

(2014) 07 MP CK 0196

In the Madhya Pradesh High Court

Case No : Writ Petition Nos. 6909/2002, 880/2004, 7860, 14378/2009, 3616, 6439, 12690/2010, 1886, 5090, 15740, 15840/2012, 1913, 4182/2013, 4081, 4815/2014, W.A. Nos. 1107, 1108/2006, 978/2007, 439, 440, 441, 1189/2008, 169, 231, 485/2009, MCC Nos. 1209, 1210, 1211

Grasim Industries Limited

APPELLANT

Vs

The State of M.P.

RESPONDENT

Date of Decision : 08-07-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 162, 246, 265

Mines and Minerals (Development and Regulation) Act, 1957 — Section 13, 13(1), 15, 18, 23A

Citation : (2015) 2 MPLJ 393

Hon'ble Judges : A.M. Khanwilkar, C.J.; K.K. Trivedi, J

Bench : Division Bench

Advocate : Kishore Shrivastava, A.K. Chitley, M.L. Jaiswal, R.S. Jaiswal, Senior Advocates, Prem Francis, Kapil Jain, Aditya Adhikari, Vijay Tulsian and K.K. Gautam, Advocate for the Appellant; Samdarshi Tiwari, Government Advocate and Swapnil Ganguly, Deputy Government Advocate, Advocate for the Respondent

Judgement

A.M. Khanwilkar, C.J.—In all these petitions, the challenge is, essentially, to the Circulars dated 19th December, 1992, and 11th August, 1993, respectively, in so far as it purport to provide for the mode of computation of royalty amount in respect of extracted Limestone by applying conversion factor of 1.6:1 metric tonne. As a consequence of these Circulars, each of the petitioners have been called upon to pay the royalty amount at an uniform rate on the assumption that they have removed and consumed 1.6 Metric Tonne Limestone for manufacturing of 1 Metric Tonne of Cement/Clinker.

2. For the nature of controversy, brought before this Court, it may not be necessary to advert to the factual position, in detail, in each of these writ petitions. Suffice it to observe that the petitioners are manufacturers of Cement

(Ordinary Portland Cement and Pozzolana Portland Cement) and Clinker. The Limestone is the basic ingredient for manufacture of these products. The petitioners claim that they have subsisting mining lease. Some of the petitioners are engaged in the stated business for quite some time, in the concerned area. After expiry of the lease period and coming into force of the Mines and Minerals (Development and Regulation) Act, 1957 (herein after referred to as the "Act of 1957"), the lessees are required to execute lease deed as prescribed in Form-K, as specified under the Mineral Concession Rules, 1960 (herein after referred to as "the Rules of 1960").

3. The gravamen of the petitioners' case is that the two Circulars issued by the State Government dated 19th December, 1992, and 11th August, 1993, are repugnant to the legislative scheme governing the payment of royalty amount in relation to the excavated Limestone which is a major mineral. The Parliament has exclusive power to enact law providing for royalty amount therefor. By issuing the two Circulars, the State Government has encroached upon that field. Moreover, the conversion factor, propounded by the State Government, is unrealistic, unscientific and discriminatory. For, the intake of Limestone for manufacture of Cement/Clinker would largely depend upon the efficiency and performance of the Unit, on case to case basis. Resultantly, by applying the uniform notional conversion factor, the petitioners would be made liable to pay royalty amount on assumption and in respect of Limestone which has not been excavated or, in fact, mined away by them. Further, the State Government by issuance of Circulars, which, assuming are executive order or administrative instructions, had no power to propound on the matter of conversion factor for determining royalty amount payable by the lessee. According to the petitioners, the said conversion factor, as specified in the impugned Circulars, can be applied only in cases where the petitioners have not installed Weighing Machine/Beltometer, as required in terms of Clause 13 of the mining lease deed.

4. These are the core issues agitated by the respective petitioners. In addition, the grievance of the petitioners other than Associated Cement Company Limited (in short "ACC Limited"), is that, the Authorities cannot apply the conversion factor of 1.6:1 qua them relying on the decision in ACC's case. For, that decision was not binding on them and also it cannot be cited as a binding precedent.

5. As regards ACC Limited, it is urged that the decision in earlier proceedings was in respect of different assessment period and, more so, because in the present proceedings, the challenge is essentially to the impugned Circulars. The impugned Circular has been issued by the State Government after culmination of earlier round of proceedings, bearing M.P. No. 1225/1993. In other words, it is open even to ACC Limited to challenge the said Circulars which have been made the basis for assessment for the subsequent assessment period.

6. The petitioners are also challenging the demand towards interest on the royalty amount founded on the conversion factor specified in the impugned Circulars. According to the petitioners, the question of paying such interest would

arise only if the petitioners had admitted their liability to pay royalty on the quantity of Limestone as per the impugned conversion factor or if the Assessing Authority were to adjudicate the liability of the respective petitioners and concerned petitioner had failed to pay the demanded amount within the specified time. On the other hand, the petitioners have paid the amount as per their admitted liability and have disputed their liability to pay royalty in respect of excess assumed quantity arrived at by the Assessing Authority on the basis of impugned conversion factor.

7. For examining the above stated broad issues, we may usefully refer to the brief facts of the leading Writ Petition No. 6909/2002.

(i) This petitioner established a cement factory and obtained three Limestone mining leases for captive consumption in its Cement Factory under separate lease deeds dated 30th November, 1984, 1983 and 7th May, 1994. Clause 13 of the lease deeds stipulated provision of Weighing Machine at or near the pithead of the mine. The said clause reads thus:

"13. To provide weighing machine

Unless specifically exempted by the State Government the lessee/lessees shall provide and at all times keep at or near the pit head or each of the pit heads at which the said minerals shall be brought to bank a property constructed and efficient weighing machine and shall weigh or cause to be weighed thereon all the said minerals from time to time brought to bank, sold exported and converted and also the converted products and shall at the close of each day cause the total weight ascertained by such means of the said minerals areas products raised sold exported and converted during the previous twenty four hours to be entered in the aforesaid books of accounts. The lessee/lessees shall permit the State Government at all times during the said term to employ any person or persons to be present at the weighing of the said minerals as aforesaid and to keep accounts thereof and to check the accounts kept by the lessee/lessees. The lessee/lessees shall give 15 days previous notice in writing to the Deputy Commissioner/Collector of every such measuring or weighing in order that some officer on his behalf may be present thereat."

(ii) Notwithstanding this stipulation, the petitioner-company did not install any Weighing Machine on the site. Instead, it asserted that it was not possible to install Weighing Machine due to wide spread out mining activity in the area. Representation in this behalf was made by the petitioner as well as the Federation of Madhya Pradesh Chambers of Commerce & Industries, of which Cement Manufacturers Association is a member, to the State Government to dispense with the requirement of installation of weighbridge. The Collector, however, issued demand notice regarding royalty amount to the petitioner based on 1.6 conversion factor for June, 1985. This demand was presumably founded on the Circulars in force at the relevant time issued by the State Government. To wit, the State Government had issued Circular on 25th September, 1963, in the

name of the Governor of Madhya Pradesh, suggesting that those mining lease holders whose annual turnover is up to 3000 tonne or less, they shall not be forced to install Weighing Machine. The said Circular reads thus:

"No. 7050-5110/XII Government of Madhya Pradesh, Natural Resources Department,

Bhopal dated the 25th September 1963 Bhadra, 1885

To,

All Collectors, Madhya Pradesh,

Sub:-Provision of weighing machine by the lessees over the pits head.

The State Government have carefully considered the question of the provision of weighing machines by the lessees over the pits head and have decided that lessees whose annual extraction is or below 3000 tons need not be pressed to keep weighing machine over pits head, and they may keep ordinary weighing balances for weighment of minerals extracted by them. Lessees whose output is 3000 tons or more per annum will however have to keep weighing machine over that pits head. In exercise of powers conferred under Rule 27(1)(2) of the Mineral Concession Rules 1960 the State Government hereby order that lessees whose annual output is 3000 tons or more must provide weighing machines over the pits head and those whose out put is below 3000 tons per annum may keep ordinary weighing balance in place of weighing machines.

It may therefore, be ensured that an ordinary weighing balance or a weighing machine as per criteria laid above is kept by the assesses over the pits heads for proper weighment of the mineral extracted by them from the areas held under mineral concessions.

By order and in the name of the Governor of Madhya Pradesh,

Sd/- B.C. Joshi, Under Secretary to Government, Madhya Pradesh, Natural Resources Department"

(iii) Another circular relevant on the subject issued by the Under Secretary to the Government of Madhya Pradesh, in the name of the Governor, dated 2nd May, 1967, superseding the earlier memo dated 9th April, 1964, reads thus :

"No. 2283-4899 (II) GOVERNMENT OF MADHYA PRADESH MINERAL RESOURCES DEPARTMENT

Bhopal, dated the 2nd May, 1967

To,

All Collectors, Madhya Pradesh

Sub:-Provision of weighing machine by the lessees over the pits head.

Ref:-This deptt. Memo No. 3378-2157/KII dt. 9th April, 1964.

The State Government had vide this department circular memo No. 7950-5115/KII dated 25th September 1963 made it obligatory on the lessees to maintain weighing scales at pit sight. On a representation received from the lessee the operation of these orders were stayed vide this deptt. memo No. 3378-2157/KII dated 9th April, 1964.

The Government have after considering the representations received in this connection decided that the condition of maintaining weighing scales by lessee may be relaxed as under:

(1) In case of those lessees:-

a) Who removed the entire ore by rail only.

b) Where such ore is weighed at the time of removal or the scales provided by the railway.

c) If the Mine owners put down the source of the ore in the challans, and

d) If they send such monthly statement of the exports to the DGM and the Collector concerned.

(2) In special cases where the entire ore is used for internal consumption as raw material, the quantity used in this case be assessed from the quantity and quality of finished product.

This supersede memo No. 3378-2157/KII dated 9th April 1964.

By order and in the name of the Governor of Madhya Pradesh

Sd/- (K.S. Mehta) Under Secretary to Government Madhya Pradesh"

(iv) On 24th August, 1974, the Officer In-charge, Directorate of Geology and Mining sent Letter, which reads thus:

(emphasis supplied)

This Letter provided guideline for assessment and determination of royalty amount with the conversion factor of 1.6:1. Another circular issued by the Directorate of Mining and Geology dated 29th December, 1977, reads thus:

(emphasis supplied)

(v) The said petitioner had challenged the demand made by the Collector towards the royalty amount on the basis of conversion factor of 1.6:1 by filing revision under Section 30 of the Act of 1957 read with rule 55 of the Rules of 1960. That revision application (No. 2/MP-86/91-M.V/RC-II) was disposed of by the Tribunal directing the State Government to grant hearing to the petitioner on the question of requirement of weighbridge and conversion factor. The State Government was further directed to give reasonable opportunity to the petitioner-

company to present their case regarding their claim for waiving the installation of Weighbridge as also their claim that the actual quantity of Limestone required for the manufacture of 1 Tonne of cement is 1.5 tonne and not 1.6 tonne.

(vi) The said petitioner had also filed Writ Petition in the High Court, being M.P. No. 2175/1993. The said writ petition was disposed of by directing the Assessing Officer to give a proper and adequate hearing to the petitioner-company, including opportunity to produce the evidence in support of their case to substantiate their contention that the actual quantity of Limestone required for manufacture of 1 tonne cement in their plant was not 1.6 tonnes but 1.5 tonne or lesser. The Assessing Officer was directed to decide the case on the basis of the material brought on record by both the sides and without being influenced by the observations made by the Government of India vide final order dated 23rd August, 1993, whilst remanding the case to the State Government. The petitioner-company was asked to appear before the Assessing Officer who, in turn, was expected to re-assess the quantity of Limestone extracted by the petitioner-company afresh.

(vii) As aforesaid, the said petitioner had made representation to the State Government to dispense with the requirement of weighbridge and had raised objection to the conversion formula of 1.6:1. In response to the said representation, the Principal Secretary, Government of Madhya Pradesh after hearing the petitioner thought it appropriate to refer the matter to the Cement Research Institute (CRI) of India, Faridabad (later on became "National Council for Cement and Building Materials"). The petitioner is relying on the two reports of the said National Council for Cement and Building Materials, which dealt with the factors contributing to Limestone consumption and on which basis the average Limestone consumption per tonne of Clinker can be determined. The conclusions in the said report can be summed up thus:

"CONCLUSIONS

1. Limestone consumption factor was determined on the basis as explained in para 7.0 and found to be :

(i) 1.44 tonne per tonne of clinker on the samples collected by the NCB for a period of three days.

(ii) 1.42 tonne per tonne of clinker based on the chemical analysis data provided by the plant.

(iii) 1.42 tonne per tonne of clinker based on actual kiln food consumed and the kiln dust losses through stack.

(iv) 1.43 tonne per tonne of clinker when kiln dust stack losses and cooler stack losses together taken into account."

(viii) As regards the necessity of installation of weighbridge, the observations of the report of National Council for Cement and Building Materials reads thus:

"Hence, in case a weighbridge is installed, it will lead to lower productivity, higher equipment cost in the form of additional dumper, higher operational cost for the same leading to increased production costs of cement, higher fuel consumption which is scarce national resource. In view of the above study it is recommended that the limestone booking on the basis of number of dumpers is adequate and there is no need to install any weighbridge for the same."

(ix) The said petitioners paid royalty from 1985 to 1999 based on National Council's reports. According to the petitioners, the Department did not raise any objection in that behalf. However, surprisingly, on 17th June, 1999, the petitioner received a show-cause notice from the Under Secretary as to why the stay order granted to the petitioner by the Principal Secretary dated 12th July, 1994 should not be vacated on the ground that a weighbridge has not been installed by the petitioner. The petitioner submitted reply to the said show-cause notice. After submission of the response, the petitioner came across the report of Taparia Committee which supported the claim of the petitioner about the conversion factor of 1.6 being excessive. The petitioner, therefore, filed additional submissions relying on the Taparia Committee's report. The Under Secretary vide order dated 24th January, 2000, decided the matter rejecting the claim of the petitioner notwithstanding the fact that the hearing on the show cause notice was held before the Principal Secretary.

(x) The petitioner, therefore, challenged the decision by way of revision before the Tribunal constituted by the Central Government under the Act of 1957.

(xi) During the pendency of the said revision, the petitioner received demand notices on the basis of conversion factor of 1.6 which have also been challenged by the petitioner.

(xii) According to the said petitioner, the National Council for Cement and Building Materials submitted its report while the representation filed by the petitioner was pending. On the basis of the analysis done by the National Council, the Government of India issued a letter dated 20th March, 2002, under the signature of Joint Secretary regarding fixation of norms to determine the requirement of Limestone for manufacture of cement as 1:1.43 qua the petitioner. The petitioner, therefore, placed this communication along with an affidavit before the Revisional Authority. The said letter reads thus:

"File No. 13(11) 2002-Cem. Dated the 20th March, 2002

To

The Principal Secretary, Department of Mineral Resources, Government of Madhya Pradesh.

Sub:-Fixation of norms for determining the requirement of Limestone for manufacture of cement.

Sir,

It has been brought to the notice of this Ministry that your Department vide circular letter dated 11.8.1993 has fixed consumption norm of 1.6 tonnes of limestone for manufacture of 1 tonne of cement and have provided for installation of weighing machines at the mines to monitor the quantity of limestone mined.

In this connection, it is stated that on the basis of requests of State Governments/other Government Departments, the National Council for Cement and Building Materials a premier R & D organization under the administrative control of this Ministry has conducted various fields studies for determining the norms of consumption of limestone for production of cement. The result of studies conducted by it in respect of Cement plants in the State of Madhya Pradesh is enclosed and indicates consumption norm of 1.43 in respect of Vikram Cement Plant. Since this norm has been arrived at after detailed scientific analysis carried out by the Council it would be desirable if the State Government could also consider the possibility of adopting the same.

At the same time, you are requested to review the condition of installation of weighing machines at the mines for the reason that heavy dust in the mining area hampers the correct working of the weighing machine. However, it is learnt that most of the cement companies are already using Beltometres for determining the quantity of the mined limestone.

Yours faithfully,

Sd/- (S. JAGADEESAN) Joint Secretary (Cement)"

(emphasis supplied)

(xiii) Notwithstanding the material produced by the said petitioner before the Revisional Authority, the Revisional Authority dismissed the revision application preferred by the said petitioner. The Revisional Authority, essentially, followed the decision in ACC's case decided on 10th April, 1992, by the Tribunal and affirmed by the High Court on 28th June, 1993, in M.P. No. 1225/1993.

(xiv) Further, the decision of the Under Secretary vide order dated 24th January, 2000, was non-est in law, as being opposed to the principles of natural justice. Inasmuch as, the hearing of the proceeding was conducted before the Principal Secretary whereas the order has been passed by the Under Secretary. Moreover, the decision is founded on ACC's case, notwithstanding the directions of the High Court to decide the matter afresh both on the question of waiving the requirement of installation of weighbridge as also on the fact that only 1.5 Metric Tonne or lesser quantity of Limestone was consumed for manufacture of 1 Tonne of cement in the plant operated by the said petitioner-company and not 1.6 Tonne as assumed.

(xv) However, considering the fact that other petitions are pending in this Court, which, in turn, have questioned the authority of the State Government to issue circulars dated 19th December, 1992 and 11th August, 1993, we may have to

examine the other issues raised before us.

8. Reverting to the chronology of other relevant events, on 25th May, 1987, the State Government issued order for installation of weighbridges in the mining area by all cement industries to whom mining lease for captive consumption was granted. ACC Limited, inter alia, challenged that decision as also the conversion factor of 1.6 being excessive. The said Company had relied on its mining lease deed for Limestone and Clay executed prior to issuance of Circular (for conversion factor) by the Department. The relevant portion of Part-VI of the said mining lease reads thus:

"Part VI PROVISIONS RELATING TO THE RENTS AND ROYALTIES

1. The rent, water rate and royalties mentioned in Part V of this Schedule shall be paid free from any deductions to the State Government at Jabalpur and in such manner as the State Government may from time to time prescribe PROVIDED ALWAYS and it is hereby agreed that Rs. _____ the balance standing to the credit of the lessee on account of the deposit made by him as a licensee over an area which included the said lands shall be retained and accepted by the State Government in satisfaction of the rents and royalties mentioned in Part V until they reach that amount provided that the report required under Mineral Concession Rule 25 has already been submitted.

2. For the purpose of computing the said royalties, the lessee should keep correct accounts of the minerals produced and the products thereof manufactured and dispatched. The accounts of the said minerals and the products thereof in stock or in process of export may be checked by the Officer authorized by the Central or State Government. For the purpose of assessing royalty-----hereinbefore-----the lessee shall submit to the State Government or such officer/officers of the State Government as may be specified in that behalf, half-yearly on the 15th day of March/September and on the 15th day of September/March a statement showing the quantity of clinker and cement manufactured and the quantity of both carried away or exported from the said lands during the period, along with the pit's mouth raising cost of limestone, as properly audited. The lessee shall also at all times submit audited books of account showing the quantity of limestone and clay used for manufacture of cement and the pit's mouth raising costs of the said minerals, and other particulars as may be demanded from time to time and in such form as may be prescribed to enable the State Government to assess and compute royalty payable according to these presents.

IT IS HEREBY AGREED that the sale value of the limestone as pit's mouth shall be arrived at by adding to the pit's mouth raising cost (as arrived at after proper audit and including overhead charges) twenty-five per cent thereof as profit and IT IS FURTHER AGREED that for the sake of convenience royalty shall be computed on the cement manufactured and sold and or exported or used by the lessee at the rate of 7 annas per ton of cement, so dispatched consumed, sold

(reckoning that approximately 1.5 tons of limestone and certain amount of clay royalty on which at the present rate amounts to one anna are required in the manufacture of one ton of cement) so long as the pit's mouth raising cost of limestone does not exceed Rs. 4/- per ton. For every increase of one rupee or fraction thereof in the said pit's mouth raising cost, there should be a corresponding increase of one anna six pies per ton of cement on which the royalty is computed.

3. Should the royalty and/or rent reserved and made payable by the lease be not paid within a space of two calendar months next after the date fixed in the lease for the payment of the same, the State Government may enter upon the premises and diestrum all or any of the mineral or beneficiated products or movable property therein and may order the sale of the property so distrained or of so much of it as will suffice for the satisfaction of the rent and/or royalties due, and all costs and expenses occasioned by the non-payment thereof.-----per annum on all arrears of the royalties and rents reserved and made payable by this lease from the date fixed for the payment of the same to the date of payment or recovery thereof."

(emphasis supplied)

9. The Tribunal, however, rejected the claim of ACC Limited vide decision dated 10th April, 1992. It may be useful to reproduce the relevant part of this decision containing the discussion/analysis which indeed has been pressed into service by the respondent-State for justifying the conversion factor of 1.6. The same reads thus:

"9. The crucial issue, therefore, is whether the State Government are right in applying a factor of 1.6 in the instant case because of the failure of petitioner to install a weighbridge.

10. It is admitted by the petitioner that he has not installed a weighbridge. The petitioner's argument that a weighbridge would be of no avail as both limestone and clay, which get mixed up during mining operation, cannot be weighed separately and weighing these two minerals together will not help in assessing the quantity of limestone used for manufacture of cement. The petitioner has also stated that since the State Government did not insist on such a condition in case of other lessees they should not have insisted on the petitioner to install a weighbridge. The State Government on the other hand has stated that it is possible to weigh limestone and clay separately as they occur in different horizons and can be mined separately. It was open to the petitioner to transport these two minerals in separate trucks and measure the trucks in the weighbridge. We find it difficult to accept the argument of the petitioner as clay and limestone being two different minerals have two different rates of royalty and proper accounts of minerals used are required to be kept for computation of royalty.

11. In this regard it will be worthwhile to refer to the lease agreement between

the petitioner and the State Government when the lease was renewed in 1969. Clause 2 of Part VI deals with mode of computation of royalty. It reads as follows:

"For the purpose of computing the said royalties, the lessee shall keep a correct account of minerals, minerals produced and the products thereof manufactured and dispatched. The accounts of the said minerals and the products thereof in stock or in process of export may be checked by the officer authorized"

12. Part VIII clause 15 of the agreement requires the lessee to install a weighbridge. This is with the intention of calculating the quantity of minerals produced and dispatched. From the plain reading of the lease agreement it is abundantly clear that it is incumbent on the lessee to keep proper account of minerals produced and dispatched. In the instant case the lessee did not install the weighbridge which could have enabled him to keep proper account of the minerals dispatched. The lessee also did not evolve any alternate method of keeping accounts of minerals produced and dispatched. His argument is that in the absence of any alternate method the State Government should have followed the ratio of 1.5 which was adopted upto 1969. We are unable to accept this argument as though the previous agreement deed had specifically provided for such a ratio, the agreement at the time of renewal in 1969 had deleted such a provision; on the contrary, it was visualized that the lessee would set up a weighbridge. Had the lessee installed a weighbridge as contemplated, calculation of royalty would have been smooth and easy. Only when the lessee defaulted in installing the weighbridge instead of repeated reminders from the State Government, the State Government had no other option but to adopt a fresh factor for computing royalty; it was the same method, but a different factor.

13. The State Government have submitted that when on a previous occasion a factor of 1.6 was followed it was because they were satisfied that it was the proper ratio of limestone to cement. That is why there was an express provision in the lease deed that a factor of 1.5 will be adopted. However in the "70s the State Government had noticed that the consumption ratio had changed and by and large 1.6 tonnes of limestone was used for manufacture of 1 tonne of cement. Therefore, a factor of 1.6 was used while calculating royalty. When the petitioner objected to this revised factor of 1.6, the State Government had got the matter checked by referring to various cement manufacturers. The State Government submitted replies received from several such manufacturers in the mid-"80s to how that a factor of 1.6 is more rational and realistic than a factor of 1.5.

14. We have perused the replies received from various cement companies. Satna Cement Works in its letter dated 9th May, 1984 has stated that 1.6 tonnes of limestone is required to manufacture 1 tonne of Portland cement based on its chemical composition. The figure calculated by Cement Corporation of India, Akaltara Cement factory in its letter dated 14th May, 1984 is also 1.6. M/s. Raymond Cement Works, Gopalnagar, have also confirmed in their letter dated 7th May, 1984 that 1.6 M.T. of limestone is required to produce 1 tonne of

cement. The Cement Corporation of India, Mandhar Cement Factory has given a range of 1.55 to 1.68 in its letter dated 5th June, 1984. Jamul Cement Works of the Associated Cement Companies Limited, i.e. another factory of the petitioner company, in letter dated 8th June, 1984 has quoted the figure of 1.58 tonnes. Century Cement in Baikunt district of Madhya Pradesh in its letter dated 5th June, 1984 mentioned that for 1 tonne Clinker 1.57 tonnes of ground limestone is required. Dalla cement factory of Uttar Pradesh State Cement Corporation Limited in its letter dated 4th April, 1987 has indicated that approximately 1.6 M.T. of average grade limestone is required for manufacture of 1 MT of Portland cement clinker. Orissa Cement Limited, Rajgangpur, Orissa has quoted the figure 1.55 in its letter dated 7th April, 1987. This would show that different cement plants mostly in Madhya Pradesh and two outside Madhya Pradesh, have indicated that the requirement of limestone for one tonne of clinker would vary from 1.55 to 1.68 depending on the quality of limestone. Most of them have indicated that the requirement would be approximately 1.6 MT. In the face of this evidence, the action of the State Government in adopting a factor of 1.6 does not appear to be arbitrary or unjust. On the other hand, the petitioner company has not produced any evidence or document before us to prove that it would have been more reasonable to adopt a factor of 1.5. Its only argument is that a factor of 1.5 which had been used between 1959 to 1969 should also have been used for the subsequent period. According to the petitioner company this particular factor has no sanctity as such. It has to be based on rational and reasonable considerations. In the instant case the State Government adopted a factor of 1.6 after taking into consideration the consumption of limestone by cement plants similarly situated. They have also been guided by the representation of cement manufacturers before Tariff Commission wherein they had represented for the necessity of using higher usage ratio of the order of 2.2 as against 1.55 between limestone and Clinker (para 18.2.4 of the Tariff Commission on the Comprehensive Review of the Cement Industry and Revision of Fair Ex-works Prices Payable to the Producers, Bombay, 1974).

15. The next question is whether the State Government had given adequate and reasonable opportunity of hearing to the petitioner company before passing the impugned order. The petitioner has accused the State Government that no opportunity was given to it before the order was passed. On the other hand, the State Government have stated that on the representation of the petitioner, the demands raised by the Additional Collector, Katni were stayed. The petitioner was given a number of opportunities to represent its case. It was given dates on 19th December, 1988, 21st December, 1989 and also 30th April, 1990 and finally on 18th May, 1990. The petitioner company had filed written submissions on 4.1.9. On 18th May, 1990 the State Government after hearing the petitioner's representative and considering the petitioner's written submissions passed the impugned order. The State Government was satisfied under the facts and circumstances of the case that a factor of 1.5 was most appropriate and reasonable. It was also the conscious decision on the part of the State

Government to defer consideration of other points mentioned in the Additional Collector's notice as the petitioner's application for renewal of mining lease was pending. According to the State Government such deferment of consideration of other points should in no way vitiate the decision of the State Government regarding additional royalty to be paid by the petitioner company based on a factor of 1.6.

16. After considering the written and oral submissions made and the fact and evidence on record, we are satisfied that the State Government had afforded due opportunity to the petitioner of personal hearing before they decided about the additional royalty etc. payable by the petitioner. It was incumbent on the petitioner to maintain correct and proper accounts of minerals produced and dispatched which the petitioner has failed to do. Under the circumstances, therefore, the State Government adopted the next best course open to them for computation of royalty by applying a usage ratio or a conversion factor between limestone and cement. While arriving at the factor, it appears that the State Government was guided, inter alia, by the experience of other cement factories in and outside Madhya Pradesh. Since the State Government have adopted a factor of 1.6 which is followed by many other cement plants as well, before applying such a factor the State Government had given reasonable opportunity of personal hearing to the petitioner, we find the action of the State government just, fair and reasonable under the facts and circumstances of the case. We, therefore, do not find any valid ground or justification to interfering with the impugned order of State Government."

(emphasis supplied)

10. After this decision of the Tribunal, ACC Limited installed weighbridge and made it operational from 23rd April, 1992. That fact was communicated to the Authorities on 7th August, 1992.

11. Be that as it may, the Under Secretary of the Mineral Resources Department, Government of Madhya Pradesh issued the impugned circular on 19th December, 1992, which reads thus:

(emphasis supplied)

12. Being aggrieved by the decision of the Tribunal dated 10th April, 1992, ACC Limited had preferred writ petition in this Court, being M.P. No. 1225/1993. The Division Bench of this Court summarily dismissed the said writ petition vide order dated 28th June, 1993, with the following observations:

"Shri Y.S. Dharmadhikaree, Adv., for the petitioners, heard on the question of admission.

The petitioners hold quarry lease for extraction of limestone for manufacturing cement. It appears that in the process of extraction, the petitioner extracted not only the limestone but also some clay, which was found embedded in layers of lime-stone. Admittedly, the petitioner did not keep any account of quantity of

clay extracted in this process and hence the question arose as to how much actual limestone was extracted so as to subject the said quantity to payment of royalty. The respondents, with the help of experts devised a formula based on consumption of limestone per ton, in manufacture of cement and on that basis fixed the quantity chargeable to royalty. It is this decision, which is under challenge in this petition. The fact that the petitioners have themselves not kept any account of the quantity of clay extracted by them, is enough to justify adopting a formula for determining the royalty payable limestone. The basis for determining this quantity being the cement, per ton in manufacture of cement, cannot be said to be unreasonable or arbitrary. This Court does not have expertise to devise a better formula for the purpose. Since this Court finds the formula justified, no case for entertaining the petition exists, which fails and is dismissed summarily."

(emphasis supplied)

13. After the decision of the High Court, the State Government issued another impugned Circular on 11th August, 1993, under the signature of the Under Secretary, Mineral Resources Department, Government of Madhya Pradesh, which reads thus:

(emphasis supplied)

14. Although ACC Limited had installed Weighing Machine, but, according to the Authorities, it was not possible for them to manufacture cement on the basis of consumption of Limestone shown by them. For that reason, the Appropriate Authority issued demand towards royalty amount on the basis of conversion factor of 1.6:1. Being aggrieved by the said demand, ACC Limited filed writ petition in this Court being Writ Petition No. 516/1996. That writ petition was heard along with other companion petitions, in all 17 petitions, by the learned Single Judge. The learned Single Judge on the basis of rival submissions formulated 13 points for consideration as under:

"26. The following points arise for consideration in these petitions:-

- (1) Whether circular Annexure R/2 amount to imposition of tax on major mineral by State Government; hence beyond state legislative and executive power and State has imposed royalty on unused quantity of lime stone;
- (2) Whether Annexure R/2 violates section 9 of Mines & Mineral Development Act, Mineral Concession Rules, 1960 and condition of lease deed;
- (3) Whether petitioners are violating the condition of not establishing the "weigh bridges" at each of pithead; if yes, whether State could only take the action to determine lease;
- (4) Whether State has imposed royalty on processed material thus have changed the taxing event;
- (5) Whether action of State as per Annexure R/2 by prescribing minimum

consumption ratio of limestone in manufacture of 1 ton of cement is a step towards making grant of right to make assessment of royalty effective and to prevent evasion of royalty;

(6) Whether Beltometer is an effective measure hence conversion factor is bad in law;

(7) Whether condition to establish weigh bridge is bad in law;

(8) Whether Rule 64B and 64C of Rules are declaratory and have retrospective operation and supersede Annexure R/2 of Aug. 11, 1993;

(9) Whether conversion factor is not reasonable and is based on assumption and could not be applied uniformly to all cement manufacturers;

(10) Whether conversion factor has been imposed without hearing; thus, bad in law;

(11) Whether State has acted in violation of Article 14 in picking up only cement manufacturers for application of formula;

(12) Whether conversion factor could not be imposed with retrospective effect in WP124/96;

(13) Whether decision of Division Bench of this Court in MP No. 1225/93 holding that conversion factor of 1.6 is proper is binding; if yes, to what extent?"

After analyzing the rival submissions and keeping in mind the legal precedents, the learned Single Judge answered the aforesaid issues against the petitioners and consequently dismissed their writ petitions by a common judgment dated 15th May, 2002.

15. Against that decision, writ appeals have been filed which were heard together along with other writ petitions forming part of this group of cases. It may be noted that during the pendency of the said appeals, the Letters Patent Appeal was abolished. However, subsequently due to enactment of Madhya Pradesh Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005, the said Appeals stood revived and are, therefore, being heard together. As a matter of fact, the said writ appeals were disposed of by common judgment dated 4th August, 2009 with a direction to the State Government to constitute a Technical Committee and afford an opportunity of hearing to each of the appellants and thereafter the Committee to pass reasoned and cogent order. The Technical Committee was expected to deal with the matters regard being had to the product and technology involved in each case and facts which are peculiar to that case. The Committee was directed to take final decision in the matter within four months from the date of commencement of hearing. However, later on, the Committee was not constituted. Therefore, review petitions came to be filed and those petitions were allowed by recalling the order dated 4th August, 2009, on 20th November, 2009. As a result, the writ appeals have been restored back to the file to its original number for being heard afresh on merits. This is how the writ

appeals have come back for hearing before us along with the writ petitions filed by different petitioners from time to time questioning the conversion factor of 1.6:1 applied by the Authorities.

16. Some of these petitions have been filed by the petitioners who have already installed Weighing Machine as in the case of ACC Limited. Another set of petitions have been filed by the petitioners who have installed Beltometer instead of Weighing Machine. The third set of petitions are filed by those who have failed to install Weighing Machine as well as Beltometer. In the first two categories, it is possible that the Weighing Machine/Beltometer installed by the concerned petitioner is not as per the technical specifications or may have become defective. In either case, it will be of no use for computing the accurate quantity of Limestone excavated by the concerned Unit which in turn has been utilized for manufacture of Cement/Clinker. We will advert to this aspect a little later.

17. (i) Shri Kishore Shrivastava, learned Senior Counsel invited our attention to the provisions of the Act of 1957 and Rules of 1960. He submitted that the entire field regarding major mineral is occupied by List-I of the VII Schedule of the Constitution. As a result, the State Legislature much less the State Government is not competent to prescribe mode of assessment/computation. He relies on the decision of the Apex Court in the case of *Bajinath Kadio Vs. State of Bihar and Others*, ; *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, ; *State of M.P. Vs. Mahalaxmi Fabric Mills Limited and others*, . He then submits that if the State Legislature could not deal with the matter of mode of assessment/computation, the State Government cannot be allowed to exercise executive powers relating to that subject or for that matter issue administrative instructions. In that case, it is not open to the State Government to invoke Article 162 of the Constitution. He relied on Article 246 of the Constitution and would contend that the prescription of mode of assessment/computation can be only by way of legislation on that subject by the Parliament. Reliance is placed on the decisions of the Apex Court in the case of *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, which has taken the view that tax can be imposed only by law made by the Parliament or State Legislature. Reliance is also placed on the Apex Court decisions in the case of *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, ; and *State of Gujarat and Others Vs. Akhil Gujarat Pravasi V.S. Mahamandal and Others*, to point out the distinctive features to constitute tax. As a matter of fact, contends learned counsel that the impugned circulars ex facie are not executive orders. For, the same are not issued in the name of Governor. For that reason, the Circulars do not have the force of law. Reliance is also placed on the decisions of the Apex Court in the case of *Bachhittar Singh Vs. The State of Punjab*, ; *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, ; *A.N. Parasuraman Etc. Vs. State of Tamil Nadu*, ; and *Kunj Behari Lal Butail and Others Vs. State of H.P. and Others*, . He further submits that so far as the petitioners for whom he is appearing, the Circulars will have no application having regard to the fact that the said petitioners have already

installed Weighing Machine as per the specifications. The question of invoking notional conversion factor qua those Units would be impermissible in law. According to him, the actual consumption of Limestone for manufacture of Cement by the Units represented by him is much less than the notional conversion factor of 1.6:1. As a necessary corollary, the amount demanded and to be collected by the State would be in the nature of collection of tax and not royalty as such. He further submits that unless the Authorities were to record a positive finding about improper maintenance of accounts and record maintained by the concerned Unit or for that matter about the installation of Weighing Machine not in accordance with the specifications or about its improper functioning, it is not open to the Authority to invoke notional conversion factor. Such finding is the quintessence for resorting to assessment on the basis of conversion factor. Learned counsel also invited our attention to clause 13 of Form-K. He submits that on plain language of the said provision, the Weighing Machine is expected to be installed at or near the pit head. The expression "pit-head" has not been defined in the Act or the Rules nor in the lease deed. He relied on the decision of the Apex Court in the case of Panyam Cements and Minerals Ltd. Vs. Union of India (UOI) and Others, , which throws light on this exposition.

(ii) He has relied on the provisions of rule 51 of the Rules of 1960 to point out that the assessment must be based on the return filed under that provision and, therefore, cannot be made on notional basis, more so, in absence of any finding by the Authority about the inaccuracy and misleading contents of the said returns. He has placed reliance on the decision of the Apex Court in the case of Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., , which expounds about the term "assessment". Reliance is also placed on the decision of the Apex Court in the case of Duncans Industries Ltd., Calcutta Vs. Commissioner of Central Excise, New Delhi, to contend that there cannot be two assessments for the same period. Our attention is also invited to the decision of the Apex Court in the case of The Commissioner of Sales Tax, Madhya Pradesh Vs. H.M. Esufali, H.M. Abdulali, Siyaganj, Main Road, Indore, to contend that before resorting to best judgment assessment, the returns submitted must be considered and rejected as untrue or false after examining the records. In absence thereof, the Authority cannot assume jurisdiction to hold to the contrary much less invoke notional conversion factor. He has also placed reliance on the decision of the Apex Court in the case of Raghubar Mandal Harihar Mandal Vs. The State of Bihar, and State of Orissa Vs. Maharaja Shri B.P. Singh Deo, to contend that after rejecting the return, exercise of best judgment assessment can be resorted to by the Assessing Officer. He submits that the earlier decision in the case of petitioner (ACC Limited) will be no impediment-either on the principle of res judicata or binding precedent. In the earlier proceedings, the lease condition specified royalty amount on the basis of conversion factor of 1.5:1. Moreover, the two Circulars which are impugned in the present proceedings were not the subject matter of challenge. He relied on the decisions of the Apex Court in the case of The Amalgamated Coalfields Ltd.

and Another Vs. The Janapada Sabha, Chhindwara, ; and Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, to contend that if the demand impugned is for the different period, principle of res judicata has no application. Besides, if the challenge raised in the present proceedings to the impugned circulars was not and could not be raised in the earlier petition, res judicata will have no application. He has then relied on the decisions of the Apex Court in the case of Jagdish Lal and others Vs. State of Haryana and others, ; and State of Orissa and Others Vs. Md. Illiyas, to contend that the judgment in the previous proceedings cannot be cited as precedent much less a binding precedent. For, it has decided matters in issue and is a precedent for those facts. He further submits that in any case, the claim of interest by the Assessing Officer is without authority of law. Inasmuch as, interest is payable only in respect of admitted liability or adjudicated liability. In the present case, the petitioners have not admitted their liability on the basis of conversion factor of 1.6 nor there was any adjudication by the Assessing Officer in conformity with the procedure established by law. The Assessing Officer without scrutiny of the returns has proceeded to apply the notional conversion factor. Until such adjudication is done, the question of fastening of liability of interest on the petitioners will not arise.

(iii) In response to the reply given by the respondents, he submits that the fact that the petitioners have been paying royalty amount as per the lease deed on the basis of conversion factor of 1.5 can be no impediment in challenging the demand if it is not in conformity with the provisions of law. There can be no estoppel against law. He submits that the lease deed in favour of the concerned petitioner was executed before the Act of 1957. That gets validated by virtue of Section 33 of the Act of 1957. According to the learned counsel, the Department had issued Circulars requiring the lessee to install Weighing Machine and the conversion factor of 1.6 could be applied only in cases where the Companies had failed to install the Weighing Machine. The impugned Circular dated 11th August, 1993, will have to be understood and conjointly read along with the earlier Circulars. No other meaning is conveyed on conjoint reading of the said Circulars. He further submits that the decision of the Tribunal which has been upheld by the High Court in the earlier proceedings with regard to the justness and reasonableness of the conversion factor of 1.6 cannot denude the said petitioner (ACC Limited) from contending that the Assessing Officer has to undertake scrutiny of the returns filed by the Assessee and record finding about inaccuracy or untruthfulness of that record, before invoking the notional basis of conversion factor of 1.6. Taking any other view would entail in supplanting of Section 9 of the Act of 1957 and rule 27 of the Rules of 1960. As a matter of fact, while doing scrutiny, the Assessing Officer is obliged to examine several factors including the quality of finished product as is expounded in the Circular dated 2nd May, 1967. He submits that the Circular dated 11th August, 1993, in that sense is a departure from the earlier stand of the Department which aspect can be agitated by the ACC Limited notwithstanding the decision of the Tribunal in the previous

proceedings. He contends that the decision in the case of Guman Singh Vs. State of Rajasthan and Others, , in fact, supports the argument of the petitioners that notional basis can be invoked only in exceptional cases. He submits that the said decision is not in respect of provisions governing the best judgment assessment as is applicable to the case on hand; and more so that matter pertained to minor mineral unlike major minerals in the present case. He further submits that Section 15 of the Act of 1957 can be invoked by the State only by making Rules on the subject and not by issuing Circulars or administrative instructions.

18. Shri A.K. Chitley, learned senior counsel besides adopting the above arguments, in addition, submitted that Section 15 of the Act is a rule making power. Section 23-A of the Act of 1957 deals with compounding of offences and including refers to rule made under the Act to deal with subject of illegal mining. In the context of these provisions, he submits that if the Authority was of the opinion that the disclosure made by the Company in its return was not honest, it could resort to other remedy, provided by the statute itself. However, on that opinion, it is not open to straightway invoke the notional conversion factor. He submits that, in any case, it is impermissible to apply uniform conversion formula to all the Factories/Cement Industries. Such notional basis is not applied to any other Industry excavating Limestone. He submits that the Circulars are not only arbitrary but discriminatory. He has placed reliance on the decisions of the Apex Court in the case of Kunnathat Thathunni Moopil Nair (supra) (para 7); and Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, . It is held that Article 265 mandates that all taxation-the imposition, levy and collection shall be by law; and that the Article beyond excluding purely administrative action does not by itself lay down any criterion for determining the validity of such a law to justify any contention that the criteria laid down exclude others to be found elsewhere in the Constitution for laws in general. Accordingly, he submits that it was not open to the State to introduce notional criteria for the mode of assessment by issuing Circulars or communications. Inasmuch as, the impugned Circulars provide for the mechanism of assessment which can be prescribed only by a law made by the Parliament or the Rules made thereunder. He submits that the factors influencing the consumption of Limestone during the manufacture of cement or Clinker would be materially different. It would also further depend on the technology used by the Unit and the method of processing employed by the concerned Unit. The outcome would depend on several variables and cannot be applied as a straight-jacket formula as is the attempt in the impugned Circulars. To buttress this contention, he has relied on the formula devised by the Taparia Committee constituted by the State Government to ascertain the conversion factor. Even the said Committee assumed the conversion factor to maximum 1.516 for Clinker and 1.444 for Cement. Similarly, the National Council has recommended average Limestone consumption per tone of Clinker as 1.44 and the letter issued by the Government of India dated 20th March, 2002 as 1.43:1 for manufacture of cement. He submits that the conversion factor determined by the State Government referred to in the

impugned Circulars is, therefore, unrealistic and arbitrary. Further, the State Government has taken factor on the higher side and not the lowest factor mentioned by the concerned experts. Even for that reason, the notional conversion factor specified in the impugned Circulars is unsustainable. He submits that the said factor has been devised behind the back of the Cement Industry and without giving any opportunity to them by the State Government. Thus, the formula specified by the State Government is artificial, unrealistic and without application of mind. He submits that assuming that the notional conversion factor can be permitted, it cannot be applied Industry-wise, but, should be determined Unit-wise on the basis of past performance of the concerned Unit. He submits that assessment of royalty is a quasi judicial function and there can be no mandate to decide it in a particular manner. The impugned circulars inevitably result in issuing direction to the Assessing Officers to complete the assessment proceeding in a particular manner irrespective of the record placed before the Assessing Officer. That cannot be countenanced. He has placed reliance on the decision of the Apex Court in the case of Orient Paper Mills Ltd. Vs. Union of India (UOI), . He further submits that the petitioners for whom he was appearing have installed Beltometer. That discharges the same function as that of Weighing Machines installed at the pit head for weighing the Limestone consumed for manufacture of Cement. According to him, unless the record of the Beltometer presented by the concerned petitioner was found to be incorrect or untruthful, the question of invoking notional conversion factor will not arise. He submits that the assessment must be made keeping in mind the provisions of Section 9(2) of the Act read with Rules 27 and 51 of the Rules of 1960. He further submits that the amount towards interest demanded by the Assessing Officer is without authority of law. The question of paying interest, in the fact situation of the present case, did not arise at all as the petitioner has neither admitted its liability nor any adjudication has been done in that regard.

19. Shri M.L. Jaiswal, and Shri R.S. Jaiswal, learned Senior Advocates appearing in respective petitions/appeals have adopted the above arguments but would additionally contend that as regards Limestone, the same is mentioned in the Second Schedule of the Act against Serial No. 24. That does not provide for ad valorem rate of royalty unlike in all other cases. Instead, rate of royalty is prescribed as Seventy-two rupees per tonne and Sixty-three rupees per tonne respectively. The same position applies to Lime Kankar and Limeshell. They submit that the percentage of silica is the quintessence for determining the liability towards royalty. They submit that Calcium Carbonate contents are bound to be different. Further, a common conversion formula cannot be applied as cement is broadly of three types (a) Stag-lime Cement (b) Portland Cement (c) Pozzolana Portland Cement. Each type contains different specifications. This crucial aspect has been glossed over while prescribing the uniform conversion formula. In other words, the said formula is irrational, unscientific and arbitrary. They further submit that going by the provisions of the Act and the Rules and including the covenants in the lease deeds, the liability to pay the royalty arises

only upon removal and consumption of Limestone and not otherwise. That factum cannot be assumed. They have invited our attention to the provisions of Standards of Weights and Measures Act, 1976; Legal Metrology Act, 2009; and the Rules framed under the respective enactment to contend that Beltometer/ Conveyor Weighing Machine is a recognized device for recording weights. They submit that since the field is already occupied by the concerned Central enactments which are a self-contained code, it is not open for the State Government to expound to the contrary. Reliance is placed on the decision (1990) 4 SCC 557 (SC) to point out that the State executive power is co-extensive with its legislative power and the State is denuded of its legislative competence on a subject in respect of which Parliament is exclusively competent to legislate. They submit that the Act of 1957 and the Rules of 1960 framed thereunder including Form-K in the Rules are complete Code in itself. It not only contains charging provision but also provide for the mode of assessment. They submit that the royalty amount must be uniform throughout the country. By virtue of impugned circulars, different mode of assessment is introduced with regard to the Cement Companies in the state of Madhya Pradesh, although the liability to pay the royalty arises under the Central Act. He has placed reliance on the decision of the Apex Court in the case of Sandur Manganese and Iron Ores Ltd. Vs. State of Karnataka and Others, which has taken the view that it is not open to the State Government to justify grant based on criteria that are dehors the Act of 1957 and the Rules of 1960. Reliance is also placed on the decision of the Apex Court in the case of Mahalaxmi Fabric Mills Limited and others (supra) (para 15 to 17) to contend that the fixation of royalty should have a direct nexus with the minerals throughout the country on uniform pattern so that activity of winning the minerals for the benefit of the lessees of such mining leases in the first instance and ultimately for the economy as a whole should not get in any way frustrated. They submitted that each of the petitioners had filed returns and have paid royalty on the basis of actual consumption of Limestone for manufacture of Cement in their Units. The quantity of Limestone has been worked out on the basis of the record of Beltometer operated in the concerned Units. As per the report, Annexure P/13, in Writ petitions, for whom the learned counsel were appearing, actual consumption factor was 1.463 and 1.491 respectively which was far below the notional conversion factor of 1.6.

20. Per contra, Shri Samdarshi Tiwari, learned counsel for the State has prayed for dismissal of all the petitions and appeals. According to him, the issues raised by the petitioners during the hearing have already been answered by the learned Single Judge. Besides placing reliance on the decision of the learned Single Judge, he has countered the arguments of the petitioners/appellants. He, primarily, argued that the two Circulars which are subject matter of challenge are in the nature of administrative instructions. There was no impediment for issuing such Circulars concerning the mode of assessment and more so when the Act of 1957 nor the Rules of 1960 prescribe any mode of assessment to the contrary. As a matter of fact, the said Act and the Rules make no provision regarding the

mode of assessment. As a result, the State Government in public interest directed to resort to the mode of assessment specified in the impugned Circulars. The basis mentioned in the said Circulars was in the backdrop of the past experience and the information derived by the Authorities from the Industry before issuing the said Circulars. According to him, the conversion factor mentioned in the Circular is founded on tangible basis. In fact, none of the lessees ever disputed their liability to pay royalty in respect of Limestone consumed by them on the conversion factor of 1.5:1. They paid the royalty amount on that basis without any demurrer. However, it is only when the conversion factor was changed to 1.6:1 after due consideration of all aspects, dispute has been raised by the cement companies. That dispute was taken up to the Central Tribunal as well as this Court at the instance of ACC Limited and it has been held that the conversion factor of 1.6 is just, reasonable and proper. That decision has attained finality. That is not only binding on the company at whose instance it has been rendered, but, also on this Court as a binding precedent. The learned Single Judge after considering all aspects of the matter has reiterated that the notional conversion factor of 1.6:1 does not warrant any interference. As a matter of fact, under the statutory lease, the lessees are obliged to provide Weighing Machine and comply with the specifications therefor. Even if such Weighing Machines have been provided by some of the petitioners, it has been found that the same do not reveal the accurate position regarding the quantity of Limestone excavated. Further, these very cement companies have contended that it is impossible to install Weighing Machine as provided in the statutory lease. Considering the above, in the larger public interest, it was decided to specify conversion factor which could be made the basis for assessment. In other words, even if the Weighing Machine is installed, that would not denude the Authorities from resorting to notional conversion factor of 1.6 which has been arrived at on the basis of past experience. He further submits that, in any case, the question of doubting the validity of the two Circulars does not arise. In that, the State Government was competent to issue such Circulars providing for mode of assessment. In the alternative, he submits that the said Circulars are only administrative instructions and guideline given to the Assessing Officers. He submits that the impugned Circulars are ascribable to rule 64 read with rule 54 of the Rules of 1960. In support of his submissions, reliance is placed on the decisions of the Apex Court in the case of A.P. Aggarwal Vs. Govt. of N.C.T. of Delhi and Another, ; Guman Singh (supra) and of this Court in the case of Neogy and Sons and Others Vs. State of M.P. and Others, .

21. The counsel appearing for the petitioners in Writ Petition Nos. 4182/2013; 5090/2012 and connected matters; and, 7860/2009 and connected matters, respectively, have filed written submissions on record at the conclusion of the oral argument reiterating the points mentioned hitherto. We may also place on record that Shri Kishore Shrivastava, Shri A.K. Chitley, Shri M.L. Jaiswal and Shri R.S. Jaiswal, learned senior Advocates and Shri Samdarshi Tiwari, learned Government Advocate respectively had submitted compilation of judgments, but,

during the arguments pressed into service only those judgments which are noted hitherto.

22. (i) We shall now revert to the decision of the learned Single Judge which is the subject matter of appeals under consideration. The learned Single Judge has found that the State has not attempted to impose tax as such. Under the Rules, the State has power to collect the rent and the royalty. The mode of assessment of royalty is within the purview of the State Government. The Circulars provide for mode of assessment and conversion factor of 1.6 to assess the quantity of Limestone used in manufacture of 1 tonne of Cement. Further, the State has attempted to control the large scale evasion of royalty by specifying uniform conversion factor of 1.6 for all cement industries within the State and thus obviate violation of the provisions of the Act, Rules and various clauses of the Agreement. That conversion factor has co-relation with the quantity of mineral extracted, which is the essence of Section 9 of the Act of 1957. The royalty is in respect of mining lease on the minerals removed or consumed. That formula is based on sound scientific data. It is not harsh to either party. The State has not departed from the basic principle "removed or consumed". Therefore, it could prescribe the conversion factor which does not amount to legislation, but, is intended to ensure that the royalty is paid as per the provisions of the law.

(ii) It is further held that by prescribing the conversion formula, the object and purpose of the Act is furthered and not defeated in any manner as the conversion formula is based on the quantity removed or consumed. It is further held that the installation of Weighbridges is not rendered redundant. The obligation to weigh the extracted and consumed mineral would continue and would be relevant if it is found that the consumption is more than the conversion factor. In that case, higher weighment will be reckoned for charging the royalty amount.

(iii) The argument that the State Government has exercised the power exclusively within the domain of Parliament has been rejected. Similarly, the argument that the State Government by introducing conversion factor of 1.6 has enhanced the rate of royalty has also been rejected on the finding that the conversion factor has been deduced by applying scientific principles.

(iv) The argument of the petitioners that it is open to the Authorities to resort to other option in case of filing of inaccurate or untrue returns, has been negated on the finding that availability of such option does not denude the State from prescribing mode of assessment and uniform conversion factor which is founded on scientific principles. Even the option of cancellation of lease is the last option and in any case that would not extricate the licensee/lessee from paying proper royalty amount in respect of the mineral removed or consumed by him.

(v) The learned Single Judge has also found that the State has issued impugned Circulars after due deliberation/consultation with the cement manufacturers, petitioners and other expert bodies. It is held that the past experience of the State necessitated issuance of those Circulars providing for conversion factor due

to large scale of evasion of royalty and incorrect disclosures made by the licensee/lessee. The conversion formula is not based on presumption, but, it is founded on actual data collected from the petitioners. In other words, it is not arbitrary or hit by Article 14 of the Constitution of India.

(vi) In paragraph 58 of the judgment, the learned Single Judge has adverted to the letters of the concerned Companies admitting the correctness of the conversion factor which was around 1.6 tonne and thus rejected the argument that the conversion formula was arbitrary, unscientific or hypothetical. On the other hand, the formula was reasonable one and co-related with the actual happening of the taxing event. Further, the petitioners were unable to point out the actual data maintained by them as required by clause 13 of Part-VII of the Lease Deed. No material was placed on record to show that proper entries have been effected with regard to the minerals removed and consumed. Whereas, the respondents had placed on record material to show that proper Weighbridges have not been installed by the concerned Companies (except in few cases) and that generally the entries regarding the quantity of mineral was not accurate and in conformity with the requirement of clause 13 of Part-VII of the Lease Deed. It is found that the petitioners have not pleaded that their actual figures of consumption of Limestone was very different than the conversion factor.

(vii) In paragraph 59 of the judgment, the learned Single Judge has dealt with the submissions of the petitioners that the Limestone is initially converted into Clinker, thereafter Limestone loses its identity in the process of manufacture of cement and certain other adhesives like gypsum etc. are added. Thus, conversion of Limestone into other material in the process of manufacture of cement such as clinker etc. cannot have the effect of wiping out the conversion factor of Limestone vis-a-vis. cement.

(viii) The learned Single Judge then rejected the grievance of the petitioners that the conversion factor was specified without hearing the cement companies concerned. It is held that High Power Committee of Experts was constituted.

(ix) The learned Single Judge also negated the argument that only cement manufacturers have been picked up for payment of royalty on conversion factor on the finding that cement manufactures are a separate class. Resultantly, the plea of discrimination has been negated.

(x) On the above analysis, all the writ petitions came to be dismissed by the learned Single Judge which decision is the subject matter of challenge before us by way of writ appeals.

23. Having considered the rival submissions, in our opinion, the following broad points arise for consideration:

i. Whether the decision in ACC Limited would operate as *res judicata* qua ACC Limited?

ii. Whether the said decision is a binding precedent?

iii. What is the purport of the impugned Circulars dated 19/12/1992 and 11/8/1993 respectively?

iv. Whether the said Circulars provide for the mode of assessment of royalty or otherwise?

v. Whether the State Government has power to prescribe such mode of assessment of royalty for the mineral removed and consumed?

vi. Whether the conversion factor determined as 1.6:1 is just and proper or arbitrary and unreasonable?

vii. Whether the notional conversion factor can be applied uniformly to all the cement factories in the State and even though they have installed Weighing Machine in compliance with the requirements specified in Clause 13 of Part-VII of the Lease Deed?

viii. Whether the weightment by Beltometer can be considered as accurate and could be made the basis for assessment of royalty?

ix. What order?

24. In the present set of cases each of the petitioners/appellants are engaged in manufacture of Cement/Clinker. The main ingredient of the said product is Limestone. It is indisputable that Limestone is a major mineral. It is well established position that power to enact law on the subject of major mineral is within the exclusive domain of the Parliament. The Parliament has already enacted law to deal with the subject of major minerals, being the Act of 1957. Section 9 of the said Act deals with the Royalties in respect of Mining Lease. The same reads thus:-

"9. Royalties in respect of mining leases (1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2A) The holder of a mining lease, whether granted before or after the commencement of Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per month.

(3) The Central Government may, by notification in the Official Gazette, amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:

Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of three years."

25. Section 9A deals with the subject of Dead rent to be paid by the lessee. The same reads thus:-

"9A. (1) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall notwithstanding anything contained in the instrument of lease or in any other law for the time being in force, pay to the State Government, every year, dead rent at such rate as may be specified, for the time being, in the Third Schedule, for all the areas included in the instrument of lease:

Provided that where the holder of such mining lease becomes liable, under section 9, to pay royalty for any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area, he shall be liable to pay either such royalty, or the dead rent in respect of that area, whichever is greater.

(2) The Central Government may, by notification in the Official Gazette, amend the Third Schedule so as to enhance or reduce the rate at which the dead rent shall be payable in respect of any area covered by a mining lease and such enhancement or reduction shall take effect from such date as may be specified in the notification:

Provided that the Central Government shall not enhance the rate of the dead rent in respect of any such area more than once during any period of three years."

26. Section 13(1) of the Act empowers the Central Government to frame Rules governing grant of reconnaissance permits, prospecting licences and mining leases in respect of minerals and for the purposes connected therewith. Subsection (2) of Section 13 delineates the subjects on which Rules can be framed. Sub-clause (i) thereof specifically deals with fixing of fees for specified activities and the manner in which the dead rent or royalty shall be payable. It necessarily follows that the field regarding Royalty is covered by the Act made by the Parliament.

27. In exercise of powers under Section 13 of the Act, the Central Government has framed the Rules of 1960. Rule 22 provides for the manner of making an application for grant of mining lease in respect of land in which the mineral vest in the Government. That application is required to be made to the State Government in Form "I" along with specified information. Rule 24 deals with the procedure for disposal of application for mining lease and Rule 24A provides for

the procedure regarding renewal of mining lease. Rule 24B deals with the renewal of mining lease in favour of person using the mineral in his own Industry.

Rule 27 stipulates the condition with which every mining lease is expected to be governed. The same reads thus:-

"27. Conditions.-(1) Every mining lease shall be subject to the following conditions :

(a) the lessee shall report to the State Government the discovery in the leased area of any mineral not specified in the lease, within sixty days of such discovery;

(b) if any mineral not specified in the lease is discovered in the leased area, the lessee shall not win and dispose of such mineral unless such mineral is included in the lease or a separate lease is obtained therefor;

(c) the lessee shall pay, for every year, except the first year of the lease, such yearly dead rent [at the rate specified in the Third Schedule of the Act] and if the lease permits the working of more than one mineral in the same area [the State Government shall not charge separate dead rent in respect of each mineral]:

Provided that the lessee shall be liable to pay the dead rent or royalty in respect of each mineral whichever be higher in amount but not both;

(d) the lessee shall also pay, for the surface area used by him for the purposes of mining operations, surface rent and water rate at such rate, not exceeding the land revenue, water and cesses assessable on the land, as may be specified by the State Government in the lease;

(e) Omitted

(f) the lessee shall commence mining operations within one year from the date of execution of the lease and shall thereafter conduct such operations in a proper, skillful and workman-like manner

Explanation.-For the purpose of this clause, mining operations shall include the erection of machinery, laying of a tramway or construction of a road in connection with the working of the mine;

(g) the lessee shall at his own expenses erect and at all times maintain and keep in good repair boundary marks and pillars necessary to indicate the demarcation shown in the plan annexed to the lease;

(h) the lessee shall not carry on, or allow to be carried on, any mining operations at any point within a distance of fifty metres from any railway line, except under and in accordance with the written permission of the railway administration concerned [or under or beneath any ropeway or ropeway trestle or station, except under and in accordance with the written permission of the authority owning the ropeway] or from any reservoir, canal or other public works, or buildings, except under and in accordance with the previous permission of the State Government;

(i) the lessee shall keep [accurate and faithful] accounts showing the quantity and other particulars of all minerals obtained and dispatched from the mine, the number and nationality of the persons employed therein, and complete plans of the mine, and shall allow any officer authorized by the Central Government or the State Government in this behalf to examine at any time any accounts, plans and records maintained by him and shall furnish the Central or the State Government with such information and returns as it or any officer authorized by it in this behalf may require;

(j) the lessee shall keep accurate records of all trenches, pits and drillings made by him in the course of mining operations carried on by him under the lease, and shall allow any officer authorised by the Central or the State Government to inspect the same. Such reports shall contain the following particulars, namely :-

(a) the subsoil and strata through which such trenches, pits or drillings pass;

(b) any mineral encountered;

(c) such other particulars as the Central or the State Government may from time to time require;

(k) the lessee shall strengthen and support, to the satisfaction of the railway administration concerned or the State Government, as the case may be, any part of the mine which in its opinion requires such strengthening or support for the safety of any railway, reservoir, canal, roads or any other public works or buildings;

(l) the lessee shall allow any officer authorized by the Central or the State Government to enter upon any building, excavation or land comprised in the lease for the purpose of inspecting the same;

(m) the State Government shall at all times have the right of pre-emption of the minerals won from the land in respect of which the lease has been granted;

Provided that the fair market price prevailing at the time of pre-emption shall be paid to the lessee for all such minerals.

(n) The lessee shall store properly the unutilized or non-saleable sub-grade ores or minerals for future beneficiation;

(o) in respect of any mineral which in relation to its use for certain purposes is classified as a major mineral and in relation to its use for other purposes as a minor mineral, the lessee who holds a lease for extraction of such mineral under these rules whether or not it is specified as a major mineral in the lease deed, shall not use or sell the mineral or deal with it in whatsoever manner or knowingly allow anyone to use or sell the mineral or deal with it in whatsoever manner as a minor mineral :

Provided that if on an application made to it in this behalf by the lessee, the State Government is satisfied that having regard to the inferior quality of such

mineral, it cannot be used for any of the purposes by reason of which use it can be called a major mineral or that there is no market for such mineral as a major mineral, the State Government may by order permit the lessee to dispose of the mineral in such quantity and in such manner as may be specified therein as a minor mineral;]

[(p) the lessee shall, in the matter of employment, give preference to the tribals and to the persons who become displaced because of the taking up of mining operations;]

[(q) the lessee shall not pay a wage less than the minimum wage prescribed by the Central or State Government from time to time under the Minimum Wages Act, 1948;

(r) the lessee shall observe the provisions of the Mines Act, 1952 [(35 of 1952) and of the Atomic Energy Act, 1962 (33 of 1962) in so far as they relate to atomic minerals included in Part B of the First Schedule to the Act;]

(s) the lessee shall-

(i) take immediate measures for planting in the same area or any other area selected by the Central or State Government not less than twice the number of trees destroyed by reasons of any mining operations;

(ii) look after them during the subsistence of the lease after which these trees shall be handed over to the State Forest Department or any other authority nominated by the Central or State Government;

(iii) restore, to the extent possible other flora destroyed by the mining operations.

(t) the lessee shall pay to the occupier of the surface of the land such compensation as may become payable under these rules;

(u) the lessee shall comply with the Mineral Conservation and Development Rules framed under section 18.]

(2) A mining lease may contain such other conditions as the State Government may deem necessary in regard of the following, namely :-

(a) the time-limit, mode and place of payment of rents and royalties;

(b) the compensation for damage to the land covered by the lease;

(c) the felling of trees;

(d) the restrictions of surface operations in any area prohibited by any authority;

(e) the notice by lessee for surface occupation;

(f) the provision for proper weighing machines;

(g) the facilities to be given by the lessee for working other minerals in the leased area or adjacent area;

- (h) the entering or working in a reserved or protected forest;
- (i) the securing of pits and shafts;
- (j) the reporting of accidents;
- (k) the indemnity to Government against claims of third parties;
- (l) the delivery of possession of land and mines on the surrender, expiration or determination of the lease;
- [(la) the time limit for removal of mineral, ore, plant, machinery and other properties from the lease hold area after expiration, or sooner determination or surrender or abandonment of the mining lease];
- (m) the forfeiture of property left after determination of lease;
- (n) the power to take possession of plant, machinery, premises and mines in the event of war or emergency;
- (o) filing of civil suits or petitions relating to disputes arising out of the area under lease.

[(3) The State Government may, either with the previous approval of the Central Government or at the instance of the Central Government, impose such further conditions as may be necessary in the interests of mineral development, including development of atomic minerals.]

(4) If the lessee does not allow entry or inspection under clause (i),(j) of (l) of sub-rule (1), the State Government shall give notice in writing to the lessee requiring him to show cause within such time as may be specified in the notice why the lease should not be determined and his security deposit forfeited; and if the lessee fails to show cause within the aforesaid time to the satisfaction of the State Government, the State Government may determine the lease and forfeit the whole or part of the security deposit.

[(4A) If the lessee holding a mining lease or a licensee holding a prospecting licence, is convicted of illegal mining and there are no interim orders of any court of law suspending the operation of the order of such conviction in appeals pending against such conviction in any court of law, the State Government may, without prejudice to any other proceedings that may be taken under the Act or the rules framed thereunder, after giving such lessee or licensee an opportunity of being heard and for reasons to be recorded in writing and communicated to the lessee or licensee, determine such mining lease or, as the case may be, cancel such prospecting licence and forfeit whole or part of the security deposit

(5) If the lessee makes any default in the payment of royalty as required under section 9 or payment of dead rent as required under Section 9A or commits a breach of any of the conditions specified in sub-rules (1),(2) and (3), except the condition referred to in clause (f) of sub-rule (1), the State Government shall give notice to the lessee requiring him to pay the royalty or dead rent or remedy

the breach, as the case may be, within sixty days from the date of the receipt of the notice and if the royalty or dead rent is not paid or the breach is not remedied within the said period, the State Government may, without prejudice to any other proceedings that may be taken against him, determine the lease and forfeit the whole or part of the security deposit."

(emphasis supplied)

28. We deem it apposite to also advert to Rule 51 which provides for Returns and Statements required to be filed by the holder of a prospecting licence or a mining lease. The same reads thus:-

"51. Returns and Statements :-The holder of a prospecting licence or a mining lease shall furnish to the State Government such returns and statements and within such period as may be specified by it."

The other provisions in the Rules of 1960 relevant for considering matters in issue are Rule 64 to 64D. The same reads thus:-

"64. How the fees and deposit to be made-Any amount payable under the Act or these rules except that payable in respect of revision petition under sub-rule (1) of rule 54, shall be paid in such manner as the State Government may specify in this behalf.

64A. The State Government may, without prejudice to the provisions contained in the Act or any other rule in these rules, charge simple interest at the rate of twenty four percent per annum on any rent, royalty or fee (other than the fee payable under sub-rule (1) of rule 54) or other sum due to that Government under the Act or these rules or under the terms and conditions of any prospecting licence or mining lease from the sixtieth day of the expiry of the date fixed by that Government for payment of such royalty, rent, fee or other sum and until payment of such royalty, rent, fee or other sum is made.]

[64B. Charging of Royalty in case of minerals subjected to processing:

(1) In case processing of run-of-mine mineral is carried out within the leased area, then, royalty shall be chargeable on the processed mineral removed from the leased area.

(2) In case run-of-mine mineral is removed from the leased area to a processing plant which is located outside the leased area, then, royalty shall be chargeable on the unprocessed run-of-mine mineral and not on the processed product.]

[64C. Royalty on tailings or rejects :-On removal of tailings or rejects from the leased area for dumping and not for sale or consumption, outside leased area such tailings or rejects shall not be liable for payment of royalty:

Provided that in case so dumped tailings or rejects are used for sale or consumption on any later date after the date of such dumping, then, such tailings or rejects shall be liable for payment of royalty.]

[64D. Manner of payment of royalty on minerals on ad valorem basis:

(1) Every mine owner, his agent, manager, employee, contractor or sub-lessee shall compute the amount of royalty on minerals where such royalty is charged on ad valorem basis as follows:

(i) for all non-atomic and non fuel minerals sold in the domestic market or consumed in captive plants or exported by the mine owners (other than bauxite and laterite despatched for use in alumina and metallurgical industries, copper, lead, zinc, tin, nickel, gold, silver and minerals specified under Atomic Energy Act), the State-wise sale prices for different minerals as published by Indian Bureau of Mines shall be the sale price for computation of royalty in respect of any mineral produced any time during a month in any mine in that State, and the royalty shall be computed as per the formula given below:

Royalty = Sale price of mineral (grade wise and State-wise)

published by IBM X Rate of royalty (in percentage) X Total quantity of mineral grade produced/dispatched:"

(emphasis supplied)

29. Having considered the provisions in the Act made by the Parliament and the Rules framed thereunder by the Central Government, we find that there is no express provision either in the Act or in the Rules regarding notional conversion factor to be applied during assessment by the Assessing Officer, in a suitable case. The manner in which the Return must be filed is specified. Indeed, the assessment of Royalty amount must be commensurate with the minerals removed or consumed by the lessee in conformity with the above quoted provisions. Ordinarily, it must be on the basis of "actual quantity" of minerals removed or consumed by the lessee. The Royalty tariff is specified in the second schedule to the Act. However, there is no express provision in the Act or the Rules as to what should be the mode of assessment in the event the Assessing Officer forms opinion that the Returns filed by the lessee or the record maintained and submitted are incorrect or untruthful. In that case, in law, it is open to the Assessing Officer to reject the claim of the assessee and instead apply a just and reasonable notional conversion factor keeping in mind the past experience and performance of the concerned Industry(assessee).

30. The question is: whether it was open to the State Government to issue the impugned Circulars specifying the mode of assessment of royalty and to uniformly apply it to all the cement companies across the State. Indeed, the Apex Court in the case of Baijnath Kadio (supra) has expounded on the question of legislative competence of the State Legislature. However, for recording finding that the two Circulars trench upon the Legislative field already occupied, it must be demonstrated that the purport of the instructions would result in inconsistency and will be in conflict with the provisions of the Act made by the Parliament and/or the Rules made thereunder. As aforesaid, there is nothing in

the Act made by the Parliament or for that matter the Rules made thereunder to even remotely indicate the mode of assessment to be followed by the Assessing Officer and, in particular, in cases where the Assessing Officer finds that the Returns filed by the assessee and/or the record maintained and submitted are incorrect or untruthful. Nor does the Act made by the Parliament or the Rules made thereunder expressly provide that it is not open to the Assessing Officer to apply uniform notional conversion factor which is just and reasonable to complete the assessment. In the result, the decisions of the Apex Court pressed into service [Bajinath Kadio (supra); The India Cement Ltd. (supra); Mahalaxmi Fabric Mills Ltd. (supra)] will be of no avail to the petitioners.

31. In the case of The India Cement Ltd. (supra), the contention was that the Cess on royalty cannot be levied. The Apex Court while noticing that the royalty is a tax and having found that the Cess on royalty would result in imposing tax on royalty proceeded to hold that the legislation in that regard is beyond the competence of the State Legislature because the field was occupied by Section 9 of the Central Act. Thus, it was held that Cess on royalty imposed by virtue of State Legislature cannot be sustained. However, it does not follow that the Assessing Officer is not competent to invoke notional conversion factor on case to case basis if and when such occasion arises, on account of rejection of the Assessee's claim and the Returns filed in that behalf. For the same reason, the administrative instructions contained in the two impugned Circulars on this subject, cannot be treated as trenching upon the occupied legislative field or to doubt the competence of the State Government to issue the same. On the other hand, if uniform notional conversion formula specified by the State Government is found to be just and reasonable, applying the same to all the cement companies across the State as and when such occasion arises, may obviate the possibility of uncertainty, inconsistency and exercise of unguided discretion by the Assessing Officer on case to case basis. That logic and approach would inevitably further the larger public interest and also obviate loss to public exchequer.

32. But, a word of caution may have to be expressed that invocation of uniform notional conversion factor must meet the test of necessity to do so-on account of rejection of the Assessee's claim and the Return as filed in that behalf. Royalty is payable on the quantum of minerals extracted, as it is relatable thereto. At the same time, applying a just and reasonable conversion factor does not necessarily entail in demand of royalty from the Assessee in respect of non-extracted minerals as such. On the other hand, on finding that the notional conversion factor is just and reasonable and in conformity with the past experience of the concerned Cement Company or Industry as a whole, it can be safely assumed that the Assessee Unit has had extracted and consumed the quantity equivalent to the notional conversion factor of Limestone for manufacture of cement. However, that would be a rebuttable fact. The concerned cement company/ assessee will then have to substantiate that it has extracted or removed lesser quantity of Limestone than determined as per the conversion factor and that the

records maintained by it are truthful. Suffice it to observe that application of such notional conversion factor in a given case would be a matter of mode of assessment and nothing more. Resultantly, the administrative instruction issued in that regard cannot be considered as ultra vires or impinging upon the occupied legislative field or for that matter arbitrary and discriminatory.

33. Our attention was invited to the order of the Apex Court reported in the case of Mineral Area Development Authority etc. Vs. Steel Authority of India and Others, to point out that the question whether royalty determined under the Act of 1956 is in the nature of tax has been referred to a larger coram than the Bench whose decision requires reconsideration. It is well established position that the High Court is bound by the prevailing view of the Apex Court and would be justified in deciding the matter on hand by applying the same.

34. The counsel for the petitioners had relied on the decisions of the Apex Court in the case of The Commissioner, Hindu Religious Endowments, Madras (supra); Akhil Gujarat Pravasi V.S. Mahamandal (supra); Calcutta Municipal Corporation and Others Vs. Shrey Mercantile Pvt. Ltd. and Others, ; Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, , to point out as to what would constitute tax. However, in view of the Constitution Bench judgment directly on the point, it may not be necessary for us to dilate on this aspect any further. For the reasons already recorded, the decision of the Apex Court in the case of Kunnathat Thathunni Moopil Nair etc (supra) will be of no avail to the petitioners-which has taken the view that the tax can be imposed only by law made by the Parliament or the State Legislature.

35. Reliance was also placed on the decisions of the Apex Court in the case of A.N. Parasuraman and others (supra); Kunj Behari Lal Butail and others (supra); and M/s. Devi Das Gopal Krishnan, etc. (supra) in support of the argument that the Legislature must authorize the Assessing Officer with adequate guidelines. Indeed, it is well established that determination of legislative policy and formulation of rule of conduct are essential legislative functions which cannot be delegated. Further, what is permissible is to leave it to the delegated Authority the task of implementing the object of the Act after Legislature lays down adequate guidelines for the exercise of power.

36. As has been noticed earlier, neither the Act made by the Parliament nor the Rules framed thereunder, explicitly or tacitly, provide for the mode of assessment and guidelines as to the course of action to be followed by the Assessing Officer on rejection of the claim of the assessee in the return. That matter is left to the judgment of the Assessing Officer who, in turn, has to complete the assessment on the basis of well established principles.

37. The background in which the two impugned circulars have been issued by the State Government has already been noted in the earlier part of the judgment. The Officer-in-charge, Directorate of Geology and Mining, issued a communication addressed to Director, Geology and Mining, State of M.P. on

24/8/1974 mentioning that the conversion factor of 1.6:1 should be reckoned for the purposes of assessment, for the reasons stated in the said communication. Lateron, another circular came to be issued by the State Government on 29/12/1977 under the signature of Director, Geology and Mining, State of M.P. mentioning that the Department, after due consideration, has found that, ordinarily, for manufacture of 1 tonne cement, 1.6 tonnes of limestone is consumed. Notably, option is given to the licensee that if it has any objection for applying notional factor, can cause to weigh the removed limestone for the purpose of computing Royalty amount.

38. The State Government by Circular dated 25/5/1987 issued direction to all the cement companies in the State, to ensure installation of weighbridge as per the specifications for ascertaining the correct quantity of removed limestone. In spite of insistence of the Department, most of the cement companies failed to do so. As a result, impugned Circular was issued under the signature of Under Secretary, Mineral Resource Department, Government of M.P. on 19/12/1992, addressed to all the Collectors in the State that while assessing the Returns filed by such cement companies, the assessment should be done by applying notional conversion factor of 1.6 tonne limestone for processed 1 tonne of cement. The second impugned circular issued under the signature of Under Secretary, Mineral Resource Department, Government of M.P. dated 11/8/1993 restates that in spite of insistence, most of the cement companies have failed to install Weighbridges. It further mentions that, it has also been noticed that Companies who have installed Weighbridges are not providing correct information. Inasmuch as, it is not possible to manufacture 1 tonne cement by consuming less than 1.6 tonne of limestone. As a result, comparative study was directed. The said Circular further predicates that computation of Royalty amount should be on the basis of actual quantity of limestone removed/consumed or 1.6 tonne per 1 tonne cement, "whichever is higher".

39. The first question is: whether the State Government has power to provide such mode of assessment. As aforesaid, neither the provisions of the Act nor the Rules framed thereunder expressly provide for the mode of assessment in case the Assessing Officer rejects the claim of the assessee being incorrect or untruthful. As per the said provisions, Returns are required to be filed before the State Authorities and the State Authorities are expected to analyze and undertake scrutiny of those Returns. In the event of incorrect or untrue information furnished in the Returns, the Assessing Officer, who is the employee of the State, is obliged to apply some tangible, just and reasonable yardstick for finalizing the assessment. To overcome this difficulty and keeping in mind the past experience of the Authorities that incorrect or untrue information was being furnished in the Returns, the Authorities had sought information from all the licencees, as well as, from other sources, on the basis of which it was decided to specify the conversion factor of 1.6:1 tonne. The conversion factor so determined, therefore, cannot be termed as unrealistic and arbitrary. We agree with the said view taken by the Tribunal in paragraph 14 of its decision

(reproduced in paragraph 9 above) and confirmed by the learned Single Judge in paragraph 58 of the impugned judgment. Further, the impugned circulars are only in the nature of administrative instructions issued in larger public interest to obviate any inconsistent approach by the officials of the Department concerned. Instructions contained in the impugned circulars, therefore, merely delineate the mode of assessment and nothing more. It does not impinge upon the subject of levy of Royalty or the quantum thereof, which is within the exclusive domain of the Parliament. No doubt, it was open to the Parliament to even legislate on the mode of assessment, but the Parliament having chosen not to do so, does not denude the State Authorities to apply notional conversion factor in a suitable case.

40. As is noticed earlier, even though the assessment and computation of Royalty is in respect of major mineral under the Central enactment, but the lease is granted by the State Government. Further, Returns are required to be filed before the State Government. The Returns are assessed by the authorized officers of the State Government. Thus understood, there can be no impediment for the State Government to issue administrative instructions in respect of mode of assessment on which no provision is found in the Act or the Rules-so long as the instructions are not derogatory to or inconsistent therewith. Even in absence of such instructions the Assessing Officer, during the scrutiny of Returns is competent nay, obliged to take recourse to notional conversion factor on the basis of past record and performance of the assessee.

41. Be that as it may, on a bare reading of the two circulars, it is evident that option is available to the assessee to produce record for substantiating its claim that the consumption of limestone has been lesser than the notional conversion factor of 1.6:1. Indeed, the Circular dated 11.8.93 does give an impression that even if the Assessee was able to substantiate of having utilized lesser quantity of limestone for manufacture of Cement/Clinker, there is no option but to compute the Royalty by applying notional conversion factor, "being higher".

42. It may be useful to advert to the exposition of the Apex Court in the case of Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, . In paragraph 49, the Court observed that :

"49. Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing authority. In that event, a question would arise as to how the deduction towards the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and services and the same may be deducted from the value of the works contract and that the said formula need not be uniform for all works contracts and may depend on the

nature of the works contract. We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of works contracts."

(emphasis supplied)

43. Here, it may be useful to reproduce paragraphs 2 and 3 of the decision of the Apex Court in the case of Guman Singh (supra). The same reads thus:

"2. Shri Mahabir Singh, learned counsel appearing for the petitioner, contended that the circular cannot run counter to Rules. In the Rules, assessment has to be made as per Rule 38 read with Rule 18(1)(b) and Schedule I. The assessment of more than 100% cannot be assessed by the authority. We find no force in the contention.

3. It is true that the Schedule regulates the payment at the rates of the royalty required to be paid. The circular indicates only uniform policy in the best judgment assessment. It is provided in clause 2(a) that in respect of the minerals from the mines carried for local use and the roads or the significant ways are not bitumens, the minimum weight should be assessed at 150% of similar vehicles carrying the maximum safe weight. Normally, the assessing officials can make assessment on the basis of the circular for more weight under the power vested in them. As it would indicate, it does not prescribe rate of payment of the royalty, but prescribes the mode of assessment of the total quantum of the minerals carried by the licensee under the Rules; but they failed to produce slips of the actual weighment from the mouth of the mines. On his failure to do so, an opportunity has been given; the weighment check was made at random. On the basis thereof, he assessed 150% as indicated in the circular. The method can be adopted only when the person has avoided payment of the royalty and avoidance of correct and true weighment of the minerals winnover and carried away by the licensee. Under these circumstances, we do not think that the circular runs counter to the statutory rules. It is true that the penalty by way of punishment has been provided in the Rules for contravention. The assessment is different from the prosecution for contravention. In making the

assessment, in particular when best judgment assessment is sought to be made, uniform instructions have been given in the above Circular by the Government to make the best judgment assessment so that there may not be any difference in the procedure to be adopted by different assessing authorities and uniform basis provided is always just, fair and reasonable so that the assessing authority will have a uniform and satisfied principle or procedure in that behalf."

(emphasis supplied)

44. No doubt, this case was in respect of minor mineral, but, the principle underlying is applicable to the case on hand. Indeed, notional conversion factor can be made applicable only in cases where the Assessing Officer is not satisfied with the disclosures made in the return filed by the Assessee, being incorrect or untrue and where the Assessee is unable to substantiate his claim. This decision is also an authority on the principle that the method of best judgment assessment can be adopted only when the person has avoided payment of royalty and avoidance of correct and true weighment of the minerals win over and carried away by him. Suffice it to observe that there is nothing wrong if the State were to issue administrative instructions in that behalf in larger public interest for the guidance of the officials of the concerned Department.

45. Be that as it may, the impugned Circular dated 11th August, 1993, will have to be held as excessive to the extent it directs the Assessing Officer to compute the liability on the basis of weighment record or conversion factor of 1.6, "whichever is higher". In cases, where the Licensee/Assessee is able to satisfy the Assessing Authority that the removal or consumption of Limestone is much below the notional conversion factor of 1.6, the question of invoking the notional conversion factor of 1.6 will not arise nor can be countenanced. Inasmuch as, the royalty is payable on the removed or consumed minerals. To that extent, the instructions contained in the aforesaid Circular cannot be sustained.

46. Having said this and considering the fact that in all these matters the concerned Assessing Officers have mechanically followed the instruction "whichever is higher", the appropriate course would be to relegate the petitioners/appellants before the Assessing Officer for re-examination of the entire matter afresh from the stage of filing of the returns. In the event, the Assessing Officer disapproves the claim of the assessee, may have to give notice to the assessee and give him opportunity to substantiate his claim. If the Assessing Officer is not satisfied with the explanation offered by the assessee; and the assessee fails to substantiate the claim of having utilized less than 1.6 Metric Tonnes of Limestone for production of 1 Metric Tonne of cement, will be free to apply the notional conversion factor of 1.6:1 as predicated in the impugned circulars.

47. Indeed, it will be open to the assessee to substantiate on the basis of record relating to its past performance that the conversion factor in the case of a given Unit is lesser than 1.6:1 because of special production protocol followed by the

assessee. To put it differently, the assessment will have to be done on case to case basis and only if the assessee fails to substantiate its claim in the Return filed before the Authorities or for that matter of lesser conversion factor to be applied because of special production protocol followed by it, the Assessing Officer will be free to apply the uniform notional conversion factor predicated in the impugned circulars.

48. We may mention that to obviate the complexity of the processes to finalize the assessment, it will be open to the State Government to consider the efficacy of the recent communication issued under the signature of Joint Secretary (Cement), Government of India, Ministry of Commerce & Industry Department of Industrial Policy and Promotion dated 20th March, 2002. It mentions that the result of studies conducted by the Central Government in respect of "Vikram Cement Plant" in the State of Madhya Pradesh has disclosed that the consumption factor is 1.43:1, which was arrived at after detailed scientific analysis carried out by the Council. The Government of India has recommended to the State Government to consider the possibility of adopting the said norm. Notably, this communication was placed on record before the Revisional Authority in the revision filed by the petitioners in the leading writ petition. However, the Tribunal and the Revisional Authority chose to follow the decision in the case of ACC Limited (the judgment of the learned Single Judge of this Court against which writ appeal is under consideration). On the other hand, if the State Government were to accept the said recommendation of the Government of India, then the entire controversy would come to an end as that conversion factor is broadly acceptable to all the petitioners/appellants. We, however, clarify that we may not be understood to have examined the justness of the position stated in the said communication dated 20th March, 2002. That is a matter for the State Government, to examine. We are not expressing any opinion either way on that matter. The State Government may consider the same expeditiously.

49. Since we are inclined to relegate the petitioners before the Assessing Authority for re-examining the entire matter afresh, in the light of the foregoing discussion, we do not wish to deal with other issues which may influence the said proceedings. We wish to reiterate that the Assessing Authority will have to examine the entire matter afresh on case to case basis-keeping in mind that it is not open to mechanically apply notional conversion factor even if the Assessee is able to substantiate the fact that he had in fact removed and consumed Limestone of lesser quantity. In other words, the instruction contained in the Circular dated 11th August, 1993, to apply the norm "whichever is higher", that part of the instruction stands quashed and set aside in terms of this judgment. That does not mean that in a given case, the Assessing Officer is not free to reject the claim of the Assessee and instead invoke best judgment assessment.

50. We make it clear that during the fresh assessment, it will be open to the Assessing Authority to consider whether the weighbridges installed by the concerned Unit are and were in conformity with the specifications in clause 13 of

Part-VII of the Lease Deed and also displayed the correct weights of removed Limestone. We are conscious of the fact that at this distance of time, it may be difficult for the Assessee to provide those details and equally difficult for the Assessing Authority to verify the position. However, if the Assessing Officer is not convinced with the stand of the Assessee and if the Assessee in spite of opportunity is unable to substantiate his claim or rebut the basis enunciated in the impugned circular regarding the notional conversion factor, it would be open to the Assessing Officer to invoke the notional conversion factor as specified by the State Government.

51. In case of assessees who have installed Beltometer, the same logic and approach ought to apply. Inasmuch as, if the Assessing Officer was to opine that the Beltometer had not recorded accurate weights or could not have done so and including because it was not installed as per the specifications or were to disapprove the returns submitted by the assessee on the finding that the claim set up by the assessee in the Returns is improbable and unacceptable, may call upon the assessee to substantiate the fact that the notional conversion factor to be applied in his case would be lesser than 1.6:1. If the assessee is unable to substantiate that position, the Assessing Officer could legitimately invoke the notional conversion factor specified in the impugned circulars.

52. As regards assessees who have neither installed Weighing Machines or Beltometer, such assessee may have to substantiate the claim made in the Returns, failing which the Assessing Officer would be justified in applying the notional conversion factor as specified by the State Government.

53. Reverting to the factual matrix in the leading writ petition, we have noted that the revision filed by the said petitioner against the decision of the Assessing Officer was heard by the Principal Secretary whereas the same has been decided by the Under Secretary. This is clearly against the principles of natural justice. Moreover, the decision of the Revisional Authority proceeds on the basis of the decision in the case of ACC Limited disregarding the direction contained in the order of the High Court passed in the case of the said petitioner dated 23rd November, 1993, whereby the respondent was directed to provide opportunity to the Company to produce evidence in support of its case that the actual quantity of Limestone required for manufacture of 1 tonne cement in their plant was not 1.6 tonne but 1.5 tonne or lesser. Therefore, it may be proper to set aside the earlier decision of the Assessing Officer and to relegate the matter before the Assessing Officer for re-consideration of the entire case in the light of the observations made hitherto.

54. The question as to whether the earlier decision in the case of ACC Limited in the earlier proceeding would operate as *res judicata* qua ACC Limited is concerned, even this will have to be answered against the Department. Inasmuch as, the decision of the Tribunal against ACC Limited, as upheld by the High Court, was because the said Company had not installed Weighbridges. However, after the decision went against the Company, the Company took steps

to install Weighbridges and informed the Authorities in that behalf. The decision in the previous proceedings by the Tribunal dated 10th April, 1992, and of the High Court dated 28th June, 1993, will govern the period anterior to the installation of Weighbridges by ACC. Notably, the period of assessment which is the subject matter of this proceeding, is different. Further, the assessment will have to be done on the basis of changed situation of installation of Weighbridges by the Company. Besides, the Company in the present proceedings has challenged the Circular issued after the decision of the High Court dated 11th August, 1993. The challenge to that Circular was not and could not have been made subject matter of earlier proceedings. Taking any view of the matter, therefore, ACC Limited cannot be non-suited on the ground of res judicata, as is contended.

55. The next question is: whether the decision in ACC Limited, which in turn affirms the finding recorded by the Tribunal in so far as the notional conversion factor of 1.6 being just and proper, can be treated as a binding precedent. Even this issue need not detain us. The fact that the State Government had specified the notional conversion factor of 1.6 does not mean that the Assessing Officer was not required to undertake scrutiny of the returns. He could not mechanically pass assessment order only on the basis of stated conversion factor irrespective of the substantiated factual position by the assessee that it had consumed lesser quantity of Limestone.

56. As aforesaid, unless the Assessing Officer were to record his opinion that the disclosures made by the Assessee in the return were incorrect or untrue, it is not open to the Assessing Officer to straightway apply the principle of best judgment assessment by invoking notional conversion factor. Suffice it to observe that the decision of the Tribunal, as has been confirmed by the High Court, therefore, will be of no avail. As a matter of fact, the said decision of the High Court is one of not interfering in exercise of writ jurisdiction and summarily dismissing the writ petition at admission stage. Further, the High Court was not called upon to examine the controversy answered in this judgment about the justness of the direction given to the Assessing Officer to complete the assessment by invoking notional conversion factor of 1.6 even if the Assessee was able to substantiate that the actual Limestone consumed was of lesser quantity than 1.6.

57. Taking over all view of the matter, therefore, we are inclined to dispose of all the writ petitions and writ appeals by quashing and setting aside the instruction contained in the Circular dated 11th August, 1993 ("whichever is higher"), to invoke notional conversion factor of 1.6 even in cases where the Assessee was able to substantiate the fact that the actual quantity of Limestone consumed was lesser than 1.6. Besides quashing that part of the instruction, we are inclined to quash and set aside the decision of the Tribunal and the Revisional Authority as also of the Assessing Authority in respect of every petitioner(s)/appellant(s) and including all consequential actions and demand notices based on the order of the Assessing Authority; and instead relegate them before the concerned Assessing

Authority to re-examine the issue afresh from the stage of filing of Returns in the light of the observations made hitherto. We also set aside the operative order of the learned Single Judge dismissing the writ petitions filed by the Appellants and instead grant same relief even to those writ petitioners by relegating them before the Assessing Officer.

58. Accordingly, all writ petitions and writ appeals are disposed of on the above terms.

59. All the MCCs are disposed of in terms of this order.

60. No order as to costs.