

(1965) 04 PAT CK 0002

In the Patna High Court

Case No : Misc. Judicial Case No's. 1608 to 1614 of 1964

Laddu Mal and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 26-04-1965

Acts Referred:

Bihar Minor Mineral Concession Rules, 1964 — Rule 2, 20, 25, 26, 27

Constitution of India, 1950 — Article 265, 366, 366(28)

Mineral Concession Rules, 1949 — Rule 4

Mines and Minerals (Development and Regulation) Act, 1957 — Section 10, 11, 12, 13, 13(1)

Mines and Minerals (Regulation and Development) Act, 1948 — Section 8

Citation : AIR 1965 Patna 491

Hon'ble Judges : H. Mahapatra, J;A.B.N. Sinha, J

Bench : Division Bench

Advocate : Raghunath Jha, Mahendra Kant Chaudhury and H.R. Das and B.C. De, in M.J.C. 1609/64, for the Appellant; Mahabir Prasad, Dinesh Charan and Jagat Narain Prasad Sinha, for the Respondent

Final Decision : Partly Allowed

Judgement

Mahapatra, J.—In all these cases, the petitioners are brick-layers. They manufacture bricks and sell them. They were served with notices from the Assistant Mining Officer, Purnea, calling upon them to pay certain amounts of money, as royalty for the period from 1958 to 1964, during which lime they were

"engaged in manufacture and sale of bricks by using sand, earth, clay etc. which constitute minor minerals..... for which no permit or mining lease has been obtained nor any royalty has been paid to Government".

Another notice from the same officer was also served on them to show cause why they should not be prosecuted under Rule 37 of the Bihar Minor Mineral (Concession Rules, 1964, as they were engaged in manufacture and sale of bricks by using sand, clay etc. which constituted minor minerals, for which no permit or mining lease had been obtained, nor any royalty had been paid to

Government. The Block Development Officer also gave a notice to each of them asking them to take permit for digging earth and taking sand for manufacture of bricks and to produce accounts in respect of such manufacture.

2. The petitioners challenged all these notices, mainly on the ground that what were being used by them for manufacture of bricks were not minor minerals, and, therefore, the Bihar Minor Mineral Concession Rules, 1964, were not applicable to them and that secondly, the Bihar State Government have no authority in law to impose any royalty in respect of minor minerals and, in any case, the Assistant Mining Officer was not authorised under the Act or Rules, to assess or collect royalty from the petitioners.

3. Article 366 of the Constitution of India defines taxation as follows:--

"28. "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly."

Such was the definition in item No. 17 of Section 311(2) of the Government of India Act, 1935.

"Royalty" is used in secondary sense to signify that part of the *reddendum* which is variable and depends upon the quantity of minerals taken out. It is a payment made to the land-owner by the lessee of the mine, in return of the privilege of working it. It is different from rent and is a kind of levy, in proportion to the minerals worked. Though its origin was riveted in the concept of royal prerogative and sovereignty, in the present context of things, it is an impost by the Government. The Supreme Court, in the case of *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, referred to and adopted a neat definition of what tax means, as given by Latham, C. J. of the High Court of Australia in *Matthews v. Chicory Marketing Board* 60 CLR 263 :

"A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered".

The essence of taxation is compulsion and it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law (see *Lower Mainland Dairy v. Crystal Dairy Ltd.* 1938 AC 168). The contribution payable by the employer under the Employees Insurance Act was held, in the case of *Anand Kumar Bindal Vs. Employees' State Insurance Corporation and Others*, to be of a nature of tax, because, it was a compulsory exaction, recoverable, in the event of non-payment, as it was an arrear of land revenue. Royalty on minerals is also so recoverable. On a reference to the State Annual Budget, we found that all collections made on account of royalty on mines and minerals, become a part of the consolidated fund. It is, admittedly, not a payment for services rendered and therefore not "fee". A demand of 12 annas, by way of toll, by Government for each passing and repassing of a motor vehicle over Frazer Bridge was held to be a tax in the case of *Mrs. K.K. Wadhvani Vs. State of Rajasthan and Another*, . It

is not the name of the tax but its real nature, its pith and substance which determine into what category a levy will fall (see AIR 1945 98 (Privy Council) .

Their Lordships of the Supreme Court observed in the case of *Sri Jagannath Ramanuj Das v. State of Orissa*. AIR 1054 SC 400 that there is no generic difference between a tax and a fee and both are different forms, in which the taxing power of a State manifests itself. The Constitution of India has made a distinction between a tax and a fee for legislative purposes and there are various entries in the three lists in Schedule VII about different forms of taxation, while there is an entry at the end of each of the lists about imposition of fees. In the above case, their Lordships of the Supreme Court, while considering the nature of the annual contribution payable by every Math or temple, under the Orissa Hindu Religions Endowments Act (Act IV of 1939, observed:

"But the essential thing in a tax is that the imposition is made for public purpose to meet the general expenses of the State without reference to any special benefit to be conferred upon the payers of the tax. The taxes collected are all merged in the general revenue of the State to be applied for general public purposes. Thus, tax is a common burden and the only return which the tax payer gets is the participation in the common benefits of the State. Fees, on the other hand, are payments primarily in the public interest but for some special service rendered or some special work done for the benefit of those from whom payments are demanded.

Thus, in fees there is always an element of "quid pro quo" which is absent in a tax. Two elements are thus essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly. But this by itself is not enough to make the imposition a fee, if the payments demanded for rendering of such services are not set apart or specifically appropriated for that purpose but are merged in the general revenue of the State to be spent for general public purposes."

4. Tested in the light of those observations, "royalty" on mines and minerals cannot be a fee but a levy of the nature of a tax. A tariff imposed on export of charcole was held by the Supreme Court, in the case of *Firm Gulam Hussain Haji Yakub and Sons Vs. State of Rajasthan*, to be a tax. Imposition of a condition for payment of 20 per cent of the price of liquor in the wholesale license granted to dealer in foreign liquor, was found by the Supreme Court in the case of *State of Kerala and Others Vs. P.J. Joseph*, as an impost not authorised by law in the *Cochin Abkari Act and Rules*.

5. I should like to refer to two other cases cited by learned Counsel, in this connection. In the case of *Brocklebank Limited v. The King* (1925) 1 KB 52 as a condition of license for the sale of a ship to an Italian Firm, a percentage of the sale price was asked for by the Ministry of shipping and was collected. There was a bill for refund of that amount. That condition was held to be an impost, though

the bill was refused, because such imposition was protected by the Indemnity Act. In the case of Attorney General v. Wilts United Dairies Ltd. 1922 WN 217 though the Food Controller had the power to regulate and control the milk supply he was held not to have any power to levy any money (2d.) on any subject, in that connection. because, that would be of the nature of a tax and not authorised by law. Royalty on minerals should be taken as an imposition of a tax or impost and would come under the definition given in Article 366 Clause (28) of the Constitution.

6. In Article 265. it has been provided that no tax shall be levied or collected except by authority of law. We have to find if there is such authority given to the State Government, to impose and demand royalty for mines and minerals. Learned Counsel's contention was that it was not there. He referred to item 51 of the Union List in the Seventh Schedule:

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

The corresponding item in List 11--State List, is item 23.

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

The area of legislative operation has been kept separate and distinct. Anything, beyond what is declared by Parliament to be expedient in the public interest to be kept under the control of the Union, will be under the legislative ambit of the State in regard to mines and mineral development in the State. The Mines and Minerals (Regulation and Development) Act, 1957 (Act 67 of 1967) is an enactment of the Parliament for the regulation of mines and the development of minerals under the control of the Union. In the definition in Section 3(a) "minerals" includes all minerals except mineral oils; (c) "mining lease" means a lease granted for the purpose of undertaking mining operations, and includes a sub-lease granted for such purposes; (d) "mining operations" means any operations undertaken for the purpose of winning any mineral; (e) "minor minerals" means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral. Section 2 declared that it was expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided. The definition of "minerals" in Section 3 and the provisions under Sections 4 to 13 make it clear that the Parliament gave control of all mines and minerals except mineral oil, to the Union Government.

It is only in Sections 14 and 15 that an exception was provided about the minor minerals. I quote below both the sections. They were very much under discussion at the Bar:

"14. The provisions of Sections 4 to 13 (inclusive) shall not apply to prospecting licenses and mining leases in respect of minor minerals

"15 (1). The State Government may, by notification in the official Gazette, make rules for regulating the grant of prospecting licenses and mining leases in respect of minor minerals and for purposes connected therewith.

(2) Until rules are made under Sub-section (1), any rules made by State Government regulating the grant of prospecting licenses and mining leases in respect of minor minerals which are in force immediately before the commencement of this Act shall continue in force".

Thus, while, according to item No. 54 of the Union List in Schedule 7, the Parliament gave the power to the Union Government to regulate all mines and development in that minerals (except oils) thereby leaving no area for legislation in that respect to the State Legislature, it clearly provided in Act 67 of 1957 that as far as minor minerals are concerned, the State Governments are authorised to make rules for regulation of the grant of prospecting licences and mining leases and for purposes connected therewith. It is only under this delegated authority that the State Government (not the State Legislature) can frame rules in connection with minor minerals. Having given this power to the State Government, the Parliament had to exclude, in Section 14, the operation of the provisions under Sections 4 to 18, in respect of minor minerals, as otherwise, there would have been conflict and overlapping. The Bihar Minor Mineral Concession Rules, 1964. were made u/s 15 and they came into force from the 18th April 1964. Before that rules for regulating the licences and leases in respect of minor minerals and other connected purposes, were in force in the State of Bihar, to which I shall refer later and those rules were operative till the 18th of April, 1964, under Sub-section (2) of Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957 (to be referred hereafter as the Act). I should here refer to item 50 in the State List in the Seventh Schedule which is as follows:--

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

The rates of royalty mentioned in the Bihar Minor Mineral Concession Rules 1964 (to be referred hereafter as the Rules) have not been prescribed by the State Legislature. In view of the limitations imposed by the Parliament under Act 67 of 1957, it is doubtful if any legislative competency has been left for the State Legislature to impose any tax on mineral rights. If the powers given to the State Government u/s 15 of the Act do not include the imposition of royalty, in respect of minor minerals, the impugned demand for payment of such royalty from the petitioners cannot be sustained.

7. Section 9 of the Act provides for payment of royalty by the holder of a mining lease in respect of any mineral removed by him. after the commencement of the Act, at a rate specified in the Second Schedule. The Central Government has

been empowered to enhance or reduce such rate, subject to certain restrictions. If Section 14 would not have excluded Section 9 from its operation, in respect of minor minerals, there would have been no doubt that the rate in the second Schedule would have applied to minor minerals also, and in that view, the rules, made u/s 15 by the State Government, would have been subject to that rate of royalty in item 14 of the Second Schedule. Section 13, which has also been excluded from application to minor minerals, provides that the Central Government may, by notification in the Official Gazette, make rules for regulating the grant of prospecting licences and mining leases in respect of minerals and for purposes connected therewith. In Sub-section (2) some particulars have been stated, without prejudice to the generality of the power given under Sub-section (1), about which rules may provide. None of those particulars refers to imposition of royalty. The last particular mentioned in that sub-section is any other matter which is to be, or may be prescribed under the Act. Since royalty has already been provided for in Section 9, it was not obviously necessary to include that in the particulars given in Sub-section (2) of Section 13 although that would be, in my view, a matter which would come within the rule making powers provided for in Sub-section (1). The power thereunder is wide enough to make rules for regulating the grant of prospecting licences and mineral leases and for all purposes connected therewith.

Learned Counsel for the petitioners wanted to emphasise upon the word "grant" in that sub-section and contended that the rule-making power is only confined to the matters connected with the grant of licences or leases, and not any levy in that respect. It is difficult to concede to this argument. Conditions of rent and royalty are integral parts of a lease, and they would necessarily come within the ambit of the powers given to make rules under Subsection (1). Besides, the last clause in this sub-section "and for purposes connected therewith" will also necessarily include the imposition of a condition for payment of royalty. That is a purpose connected with the grant of the mining lease. I do not find any item in the Union List in the Seventh Schedule corresponding to item 50 of the State List. If imposition of royalty shall be taken, as contended for the petitioners, as a matter outside the regulation of mines and mineral development, Section 9 of the Act will be outside the legislative competency of the Parliament. A reference, in this connection, to the Mineral Concession Rules, 1949, which were made u/s 5 of the Mines and Minerals (Regulation and Development) Act, 1948, will be helpful. That Act, in Section 5(1) authorised the Central Government to make rules for regulating the grant of mining leases..in respect of any mineral. Sub-section (2) of that section gave four particulars about which Rules could be made, without prejudice to the generality of the power given in Sub-section (1). Those particulars did not include "Royalty". Such Rules were to be laid before the Central Legislature, (Section 10 of that Act). Rules, then made provided in Rule 41 that every mining lease shall include a condition that the lessee shall pay "Royalty" on minerals despatched from the leased area at the rate specified in the first" Schedule to the Rules.

Thus it is clear that, the Legislature having not disapproved that rule when laid before it, grant of a mining lease included the power to prescribe the rate of "Royalty". Those rules were made in pursuance of the Act which was enacted under the legislative power of the Central Legislature given in item 36 of List 1, Seventh Schedule in the Government of India Act 1935, which was in the same terms, "Regulation of mines and mineral development to the extent...." There can hardly be any doubt that regulation of mines and mineral development would include the power to prescribe the levy on the minerals extracted or/and despatched. In exercise of that power, Parliament enacted Section 9, and in exercise of that power, Parliament could delegate the imposition of any royalty, in respect of some specified minerals, such as minor minerals, to the State Government.

8. Unless there be any compelling reason to think that the Parliament wanted to exclude the minor minerals from the imposition of any royalty whatsoever, it will not be proper to read Section 15 to mean such exclusion from the powers of the State Government. The scheme of the Act is clear that the Parliament gave power to the Union Government to modify the rates of royalty for all minerals except the minor minerals and for minor minerals, every thing was left to the State Government. The scope of rule-making power of the State Government, as provided in Section 15(1), is identical with that of the Central Government, as given in Section 13(1). If the view that I have taken about Section 13(1) is correct to the extent that it includes the power to prescribe the rates of royalty, the State Government will have the same power to make rules about royalty for minor minerals u/s 15(1). Admittedly, before 1957, when the Mines and Minerals (Regulation and Development) Act was enacted, the State Government had the power to prescribe rules for regulating the extraction of minor minerals (vide Section 8--The Mines and Minerals (Regulations and Development) Act 1948, Rule 1. Mineral Concession Rules 1949]. Royalty was being collected for minor minerals also. So was the position before the Constitution came in 1950. In that context, if the Act of 1957 did not specifically express anywhere the intention to abolish imposition of royalty in respect of minor minerals, it has to be taken that the Parliament look appraisal of the existing law and usage and delegated all powers in that connection to the State Government in respect of minor minerals u/s 15. If the Parliament would have wanted really to exclude minor minerals from payment of royalty, it would have so expressed in Section 9 which specifically provides for payment of royalties on all minerals. The exclusion of Sections 4 to 13 as mentioned in Section 14, in respect of minor minerals, appears to be for the sole purpose of conferring all such powers, as covered by those sections, on the State Government, in respect of minor minerals. I am, therefore, of the view that imposition of royalty is within the powers given to the State Government to make rules u/s 15 of that Act. Any rules in that respect made by the State Government that was (sic.) in force on the 28th of December, 1957, when the Mines and Minerals (Regulation and Development) Act came into force, continued to be operative till the Bihar Minor Mineral Concession Rules,

1964. were commenced on the 18th April, 1964.

9. Learned Counsel very strenuously pressed that brick-earth is not a mineral and will not be included within the scope of item 54 of the Union List or items 23 and 50 of the State List of the Seventh Schedule of the Constitution. The impugned notices stated the use of sand, earth and clay by the petitioners for manufacture of bricks. Both parties appear to take that to mean brick-earth. I have already quoted the definition of minor minerals as given in the Act of 1957. Brick earth was not included in the original definition of "minor minerals" in Section 3(8) of Mines and Minerals Act but subsequently notified by the Central Government on the 1st of June, 1958, to be a minor mineral. In the Bihar Rules of 1964 brick-earth has been defined as meaning any earth or clay used for the manufacture of bricks. Learned Counsel contended that such earth is found mostly from the surface and immediately below it. This, according to him, cannot be said to be mineral. The meaning of mineral as given in the Imperial Dictionary of English language is "any ingredient in the earth's crust; more specifically a body destitute of organisation, but with a definite chemical composition, and which naturally exists within the earth or its surface." In the Oxford Dictionary the meaning is given as "any of the species into which organic substance are classified" Brick earth or clay can easily come within the above meanings of the word "mineral". It is true that the primary meaning of the word "mine" standing alone, is an underground excavation made for the purpose of getting minerals. When we speak of mineral, our mind takes the association of the word "mine" and usually, what is brought out of the bowels of the earth is known as mineral. But from the dictionary meaning of the word "mineral" it cannot be confined to that alone. "Minerals" is, by far, a more general word than "mines". In Stroud's Judicial Dictionary (2nd Edition) brick-clay has been mentioned with other minerals, such as, China clay, coal and ironstone, granite, slate, stone etc. In several decisions referred to in that dictionary, in that connection, brick-clay has been held to be a mineral. The definition of "minor minerals" as given in the Act is artificial. It has only divided the minerals into two sections so that their development may be regulated separately by two authorities, Union and State Government. If brick-earth or brick-clay is a mineral and I do not find any reason why it should not be, the Parliament had legislative competency to enact about it.

10. Learned Counsel's next contention was that though "minerals", in an abstract sense, may include brick-earth or clay, it would not be so included in the expression "mines and minerals". The word "minerals" used in conjunction with the word "mines" should be taken to have a limited connotation, in the sense that it will only be referable to the underground working of a mine. Any inorganic substance that does not come out of working of a mine should not be, Learned Counsel continued, taken as a mineral in the limited sense. He referred to item No. 54 of the Union List in the Constitution and pointed out that mineral development has been mentioned there with the word "mines" and in that restricted sense, the legislative power of the Parliament will have to be determined, so far as the minerals are concerned. The definition of minerals as

including all minerals except mineral oil, given in Section 3(a) of the Act should also be taken, according to his argument in such restricted sense, or otherwise, that should be ultra vires of the Constitution.

He referred to some cases in his support, including the leading case of *Glasgow Corporation v. Farie*, (1888) 13 AC 657. The 18th section of the Waterworks Clauses Act, 1847, provided that "the undertaker shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them". The appellants purchased from the respondent a parcel of land for the purpose of erecting waterworks. Under the land, was a seam of valuable brick-clay. The respondent worked that clay in the adjoining land and when he reached the appellants' boundary, he claimed the right to work out the clay under the land purchased by the appellants. The House of Lords held, reversing the decision of the Court of Session, that brick-clay, forming the surface or subsoil of land, was not included in the reservation in the Act, and that the appellants were entitled to an interdict restraining the respondent from working the brick-clay under the land purchased by them. In the dissenting judgment of Lord Herschell, there are certain observations which would go to support the contention of learned Counsel in the present case, to some extent, for taking a narrower meaning of the word "minerals" when used with the word "mines". At one place, in that judgment, even Lord Herschell said that in the widest sense, the clay is mineral.

The final decision was grounded on the judgments of Lord Halsbury, L.C., Lord Watson, and Lord Macnaghten. Lord Chief Justice referred to the case of *Hext v. Gill* (1872) 7 Ch. A 699 and quoted Lord Justice Mellish saying that:

"the word "mines" combined with the more general word "minerals" does not restrict the meaning of the word "minerals" ;..... ..that a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning."

The last mentioned Lord at page 689 of the report observed:

"Now the word "minerals" undoubtedly may have a wider meaning than the word "mines". In its widest signification it probably means every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life. In some of the reported cases it seems to be laid down, or assumed, that to be a mineral a thing must be of commercial value, or workable at a profit. But it is difficult to see why commercial value should be a test, or why that which is a mineral when commercially valuable should cease to be a mineral when it cannot be worked at a profit. Be that as it may, it has been laid down that the word "minerals" when used in a legal document, or in an Act of Parliament, must be understood in its widest signification, unless there be something in the context or in the nature of the case to control its meaning. It has also been held that the use of the word "mines" in conjunction with

"minerals" does not of itself limit the meaning of the latter word. At the same time, it cannot be disputed that the term "minerals" is not unfrequently used in a narrower sense, and one, perhaps, etymologically more correct, as denoting the contents or products of mines. Nor indeed are the authorities all one way in preferring the wider meaning of the word "minerals". For example, in *Church v. Inclosure Commissioners* (1862) 11 CB (NS) 664, at p. 681 Williams, J., observed and apparently the rest of the Court agreed, that "minerals in the ordinary sense" meant minerals which could be worked in the ordinary way underground leaving the surface or crust unaffected"".

It does not follow from these observations that "minerals" will always be referable to working a mine and taken in narrow sense. In item No. 54 of the Union list in the Constitution the expression used is not really "mines and minerals; it includes two things (1) regulation of mines and (2) mineral development. Lord Macnaghten's own view was that the expression "mines and minerals" did not of itself limit the meaning of the latter word to an underground operation of mines. The expression in the 18th section of Waterworks Clauses Act that came for examination was "any mines of coal, ironstone, state, or other minerals." It was the "mine" that was the most important thing in that and the reservation in the statute was in regard to that--"the undertakers shall not be entitled to any mines of". It was to be seen, in that case, if brick-clay could be included in that reservation, in the sense that it was a mine like that of coal, ironstone or state. The whole purpose of the reservation in that statute was not to give any right in the underground mines to undertakers while their waterworks, constructed on the surface, would not be affected by the operation of such mines reserved to the right of the vendor. Brick-clay or common clay which constituted the subsoil of the greater part of the land of the country, which never could, in any locality, be caught by underground working, but, under all circumstances was only to be won by tearing up and destroying the surface over the entire extent of the working was considered in that case as not like a mine of coal or ironstone and accordingly, not included in the reservation. The case is not an authority, for the proposition that brick-earth or brickclay is not mineral.

11. Two other cases: (1872) 7 Ch. A 699 and *Jersey (Earl) v. Neath Poor Law Union Guardians* (1899) 22 QBD 555 have been referred, on the meaning of "mines and minerals", in many later cases learned Counsel also referred to them before us. They do not give us more than the case of (1888) 13 AC 657 which I have discussed above, in the former case (1872) 7 Ch. A 699 china clay was held as included in a reservation which spoke of "mines and minerals", yet the surface right of the tenant was not allowed to be interfered with under the right thus reserved. Similar was the position in the latter case.

12. In the case of *Todd, Birston and Co. v. North Eastern Ry. Co.* (1903) 1 KB 603 which arose out of arbitration between the two parties, all the land, the subject of arbitration, contained, immediately under the surface or vegetable soil, an extensive bed of clay or common brick earth which extended to a

considerable depth. Clay of the same character existed immediately under the surface over a large area of land in the district. The clay was worked by open work and not by mining. The North Eastern Railway Company required the land for the purpose of widening their railway. The claimants contended that the brick-clay lying under the land which the company took was a mineral within the meaning of Section 77 of the Railways Clauses Consolidation Act, 1846, and, therefore, they were entitled to dig and take the clay away up to the boundary of the land already belonging to the Railway Company, and they further claimed to be paid for all the clay lying under the land sought to be taken by the Railway Company. The plea of the Company was that brick-clay was not a mineral within the meaning of the Act and the claimants were not entitled to any payment, in that respect, for the brick-clay that lay under the land to be taken, as was necessary for the lateral support of the railway already constructed. The question for the opinion of the Court was whether the brick-clay in that case was a mineral within the meaning of Section 77 of the Railway Clauses Consolidation Act. The claimants were the appellants before the King's Bench Division. Section 77 said:

"The company shall not be entitled to any mines of coal, ironstone, state, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

On the facts of that case, Lord Chancellor Earl of Halsbury very briefly referred to the case of (1888) AC 667 and said that that decision covered the case. Chief Justice Lord Alverstone compendiously interpreted the earlier case to have laid down that where there had been a sale of land under the Land Clauses Act, incorporating either the Railway Clauses Act or the Waterworks Clauses Act, if the substance which was attempted to be worked as a mineral was found to be the ordinary surface of the soil, that substance was not a mineral for the purpose of any one of those Acts. If a person has sold the land to another, he cannot possibly seek to take away the brick-clay from the very surface of it. On the particular facts and circumstances of all the aforesaid cases, brick-clay was excluded from the expression "mines of coal, ironstone, state or other minerals" as contained in the particular statute. That does not destroy the generic meaning of "minerals" which will include an inorganic, substance, such as, brick-earth or clay.

13. Another line of cases was also referred by learned Counsel, in which the discussion is whether a substance that may be got for manufacturing or mercantile purposes, if not worked for commercial profit, will be called a mineral. Some of the cases took the view that abstractly speaking, a substance will come within the species of minerals but if not worked for profit or for manufacturing purposes, it will not be included in the category of minerals as used in any deed

or statute. But the later view has settled the point, saying that neither of those two elements will be relevant. In the instant case that point has no bearing and it is not necessary to discuss those cases.

14. Learned Counsel pleaded that "minerals" should be understood in the sense in which it is generally taken in common parlance in the commercial world and by the public. If this loose meaning is accepted, then there will be many inorganic substances, such as, morrum, sand, chalk, pebbles which are not ordinarily described by the common man as a mineral, shall have to be kept out. I do not see any justification for this, learned Counsel referred to the case of the Caledonian Rly. Co. v. Glenboig Union Fireclay Co. 1911 AC 290. There a fireclay Company gave a notice to the Railway Company of their intention to proceed to work out the fireclay in the lands underneath or adjacent to appellants' railway near Glenboig Station. The Railway Company had taken those lands u/s 70 of the Railways Clauses Consolidation Act. The respondents used the fireclay for manufacture of sanitary wares, fireclay bricks and the like. The average thickness of the clay seam was between 4ft and 9ft. A question arose whether fireclay was a mineral within the meaning of Section 70 of the Railways Clauses Consolidation Act

The respondents contended that both in commercial and scientific parlance, fireclay was and had always been described as a mineral. The geological and mineralogical experts, who were examined as witnesses, agreed that fireclay was composed entirely of mineral substance, but they differed upon the question whether it could scientifically be described as a mineral. Some of them thought that the term "mineral" should be confined to homogeneous substance having a definite physical structure and a definite chemical composition and within that definition, fireclay did not fall and, therefore, it was not a mineral in the stricter sense. Fireclay was generally regarded as a mineral by mining engineers and other business men. The Lord Ordinary held, at the first instance, that the fireclay in dispute did not form part of the subsoil and, therefore, was a mineral. He observed that there was some authority for the view that certain strata might pass to the Compulsory purchaser if they lay on the surface, but might be reserved to the seller if they occurred at some depth below it. His view was upheld by the First Division of the Court of Session and also in the House of Lords. As I find, that case was decided with reference to the depth under subsoil at which the seam of fireclay lay and not with reference to how the ordinary man or the commercial or business community, took fireclay to be a mineral or not.

15. In the case of Hugh Symington v. Caledonian Rly. Co. 1912 AC 87 again Sections 70 and 71 of the Railways Clauses Consolidation Act came for interpretation with reference to the working of freestone rock. The House of Lords held whether a substance is a mineral within the meaning of those sections of the Act was a question of fact. They observed that freestone rock was a substance of exceptional character and recognised in the mining and commercial world and by railway companies and by all proprietors of and through whose land

railway line was constructed. This observation, however, had no material bearing upon the basis of that decision.

16. Another case relied upon by learned Counsel was (1862) 142 ER 956. The Inclosure Commission was prohibited from acquiring the land at the instance of one Mr. Church who claimed that his assent should have been taken inasmuch as he had a right to work brick-earth in the land in question. The reservation included the expression "mines, mineral stone and other substrata" Brick-earth was held as not included in that reservation obviously for the reason that it lay on the surface and in the subsoil. The prohibition against the Inclosure Commission was, therefore, finally upheld.

17. If I can say so with respect, none of the above cases, on which learned Counsel greatly stressed, afford any assistance to us in the present case. The two relevant items in the two Lists in the Seventh Schedule of the Constitution do not appear to have kept any mineral out of the legislative competency of the Legislatures. It cannot be argued that at the time when the Constitution was made in 1950, brick-earth was not considered to be a mineral in the legislative field. In the Mineral Concession Rules, 1949, the definition of minor minerals included brick-earth. The Constitution makers should be taken to have been aware of that legal concept, when they mentioned "minerals" in the Lists in the Seventh Schedule. If there would have been a consistent judicial interpretation in other countries that brick-earth should not be taken as a mineral, in any Act or deed, (I do not see of say that there was any such interpretation) yet the inclusion of brick-earth in the definition of minor minerals in a Statutory Rule in our country should raise an inference that our Constitution makers and legislators understood and used the expression in that meaning. My conclusion is that brick-earth is a mineral and its inclusion in the definition of "minor minerals" as given in that Act of 1957 (Mines and Minerals (Regulation and Development) Act) is not ultra vires the Constitution, Seventh Schedule.

18. Learned Counsel's next contention was that the Assistant Mining Officer who gave the notice demanding the payment of royalty was not authorised to do so. The Bihar Minor Mineral Concession Rules, 1964, defines competent officer in Section (Rule ?) 2(c). Assistant Mining Officers in the State were authorised to perform the duties of the competent officer by the State Government on the 6th of September, 1964, by a notification. The impugned notices were issued thereafter. Further, it was argued that the rules do not provide a procedure for assessment of royalty and no opportunity was given to the petitioners to object to the quantum or calculation of the demand. Rule 20 provides for charge of royalty according to the Second Schedule and the Schedule states the rate of royalty for brick-earth to be Rs. 1.50 per 1,000 bricks. The demand in the impugned notices was on this basis. The mining lessee is required by the rules to maintain accounts and registers and submit the same to the authorities (see Rule 30-A and H). The impugned notices also stated that objections, if any, could be filed by the petitioners before the Assistant Mining Officer by a certain date

mentioned therein. None of the petitioners availed themselves of that. Thus, I do not find any substance in the contention raised on behalf of the petitioners.

19. The impugned notices asked for payment of royalty for the period from 1958 to 1964. The Rules came into effect from the 18th of April, 1964. Prior to that, no rate of royalty had been prescribed for the brick-earth in any of the rules that held the field like the Mining Concessions (Bihar) Rules 1945. Rule 20 of the 1964 Rules provided that when a lease is granted or renewed royalty shall be charged at the rates specified in Schedule 2. None of the petitioners took any lease. Their use of brick earth was not under any lease. Rule 37 provides penalty for unauthorised extraction and removal of minor minerals, and according to that, notices were given to the petitioners as to why they should not be prosecuted. The rates of royalty given in Schedule 2 cannot have any retrospective application, nor can they be enforced against a person, even after the rules came into force, who did not take a mining lease under the rules. A new rule has now been made for imposing royalty even in cases where somebody unauthorisedly extracts minor minerals without taking a lease; but that would not apply against the petitioners for the prior period, for which the demand of royalty was made in the impugned notices. In that view, the notices by the Assistant Mining Officer to the petitioners asking for payment of royalty were without any authority of law, and those notices have, therefore, to be quashed and the opposite parties are to be prohibited from taking any action on or following those notices. The notices by the Assistant Mining Officer calling upon the petitioners to show cause why they should not be prosecuted under Rule 37 of the Bihar Minor Mineral Concession Rules 1964, have no legal infirmity because Rule 37 will be applicable to the unauthorised users of brick-earth, after the 18th of April, 1964.

20. The notices issued by the Block Development Officer asking the petitioners to take quarry permit were also challenged. "Quarry" has been defined in the rules as meaning any area declared as such by the Government and set apart for working away minerals. The lands from which the petitioners used brick-earth have not been declared or set apart by the Government and, therefore, they cannot be said to be "quarry", "Quarry-permit", according to the definition, means a permit granted under Chapter IV of the Rules, to extract and remove any minor mineral in specified quantities from the specified areas. Rule 25 deals with grant of quarrying permits in areas other than those in reserved or protected forests. It lays down that, on an application made to him, the Competent Officer may grant a quarrying permit to any person to extract and remove from any specified land within the limits of his jurisdiction any mineral not exceeding one lakh cubic feet in quantity under any one permit, on payment of royalty at the rates specified in Schedule II. The manner in which application for such permit is to be made is given in rule 26. One of the requirements is to give the description of the lands from which the minor mineral is to be extracted and removed. It is with reference to such description that a quarry permit is to be given. Rule 25 has only excluded reserved and protected forests.

Thus, if a person wants to extract and remove any minor mineral from any other land, he has to take a quarry permit according to Rules 25 to 27. Quarry permits in reserved and protected forest area are dealt with under rule 28 with which we are not concerned. The difference between a mining lease and a quarry permit is obvious. Rule 27 lays down that every quarrying permit granted under Rule 25 shall contain a condition that the depth of the pit below the surface shall not ordinarily exceed ten feet. and that for digging pits beyond ten feet, the permit-holder shall obtain the approval of the Competent Officer. A quarry permit, it appears to me, can be in relation to any land which may or may not come under the definition of "quarry". The words "any specified land" in Rule 25 are with reference to the description of the land which the permit-holder is required to state in his application. I cannot find any justification to challenge the notices calling upon the petitioners to take quarry permit for extracting brick-earth from the lands which may not have been declared and set apart by the Government as a quarry.

21. The result is that in all these applications, the notices issued by the Assistant Mining Officer calling upon the petitioners to pay royalty for the period 1958 to 1964, on account of brick-earth at the rate of Rs. 1.50. per 1,000 bricks are quashed and the opposite parties are directed not to take any action on and following those notices. In the circumstances of the case, parties will bear their own costs.

A.B.N. Sinha, J.

22. I agree