*, .

8. On the other hand, the contention of the State is that the cess imposed in terms of the Cess Act being a tax on land as envisaged under Entry 49, List II of the VII Schedule to the Constitution of India, the same is valid. In this connection, it has been contended that so far as the Cess Act is concerned, it is not tax on royalty as was in the case of *Tamil Nadu Panchayat Act, 1958* which was the subject-matter of decision in the *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , but is really a tax on land.

9. According to the learned Advocate General, who appeared on behalf of the State, if a power to levy tax is within the competence of the State legislature, the same cannot be, declared ultra vires on the ground that the measure to calculate the tax is on the basis of royalty payable or on the value of the mineral. It has been contended that the measure of tax cannot be destructive of the basic characteristics of the tax. In this connection our attention has been drawn to Section 5 of the Cess Act which is the charging section and which provides for levy of cess on all types of land, He submitted that in order to judge the legislative competence for levy of tax, the Court is required only to identify the subject-matter of tax and the same is to be found only in the charging section of any statute and for that purpose it is impermissible to look into any other provisions of the statute. It was also contended that measure of tax on land may be based on annual value of the land or the use to which the land is put. According to him, the measures employed for assessing tax should not be confused with the nature thereof.

10. Learned Advocate General urged that in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, the question as to whether the amount of cess can be calculated on the basis of mineral bearing land or on the basis of dead rent had not been considered.

Learned Advocate General further submitted that in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, the question was as to whether a tax on land revenue in terms of the provisions of *Tamil Nadu Panchayat Act* is permissible or not, whereas under the *Bihar Act*, cess is evidently levied on land which has got nothing to do with the imposition of any cess on minerals, as

would be evident from Section 5 thereof.

11. Learned Advocate General, therefore, contended that these aspects of the matter having not been considered by the Supreme Court in the *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , the same should not be treated as a precedent in terms of Article 141 of the Constitution as a decision is what it decides and not what may remotely or even logically follows therefrom.

12. Learned counsel appearing for the petitioners in reply contested these contentions. It was submitted that in view of the explanation appended to Section 115 of the Tamil Nadu Gram Panchayat Act, the Supreme Court held that it is impermissible for the State Legislature to impose cess on royalty. It was further submitted that it is true that normally the charging section should be considered for the purpose of finding out the true nature of the tax but for that purpose the same has to be read along with other relevant provisions. It was urged that for the purpose of imposition of cess under the Cess Act, the land has not been taken to be a Unit but the mineral has been taken to be a unit and in that view of the matter in pith and substance, cess has been imposed not on the land but on mineral which is ultra vires the power of the State Legislature.

13. It was further submitted that in view of the declaration made in the 1957 Act in terms of Entry 54, List I of the VII Schedule to the Constitution of India, cess could not be levied either in terms of Entry 45, or Entry 49 or Entry 50, List II of the VII Schedule to the Constitution as has been held in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, . It was further pointed out that royalty is not a fee but a tax and in that view of the matter, no cess could have been imposed on royalty.

14. The Cess Act was enacted to amend and consolidate the law relating to rating for the construction, charges and maintenance of district roads and other means of communication and of provincial public works within the territories maintained by the then Lieutenant Governor of Bengal and to levy of local cess on immovable property situate therein and to the construction of local committees for the management of the proceeds of the said local cess and also to provide for the construction and maintenance of other works of public utility out of the proceeds of the said local cess. The Act has been applied in certain districts of Bihar including Hazaribagh, Palamau, Ranchi and Dhanbad.

Proviso to Section 2 of the Cess Act, however, provides that nothing therein contained shall be deemed to affect the immovable property except mines and quarries within the limits of any Municipality under the Bihar and Orissa, Municipal Act, 1922 or save as provided in any notification that may be issued under Subsection (4) of Section 3 of the Cantonment Act, 1924 within the limits of any cantonment. It is, therefore, clear that so far as mines and quarries are concerned, the Cess Act applies even to a Municipality.

15. The Cess Act has been amended from time to time as the relevant amendments in Section 4 and Section 6 of the Act, which are material for the

purpose of disposal of this case, have been taken into consideration by a Division Bench of this Court in Indian Alluminium Co. Ltd. and Another etc. Vs. State of Bihar and Others, , it is not necessary to retrace the history thereof.

However, for the purpose of these cases, the relevant provisions which are material are being noticed.

16. The interpretation clause contained in Section 4 of the Cess Act begins with the words " in this Act unless there be something repugnant in the subject or context (at page 122)".

"Royalty" has been defined in the following terms:

"Royalty for the purpose of this Act in respect of mines and quarries means payment (which includes dead rent) made or likely to be made to the owner of mines and minerals for the right of working the same on the quantity or value of such produce by a lessee if the land had been held under a lease granted under Mines and Minerals (Regulation & Development) Act, 1957 (Act 67 of 1957) and rules made thereunder and including any amount which Government may demand for the appropriation of mines and minerals belonging to the Government and amount that may be paid as or in lieu of royalty for the right of working mines and quarries in areas held or acquired under any Act or Agreement."

17. By the Bihar Finance Act, 1982, the Cess Act was amended with effect from 1-4-1982, whereby and whereunder, the following interpretation clause and explanation was added at the end, in the following terms:

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

Explanation :-- Value at pit's mouth of a mineral shall be the price (excluding excise and taxes) obtained for a sale of that mineral at Pit's mouth and where sale price of the mineral at pit's mouth cannot be ascertained or where the mineral is sold elsewhere than at the pit's mouth or where the mineral is transferred before sale by any process of benefication or physical or chemical change the pit's mouth value of the mineral shall be determined by making reasonable allowances for expenditure directly incurred in transport, handling or benefication or physical or chemical change, and where such expenditure cannot be fairly ascertained the pit's mouth value shall be taken to be the cost of production of the mineral at the pit's mouth or such value as may be determined under Section 76."

18. Section 5 of the said Act reads as follows:

"From and after the commencement of the Act in any district or part of a district all immovable property situate therein except as otherwise in Section 2 provided shall be liable to the payment of a local cess".

19. Section 6 which is the subject-matter of controversy has been amended on a number of occasions.

Prior to 1975, cess used to be realised on each rupee of annual net profit and in the case of annual value of land @ 20 pc; per rupee of the annual value. However, by reason of Cess Amendment Ordinance, 1975, which came into effect from 1-4-1975, a measure was adopted for calculating cess on the basis of royalty. Thereafter various ordinances have been promulgated from time to time. As noticed hereinbefore, by reason of the Finance Act, 1982, the provisions of determining Cess on the basis of the value of the mineral bearing land was also introduced.

20. Section 6 of the Said Act, as it now stands as amended by the Bihar Cess (Amendment) Act, 1988, reads as follows (at page 123):

"Cess how to be assessed :--

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

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

(aa) In the case of value of mineral bearing land where the local cess payable in any one year in respect of any mineral bearing land as assessed in Clause (a) is less than 40% of the value of mineral bearing land in that year then notwithstanding anything hereinbefore contained, the State Government may assess the local cess at such percentage of the value of the mineral bearing land, not exceeding 40% as may be notified in the official gazette from time to time although the cess so assessed may exceed five times the amount of royalty."

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

(c) In the case of annual value of land, twenty paise per rupee of the annual value and

(d) In the case of sale value of immovable properties including forest produce, the rate will not exceed 20% and the State Government may by notification prescribe from time to time the commodities on the sale of which cess along with the rates at which it would be levied."

21. Section 9 of the Cess Act provides the manner in which proceeds of cess are to be applied. In terms of second proviso to Section 9 of the Cess Act, the

amount of 10% of the remaining sum of local cess shall be spent for purposes relating to mineral development.

22. The Cess Act has been amended from the year 1975 only with regard to the imposition of cess on different minerals and the rate thereof. The imposition of cess has been made on different minerals at different rates from time to time.

23. So far as the mineral "bauxite" is concerned, the amount of cess is admittedly calculated on the basis of royalty. However, so far as coal is concerned, the State of Bihar had issued various notifications in purported exercise of its power conferred upon it u/s 6 of the Cess Act as amended from time to time whereby rate of cess is to be measured on the basis of pit mouth value of coal or on the basis of royalty, whichever is higher.

24. By a notification dated 5-12-1975, cess was fixed at 30% of the royalty with effect from 1-4-1975. Thereafter by a notification dated 10-6-1976 the rate of cess was determined at 40% on the amount of royalty in respect of mines and minerals with effect from 1-4-1976. Again by a notification dated 31-3-1979 rate of cess was determined at 60% on the amount of royalty in respect of all mines and minerals. By another notification, the rate was fixed at 80% with effect from 1-4-1979. Thereafter by another notification, it was fixed at 100% of the royalty in respect of all minerals. Thereafter, vide Memo No. 1061/80-2288/N dated 4-4-1985 instruction was given to all the District Mining Officers to collect cess on dead rent at 100% which was not levied before.

25. By reason of the notifications dated 31-3-1983, 6-4-1984, 16-6-1985 and 16-12-1987, cess was directed to be calculated on the basis of pit mouth value of coal at 10%, 20% 30% and 40% respectively. The said notifications have been annexed with C.W.J.C. No. 368 of 1990(R) and marked as annexures 7 to 10 thereto.

26. For better appreciation of the nature of the levy notification bearing No. SO 1581 dated 16-12-1987 may be quoted below:

"In exercise of the powers conferred by Section 5 of the Cess Act, 1880 (Bengal Act IX of 1880) as amended by the Bihar Cess (Amendment) Ordinance, 1987 (Bihar Ordinance No. 30 of 1987) and in continuation of Ordinance No. 30 of 1987 and in continuation of notification No. SO 1257 dated 20-11-1985, the Governor of Bihar is pleased to further determine the cess on coal with effect from 16th December, 1987, in manner herein provided. The rate of cess on coal shall be forty (40) per cent of the pit's mouth value of coal to be computed in the manner prescribed u/s 4 of the Cess Act, 1880 in cases only where the amount of cess charged at the rate of five hundred per cent on the amount of royalty of coal is less than the amount charged at the rate of 40% of the pit's mouth value of coal."

27. Before we embark upon the discussions relating to the legislative competence of the State, relevant entries in Lists I and II may be noticed:

"Entry 54 List I:

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

Entry 23 of List II:

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

Entry 45 of List II:

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

Entry 49 of List II: Taxes on lands and buildings.

Entry 50 of List II:

Taxes on mineral right subject to any limitation imposed by Parliament by law relating to mineral development.

28. The main contention which arises for consideration in these applications is as to whether the Cess Act is covered by Entry 49 of List II of the VII Schedule of the Constitution of India or not.

29. It is now well known that various entries in the Lists do not refer to the power of legislation but field of legislation.

Recently the Supreme Court in Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, , stated the law thus (at page 836) :

"It is well settled that the different entries in Lists I, II and III of the VII Schedule deals with the fields of legislation, and these should be construed widely, liberally and harmoniously. And these entries have been construed to include ancillary or incidental power."

Reference in this connection may also be made to Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, .

30. Some well known principles one must keep in mind while interpreting to which List a particular Act is referable. If any conflict arises between the Entries under different Lists, the same have to be read together without giving a narrow meaning to any of them. Further, if a question arises under which precise entry a particular legislation falls, the theory of pith and substance has to be applied. In such a case, the principal character of a legislation has to be considered. When the question of repugnancy arises because of an apparent conflict between the

two Entries in different Lists, the question would be whether regard being had to the nature and purport of the impugned legislation, the same falls within one list or the other. When vires of an enactment is challenged effort should be made to uphold its constitutionality, if necessary by reading down the offending provisions therein, but at the same time the Court should guard against extending the meaning of the words beyond the reasonable connotation in an effort to preserve the power of the legislature.

31. Yet in a recent decision in *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, the Supreme Court stated that a Constitution is the mechanism under which laws are to be made and not merely an Act which declares what the law is to be. Proceeding further, it was held that an exclusionary clause in any of the entries should be strictly and therefore, narrowly construed. No Entry should, however, be so read as to rob it of entire content. A broad and liberal spirit should, therefore, inspire those whose duty it is to interpret the Constitution, and the Courts are not free to stretch or to pervert the language of an enactment in the interest of any legal or constitutional theory. Constitutional adjudication is not strengthened by such an attempt but it must seek to declare the law but it must not try to give meaning on the theory of what the law should be, but it must so look upon a Constitution that it is a living a organic thing and must adapt itself to the changing situations and pattern in which it has to be interpreted. It has also to be borne in mind that where division of powers and jurisdiction in a federal constitution is the scheme, it is desirable to read the Constitution in a harmonious way.

32. With regard to the ambit of a declaration under Entry 54, List I, in *Bajinath Radio Vs. State of Bihar and Others*, , the Supreme Court observed as follows (at page 1443):

"To what extent such a declaration can go is for Parliament to determine and this must be commensurate with public interest. Once this declaration is made and the extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. Any legislation by the State after such declaration and trenching upon the field disclosed in the declaration must necessarily be unconstitutional because that field is abstracted from the legislative competence of the State Legislature."

On the same subject, recently, the Supreme Court in (1990) 3 JT 533, *Bharat Coking Coal Ltd. v. State of Bihar* Civil Appeal No. 4521 of 1986 and analogous cases disposed of on 17th August, 1990, noticed the various provisions of 1957 Act as amended by Central Act 37 of 1986 to lay down the extent to which the Parliamentary declaration has gone and observed (at page 543):

"The effect of the Parliamentary declaration as contained in the Act is that the matters referred to in the declaration, stand abstracted from List II and those become matters of legislation in List I of the seventh schedule. As a result of the declaration made by Parliament u/s 2 of the Act, the State Legislature is denuded

of its legislative power with respect to the regulation of mines and mineral development and the entire legislative field has been taken over by Parliament."

33. The learned Advocate General relied on *The Associated Cement Companies Ltd. and Others Vs. The State of Bihar and Others*, , and cases relied upon by the Division Bench in support of his contentions that in pith and substance the tax is on land. In *The Associated Cement Companies Ltd. and Others Vs. The State of Bihar and Others*, the vires of the Cess Act after it was amended by Bihar Ordinance 209 of 1975 was challenged on the ground it was an impost on income, therefore, referable to Entry 82, List I and also on the ground that it was violative of Articles 14, 19(1)(h) and 31 of the Constitution. The Bench referred to the rule of "pith and substance". Relying on *H.R.S. Murthy Vs. Collector of Chittoor and Another*, , it held that the impost on the Cess Act was tax on land as is evident from Section 5 which is the charging section. It was held that Sections 5 and 6 of Cess Act are in pari materia with Sections 78 and 79 of Madras District Board Act, subject-matter of challenge in *H.R.S. Murthy Vs. Collector of Chittoor and Another*, .

34. The Division Bench thereafter following *H.R.S. Murthy Vs. Collector of Chittoor and Another*, held:

"As I have already held above that the provisions of Section 5 which remained unaltered throughout read along with those of Section 6 as amended by the impugned Ordinance merely seek to impose and levy cess on lessee's land and the remaining provisions of Section 6 as also those of Sections 72, 72A and 75 similarly provide for the machinery and mode of assessment of such cess. That cannot change the truth and substance of the character of the land tax which the charging section in unequivocal terms has made the cess payable in respect of all immovable property situate within the area concerned to be."

(underlining supplied)

The Associated Cement Companies Ltd. and Others Vs. The State of Bihar and Others, has been followed by a Division Bench of this Court, of which one of us (S. Roy, J.) is a party, in *Indian Aluminium Co. Ltd. and Another etc. Vs. State of Bihar and Others*, .

35. In that case, however, this Court held that while legislative power to enact the Cess Act must be found in Entry 49, List II of the VII Schedule to the Constitution, the notifications issued thereunder whereby and whereunder different rates of cess have been provided in respect of different minerals were ultra vires in the following terms (at page 125):

"It will appear that outer limit of the rate at which cess could be determined either with reference to royalty or annual value of mineral bearing land has been provided. Section 9 of the M & M Act provides for payment of royalty in respect of any mineral removed by the lessee or his agent, manager, employee, contractor or sub-lessees from the leased area at the rate for the time being

specified in the second schedule of the Act. Power has been given to the Central Government to amend the second so as to enhance or reduce the rate of royalty. It will thus be noticed that in M & M Act itself provisions has been made for payment of royalty at different rates for different minerals. There is no such provision in the Cess Act, Section 6 empowers the State Government to fix the rate. But it does not empower the State Government to fix different rates for different minerals."

36. In *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , Supreme Court observed (at page 95):

"Mr. Krishnamurty Iyer, however, referred to the decision of this Court in *H.R.S. Murthy*'s case. There under the terms of a mining lease the lessee worked the mines and won iron ores in a tract of land in a village in Chittoor district and bound himself to pay a dead rent if he used the leased land for the extraction of iron ores, to pay a royalty on iron ores if it were used for extraction of iron and in addition to pay a surface rent in respect of the surface area occupied or used. In the said decision the legislative competence of Sections 78 and 79 of the Madras District Board Act was upheld by which land cess was made payable on the basis of royalty. This court proceeded on the basis that other cess related to land and would therefore be covered by Entry 49 of List II. It was held that land cess paid on royalty has a direct relation to the land and only a remote relation within mining. This, with respect seems to be not a correct approach. It was further observed that it was not necessary to consider the meaning of the expression "tax on mineral right" following under Entry 50 of List II inasmuch as according to this Court, Parliament has not made any tax on mineral rights. This is not a correct basis."

The Supreme Court further observed (at page 95):

"It seems, therefore, that attention of the Court was not invited to the provisions of Mines & Minerals (Regulation & Development) Act, 1957 and Section 9 thereof. Section 9(3) of the Act in terms states that royalties payable under the 2nd Schedule of the Act shall not be enhanced more than once during a period of 4 years...."

H.R.S. Murthy Vs. Collector of Chittoor and Another, , was overruled.

In the event it be held that the decision of the Supreme Court in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , is applicable to the facts of this case, necessarily, it must be held that the Division Bench decisions of this Court in *The Associated Cement Companies Ltd. and Others Vs. The State of Bihar and Others*, and in *Indian Alluminium Co. Ltd. and Another etc. Vs. State of Bihar and Others*, , are no longer good law as therein this Court followed *H.R.S. Murthy Vs. Collector of Chittoor and Another*, , which has expressly been overruled.

37. Section 115 (1) of the Madras Panchayat Act and its explanation which was

the subject-matter of challenge in India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, , read as follows (at page 98):

"There shall be levied in every Panchayat development block, a local cess at the rate of 45 naiye paise on every rupee of land revenue payable to the Government in respect of any land for every Fasli (at page 98).

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

From a bare perusal of the aforementioned provisions it would thus appear that the local cess was chargeable on land revenue in respect of land.

38. Sub-section (1) of Section 115 of the Panchayat Act by itself was innocuous. A land revenue within the meaning of Entry 45 or Entry 49 List II would mean a revenue in respect of land. However, the explanation appended thereto provides that the land revenue inter alia would include royalty.

39. As noticed hereinbefore, in terms of Section 6 of the Cess Act, Cess is calculated inter alia on the basis of royalty.

40. In India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, it was considered as to whether imposition of any cess upon royalty is permissible in terms of Entries 45 or 50 of the List II in view of the declaration made in 1957 Act in terms of Entry 54, List I.

In paragraph 21 of the report, the Supreme Court observed that land revenue is separate and distinct from royalty will clear from the Explanation itself.

With regard to the question as to whether imposition of Cess under the T.N. Panchayat Act could have been upheld in terms of Entry 49 List II, it was held that there is clear distinction of tax directly on land and tax on income arising from land.

41. The Supreme Court further observed that if a tax or impost on land is to be levied, the same can be done only by levying the same directly on land as unit. In other words tax on land and buildings must have a definite relation to the land.

It was further held (at page 93 and 94):

"It appears that in the instant case also no tax can be levied or is leviable under the impugned Act if no mining activities are carried out. Hence, it is manifest that it is not related to land as a unit which is the only method of valuation of land under Entry 49 of List II but is relatable to minerals extracted. Royalty is payable on a proportion of the minerals extracted. It may be mentioned that the Act does

not use dead rent as a basis on which land is to be valued. Hence, there cannot be any doubt that the impugned legislation in its pith and substance is a tax on royalty and not a tax on land".

42, Oza, J., in his concurring judgment held (at page 99):

"Whether royalty is a tax or not is not very material for the purpose of determination of this question in this case. It is admitted that royalty is charged on the basis of per unit of minerals extracted. It is no doubt true that mineral is extracted from the land and is available, but it could only be extracted if there are three things:

- (1) Land from which mineral could be extracted.
- (2) Capital for providing machinery, instruments and other requirements.
- (3) Labour.

It is therefore clear that unit of charge of royalty is not only land but land labour capital. It is therefore clear that if royalty is a tax or an imposition or a levy, it is not on land alone but it is a levy or a tax on mineral (land), labour and capital employed in extraction of the mineral. It therefore is clear that royalty if is imposed by the Parliament it could only be a tax not only on land but also on these three things stated above.

It was further held (at page 99):

"When the legislature included royalty, it went beyond its jurisdiction under Entry 49 List II and, therefore, clearly is without the authority of law."

It was also held that the anomaly in the said Act to the effect that cess could be imposed on any other land but not on the land where the mines are situated could have been averted if the legislature in the explanation had used the words "surface rent" in place of "royalty".

43. The Supreme Court in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , further held that as royalty is directly relatable to the minerals extracted and on the principle that the general provision is excluded by the special one, royalty would not be relatable to Entries 23 or 49 of List II.

44. Dealing with the question as to whether power to levy cess could have been exercised under Entry 50, List II, it was held that it could not be so done in view of the declaration made in Section 2 of 1957 Act.

It was held thus (at page 94):

"The expression "land" according to its legal significance has an indefinite extent both upward and downwards, the surface of the soil and would include not only the face of the earth but everything under it or over it. See the observations in *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, . The minerals which are under the earth, can in certain circumstances fall under the expression

"land" but as tax on mineral is expressly covered by Entry 50 of List II, if it is brought under the head taxes under Entry 49 of List II, it would render Entry 50 of List II redundant. Learned Attorney General is right in contending that entries should not be so construed as to make any one Entry redundant".

45. In this case, it is clear that so far as imposition of cess on mines and minerals is concerned, the same has not been levied taking the land as a unit or the annual value thereof, but on the basis of royalty payable on the minerals raised therefrom or on the price of the value of coal raised from the mines which have no direct bearing with the imposition of cess on land as a unit.

46. It has been contended by the learned Advocate General that Section 5 of the Cess Act is the charging section and that must only be read to determine the nature of impost. Section 5 itself is innocuous. Is Court entitled to look to other provisions of the Cess Act to ascertain the nature of the tax?

47. In Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, , the Supreme Court held as follows (at page 975):

"The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section."

Proceeding further, the Supreme Court observed (at page 975):

"It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by a construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head."

48. The Supreme Court in Bombay Tyres International Ltd. (supra) held :

"It is therefore clear that the levy of a tax is defined by its nature while the measures of the tax may be assessed by its own standard. It is true that the standard adopted as the measure of the levy may indicate the nature of the tax but it does not necessarily determine it."

It was further held :

"It is apparent therefore that when enacting a measure to serve as a standard for assessing the levy the Legislature need not contour it along lines which spell out the character of the levy itself. Viewed from this stand-point, it is not possible to accept the contention that because the levy of excise is a levy on goods manufactured or produced the value of an excisable article must be limited

to the manufacturing cost plus the manufacturing profit. We are of opinion that a broader based standard of reference may be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measuring of the levy. In our opinion, the original Section 5 and the new Section 4 of Central Excise and Salt Act satisfy this test."

49. In *Bengal Coal Co. v. Sri Janardan Kishore* 65 Indian Appeals 354: The Privy Council while considering the provisions of the Bengal Cess Act construed Section 5 along with other provisions to uphold the validity thereof.

50. Even in *The Associated Cement Companies Ltd. and Others Vs. The State of Bihar and Others*, , the Division Bench read Section 5 of the Cess Act along with other provisions thereof.

In *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, , it has been held that though the method by which a tax is levied may be relevant in determining the character, its significance and effect cannot be exaggerated.

51. In *Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another*, , the Supreme Court held that taxing statute has to be construed strictly and it was further held that for construing a statute one has to look not to the form but to the substance of the levy and for that purpose nomenclature given by the Legislature is not decisive and the pith and substance rule in determining legislative competence has to be resorted. In that case it was held that a tax imposed by the State Legislature on despatch on manufactured goods outside its territory is ultra vires.

It was further held that (at page 805):

"It is well settled that while determining the nature of a tax, though the standard or the measure on which the tax is levied may be a relevant consideration, it is not the conclusive consideration. One must have regard to such other matters as decided by the Privy Council in *Governor General in Council v. Province of Madras* (1945) 72 IA 91, not by the name of tax but to its real nature its pith and substance which must determine into what category it falls."

52. From the conspectus of the aforementioned decisions it is, therefore, clear that the measure of the tax throws light on the nature of the tax and it may be considered for the purpose of finding out as to whether the impost has any nexus with the tax or not. It is evident that the true character of the levy in Cess Act is that although it appears to be tax on land, in effect, and substance, it is a tax on minerals extracted therefrom.

53. In the instant case, admittedly cess under the impugned legislation is calculated on the basis of the royalty payable by a lessee or on the basis of annual value of the mineral bearing land or upon both.

54. It has been held in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , that indirect attempt on the part of the State Legislature to impose a tax whereby and whereunder an additional royalty will have to be paid by mining lessee is beyond the legislative competence of the State inasmuch as in terms of the provisions of Section 9(3) of the 1957 Act, the amount of royalty can be enhanced by the Parliament only once in four years.

55. The real nature of the tax by way of cess can also be judged in the light of second proviso to Section 9 of the Cess act whereby and whereunder at least 10% of the cess collected has to be spent on mineral development. In view of Section 18 of the 1957 Act the entire field of legislation relating to mineral development has been taken over by the Central Government and thus the State Government cannot have any say in the matter. Thus the State will have no jurisdiction to interfere in the said field either by way of executive action or by legislation as has been held by the Supreme Court in *Bharat Coking Coal Limited (1990) 3 JT 533 (supra)*.

56. Further the intention of the Legislature, as noticed hereinbefore can also be gathered from the fact that from 1975 onwards, the Cess Act was not amended on any other subject except the enhancement of rate of cess on mines and minerals.

57. Again in terms of proviso to Section 2 of the Cess Act even the mines and quarries situated in the Municipal area are not exempted, although other lands have been so exempted.

Thus the Cess Act lay special emphasis on mines, quarries etc. including mineral development thereof.

58. At this juncture, the other submissions raised by the learned Advocate General with regard to imposition of Cess on the basis of annual value of the mineral bearing land may be noticed. According to him, as rent could be imposed by an owner of the land taking a portion of the produce as a measure it was within the competence of the State Legislature to fix the annual value of the mineral bearing land on the basis of the production from a mine. This argument, in our opinion, does not have any substance.

59. Whenever a tax is based upon the mineral rights, the same would come within the purview of Entry 50 of List II. In *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , as indicated hereinbefore it has clearly been held by the Supreme Court that it is not permissible to read the Constitution in such a manner so as to make one Entry in any list redundant. The effect of the contention of the learned Advocate General that although a tax is imposed on the produce of mine, that is, in terms of Annexure 10 to C. W.J.C. No. 368 of 1990(R), 40% of its pit head value, the same would still retain the character of a tax on land in terms of Entry 49, List II, would render Entry 50 thereof otiose and/or surplusage. This is against the decision of the Supreme Court in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, . Makers of the

Constitution in their wisdom have classified the fields of the legislation and conferred power upon the State to impose tax on mineral rights but the same is subject to the limitation imposed by the Parliament by law relating to regulation of mine and development of mineral. Further the Supreme Court clearly held that for the purpose of upholding the validity of a tax on land or building it must be referable as a tax on the land as a unit and not on the basis of the minerals extracted from it.

60. The impost on the basis of 40% of the value of the mineral lying at the pit head would be impermissible in view of the fact that the tax is being imposed considering the value of mineral as a unit and not that of the land.

In this view of the matter, it is evident that cess has not been imposed taking the land as a unit, but either the royalty or the value of coal. This is in view of the authoratative pronouncement of the Supreme Court as referred to hereinbefore is impermissible. In terms of the provisions of the Cess Act, both "royalty and mineral bearing land" refer to mining leases and quarries granted for working the same.

A bare perusal of the said definitions would demonstrate that the effect thereof is of wide amplitude.

61. In any event, as would be evident from the notification dated 16-12-1987 which is contained in Annexure 10 to C.W.J.C. No. 368 of 1990(R), it is manifest that the State of Bihar intended to levy a cess on the basis of 40% of the value of the coal at its pit head or 500% of royalty whichever is higher. Thus in this notification also the royalty has been made basis.

62. However, this may not detain us further in view of the fact that in Indian Alluminium Co. Ltd. and Another etc. Vs. State of Bihar and Others, , this Court has held that different rates of cess could not be imposed on different minerals. It is admitted that the rate of cess varies from mineral to mineral.

63. In case of coal, cess at different rates may be imposed depending upon the quality of the coal as in terms of the provisions of the Colliery Control Order, 1945, the value of coal depends, inter alia, on ash contents (percentage) thereof. There is a vast difference of price between Coaking Coal and non-coaking coal.

64. Further so far as value of the coal is concerned, evidently the same cannot be calculated only on the basis of the annual value of the land but on the capital investment made on machinery, cost of production by employing labour and other factors. Thus, the value of the mineral cannot have any nexus whatsoever with the value of the land.

65. In this connection, reference may usefully be made to Sections 6A and 6B of the Cess Act in terms whereof the State reserved unto itself the right to assess the amount of cess on the annual despatches of coal and coke from the notified mines. Section 6B of the Cess Act empowers the State to determine different rates in different districts and for different grades of coal and coke in the same

district or different districts. However, no mine has been notified in terms of the said Act as yet.

66. It would thus appear that the State reserved unto itself the power to impose cess at different rates depending upon the location of the mines and grade of coal only in relation to notified mines and not in respect of all coal mines.

67. Cess in terms of Entry 49, List II of the VII Schedule to the Constitution of India thus could have been imposed only on the basis of a surface rent, which reflects the value of the land and not otherwise.

68. In *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , the Supreme Court as also in *Indian Alluminium Co. Ltd. and Another etc. Vs. State of Bihar and Others*, , this Court has held that royalty is a tax which is charged on the basis ,of per unit of minerals extracted. So far as pit head value of the mineral is concerned, the same denotes as income. In *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , the Supreme Court, as noticed hereinbefore, laid down the distinction between tax directly on land and tax on income arising from land. The Supreme Court in this connection followed its own decisions in *New Manek Chowk Spinning and Weaving Mills Co. Ltd. and Others Vs. Municipal Corporation of The City of Ahmedabad and Others*, , and held that tax on machinery situated in the building would be ultra vires the power of the State Legislature.

69. Oza, J., in his concurring judgment in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , while holding that no cess is payable on the basis of royalty, proceeded on to hold that if surface rent is charged or as an imposition on the land only, the same will clearly fall within the purview of Entry 49 of List II and thus the cess levied on that basis will also be justified as a tax on land falling within the Entry 49.

70. It was submitted by the learned Advocate General that it is permissible to impose tax on land depending upon the nature of use thereof. In this connection, reliance was placed on *Ajoy Kumar Mukherjee Vs. Local Board of Barpeta*, . In that case the Supreme Court was considering the provisions of Assam Local self Government Act, 1953 to ascertain whether the tax was referable to Entry 49, List II. It held:

"that the tax provided therein is a tax on land, though its incidence depends upon the use of the land as a market."

This decision is of no assistance as it has already been found hereinbefore that cess is leviable, inter alia, on removal of mineral and it was not an impost on the land.

71. Our attention has also been drawn to a Full Bench decision of the Madhya Pradesh High Court in *M.P. Lime Manufacturers' Association, Katni and Others Vs. State of Madhya Pradesh and Another*, . In that case, the validity of Section 11 of the M. P. Upkar Adhiniyam, 1981 was in question. It was held by the Full

Bench that as a cess was imposed on the mineral produced, it was not referable to either Entry 49 or Entry 50 of List II.

72. It is necessary to notice Annexure 14 to the writ petition in C.W.J.C. No. 368 of 1990(R), order of the Supreme Court dated 19th March, 1990, passed in Civil Appeal No. 1521 of 1990, Central Coalfields Ltd. v. State of Bihar. The Central Coalfields Limited filed a writ petition in this Court in which it stated that no royalty was payable on coal, subject-matter of Section 9(2A) of .1957 Act. It was held that cess was payable. It is reported in Central Coal Fields Ltd. Vs. State of Bihar and Others, . The Supreme Court in Civil Appeal No. 1521 of 1990 overruled this decision of this Court relying in India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, .

73. In fine, it is held that as the State Legislature has exceeded its competence in measuring the cess in respect of the mineral bearing lands on the basis of royalty or on the basis of pit head value of the mineral the Cess Act must be struck down. All the writ petitions are allowed.

74. In India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, , the Supreme Court declared Section 115 of the Tamil Nadu Panchayat Act as ultra vires with prospective effect.

In terms of the decisions of the Supreme Court, it is held that the petitioners are entitled to refund the royalty paid to the State of Bihar only from the date of the judgment in India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, , that is from 25th October, 1989.

75. As this judgment will cover a large number of writ applications, we may observe that in some cases we have passed interim orders to the effect that if the purchasers of a mineral have paid cess to the mining lessees the latter will refund the same to the purchasers with interest at the rate of 18 per cent per annum from the date of deposit till the date of repayment and in the event the mining lessees have deposited the said amount with the State of Bihar, the State shall refund the amount of cess with 18 per cent per annum. It is directed that in such cases interest would be payable by the mining lessees or the State, as the case may be, in terms aforementioned.

However, regard being had to the facts and circumstances of these cases, the parties shall pay and bear their own costs.