

(2011) 10 RAJ CK 0002

In the Rajasthan High Court

Case No : Civil Writ Petition No. 4345 of 2009

Madhyabharat Phosphate Pvt. Ltd. (M/s.)

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 12-10-2011

Acts Referred:

Constitution of India, 1950 — Article 245(1), 246, 248(2), 252(1), 254
Mines Act, 1952 — Section 19, 57, 57(e), 57(k), 57(m)
Mines and Minerals (Development and Regulation) Act, 1957 — Section 13, 13(1),
13(2)(i), 13(2)(qq), 13(2)(r)
Water (Prevention and Control of Pollution) Cess Act, 1977 — Section 3

Citation : (2012) 1 RLW 538

Hon'ble Judges : Arun Mishra, C.J.;Alok Sharma, J

Bench : Division Bench

Advocate : M.S. Singhvi, assisted by Akhilesh Rajpurohit, Bhuvnesh Sharma, Vineet Dave, D.D. Thanvi, B.M. Bohra, Ramit Mehta, Dinesh Mehta, P.K. Bohra, Arvind Shrimali and Manish Dadhich, for the Appellant; M.R. Singhvi, R.L. Jangid, AAG, Anand Purohit, AAG, K.K. Bissa, Govt. Counsel, R.K. Soni, AGC and Kuldeep Mathur, for the Respondent

Judgement

Arun Mishra, C.J.—These writ petitions have been filed questioning the validity of Chapter VII of the Rajasthan Finance Act, 2008, hereinafter for the sake of brevity referred-to as "the Finance Act, 2008", providing for levy of cess on mineral rights and, therefore, they are being disposed-of together by this common order. Petitioners are holders of mining leases granted for extraction of major minerals or re-using major minerals. They have been called upon to pay the environment and health cess imposed u/s 16 of the Rajasthan Finance Act. In exercise of the powers conferred by Section 19 of the Finance Act, 2008, the State Government has framed the rules called Rajasthan Environment and Health Cess Rules, 2008, hereinafter for the sake of brevity referred-to as "the Rules of 2008". Rule 13 of the Rules of 2008 provides for the head under which cess collected u/s 16 of the Finance Act, 2008 is to be credited. Rule 14 of the Rules of 2008 provides for the allocation of the funds for the implementation of

environmental and health projects in mining areas of the various parts of the State. Petitioners have submitted that the field is occupied by the provisions of the Mines and Minerals (Development and Regulation) Act, 1957, hereinafter for the sake of brevity referred to as "MMDR Act, 1957" enacted by the Central Government. Thus, the field is very much occupied as per the declaration made in MMDR Act, 1957 and the State Government had no competence to enact the Finance Act, 2008 and the Rules framed thereunder. It is submitted that the MMDR Act, 1957 occupies the whole field. Section 2 of MMDR Act, 1957 deals with the declaration as to the expediency of the Union control. Section 9 of MMDR Act, 1957 provides for realization of Royalty in respect of mining leases. Section 13 deals with the power of the Central Government to make rules in respect of major minerals. It is submitted that u/s 13(i) of MMDR Act, 1957, the fixing and collection of fees for (reconnaissance permits prospecting licenses or mining leases) surface rent, security deposit, fines, other fees or charges and the time within which and the manner in which the dead rent or royalty shall be payable, have been provided. It is provided in Section 13(2)(qq) the manner in which rehabilitation of flora and other vegetation, such as trees, shrubs and the like, destroyed by reason of any prospecting or mining operations shall be made good by the person holding the prospecting licence or mining lease. Section 13(2) (r) deals with any other matter which is to be or may be prescribed under the said Act. As per Section 15(1) of MMDR Act, 1957, the State Govt. has the power to make the rules in respect of minor minerals, which is specifically provided in Section 15(1A)(g) & (i). Section 18 deals with the mineral development, Sec. 25 provides for recovery of certain sums as arrears of land revenue and II Schedule to MMDR Act, 1957 provides rates of royalty.

2. It is also submitted by the petitioners that Rule 3(j) of the Mineral Conservation and Development Rules, 1988, hereinafter for the sake of brevity referred-to as "the Rules of 1988, takes care of "environment" and "environmental pollution", which have the same meanings, assigned respectively to these terms in Environment (Protection) Act, 1986, hereinafter for the sake of brevity referred-to as "the Act of 1986". Other rules also provide details as to financial assurance, protection of environment against pollution etc.

3. Reference has also been made to the Mines Act, 1952, hereinafter for the sake of brevity referred-to as "the Act of 1952", which also provides for health and safety of the workers working in the Mines, as such, the field of health is occupied by the Central Legislation. It is also submitted that the Mines Rules, 1955, hereinafter for the sake of brevity referred-to as "the Rules of 1955", provides for health & sanitation, First Aid & Medical appliances, leave with wages and overtime, welfare amenities, fees of medical practitioner for occupational diseases & mode of payment of fees etc. Hence, the State had no competence to enact the provisions contained in Chapter VII of the Finance Act, 2008. It is also submitted that the Central Government had enacted the Act of 1986, the Water (Prevention and Control of Pollution) Act, 1974, hereinafter for the sake of brevity referred-to as "the Act of 1974" and the Air (Prevention and Control of

Pollution) Act, 1981, hereinafter for the sake of brevity referred-to as "the Act of 1981", hence the State Government is not competent to enact the impugned provisions in the Finance Act, 2008. Thus, it is submitted that Chapter VII of the Finance Act, 2008 providing for levy of environment and health cess in so far as it concerns major mineral, is ultravires the powers of the State legislature. The petitioners have submitted that the parliament in exercise of powers conferred by Entry 54 & 55 of List I has enacted the Act of 1951 and MMDR Act, 1957 and the Rules framed thereunder; the power with respect to major mineral vests in the Central Government; the State legislature has power to legislate in respect of minor mineral only; thus, the Chapter VII of the Finance Act, 2008 is ultravires; the cess in question is in the nature of fee; Section 17 of the Finance Act, 2008 provides for utilization of cess for protection of environment and health and maintenance of ecological balance especially in mining areas of the State. In accordance with the Rules of 2008, the cess is to be credited under the head environment and health fee and the amount is to be utilized for the purpose of Environment and Health Care Fund, which is to be spent for implementation of Environment and Health Projects in Mining areas; the cess in question is in the nature of fee and fee on the major mineral is squarely covered by the provisions contained in Section 13 of MMDR Act, 1957 and the Act of 1952 and the Rules of 1988, It is also submitted that in case, it is held that the cess is not a fee but a tax, then too, the field is covered by MMDR Act, 1957 and power to levy tax on the mineral rights in respect of major minerals is vested in the parliament. The expression "royalty" shall include in itself tax, the term "taxation" has been defined in Article 366(28) of the Constitution of India. The term "royalty" in the plain sense is a tax but it would fall within the expression "impost" and hence, it would fall within the expression "tax".

4. Reliance has been placed on the decision of the Hon'ble Supreme Court in India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, . It is submitted that the decision is rendered by the seven judges bench of the Apex Court holding the royalty to be a tax. It is submitted that the decision rendered in the The State of West Bengal Vs. Kesoram Industries Ltd. and Others, is not the correct one. The decision has been referred to the larger Bench vide order dated 31.3.2011 in Civil Appeal No. 4056-4064/1999 Mineral Area Development Authority vs. Steel Authority of India. It is submitted that the case at hand is covered by the decision rendered in India Cement (supra).

5. So far as the rock phosphate matters are concerned, additional grounds have been urged challenging the validity of the notification dated 23.1.2009 on the ground that the notification is a subordinate legislation and seeks to levy environment and health cess with retrospective effect i.e. with effect from 1.4.2008 and to the extent of the retrospective effect, the notification is illegal and bad in law. In Keso Ram (supra), the cess which was imposed was not the cess on royalty but it was a case of imposition of tax on land. Thus, any observation made regarding India Cement (supra) or royalty not being tax, are beyond the scope of consideration and, therefore, the decision of Keso Ram

(supra) cannot be said to be a binding precedent.

6. The respondents in their return have submitted that earlier writ petition was filed, which has been dismissed by this Court; there is no violation of any of the legal or fundamental rights of the petitioners. The State is competent to levy cess on mineral rights. Under Entry 50 of List II of Schedule VII appended to the Constitution of India, the State is competent to levy environment and health cess on mineral rights. Under the Finance Act, 2008, the Rules of 2008 have been framed. There is no repugnancy in the Central Acts and the Finance Act, 2008 enacted by the State Government and the cess is sought to be recovered for the matter connected with the environment and health issues. For the environmental upgradation and restoration of ecology in the mining areas, the State has legislative competence to enact the provisions.

7. Additional submissions have also been made by the respondents; it has been submitted that earlier, the validity of the Rajasthan Finance Act, 2006 and Rajasthan Land Tax Rules, 2006 were questioned by filing various writ petitions being DBCWP No. 1451/2007 "GKW Limited vs. State and ors. & other bunch of writ petitions. Those writ petitions were decided by the Division Bench on 22.2.2008 and it was held that the imposition of the land tax was within the legislative competence of the State Government. The respondents contend that the validity of the Finance Act, 2008 has been questioned on the same grounds, as such, this petition is also liable to be dismissed.

8. Mr. M.S. Singhvi, learned Sr. Advocate, assisted by S/Shri Akhilesh Rajpurohit, Bhuvnesh Sharma, Vineet Dave and S/Shri D.D. Thanvi, B.M. Bohra, Ramit Mehta, Dinesh Mehta, P.K. Bohra, Arvind Shrimali, Manish Dadhich, appearing on behalf of the petitioners, have submitted that the provisions of Chapter VII of the Finance Act, 2008 are ultravires alongwith the Rules of 2008 enacted for the purpose of collection of environment and health cess. Counsel submitted that Article 265 of the Constitution of India deals with the taxes not to be imposed except by authority of law. Article 246 deals with the subject matter of laws made by Parliament and by the Legislatures of States. As per Article 254, in case, there is inconsistency in the law made by the Parliament and the law of the State Legislature, the Central Legislation has to prevail. Reference has been made to Entry Nos. 54, 55, 86, 96 and 97 of List I of Schedule-VII of the Constitution of India. Learned counsel have also referred to Entry Nos. 6, 49, 50 and 66 of List II and Entry Nos. 17A, 17B, 23 and 47 of the List III. Counsel have also relied upon the declaration as to the expediency of Union control made in Section 2 of MMDR Act, 1957. Thus, the field is stated to be fully occupied by the Central Legislation with respect to the declaration made under MMDR Act, 1957. The State is not delegated the power to enact the law as to major minerals. Section 9 of MMDR Act, 1957 deals with royalty. Senior Counsel has also relied upon the various provisions of ss. 13(1), 13(2)(i), 13(2)(qq) & 13(2)(r) to contend that the field is occupied by the Central Legislation and the State could have made rules only in respect of the minor minerals as has been provided in

Section 15(1) of MMDR Act, 1957. Section 18 of MMDR Act, 1957 deals with the mineral development and Section 25 thereof deals with the recovery of certain sums as arrears of land revenue. Thus, the State could not have enacted the provisions under Chapter VII of the Finance Act, 2008. Learned Senior Counsel has also referred to the rules called the Rules of 1988 dealing with the "environment" and "environmental pollution" in the field of the mineral conservation and development. He has also relied upon the definition of "environment" and "environmental pollution" under Rule 3(j). Reference has also been made to Rule 23F of the Rules of 1988, which provides for financial assurance and other provisions in Chapter V of the Rule of 1988 relating to "environment". Thus, it was submitted that environmental field is occupied by the aforesaid legislation and consequently, the State has no power to levy environment and health cess. Learned Sr. Counsel has also relied upon the provisions contained in Chapter V of the Act of 1952 providing for health and safety of the workers working in the Mines. He has also relied upon Chapter VI dealing with Hours and Limitation of Employment and Chapter VII dealing with Leave with Wages of the Act of 1952 to contend that the field is fully occupied by the Central Legislature. Reliance has also been placed on the provisions of the Rules of 1955. Chapter V of the Rules of 1955 deals with the Health and Sanitation Provisions. Chapter VI deals with First-Aid and Medical Appliances, Chapter VIII provides for Leave with Wages and Overtime and Chapter IX deals with the Welfare Amenities. Rule 82 of the Rules of 1955 has also been referred providing for Fees of medical practitioner in case of occupational diseases & Rule 83 prescribes the Mode of payment of fees etc. Reliance has also been placed on the provisions of the Act of 1986 as also the Act of 1974 and the Act of 1981. The precise submission of the learned Senior Counsel is that the State has no power to levy environmental or health cess in so far as it concerns with the major minerals, the same amounts to levy of excise on major minerals, which is impermissible. The Acts and the Rules, referred-to above, are stated to take care of environmental and health aspects, thus, the State was incompetent to enact the provision with respect to environment and health cess; the State could have enacted if at all the provision with respect to minor mineral only. The cess levied is in the nature of fee and the fee on the major mineral is covered by the provisions of Section 13 of MMDR Act, 1957 as also the Act of 1952 and the Rules of 1988. It was also submitted that in case, the cess is a tax, then also, the field is covered by MMDR Act, 1957, other Central enactments and the Rules framed thereunder. It has also been held wrongly that a typographical error crept in the judgment of the India Cement; the correctness of Keso Ram (supra) has been referred to the larger Bench by the Apex Court, as such, it cannot be relied upon; the law has not been correctly laid down in Keso Ram (supra); the decision of the larger Bench is binding, as the case of India Cement was decided by the Seven Judge Bench. Mr. M.S. Singhvi, learned Senior Counsel has also submitted that the notification dt. 23.1.2009 with respect to rock phosphate matters suffers with illegality as it seeks to enhance levy of health cess with retrospective effect i.e. 1.4.2008. The notification is subordinate legislation, thus, it could not have

been given retrospective effect in the absence of main legislation providing for the same. Counsel also submitted that the question whether the Royalty was a tax, was not a question referred in Keso Ram. The writ petitions be allowed in the light of the decision in India Cement (supra).

9. S/Shri M.R. Singhvi, R.L. Jangid AAG, Anand Purohit AAG, K.K. Bissa Govt. Counsel, R.K. Soni AGC & Kuldeep Mathur appearing on behalf of the respondents, have submitted that there is no repugnancy of the impugned provisions with any Central Acts & the Rules and it is within the competence of the State to enact the provisions contained in Chapter VII of the Finance Act, 2008. They have relied upon the Entry 50 of the List II of Schedule VII of the Constitution of India. The field is not occupied by any of the Central Act or the rules framed thereunder. They have different field to operate. There is no invalidity in the notification, which has been issued.

10. Before dilating upon the submissions, it would be appropriate to refer to the provisions contained in the Finance Act, 2008. It is appropriate to consider the aims & objects with which the provisions contained in Chapter VII of the Act of 2008 have been enacted. It is provided under Article 48A of the Constitution that it is the duty of the State to promote welfare of the people & to protect & improve the environment. The damage to environment is unavoidable by mining operations, therefore, the beneficiaries from the mining operations should contribute for its protection. In addition to environmental degradation, public health is also adversely affected by mining activities. Hence it was considered expedient that environment and health cess be levied on mineral rights and the proceeds of the cess be dedicated to the protection and improvement of environment and health and maintenance of ecological balance, specially in those areas of State where mineral are being mined. The aims and objects are quoted below:

VI. ENVIRONMENT AND HEALTH CESS:

Directive principals of State Policy in our Constitution require that the State should endeavor to promote welfare of people not only by securing a just and equitable social order but also by improving public health. Article 48A casts duty on the State to protect and improve the environment.

Environment is what we owe to our future generations. Every human being in the universe is duty bound to preserve it and pass on it to the next generation at least in the condition in which we inherited from our ancestors. Despite efforts, damage to the environment is unavoidable in mining operations. Therefore, the beneficiaries from mining operations should contribute for its protection.

In addition to environmental degradation, public health is also get affected by mining activities. Minerals are nature's gift to the people. Therefore their use should enhance welfare of the people. It should not result in accumulations of wealth in the hands of the few. People who gain much from the minerals should contribute, not much, but at least a small amount for those who suffer from the

activities of winning minerals.

In view of the duty of the State to protect and improve the environment and health of the people and corresponding social and moral duty of those who are benefited by these natural resources, it was considered expedient that a environment and health cess be levied on mineral rights and the proceeds of the cess be dedicated to the protection and improvement of environment and health and maintenance of ecological balance, specially in those areas of State where mineral are being mined.

The Bill seeks to achieve the aforesaid objectives.

Hence the Bill.

Sd/-

11. Section 15 of the Finance Act, 2008 defines the "cess" which means environment and health cess levied under Chapter VII. The word "dispatched" includes removal for captive use; and "mineral right" means rights conferred on a lessee under a mining lease granted or renewed for mining operation in relation to minerals as defined in MMDR Act, 1957. Section 16 deals with the levy and collection of cess on mineral rights, which provides for levy of environment and health cess on mineral rights in respect of such minerals and at such rates not exceeding rupees five hundred each tonne of mineral dispatched, as may be notified by the State Government from time to time, Section 17 deals with the application of proceeds of cess. The proceeds of the cess levied under Chapter VII shall first be credited to the Consolidated Fund of the State and may, if the State Legislature by appropriation made by law in this behalf so provides, be utilized for protection of environment and health and maintenance of ecological balance specially in mining areas of the State. Section 18 of the Chapter VII deals with the exemption and Section 19 deals with the power to make rules. For carrying out the purposes of this Chapter, the rules can be framed with respect to the assessment and collection of the cess levied under Chapter VII, the manner in which accounts relating to the proceeds of cess shall be maintained and the maner in which the proceeds of the cess may be applied at the object specified in Section 17. The rules may also provide penalty for contravention of the rules.

12. Section 16 of the Finance Act, 2008 is quoted below:

16. Levy and collection of cess on mineral rights.- Subject to any limitation imposed by Parliament by law relating to mineral development, there shall be levied and collected, in such manner as may be prescribed, an environment and health cess on mineral rights in respect of such minerals and at such rates, not exceeding rupees five hundred each tonne of mineral dispatched, as may be notified by the State Government from time to time.

13. The Rules of 2008 have been framed under the Finance Act of 2008, which were notified on 23.6.2008. Rule 4 of the Rules of 2008 provides for payment of cess and Rule 5 provides for Returns. Rule 7 deals with assessment of cess and

Rule 8 dealing with the notice of demand etc. Rule 10 provides for refund of cess and Rule 13 provides for deposit of cess and receipt heads of deposit of cess collected under Sec. 16 of the Finance Act, 2008. Rule 15 provides for constitution of Rajasthan Environment and Health Administrative Board & the process thereof. Rule 16 deals with the powers and functions of the Board, which is quoted below:

16. Powers and functions of the Board.- REHAB shall exercise the following powers and discharge the following functions:

(i) Formulation of general policies and procedures to facilitate management of the Fund.

(ii) Long term plan to mitigate the environmental and health issues in mining areas to be undertaken by developing synergy with Government/Private Institutions, preferably in PPP mode.

(iii) Finalization of projects and recommendation to the State Government for allocation of Fund.

(iv) Specific campaign to achieve immediate goals for problem areas identified in collaboration-with Mines, Health and Forest Department.

(v) Monitoring mechanism for time bound implementation of projects and guidance to ensure optimum utilization of financial as well as in house expertise.

(vi) Authorized disbursement of funds to implementing agencies, consultants or any other persons/institutions appointed for implementing the objectives of the Fund pursuant to the operational policies and procedures.

(vii) Act as a repository for information based on extensive evaluation of projects.

(viii) Creation of strategic alliances/associations with authors of best practices around the world so as to ensure the best possible measures for environmental upgradation and restoration of ecology in mining areas.

(ix) Undertake feasibility studies, advanced scientific studies, analytical report based on multi agency input, surveys, simulation studies and creation of a shelf of projects for future application of the Fund.

(x) Recommendation to the State Govt. for grants, subsidy and other capital support to achieve the objectives of Fund in the mining areas.

(xi) Recommendation to the State Government for securitizing future receipts into the Fund for leveraging loans to be taken for environment and health projects.

(xii) May assign, the discharge of the day to day affairs to a Committee under the chairmanship of Principal Secretary, Finance, representatives from Mines and Forest Department, not below the rank of Secretary and one nonofficial REHAB member, as the member of the Executive Committee.

(xiii) The Board may also assign such other functions to the Committee as are not inconsistent with the provisions of the Act.

(xiv) Financial and performance audit every year and making them public by the Board's own web site.

14. The various entries, which have been referred-to, are Entries No. 54, 55, 86, 96 and 97 in List I of Schedule VII of the Constitution of India, which are quoted below:

54. 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.

55. Regulation of labour and safety in mines and oilfields.

86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

96. Fees in respect of any of the matters in this List, but not including fees taken in any court.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

15. Entry 54 of List-I deals with the 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. Entry 55 deals with the regulation of labour and safety in mines and oilfields. Entry 86 deals with taxes on the capital value of the assets, except as provided thereunder. Entry 96 deals with the fees in respect of any of the matters in this List. Entry 97 deals with any other matter not enumerated in List II or List III i.e. State Legislature and Concurrent List respectively, including any tax not mentioned in either of those Lists.

16. The Entries of the List II of the State List contained in Schedule VII, which are referred for our consideration, are Entries No. 6, 23, 49, 50 and 66. They are quoted below:

6. Public health and sanitation; hospitals and dispensaries.

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.

49. Taxes on lands and buildings.

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

66. Fees in respect of any of the matters in this List, but not including fees taken in any court.

17. Entry 6 in List-II deals with the public health and sanitation. Entry 23 of the

List II deals with the regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union. Entry 49 provides the power of the State in respect of the taxes on lands and buildings. Entry 50 provides taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development. Entry 66 deals with the fees in respect of any of the matters in List II, but not including fees taken in any court.

18. List III, which is a Concurrent List, the Central and the State Government both can legislate with respect to matters enumerated, subject to certain riders. Entry 17A deals with the forests. Entry 17B deals with the protection of wild animals and birds. Entry 23 deals with the social security and social insurance; employment and unemployment. Entry 47 provides power to levy fees in respect of any of the matters in the List III, but not including fees taken in any court. We may mention at the outset that we are not at all impressed by the submission raised by Mr. M.S. Singhvi, learned Sr. Counsel, appearing on behalf of the petitioners that decision in *Keso Ram (supra)* is per incuriam and the law has not been correctly laid down in the same and in view of the reference made to the larger Bench, it cannot be relied upon and the decision in *India Cement* prevails.

19. We are of the considered opinion that in view of the question involved in the present matter, the aforesaid question is not germane. The decision in *India Cement (supra)* is of no help to the petitioners as to the question involved in the present matter. Even otherwise, decision in *Kesoram (supra)* cannot be said to be per incuriam.

20. It was submitted on behalf of the petitioners that Sec. 2 of MMDR Act, 1957 contains a declaration that it is 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 provided in the Act. Thus, the field is occupied by MMDR Act, 1957 and it was not within the competence of the State Govt. to enact the provisions contained in Chapter VII of the Finance Act, 2008.

21. The word "regulation" has to be read in the context in which it has been used. The word "regulation" has been defined as a rule or order prescribed for management or governance as laid down by the Apex Court in *Saurashtra Cement and Chemical Inds. and Another Vs. Union of India (UOI) and Others*.

22. In our opinion, the declaration contemplated under Entry 54 of Seventh Schedule is confined to the control and regulation of mines and development of the mineral to the extent provided in the said Act. The words used in Section 2 of MMDR Act, 1957 are that declaration may be made with respect to regulation of mines and the development of minerals to the extent hereinafter referred. The word "hereinafter" means as provided in MMDR Act, 1957.

23. Our endeavour is to find out whether by the provisions of MMDR Act, 1957, which have been relied upon by Mr. M.S. Singhvi, learned Sr. Counsel, the State is divested with the power to impose and levy environment and health cess on

mineral rights?

24. Considering the aforesaid purport of the "regulation", now we come to the provisions of Section 9 of MMDR Act, 1957, which provides for Royalty in respect of mining leases to be paid by the holder of the mining lease. Section 13(1) of MMDR Act, 1957, which has been referred to by Mr. Singhvi, learned Senior Counsel, deals with the power of the Central Government to make rules in respect of minerals regulating the grant of reconnaissance permits, prospecting licences and mining leases in respect of minerals and for purposes connected therewith. Section 13(2)(i) provides for fixing and collection of fees for reconnaissance permits, prospecting licences or mining leases, surface rent, security deposit, fines, other fees or charges and the time within which and the manner in which the dead rent or royalty shall be payable. Section 13(2)(qq) provides the manner in which rehabilitation of flora and other vegetation, such as trees, shrubs and the like destroyed by reason of prospecting or mining operations made in the same area.

25. Section 13(2)(i), 13(2)(qq) and 13(2)(r) are quoted below:

13(2)(i)- the fixing and collection of fees for (reconnaissance permits, prospecting licences or mining leases), surface rent, security deposit, fines, other fees or charges and the time within which and the manner in which the dead rent or royalty shall be payable;

13(2)(qq)- the manner in which rehabilitation of flora and other vegetation; such as trees, shrubs and the like destroyed by reason of any prospecting or mining operations shall be made in the same area or in any other area selected by the Central government (whether by way of reimbursement of the cost of rehabilitation or otherwise) by the person holding the prospecting licence or mining lease;

13(2)(r)- any other matter which is to be, or may be, prescribed under this Act.

26. Section 13(1) of MMDR Act, 1957 deals with the power of the Central Government to make rules in respect of minerals regulating the grant of reconnaissance permits, prospecting licences and mining leases in respect of minerals and for purposes connected therewith. Section 13(2) (i) provides for fixing and collection of fees for reconnaissance permits, prospecting licences or mining leases, surface rent, security deposit, fines, other fees or charges and the time within which and the manner in which the dead rent or royalty shall be payable. The collection of fees which is provided under Sec. 13(2)(i) is with respect to reconnaissance permits, prospecting licences or mining leases, surface rent, security deposit, fines etc. Sec. 13(2)(i), as quoted above, does not cover the field with respect to levy of cess for the purpose of environment and health, which is not a fee, thus, it is not covered under Sec. 13(2)(i). Sec. 13(2)(qq) has been relied upon, which provides the manner in which rehabilitation of flora and other vegetation, such as trees, shrubs and the like destroyed by reason of prospecting or mining operations, shall be made. The provision has the reference

and is confined to the rehabilitation of flora and other vegetation, such as trees, shrubs and the like destroyed by reason of prospecting or mining operations. Thus, Section 13(2) (qq) does not take care of ill effects on environmental degradation & health, except trees, shrubs and the like destroyed by reason of any prospecting or mining operations, which may adversely affect the environment and also the health of the inhabitants in several other modes and they are not covered under the provisions of Sec. 13(2)(qq) nor it is any other matter which is to be or may be prescribed under MMDR Act, 1957 as envisaged u/s 13(2)(r).

27. Section 15(1) deals with the power of the State Government to make rules in respect of minor minerals in the field of regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith. Section 15(1A) of MMDR Act, 1957 contains a provision that such rules as may be framed by Section 15(1), may provide for all or any of the following matters, namely:-

- a. the person by whom and the manner in which, applications for quarry leases, mining leases or other mineral concessions may be made and the fees to be paid therefor;
- b. the time within which, and the form in which, acknowledgement of the receipt of any such applications may be sent;
- c. the matters which may be considered where applications in respect of the same land are received within the same day;
- d. the terms on which, and the conditions subject to which and the authority by which quarry leases, mining leases or other mineral concessions may be granted or renewed;
- e. the procedure for obtaining quarry leases, mining leases or other mineral concessions;
- f. the facilities to be afforded by holders of quarry leases, mining leases or other mineral concessions to persons deputed by the Government for the purpose of undertaking research or training in matters relating to mining operations;
- g. the fixing and collection of rent, royalty, fees, dead rent, fines or other charges and the time within which and the manner in which these shall be payable;
- h. the manner in which the rights or third parties may be protected (whether by way of payment or compensation or otherwise) in case where any such party is prejudicially affected by reason of any prospecting or mining operations;
- i. the manner in which the rehabilitation of flora and other vegetation, such as trees, shrubs and the like destroyed by reasons of any quarrying or mining operations shall be made in the same area or in any other area selected by the State Government (whether by way of reimbursement of the cost of rehabilitation or otherwise) by the person holding the quarrying or mining lease;

- j. the manner in which and the conditions subject to which, a quarry lease, mining lease or other mineral concessions may be transferred;
- k. the construction, maintenance and use of roads, power transmission lines, tramways, railways, aerial ropeways, pipelines and the making of passage for water for mining purposes or any land comprised in a quarry or mining lease or other mineral concessions;
- l. the form of registers to be maintained under this Act;
- m. the reports and statements to be submitted by holders of quarry or mining leases or other mineral concessions and the authority to which such reports and statements shall be submitted;
- n. the period within which and the manner in which and the authority to which applications for revision of any order passed by any authority under these rules may be made, the fees to be paid therefore, and the powers of the revisional authority; and
- o. any other matter which is to be, or may be prescribed.

28. In our opinion, the power under Entry 50 of List II of Seventh Schedule of the Constitution of India is not at all affected by Section 15 or Sec. 13 of MMDR Act, 1957. Section 15(1A)(g) provides the fixing and collection of rent, royalty, fees, dead rent, fines or other charges and the time within which and the manner in which these shall be payable. Section 15(1A)(i) provides the manner in which the rehabilitation of flora and other vegetation, such as trees, shrubs and the like destroyed by reasons of any quarrying or mining operations shall be made but the provision is confined with respect to the State to frame the rules in case of mining of minor minerals for providing rehabilitation of flora and other vegetation destroyed by reason of any quarrying or mining operations. It does not deal with the effect on general environment and health of the inhabitants. The provisions of Section 15(1A)(g) and 15 (1A)(i) of MMDR Act, 1957, which are pressed into service by the petitioners, in our opinion, does not impinge upon the State's power to levy the environment and health cess on mineral rights as contemplated under Entry 50 of List II of Seventh Schedule of the Constitution of India.

29. The State is competent to levy environment and health cess on mineral rights under Entry 50 of List II of the Constitution of India. Entry 6 of List II of Seventh Schedule enables the State in the field of public health and sanitation. Entry 23 enables the State to provide regulation of mines and mineral development subject to the provisions of List I. Under List III - Concurrent List under Entry 23, it is open to the State with respect to Social security and social insurance, employment and unemployment. Entry 17A of List III enables the State to legislate in the field of forests. The entries have to be given wide amplitude subject to certain riders in the field of legislation.

30. The provisions of Section 18 of MMDR Act, 1957 which deals with Mineral

development or Section 25 thereof providing for recovery of certain arrears as arrears of land revenue, the provision does not come in the way of the State to enact the provisions contained in Chapter VII of the Finance Act, 2008. The State is not recovering any sum as arrears of land revenue by imposition of environment and health cess, the amount is not recoverable u/s 25 of MMDR Act, 1957 as arrears of land revenue.

31. Rule 3(j) of the Rules of 1988 has been pressed into service by Mr. M.S. Singhvi, learned Senior Counsel, appearing on behalf of the petitioners, which defines "environment" and "environmental pollution" and have the same meanings, assigned respectively to these terms in Environment Protection Act, 1986. Merely by the import of said definitions from the environment (Protection) Act, 1986, the matter cannot be said to be covered within the ken of the Rules of 1988. Rule 23F of the Rules of 1988 has been heavily relied upon by Mr. Singhvi, which provides for financial assurance to be given by every lease holder. Rule 23F of the Rules of 1988 is quoted below:

23F. Financial assurance.- (1) Financial assurance, has to be furnished by every leaseholder. The amount of financial assurance shall be rupees twenty five thousand for A category mines and rupees fifteen thousand for B category mines, per hectare of the mining lease area put to use for mining and allied activities. However, the minimum amount of financial assurance to be furnished in any of the forms referred to in clause (2) shall be rupees two lakh for A category mines and rupees one lakh for B category mines.

Provided that a leaseholder shall be required to enhance the amount of financial assurance with the increase in the area of mining and allied activities.

Provided further that where a leaseholder undertakes reclamation and rehabilitation measures as part of the progressive closure of mine, the amount so spent shall be reckoned as sum of the financial assurance already spent by the leaseholder and the total amount of financial assurance, to be furnished by the lessee, shall be reduced to that extent;

(2) The financial assurance shall be submitted in one of the following forms to Regional Controller of Mines or the officer authorized by the State Government in this behalf, as the case may be, or any amendment to it;

(a) Letter of Credit from any Scheduled Bank;

(b) Performance or surety bond;

(c) Trust fund build up through annual contributions from the revenue generated by mine and based on expected amount sum required for abandonment of mine; or

(d) Any other form of security or any other guarantees acceptable to the authority;

(3) The lessee shall submit the financial assurance to the Regional Controller of

Mines or the officer authorized by the State Government in this behalf, as the case may be, before executing the mining lease deeds. In case of an existing mining lease, the lessee shall submit the financial assurance along with the progressive mine closure plan.

(4) Release of financial assurance shall be effective upon the notice given by the lessee for the satisfactory compliance of the provisions contained in the mine closure plan and certified by the Regional Controller of Mines or the officer authorised by the State Government in this behalf, as the case may be.

(5) If the Regional Controller of Mines or the officer authorised by the State Government in this behalf, has reasonable grounds for believing that the protective, reclamation and rehabilitation measures as envisaged in the approved mine closure plan in respect of which financial assurance was given has not been or will not be carried out in accordance with the mine closure plan, either fully or partially, the Regional Controller of mines or the officer authorised by the State Government in this behalf, shall give the lessee a written notice of his intention to issue the orders for forfeiting the sum assured atleast thirty days prior to the date of the order to be issued.

(6) Within thirty days of the receipt of notice referred to in sub-rule (5), if no satisfactory reply has been received in writing from the lessee, the Regional Controller of Mines or the officer authorised by the State Government in this behalf as the case may be, shall pass an order for forfeiting the surety amount and a copy of such order shall be endorsed to the concerned State Government.

(7) Upon the issuance of order by the Regional Controller of Mines or the officer authorised by the State Government in this behalf, as the case may be, the concerned State Government may realise any letter of credit or bond or any other surety, guarantee provided or obtained as financial assurance for the purpose of performance of protective, reclamation, rehabilitation measures and shall carry out those measures, or appoint an agent to do so.

32. A bare reading of the aforesaid provision makes it clear that financial assurance is related to reclamation and rehabilitation measures as part of the progressive closure of mine & the amount so spent shall be reckoned as a sum of the financial assurance. The financial assurance which is covered under the second proviso to Rule 23F of the Rules of 1988 is relating to progressive closure of mine and reclamation and rehabilitation to be done as envisaged under the provisions of MMDR Act, 1957. Such financial assurance does not cover the field of environment and health cess on mineral rights as provided in the aims and objects and Section 16 of the Finance Act, 2008 and the rules framed thereunder.

33. Chapter V of the Rules of 1988 deals with the environment. Rule 31 deals with the precautions for the protection of environment and control of pollution while conducting prospecting, mining, beneficiation or metallurgical operations in the area. Rule 32 deals with the removal and utilisation of top soil of the mining area. Rule 33 deals with the storage of overburden, waste rock, etc. Rule 34

deals with the reclamation and rehabilitation of lands. Rule 35 deals with the precaution against ground vibrations. Rule 36 deals with the control of surface subsidence. Rule 37 deals with the precautions to be taken against air pollution. Rule 38 deals with the discharge of toxic liquid. Rule 39 deals with the precaution against noise to be undertaken by the lessee. Rule 40 deals with the permissible limits and standards of all pollutants to be those notified by the concerned authorities under the provisions of the relevant statutes from time to time. Rule 41 deals with the restoration of flora and a duty is cast upon the licence/lease holder to carry out prospecting or mining operations in such a manner so as to cause least damage to the flora of the area under licence/lease. The aforesaid provisions relating to the operational safeguards when the mining activity is undertaken, cannot cover the field envisaged under the Finance Act, 2008 and the rules framed thereunder.

34. Mr. M.S. Singhvi, learned Sr. Counsel, has relied upon the provisions of the Act of 1952, particularly Chapter V as to health and safety. Section 19 of the Act of 1952 provides facility of drinking water. Section 20 provides conservancy facilities. Section 21 deals with availability of medical appliances in aid to the workers during the mining operations such as first aid boxes or cupboards etc. Section 24 deals with the power of Government to appoint court of enquiry in cases of accidents. Section 25 deals with the notice of certain diseases, which enjoins a duty upon the owner, agent or manager to inform about the disease contracted by any person, employed in a mine, notified by the Central Government in the manner prescribed to the concerned authorities, Section 26 deals with the power to direct investigation of causes of disease. The provisions contained in Chapter VI of the Act of 1952 provides for hours and limitation of employment. Chapter VII provides leave with wages. u/s 57 contained in Chapter VIII, the Central Government is empowered to make regulations consistent with the Act for the purposes enumerated therein. Section 57(k) provides for the safety of the persons employed in a mine and Section 57(m) provides for the safety of the roads and working places in mines etc. as provided therein. Section 57(n) provides for the inspection of workings and sealed off fire-areas in a mine and for restriction of workings in the vicinity of the sea or any lake or river etc. Section 57(o) provides for ventilation of the mines. Section 57(q) provides for regulating the use of machinery in mines. Section 57(r) provides for proper lighting of mines. Section 57(y) provides for protection from injury. The aforesaid provisions of the Act of 1952 also do not cover the field as envisaged by the Finance Act, 2008.

35. u/s 58 of the Act of 1952, the Central Government has power to frame the rules. Section 58(d) provides for requiring the maintenance in mines of suitable rooms for women, children etc. Section 57(e) provides for requiring the maintenance at or near pitheads of bathing places equipped with shower baths and of locker rooms for the use of men employed in mines. Section 58(f) prescribes the standards of sanitation to be maintained and the scale of latrine and urinal accommodation. Section 58(ff) provides for supply and maintenance

of medical appliances and comforts. Section 58(q) provides for requiring the employment of welfare officer, in case five hundred or more persons are ordinarily employed. Section 58(r) requires establishment of rescue stations for specified mines. Section 58(s) provides for the management of rescue stations. Section 58(sa) provides for the standards of physical fitness and other qualifications of the persons constituting rescue brigades. Section 58(w) provides for any matter, not provided-for by this Act. The matter dealt within legislation under challenge cannot be said to be covered within the ambit of the aforesaid provisions of the Act of 1952. The endeavour made by Mr. M.S. Singhvi, learned Sr. Counsel, while making the aforesaid submission, is fruitless.

36. Submission has been raised by Mr. M.S. Singhvi, learned Sr. Counsel, that the provisions contained in Chapter VII of the Finance Act, 2008 levying environment and health cess in so far as it concerns major mineral, Is ultravires the powers of the State, Legislature. He has submitted that Entry 54 of the List I of Seventh Schedule provides for the jurisdiction of the Parliament alone to legislate on the subject of Regulation of Mines and Mineral Development to the extent to which such regulation and development under the control of the Union is declared by the Parliament by law to be expedient in the public interest, Entry 55 provides for the jurisdiction of the Parliament to legislate on Regulation of labour and safety in mines & oilfields. Under Entry 54, the Parliament has enacted MMDR Act, 1957 and the Act of 1952 and the Mines Rules 1955 and the Mines Rescue Rules, 1985. Under MMDR Act, 1957, the Rules of 1988 have been framed. u/s 15 of MMDR Act, 1957, the Central Government has delegated the powers on the State Government with respect to minor minerals. u/s 18, it is the duty of the Central Government to take all such steps as may be necessary for the conservation and systematic development of minerals in India.

37. The Apex Court in *Keso Ram* (supra) has held that while reading the three Lists, List I has priority over Lists III and II, and List III has priority over List II. However, still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I. The Apex Court has laid down in para 31(6) thus:

31(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the Legislature which enacted it, an incidental encroaching in the field assigned to another Legislature is to be ignored. While reading the three Lists, List I has priority over Lists III and II, and List III has priority over List II. However, still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter with in List II though it may incidentally affect any item in List I.

38. We find no repugnancy in the provisions of the Finance Act, 2008 and the rules framed thereunder with the aforesaid legislation, as the Apex Court has laid

down that in spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and if a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State Law will be *ultra vires* and shall have to give way to the Union law. Where there are three Lists containing a large number of entries, there is bound to be some overlapping among them but the Entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non-obstante clause "subject to" as enumerated in Article 245(1) of the Constitution does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step, (i) Whether it is still possible to effect reconciliation between two Entries so as to avoid conflict and overlapping? (ii) in which Entry, the impugned legislation falls? The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the Legislature to the legislation is immaterial. Regard must be had to the enactment as a whole to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded. That interpretation would be preferred which would avoid conflict between two legislations. The Court shall have regard to the object and the scheme of the tax law under consideration and the purpose for which the cess is levied, collected and intended to be used. The Courts shall make endeavour to search where the impact of the cess falls. The subject matter of levy is not to be confused with the method and manner of assessment or realisation and (iii) Having determined the field of legislation wherein the impugned legislation falls by applying doctrine of pith and substance, can an incidental trenching upon another field of legislation" be ignored? Once it is so determined that the impugned legislation substantially falls within the power expressly conferred upon the Legislature which enacted it, an incidental encroaching in the field assigned to another Legislature is to be ignored. While laying down so, the Apex Court has relied upon the decisions in *Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others*, , *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, , AIR 1945 98 (Privy Council) , and 1942 F.C.R. 90 (Federal Court) .

39. The Apex Court has further laid down that every effort should be made as far as possible to reconcile the seeming conflict between the provisions of the State Legislation and the Union Legislation. In view of what has been laid down in *Keso Ram (supra)*, we are of the considered opinion that it cannot be said that the cess in issue is a case of levy on extraction of minerals. It cannot also be said that the cess levied is a royalty covered under MMDR Act, 1957. The cess impugned is an impost, which is levied on the mineral rights. It is a cess within the purview of Entry 50 of List II of Seventh Schedule as per Section 16 of the Finance Act, 2008 for the purpose of environment and health as clarified in aims

and objects of the Finance Act, 2008 and the rules framed thereunder. We are of the considered opinion that merely by making certain provisions for the safety of the persons employed in mines with respect to financial security etc., it cannot be said that the field is covered by the declaration made in Section 2 and the provisions contained in MMDR Act, 1957.

40. The fields of taxation in List I are with respect to the power of the Union and with respect to the power of the State in List II and there can be no overriding in the field of taxation. The Apex Court has clarified in *Kesoram* (supra) that there can be an overlapping in fact, as the methodology or mechanism adopted for assessment and quantification can be similar for taxes relating to different fields of taxation but there can be no overlapping in law i.e. even though the mechanism adopted for assessment is similar but the subject matter of two taxes by reference to the two Lists can be different and, therefore, the two taxes cannot be said to be overlapping. The Apex Court relied upon the *Hoechst Pharmaceuticals Ltd's* case and *Governor General in Council's* case (supra). Thus, merely because the health and environment cess is measured by the quantity of the mineral removed, it cannot be said that it is tax on mineral or because of the measure adopted, it ceases to be a cess on mineral rights. The Apex Court has laid down in the case of *Kesoram* (supra) in para 31(1) thus:

31.(1) the various entries in the three Lists are not "powers" of legislation but "fields" of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.

41. Merely by the fact that certain provisions have been made with respect to protection of environment and health of the workers and a reclamation of the area in the Act of 1957 and which have been pressed into service by Mr. M.S. Singhvi, learned Sr. Counsel, it cannot be said that the State is denuded of its power to enact the provisions contained in Chapter VII of the Finance Act, 2008. Considering the provisions of List II of Seventh Schedule & Art, 265 of the Constitution, the Apex Court in *Kesoram* (supra) has laid down that The legislative power to tax by reference to Entries in List II is plenary unless the entry itself makes the field "subject to" any other entry or abstracts the field by any limitations imposable and permissible. A tax or fee levied by State with the object of augmenting its finances and in reasonable limits does not ipso facto trench upon regulation, development or control of the subject, the power to legislate whereof has been conferred on the parliament. It is different, if the tax or fee sought to be levied, by State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental. Thus, in our opinion, the State could not be denied its plenary power to tax mineral rights when it wants to augment its finances in reasonable limits. Thus, levy of cess on environment and health purpose does not trench upon regulation, development or control of the

subject, under MMDR Act, 1957 enacted by the Parliament. In case, the Parliament has chosen not to legislate and failed to say something explicit, it is not for the court to venture into an enquiry to find and hold that what tax would hamper mineral development. It has been held in *Kesoram* (supra) that Entries 52, 53 and 54 in List I are not heads of taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of the Union having enacted laws by reference to Entries 52, 53, 54 in List I. It has been further laid down that it is for the Parliament to legislate and impose limitations on the State's otherwise plenary power to levy taxes on mineral rights or taxes on lands (including mineral bearing lands) by reference to Entries 50 and 49 in List II and lay down the limitations on the State's power, if it chooses to do so, and also to define the extent and sweep of such limitations. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Union, it is not unconstitutional. Thus, the regulation of mines and minerals vesting in the Union Govt. in MMDR Act, 1957 & the Act of 1952 and Rules of 1955 and Rules of 1988 relied upon by Mr. M.S. Singhvi, learned Senior Counsel, appearing on behalf of the petitioners, could not have come in the way of the State to enact the impugned provision in question, as it does not either impinge upon regulation of mines and mineral development or upon control of industry by the Union. The State is augmenting its revenue resources for the purpose of environment and health. The power to tax the mineral rights is with the State. The power to curtail the exercise of such power is with the Union. This is the result achieved by homogeneous reading of Entry 50 in List II and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional.

42. We find no limitation having been imposed in any of the Central Legislation in the field of taxation of mineral rights, which has been enacted by the State Government in Chapter VII of the Finance Act, 2008. The power of the State to regulate the mines and mineral development under Entries 23, 52 and 54 of List II of Seventh Schedule of the Constitution, is subject to the provisions of List I. The power of the State to enact legislation with respect to mineral rights is plenary. Any Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming subject matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament. In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the declaration. To what extent, the declaration made in the List I, Entries 52 and 54, would go, is for the Parliament to determine and

this must be commensurate with public interest. Considering the declaration made by the Parliament under MMDR Act, 1957, we are of the considered opinion that there is no denial to the State to enact the provision like Section 16 of the Finance Act, 2008 and the Rules of 2008. In spite of the declaration made with reference to Entries 52 and 54, the State is free to act in the field left out from the declaration. The field of cess on mineral rights, which has been occupied by Section 16 of the Finance Act, 2008, is left out from the declaration under MMDR Act, 1957 and is thus not covered under MMDR Act, 1957. Thus, there is no transgression upon the powers of the Central Legislature.

43. An effort was made by Mr. M.S. Singhvi, learned Senior Counsel, appearing on behalf of the petitioners, to give wide meaning to the provisions of MMDR Act, 1957. The Apex Court in *Kesoram* (supra) has cautioned and dealt with the submission and it has been laid down that in spite of an inclination on the part of the Courts to be liberal in assigning a wide meaning to the scope of the qualifying words used in Entry 54 of the List I and Sec. 2 of MMDR Act, 1957, the boundaries of limitation exist and the expanse of these provisions cannot be so stretched as to strike at the State Legislations Which are adequately accommodated within the field of an Entry in List II which too shall have to be meaningfully and liberally construed. The effect of the declaration u/s. 2 of MMDR Act, 1957 is that no State Legislature shall have power to enact any legislation touching (i) the regulation of mines, (ii) the development of minerals, and (iii) to the extent provided by Act No. 67 of 1957 but this does not exclude the power to tax mineral right under Entry 50 of List II.

44. Upon careful reading of the provisions of MMDR Act, 1957, the field to tax mineral rights cannot be said to be reserved for the Central Government. In our opinion, the State has right to levy the tax on mineral rights as envisaged under Entry 50 of List II of Seventh Schedule of the Constitution. The Apex Court in *Kesoram* (supra) has further laid down that a mineral right is the right to search for the development and remove materials from the land. Mineral is something which grows in a mine and is capable of being won or extracted so as to be subjected to a better or precious use. Until extracted, the mineral forms part of the crust of the earth. The expanse of Entry 54 of List I cannot be so stretched as to strike at the State Legislations, which are adequately accommodated within the field of an Entry in List II. The Apex Court has laid down thus:

137. All the minerals form part of the land. Minerals are conceived by the mother earth by the process of nature and nurtured over innumerable number of years and delivered on their assuming value and utility for the earthlings. Generally and broadly speaking - and that would suffice for our purpose, a mine is an excavation in the earth which yields minerals. Mineral is something which grows in a mine and is capable of being won or extracted so as to be subjected to a better or precious use. Until extracted, the mineral forms part of the crust of the earth. A mineral right, according to Black's Law Dictionary (Seventh Edition) is the right to search for, develop, and remove materials from the land. It also

means the right to receive a royalty based on the production of minerals which right is usually granted by a mineral lease. In both the senses, the right vests in the owner of the land and is capable of being parted with.

139. It is true that once a central legislation declares regulation of mines and mineral development by law to be expedient in the public interest, the legislation relating to regulation of mines and development of minerals shall fall within the sweep of Entry 54 of List I. The entry has to be liberally and widely interpreted. Yet it cannot be lost sight of that the entry itself employs an expression "to the extent to which such regulation and development under the control of the Union is declared by Parliament by law" as qualifying the preceding expression stating the subject "regulation of mines and minerals development", Section 2 of MMDR Act too qualifies the relevant declaration by suffixing to it the expression "to the extent hereinafter provided". Section 15 of the Act has excepted and preserved the power of State Governments to make rules in respect of minor minerals. The qualifying words used in Entry 54 of List I end in Section 2 of the MMDR Act contain an in-built indication that in spite of an inclination on the part of the Courts to be liberal in assigning a wide meaning to the scope of the said provisions, the boundaries of limitation are there and the expanse of these provisions cannot be so stretched as to strike at the State Legislations which are adequately accommodated within the field of an Entry in List II which too shall have to be meaningfully and liberally construed.

140. The MMDR Act enables control over the regulation of mines and the development of minerals being exercised by the Central Government through legislation. The High Court has upheld the validity of the SADA Act by relating it to Entry 5 in List II which is local government. Any local government exercising the power of governance over a local area shall have to administer, manage and develop the area lying within its territory which cannot be done without raising funds. It is usual for every piece of legislation giving birth to an institution of local government to feed it by incorporating provisions conferring power of generating funds for meeting the expenses of governance. The SADA Act intends to achieve a level of local governance which the usual models of local government such as boards and municipalities are not considered capable of achieving and that is why a special development area and a Special Area Development Authority. The fund established under the Act meets expenses of administration needed to be incurred by the authority, The funds cannot be utilized for any purpose other than the administration of the Act. There are pieces of land which though containing a mine yet fall within the territory of special development area. It was pointed out by the respondents before the High Court that in spite of the Act having been enacted in the year 1986 the successive State Governments, which had preceded, did not take care of the legislation and it was only the then government which became conscious of its obligations under the SADA Act and commenced identifying special areas requiring development such as Sonbhadra, The imposition of cess envisaged through the SADA Act and the Rules was a step towards developing the special

area, It is a matter of common knowledge, and does not need any evidence to demonstrate, that mining activity carried on the land within the special area involves extraction, removal, loading-unloading, and transportation of the minerals accompanied by its natural consequences entailed on the environment and the infrastructure such as roads, water and power supply etc. within the special area. The impugned cess can, therefore, be justified as a fee for rendering such services as would improve the Infrastructure and general development of the area the benefits whereof would be availed even by the stone crushers. Entry 66 in List II is available to provide protective constitutional coverage to the impugned levy as fee.

45. A charging Section is necessary especially empowering the State to levy tax. Section 16 of the Finance Act, 2008 is the charging Section. It clearly provides that the cess is levied on mineral rights. Thus, we have to go by the charging provision, not by the machinery provisions. As submitted, it cannot be said to be form of excise on minerals on which the Royalty is levied under MMDR Act, 1957.

46. The Apex Court has laid down that under Sections 13(2)(i), 13(2)(qq) and 18(2) of MMDR Act, 1957, the power to levy tax or fee cannot be spelled out from the said provisions, hence, MMDR Act, 1957 has not placed any limitation on the powers of the State to legislate in the field of taxation on the mineral rights. The Apex Court has also considered the expression "other fees or charges" as enumerated in Section 13(2)(i) of MMDR Act, 1957, which provision has also been relied upon by Mr. M.S. Singhvi, Learned Sr. Counsel, appearing on behalf of the petitioners. The Apex Court has laid down that they have to be interpreted ejusdem generis taking colour from other words and phrases employed in the same clause. The word "charges" cannot and does not include within its meaning any tax, The expression "other fees or charges" must be assigned such meaning as to include therein only such fees and charges as are meant for regulation or development. Thus, the cess in question is not covered under the provisions of Section 13(2)(i) of MMDR Act, 1957 as contended by Mr. M.S. Singhvi, learned Sr. Counsel.

47. Mr. Singhvi has also relied upon Sections 18 and 25 of the Act of 1957. The Apex Court considering the aforesaid provision in Kesoram (supra) has observed that power to levy tax or cess cannot be spelled out from Sections 13, 18 & 25 of the of 1957. Section 18(2) (q) speaks of fee to be paid on applications for revision and not on minerals, mineral rights or mining land, Section 25 speaks of "recovery of tax and fee" amongst others. Two observations are spontaneous. Firstly a provision for recovery, being a machinery provision, cannot be read as empowering the levy of tax or fee, Secondly, it speaks of tax or fee being due to the Government without defining the same and without qualifying the word "Government" with Central or State. A perusal of several provisions of the Act and in particular Sections 9A, 15, 15(1-A)(a) and (g), 15(3), 17(3), 21(5), 25 goes to show that the power of recovery is invariably given to the State Government and obviously the word "Government" in Section 25 refers to the

State Government, which only is empowered to recover the sums due as arrears of land revenue. Thus, the submission of Mr. M.S. Singhvi, learned Sr. Counsel, stands repelled by the dictum of the Apex Court.

48. The Apex Court has also considered the tax on mineral rights on coal and brick matters. In *Kesoram* (supra), while considering the question in coal matters annual value of the coal bearing land as the basis and in the brick earth matters, the quantity of brick earth dispatched, the Apex Court has laid down that assuming both the matters to be a tax on mineral rights, it would be covered by Entry 50 in the List II. By reference to Entry 50 of List II and Entry 54 in List I, the Central legislation has not cast any limitations on the State Legislature's power to tax mineral rights, or land for that matter. The impugned cess was held to be a tax on coal-bearing and mineral-bearing land. It was construed as a tax on mineral rights and was, therefore, held to be valid.

49. The Apex Court has laid down in para 130 thus:

130. The amendments incorporated by the West Bengal Taxation Laws (Amendment) Act 1992 w.e.f. 1.4.1992 into the provisions of the West Bengal Primary Education Act 1973 and the West Bengal Rural Employment and Production Act 1976 classify the land into three categories: (i) coal-bearing land, (ii) mineral bearing land (other than coal-bearing land) or quarry and (iii) land other than the preceding two categories. These three are well-defined classifications by reference to the user or quality and the nature of product which it is capable of yielding. The cess is levied on the land. The method of quantifying the tax is by reference to the annual value thereof. It is well-known that one of the major factors contributing to the value of the land is what it produces or is capable of producing. Merely because the quantum of coal produced and dispatched or the, quantum of mineral produced and dispatched from the land is the factor taken into consideration for determining the value of the land, it does not become a tax on coal or minerals. Being a tax on land it is fully covered by Entry 49 in List II. Assuming it to be a tax on mineral rights it would be covered by Entry 50 in List II. Taxes on mineral rights lie within the legislative competence of the State Legislature "subject to" any limitation imposed by Parliament by law, relating to mineral development. The Central legislation has not placed any limitation on the power of the States to legislate in the field of taxation on mineral rights. The challenge to constitutional validity of State legislation is founded on non-availability of legislative field to State; it has not been the case of any of the writ petitioners that there are limitations enacted by Central legislation and the State of West Bengal has breached or crossed those limits. Simply because incidence of tax is capable of being passed on to buyers or consumers by the mine owners with an escalating affect on the price of the coal, it cannot be inferred that the tax has an adverse effect on mineral development. Entry 23 in List II, speaks of regulation of mines and mineral developments, subject to the provisions of List I with respect to regulation and development under the control of the Union. The Central Legislation has taken over regulation

and development of mines, and mineral development in public interest. By reference to Entry 50 of List II and Entry 54 in List I, the Central legislation has not cast any limitations on the State Legislature's power to tax mineral rights, or land for the matter of that. The impugned cess is a tax on coal bearing and mineral-bearing land. It can at the most be construed to be a tax on mineral rights. In either case, the impugned cess is covered by Entries 49 and 50 of List II. The West Bengal Taxation Laws (Amendment) Act 1992 must be and is held to be intra vires the Constitution.

50. It was also contended by Mr. M.S. Singhvi, learned Sr. Counsel, appearing on behalf of the petitioners, that the quantity, which is dispatched, is taxed. As cess is levied on mineral dispatched which makes it a tax on mineral extracted. In our opinion, it is a mere measure of taxation. The cess is not levied on the production of the mineral. The Apex Court in *Kesoram* (supra) has laid down that Entry 54 in List I does not cast any limitations on the State Legislature's power to tax mineral rights.

51. The Apex Court has considered the nature of tax, subject of tax and measure/mode/machinery of tax. The Apex Court also considered the question whether adoption of same measure of taxation can trench upon field of legislation of another legislature. The Apex Court has laid down that the standard adopted as a measure of levy may be indicative of the nature of the tax, but it does not necessarily determine it and its effect must be weighed alongwith and in the light of the other relevant circumstances. When enacting a measure to serve as a standard for assessing the levy i.e. measure of tax, the Legislature need not contour it along lines which spells out the character of the levy itself, The legislature being permitted a greater latitude, like play in the joints, in the field of taxation and economic activity, even crudities and inequities having to be accommodated, any measure of tax which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy. Adoption of the same measure/mechanism of taxation by two legislatures cannot ipso facto imply a trenching of either field of legislation, so long as the essential character of levy is not departed from within the four corners of the particular entry. The legislature is free to adopt such method of levy as it chooses. Thus, merely by the fact that cess is levied on the measure of quantity dispatched under Sec. 16 of the Finance Act, 2008, its nature is not changed from being a cess on mineral rights to a tax on minerals.

52. The Apex Court in *Kesoram* (supra) has also considered the meaning of "land" and "rights in land", used in Entry 49 of List II of Seventh Schedule and it has been held that the land includes all strata above or below the surface of the earth. Therefore, merely because a tax on land or buildings is imposed by reference to its income or yield, it does not cease to be a tax on land or buildings. The income or yield of the land/building is taken merely as a measure of the tax. Thus, in the instant case, merely by adopting measure of quantity dispatched, the cess on mineral rights will not become a royalty or a cess on

mineral. The Apex Court has further laid down that considering purport of Entry 49 in List II of Seventh Schedule, one of the major factors contributing to the value of the land is what it produces or is capable of producing. Merely because the quantum of coal produced and dispatched or the, quantum of mineral produced and dispatched from the land is the factor taken into consideration for determining the value of the land, it does not become a tax on coal or minerals. The method of quantifying the tax is by reference to the annual value thereof. Merely because the quantum of coal produced and dispatched or the, quantum of mineral produced and dispatched from the land is the factor taken into consideration for determining the value of the land, it does not become a tax on coal or minerals. Being a tax on land, it was found to be fully covered by Entry 49 in List II.

53. The Apex Court in *Keso Ram* (supra) has also laid down that Royalty is distinguishable from cess. The royalty is levied by reference to the quantity of the minerals produced and because the impugned cess too is quantified by taking into consideration the same quantity of the mineral produced, the latter does not become royalty. The Apex Court has laid down that Royalty is the rent of the land on which the mine is situated or the price of the privilege of winning the minerals from the land parted by the government in favour of the mining lessee. The cess is a levy on mineral rights with impact on the land and quantified by reference to the quantum of minerals produced. The distinction, though fine, yet exists and is perceptible. Thus, the submission raised by Mr. M.S. Singhvi, learned Sr. Counsel, that cess in question is virtually a royalty on mineral and levy of cess on environment and health amounts to levy of Royalty, is rejected.

54. It was also submitted by Mr. M.S. Singhvi, learned Sr. Counsel, appearing on behalf of the petitioners, that the field is occupied as the Parliament has enacted Environment Protection Act, 1986, thus, the impugned legislation was not permissible. No doubt, the said Act has been enacted to provide for protection and improvement of environment and matters connected therewith but it has no effect on power of the State to levy tax on mineral rights.

55. Similarly, Mr. M.S. Singhvi, learned Sr. Counsel has relied upon the Air (Prevention and Control of Pollution) Act, 1981, which has been enacted in order to preserve the quality of air and control of air pollution; the Act provides for constitution of Central and State Boards for prevention, control and abatement of air pollution; it also provides for powers & functions of the Central and State Boards to improve the quality of air & to prevent & abate the air pollution in the country. Similarly, learned Sr. Counsel has relied upon the Water (Prevention and Control of Pollution) Act, 1974. In our considered opinion, it cannot be said that the said Statutes in any manner curtailed the power to enact the provisions contained in Chapter VII of the Finance Act, 2008 enacted under the relevant entries of the List II of Seventh Schedule of the Constitution. We have not found any repugnancy in the Environment Act and the Air Pollution Act with the provisions of Chapter VII of the Finance Act, 2008 and the field cannot be said to

be covered by above Central enactments and there is no trenching on the respective fields occupied by the said enactments.

56. It was submitted by Mr. M.S. Singhvi, learned Sr. Counsel, appearing on behalf of the petitioners, that the Water Pollution Act has also been enacted by the Parliament. The State Government and various other States have agreed and passed resolution under Article 252(1) of the Constitution to the effect that the matters regarding prevention and control of water pollution should be regulated in those States by the Parliament. In our opinion, by the aforesaid enactment of 1974 and the resolution so passed by the State Govt. and various other States, it cannot be said that there is any violation of the said provisions of the said Act and there is no trenching by the State Government in the field reserved under Water Pollution Act, by legislating the enactment in question i.e. the Finance Act, 2008 and the rules framed thereunder.

57. It was also submitted by Mr. M.S. Singhvi, learned Sr. Counsel, that the Parliament has also enacted the Water (Prevention & Control of Pollution) Cess Act, 1977. The object & purpose of the said Act is to provide for levy and collection of cess on water consumed by persons carrying on certain industries and by local authorities in augmenting the resources of the Central Boards and State Boards, constituted under the Act of 1977 and Act of 1974. Section 3 of the Act of 1977 is charging provision for levy and collection of cess for the purposes of the Act of 1974. By the aforesaid provision imposition of cess under Sec. 3 of the Act of 1977 has been made. In our opinion, the fields are totally different and there is no repugnancy between the provisions of the Act of 1977 and the Finance Act, 2008. There is no trenching upon the provisions of Water Act of 1977, made by the impugned legislation in Chapter VII of the Finance Act 2008. No fetter is caused by the Water Act of 1977 or the rules framed thereunder upon the power of the State Legislature to enact the aforesaid provisions of Chapter VII of the Finance Act 2008.

58. It was also contended by Mr. M.S. Singhvi, learned Sr. Counsel, that Royalty is also a tax. In the instant case, no royalty is realized. We are unable to accept the submission considering the provisions in question and in view of the decision of the Apex Court in Kesoram (supra). Levy in question is of cess on mineral rights, which is charged u/s 16 of the Finance Act, 2008. Thus, there is no room for creating confusion so as to hold levy of cess in question to be a royalty. The Apex Court in Kesoram (supra) has summarized the conclusions in para 129 thus:

129. The relevant principles culled out from the preceding discussion are summarized as under:-

(1) In the scheme of the Lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation. They are separately enumerated.

(2) Power of "regulation and control" Is separate and distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be

capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law. The subject matter of two taxes by reference to the two Lists is different. Simply because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. This is the distinction between the subject of a tax and the measure of a tax.

(3) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined the amount of tax is capable of being measured in many ways for the purpose of quantification, Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by Legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax.

(4) Entries 52, 53 and 54 in List I are not heads of taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of Union having enacted laws by reference to Entries 52, 53, 54 in List I. It is for the Union to legislate and impose limitations on the States' otherwise plenary power to levy taxes on mineral rights or taxes on lands; (including mineral bearing lands) by reference to Entry 50 and 49 in List II and lay down the limitations on State's power, if it chooses to do so, and also to define the extent and sweep of such limitations.

(5) The Entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non-obstante clause "subject to" does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:

One - Is it still possible to effect reconciliation between two Entries so as to avoid conflict and overlapping?

Two - In which Entry the impugned legislation fails by finding out the pith and substance of the legislation?

and

Three - Having determined the field of legislation wherein the impugned legislation fails by applying doctrine of pith and substance, can an incidental trenching upon another field of legislation be Ignored?

(6) "Land", the term as occurring in Entry 49 of List II, has a wide connotation, Land remains land though it may be subjected to different user. The nature of user of the land would not enable a piece of land being taken out of the meaning

of land itself. Different uses to which the land is subjected or is capable of being subjected provide basis for classifying land into different identifiable groups for the purpose of taxation. The nature of user of one piece of land would enable that piece of land being classified separately from another piece of land which is being subjected to another kind of user, though the two pieces of land are identically situated except for the difference in nature of user. The tax would remain a tax on land and would not become a tax on the nature of its user.

(7) To be a tax on land, the levy must have some direct and definite relationship with the land. So long as the tax is a tax on land by bearing such relationship with the land, it is open for the legislature for the purpose of levying tax to adopt any one of the well known modes of determining the value of the land such as annual or capital value of the land or its productivity. The methodology adopted, having an indirect relationship with the land, would not alter the nature of the tax as being one on land.

(8) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of State Legislature cannot be annulled as unconstitutional merely because it may have an affect on the price of the commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "regulation and control" belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods. Entry 23 in List II speaks of 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, Entries 52 and 54 of List I are both qualified by the expression "declared by Parliament by law to be expedient in the public interest". A reading in juxtaposition shows that the declaration by Parliament must be for the "control of industries" in Entry 52 and for regulation of mines or for mineral development" in Entry 54. Such control, regulation or development must be "expedient in the public interest". Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming subject matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament. In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the declaration. The legislative power to tax by reference to Entries in List II is plenary unless the entry itself makes the field "subject to" any other entry or abstracts the field by any limitations imposable and permissible. A tax or fee levied by State with the object of augmenting its finances and in reasonable limits does not ipso facto trench upon regulation, development or control of the subject. It is different if the tax or fee sought to be

levied, by State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental.

(9) The heads of taxation are clearly enumerated in Entries 83 to 92B in List I and Entries 45 to 63 in List II. List III, the Concurrent List, does not provide for any head, of taxation. Entry 96 in List I, Entry 66 in List II and Entry 47 in List III deal with fees. The residuary power of legislation in the field of taxation spelled out by Article 248(2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II. It follows that taxes on lands and buildings in Entry 49 of List II cannot be levied by the Union. Taxes on mineral rights, a subject in Entry 50 of List II can also not be levied by the union though as stated in Entry by itself the union may impose limitations on the power of the State and such limitations, if any, imposed by the Parliament by law relating to mineral development and "to" that extent shall circumscribe the States power to legislate. Power to tax mineral rights is with the States; the power to lay down limitations on exercise of such power, in the interest of regulation, development or control, as the case may be, is with the union. This is the result achieved by homogeneous reading of Entry 50 in List II and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional.

59. Mr. M.S. Singhvi, learned Sr. Counsel, appearing on behalf of the petitioners, has relied upon the decision of the Apex Court in *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, in which the Apex Court has considered the question with respect to Entries 23 & 66 in List II. The Apex Court has laid down that the legislative competence of the State Legislature under Entry 23 is subject to the provisions of List I with respect to regulation and development under the control of the Union. The jurisdiction of the State Legislature under Entry 23 is subject to the limitation imposed by the latter part of the said Entry. If Parliament by its law has declared that regulation and development of mines should in public interest be under the control of the Union, to the extent of such declaration, the jurisdiction of the State Legislature is excluded. This question has already been considered by the Apex Court in *Kesoram (supra)* and it has been laid down that MMDR Act, 1957 does not impinge upon the power of legislature of the State under Entry 50 of List II. The declaration made in MMDR Act, 1957 is also considered by the Apex Court in *Kesoram (supra)*. Thus, the decision in *Hingir-Rampur Coal Co.* is of no help to the submission raised by Mr. M.S. Singhvi, learned Sr. Counsel.

60. Reliance has been placed by Mr. M.S. Singhvi, learned Sr. Counsel, appearing on behalf of the petitioners, on the decision of *State of Orissa Vs. M.A. Tulloch and Co.,* , in which the Apex Court has laid down that the repugnancy arises

when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature has superiority over the other then to the extent of repugnancy, the one supersedes another. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overborne on the ground of repugnance.

61. In the instant case, we have found that there is no repugnancy and the field in question is not covered by MMDR Act, 1957.

62. Mr. M.S. Singhvi, learned Sr. Counsel, appearing on behalf of the petitioners, has relied upon the decision of the Apex Court in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, . The question involved in *India Cement* was whether a cess on royalty is within the competence of the State Legislature. The *India Cement Co.* used to manufacture cement in its factory. The lease deed provided for realization of the royalty at the rate of Rs. 0.75 per tonne on limestone on Govt. land. Different rates of royalty were prescribed for patta lands. u/s 115 of the *Madras Panchayats Act, 1958*, as amended by *Madras Act XVIII of 1964*, the appellant was required to pay local cess at the rate of 45 paise per rupee with retrospective effect along with local cess surcharge under s. 116 of the Act. In that connection, it has been held that a cess on royalty being a tax on royalty, is beyond the competence of the State Legislature because s. 9 of the Central Act covers the field and the State Legislature is denuded of its competence under entry 23 of list II. The ratio of the aforesaid decision is not at all attracted to the facts of the present case. Thus, the submission raised by Mr. M.S. Singhvi, learned Sr. Counsel, that the decision in *India Cement* (supra) has not been correctly appreciated in *Kesoram* (supra), does not advance any support in the instant case. The levy in the instant case is a cess on mineral rights, not a cess on mineral/royalty. The Apex Court in *India Cement* (supra) made the following discussion in this regard in para 33 thus:

33. In any event, royalty is directly relatable only to the minerals extracted and on the principle that the general provision is excluded by the special one, royalty would be relatable to entries 23 & 50 of list II, and not entry 49 of list II. But as the fee is covered by the Central power under entry 23 or entry 50 of list II, the impugned legislation cannot be upheld. Our attention was drawn to a judgment of the High Court of Madhya Pradesh in *Miscellaneous Petition No. 410/83--M/s Hiralal Rameshwar Prasad & Ors. vs. The State of Madhya Pradesh & Ors.*, which was delivered on 28th March, 1986 by a Division Bench of the High Court. J.S. Verma, Acting Chief Justice, as His Lordship then was, held that development cess by s. 9 of the *Madhya Pradesh Karadhan Adhiniyam, 1982* is ultra vires. It is not necessary in the view taken by us, and further in view that the said decision is under appeal in this Court, to examine it in detail.

63. The ratio of the aforesaid decision is not attracted in the instant case, more so, in view of the decision in Kesoram's case (supra). In the instant case, the cess is not on royalty. Royalty was defined in respect to the lime stone and kankar with regard to the nature of the land. It is settled proposition of law that mere measure of levy cannot be the basis to determine its nature and the same cannot be a ground to hold trenching upon the field. Thus, the decision is of no help to the submission raised by Mr. M.S. Singhvi, learned Sr. Counsel.

64. Mr. M.S. Singhvi, learned Sr. Counsel, appearing on behalf of the petitioners, has relied upon the decision in M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, , in which the Apex Court has dealt with the question of cess on royalty in respect of land held for carrying mining operations, which was held to be ultravires to the field reserved to the State Legislature. The Apex Court also considered the question of validity of Orissa Cess Act, section 6 whereof provided for the Cess on royalty of mines and quarries, which was also declared to be invalid. The Apex Court also considered the validity of M.P. Kardhan Adhiniyam, 1982 dealing with mineral areas development cess and concluded that validity of the impugned Act cannot be upheld by reference to Entry 23 of the List II and its levy was held to be ultravires of the State legislature. Considering the scope of Section 11 of M.P. Upkar Adhiniyam providing for cess on land held in connection with mineral rights, the Apex Court held that the levy was invalid and ultravires of the State Legislature in view of the conclusion that the tax is not referable to Entry 49 or Entry 50. As already discussed, it was not a case of imposition of cess on environment & health as in the instant case, which is referable to Entry 50 of List II of the Seventh Schedule to the Constitution of India. With respect to the M.P. Act, 1982, the Apex Court has made it clear in para 61 itself that their lordships were concerned only with Part IV, which levies a cess not on land in general, which could be referred to Entry 18 or Entry 49 but only on land held in connection with the mineral rights, which, in the State, are principally in regard to coal and limestone. u/s 9 of the M.P. Act, 1982, the proceeds are to be utilised only towards the general development of mineral-bearing areas. The levy was held to be a fee and the High Court had opined that such fee would be referable to item 23 and hence, out of bounds for the State Legislature, after the enactment of MMDR Act, 1957. Their Lordships while considering the M.P. Upkar Adhiniyam Act, 1982, which came up for consideration before the M.P. High Court in M.P. Lime Manufacturers' Association, Katni and Others Vs. State of Madhya Pradesh and Another, , held that in view of Section 12 of the Act having been deleted by the 1989 amendment, the levy under Sec. 11 of the Act ceased to be a fee and became a tax. It was further held that the levy was not covered by Entry 49 or Entry 50 of List II and was, therefore, ultravires. The Full Bench observed that it is significant to note that cess is not imposed on all land and that it is not dependent either on the extent of the land held in connection with mineral rights or on the value thereof. The subject-matter of tax, therefore, is major mineral raised from the land held in connection with mineral right. If no minerals are raised, tax is not leviable. The tax is not dependent on the extent of

the land held in connection with mineral rights. It is not a case where all lands are liable to be assessed on the basis of the value of the land and that the measure of the tax in so far as land held under a mining lease is concerned, is the value of the minerals produced. Under the impugned Act, value of the land or of the minerals produced does not play any part in the levy of cess. Thus, the impugned levy was not held to be a tax on land, which is covered by Entry 49 of the State List. The Apex Court, while referring to Hingir Rampur's case (supra), observed that from a perusal of the provisions of Section 11 of the Act, it would be clear that by the charging section, tax was not imposed on the mineral rights of every holder of mining lease. In these circumstances, the tax levied by the Act was not held to be a tax covered by Entry 50 of List II of the Seventh Schedule to the Constitution.

65. The Apex Court in Orissa Cement (supra) has further observed in para 62 with respect to the Full Bench decision of the High Court that though the MMDR Act, unlike S. 6(2) of the 1984 Act, does not contain a specific provision for the levy of taxes, Sec. 25 of the MMDR Act does indicate the existence of such power. The above observations of the High Court, therefore, in our view, do not attach sufficient importance to S. 25 of the MMDR Act and the field covered thereby. This aspect is, however, not of significance in view of the conclusion that the tax is not referable to Entry 49 or Entry 50. Thus, the decision of the Apex Court in Orissa Cement is quite distinguishable, as the Apex Court has laid down with respect to Section 25 of the MMDR Act in the same manner as interpreted in Kesoram (supra) and also that the tax in question was not referable to Entry 49 or Entry 50. The Apex Court has laid down thus:

62. The other statute viz; the Madhya Pradesh Upkar Adhiniyam (Act 1 of 1982) came up for the consideration of a Full Bench of the Madhya Pradesh High Court in M.P. Lime Manufacturers' Association, Katni and Others Vs. State of Madhya Pradesh and Another, . The Full Bench held that, in view of S. 12 of the Act having been deleted by the 1989 amendment, the levy under S. 11 of the Act ceased to be a fee and become a tax. It held further that the levy was not covered by Entry 49 or Entry 50 of List II and was, therefore, *ultravires*. It observed:

It is significant to note that cess is not imposed on all land and that it is not dependent either on the extent of the land held in connection with mineral rights or on the value thereof. The subject-matter of tax, therefore, is major mineral raised from the land held in connection with mineral right. If no minerals are raised, tax is not leviable. The tax is not dependant on the extent of the land held in connection with mineral rights. It is not a case where all land is liable to payment of cess, that the liability is assessed on the basis of the value of the land and that the measure of the tax in so far as land held under a mining lease is concerned, is the value of the minerals produced. Under the impugned Act, value of the land or of the minerals produced does not play any part in the levy of cess. The quantity of major minerals produced from the land determines the

liability to pay tax. In these circumstances, the impugned levy cannot be held to be a tax on land which is covered by Entry 49 of the State list.

After distinguishing *Ajoy Kumar Mukherjee Vs. Local Board of Barpeta*, and referring to *Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others*, , the Court concluded:

The character of imposed in the instant case is that though in form it appears to be a tax on land, in substance, it is a tax on minerals produced therefrom. The subject matter of tax is, therefore, not covered by Entry 49 of the State list.

As for Entry 50, after referring *Hingir-Rampur The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, , the Court observed:

Now from a perusal of S. 11 of the Act, it would be clear that in the instant case by the charging section, tax is not imposed on the mineral rights of every holder of mining lease. The tax is levied on minerals produced in land held under mining lease. In these circumstances, the tax levied by the Act cannot be held to be a tax covered by Entry 50 of List II of the Seventh Schedule to the Constitution. In our opinion, therefore, it has not been shown that the State Legislature is competent to levy the impugned cess.

This conclusion is obviously correct in the light of our earlier discussion. The court, however, expressed an opinion, in paras 10 to 12 of the judgment, that in case the levy could be treated as a tax imposable under Entry 49 or 50 of List II in the Second Schedule to the Constitution, such power "has not been taken away by the provisions of the MMRD Act". We think, as already pointed out by us that though the MMRD Act, 1957, unlike S. 6(2) of the 1948 Act, does not contain a specific provision for the levy of taxes, S. 25 of the former does indicate the existence of such power. The above observations of the High Court, therefore, in our view, do not attach sufficient importance to S. 25 of the MMRD Act and the field covered thereby. This aspect, however, is not of significance in view of the conclusion that the tax is not referable to Entry 49 or Entry 50.

66. Thus, as the tax in issue in the said case was not referable to Entry 49 or Entry 50 of List-II of Seventh Schedule to the Constitution of India, the decision is of no help to the cause espoused by the petitioners.

67. In the *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, , the Apex Court has laid down that tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered. This definition brings out the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. The essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax payer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax.

This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is no element of quid pro quo" between the tax "payer and the public authority. Another feature of taxation is that it is a part of the common burden. The fee is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is broadly supposed to be based on the expenses incurred by the Government in rendering the service. Ordinarily the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

68. In *Krishi Upaj Mandi Samiti and Others Vs. Orient Paper and Industries Ltd.*, , the Apex Court has laid down that fee has been placed under separate category for the purposes of legislation. The tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered. There is no quid pro quo between the tax payer and the public authority.

69. In *Vijayalashmi Rice Mill and Others Vs. The Commercial Tax Officers, Palakol and Others*, , the question which came up for consideration was whether levy of cess u/s 7(1) of the Andhra Pradesh Rural Development Act, 1996 at the rate of 5% ad valorem on the quantum of purchase of goods was tax or fee. Section 8 of the said Act provides for establishment of the Andhra Pradesh Rural Development Fund. Section 9 deals with the purposes of the Fund. The impost in question did not come in any of the Entries in List II of the Seventh Schedule of the Constitution. The Apex Court has observed that ordinarily, a cess means a tax which raises revenue, which is applied to a specific purpose. Ordinarily, cess is also a tax. Health cess, education cess, road cess etc. are in the nature of tax, Nomenclature is not material. The Apex Court has laid down thus:

12. Ordinarily, a cess means a tax which raises revenue, which is applied to a specific purpose. Thus in *Guruswamy and Co. etc. Vs. State of Mysore and Others*, , Hidayatullah, J, in his dissenting judgment observed:

The word "cess" is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess, etc.) indicates. When levied as an increment to an existing tax, the name matters not, for the validity of the cess must be judged of in the same way as the validity of the tax to which it is an increment.

The aforesaid observation has been referred to by the Constitution Bench decision of this Court in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, .

70. Based upon the aforesaid decision, we are of the opinion that the cess in

question is in the nature of tax and it is not a fee.

71. The learned Sr. Counsel appearing on behalf of the petitioners has relied upon the said decision to contend that cess in question is a fee as the cess was not falling in any of the Entries of List-II of Seventh Schedule. The case of the petitioners is that it is a fee under Entry 66 of List II of the Seventh Schedule. The facts of the instant case are different. The cess is in the nature of tax which is clearly within the purview of Entry 50 of List-II of Seventh Schedule. The Apex Court has also laid down in the said decision that traditional view that there must be actual quid pro quo for a fee has undergone a sea change. If the element of revenue for general purpose of the State predominates, the levy becomes a tax. The Apex Court in *M/s Vijayalashmi Rice Mill (supra)*, has thus laid down:

16. The earlier view of the Supreme Court was that to sustain the validity of a fee some specific service must be rendered to the particular individual from whom the fee is sought to be realised. However, subsequently in *Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others*, , the Supreme Court observed: (SCC p. 380, paras 31-32)

31. The traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the subsequent decisions. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of the State predominates, the levy becomes a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered...

32. There is no generic difference between a tax and a fee. Both are compulsory exactions of money by public authorities.

72. In view of the aforesaid discussion, it is apparent that considering the nature of levy, cess in issue is a tax on mineral rights under Entry 50 of List II of Seventh Schedule of the Constitution of India.

73. Coming to the submission with regard to retrospective effect being given to the Notification dated 23.1.2009 pertaining to the recovery of cess on the Rock Phosphate, it was submitted by Mr. M.S. Singhvi, learned Sr. Counsel, appearing on behalf of the petitioners that the said notification is subordinate legislation and seeks to levy environment and health cess with retrospective effect i.e. with effect from 1.4.2008, therefore, to the extent of retrospective effect, the said notification is illegal and bad in law.

74. Section 16 of the Finance Act, 2008 enacted by the Rajasthan State Legislature delegates authority to the State Government to issue a notification to levy and collect the cess in issue in such manner as may be prescribed, an environment and health cess on mineral rights in respect of such minerals and at

such rates, not exceeding Rs. five hundred on each tonne of mineral dispatched, as may be notified by the State Government from time to time. The State Legislature itself, has not fixed the rates but has only fixed the outer limit of cess to be realized on each tonne of the mineral dispatched. There is no specific authority conferred upon the State Government by the State Legislature to prescribe the rate with retrospective effect. There is no such provision to prescribe the rate with retrospective effect made in Section 16 of the Finance Act, 2008.

75. Fiscal legislation imposing liability is generally governed by the normal presumption that it is not retrospective and it is a cardinal principle of tax law that the law to be applied is that in force in the assessment year unless otherwise provided expressly or by necessary implication. The above rule applies to the charging section and other substantive provisions such as a provision imposing penalty and does not apply to machinery or procedural provisions of a taxing Act which are generally retrospective and apply even to pending proceedings. But a procedural provision, as far as possible, will not be so construed as to affect finality of tax assessment or to open up liability which had become barred. While discussing the aforesaid proposition in the Principles of Statutory Interpretation, Eleventh Edition, by Justice G.P. Singh, it has been observed that assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is, either expressly or by necessary implication, retrospective. On the principle that a new Act affecting existing rights or creating new obligations, is presumed to be prospective only.

76. With respect to the aspect of subordinate legislation being retrospective, the Apex Court has dealt with the matter in *Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others*, . The question arose before their Lordships of the Apex Court with respect to ss. 11 and 12 of the Forward Markets Regulation Act, 1952. The question was also whether Section 11 authorized framing of bye laws operating retrospectively on subsisting contracts. Bye law 52AA of the East India Cotton Association was published in the Gazette of India, Extra Ordinary dt. 21.1.1956 affecting the subsisting contracts, which was a piece of subordinate legislation. The majority view held that the provision was not invalid on the ground of its operating retrospectively, as Section 11 of the Forward Markets Regulation Act, 1952 authorized the framing of the bye law with retrospective effect. In that context, the majority as well as dissenting view have considered the question of bye laws being retrospective. Difference of opinion was with respect to the aspect whether section 11 of the Forward Markets Regulation Act, 1952 permitted framing of bye laws with retrospective effect or not. However, there is agreement on the view that the subordinate legislation can be retrospective only if it is so permitted by the main enactment. The majority view was thus:

26. If he was wrong in his argument that the byelaw on its proper construction did not affect subsisting contracts such as these of the Appellants, Mr. Pathak's

further submission was that the impugned bye-law was invalid and ultra vires of the Act because it purported to operate retrospectively affecting vested rights under contracts which were subsisting on the day on which the bye-law came into force.

27. Mr. Pathak invited our attention to a passage in Craies' Statute Law, 5th Ed. p. 366 reading:

Sometimes a statute, although not intended to be retrospective, will in fact have a retrospective operation. For instance if two persons enter into a contract, and afterwards a statute is passed which, as Cockburn, C.J., said in *Duke of Devonshire vs. Barrow, etc., Co.* (1877) 2 Q. B. D. 286, 289) "engrafts an enactment upon existing contracts" and 752 thus operates so as to produce a result which is something quite different from the original intention of the contracting parties, such a statute has, in effect a retrospective operation.

The bye-law in so far as it affects executory contracts requiring such contracts to be closed out on a lay not originally:- contracted for and at a price fixed by law is in the above sense undoubtedly retrospective. The submission of learned Counsel was that though a legislature which had plenary power in this regard could enact a, having a retrospective operation, Subordinate legislation, be it a rule, a bye-law or a notification, could not be made so as to have retrospective operation and that to that extent the rule, bye-law or notification would be ultra vires and would have to be struck down, relying for this position on the decision of the Mysore High Court reported in AIR 1960 Mys, 326. We do not however consider it necessary to canvass the correctness of this decision or the broad propositions laid down in it. It is clear law that a Statute which could validly enact a law with retrospective effect could in express terms validly confer upon a rule-making, authority a power to make a rule or frame a: byelaw having retrospective operation and we would add that we did not understand Mr. Pathak to dispute this position. If this were so the same result, would follow where the power to enact a rule or, a byelaw with "retrospective effect" so as to Affect Pending transactions, is conferred not by express words but where the necessary intendment of I the Act confers such A power. If in the present case the power to make a byelaw so as to operate on contracts subsisting on the day the same was framed, would follow as; a necessary implication from the term of S. 11, it would not be necessary to discuss the larger question as to whether and the 753 circumstances - in which Subordinate legislation with retrospective effect could be validly made.

77. Justice K. Subba Rao in minority view has opined that Section 11 of the Forward Markets Regulation Act, 1952 does not authorize framing of the bye laws with retrospective effect. However, discussion has been made with respect to power to frame bye laws with retrospective effect. With respect to Government's power to make an order with retrospective effect, it has been laid down that unless the Statute confers power on the Govt. to frame bye laws with retrospective effect, it cannot exercise such a power. Following is the relevant

observation made:

37.It is, therefore, clear that the said byelaw, in so far as it purports to affect the mode of performance of the pre-existing contracts, is certainly retrospective in operation. I am assuming for the purpose of the present question that the bye-law cannot be construed in such a way as to confine its operation only to contracts that are entered into after it came into force. If so, the question arises whether the Central Government had power to make a bye law under S. 12 (1) of the Act with retrospective effect-Section 12 (1) of the Act reads:

The Central Government may, either on a request in writing received by it in this behalf from the governing body of a recognized association, or if in its opinion it is expedient so to do, make bye-laws for all or any of the matters specified in section II or amend any bye laws made by such association under that section.

Section 11 enumerates the matters in respect of which the recognized associations can make bye laws for the regulation and control of forward contracts. Neither s. 12 nor s. 11 expressly states that a bye-law with retrospective operation can be made under either of those two sections. Full effect can be given to both the sections by recognizing a power only to make bye-laws prospective in operation, that is, bye-laws that would not affect any vested rights. In the circumstances, can it be held that the Central Government to which the power to make byelaws is delegated by the Legislature without expressly conferring on it a power to give them retrospective operation can exercise a power thereunder to make such bye-laws. Learned counsel for the respondents contends that, as the Legislature can make a law with retrospective operation, so too a delegated authority can make a bye-law with the same effect. This argument ignores the essential distinction between a Legislature functioning in exercise of the powers conferred on it under the Constitution and a body entrusted by the said Legislature with power to make subordinate Legislation. In the case of the Legislature, Art. 246 of the Constitution confers a plenary power of Legislation subject to the limitations mentioned therein and in other provisions of the Constitution in respect of appropriate entries in the Seventh Schedule. This Court, in *Union of India vs. Madan Gopal Kabra* (1), held that the Legislature can always Legislate retrospectively; unless there is any prohibition under the Constitution which has created it. But the same rule cannot obviously be applied to the Central Government exercising delegated Legislative power for the scope of their power is not coextensive with that of Parliament. This distinction is clearly brought out by the learned Judges of the Allahabad High Court in *Modi Food Products Ltd. Vs. Commr. of Sales Tax, U.P.*, wherein the learned Judges observed: "A Legislature can certainly give retrospective effect to pieces of Legislation passed by it but an executive Government exercising subordinate and delegated legislative (1) *The Union of India Vs. Madan Gopal Kabra*, . (2) *A. T. R. 1956 All, 35. 764* powers, cannot make legislation retrospective in effect unless that power is expressly conferred.

In *Strawboard Manufacturing Co. Ltd. vs. Gutta Mill Workers Union* (1) a question arose whether the Governor of U.P., who referred an industrial dispute to a person nominated by him with a direction that he should submit the award not later than a particular date could extend the date for a making of the award so as to validate the award made after the prescribed date. Reliance was placed upon s. 21 of the U.P. General Clauses Act, 1904, in support of the contention that the power of amendment and modification conferred on the State Government under that section might be so exercised as to have retrospective operation. In rejecting that contention, Das, J., as he then was, observed:

It is true that the order of April 26, 1950, does not ex facie purport to modify the order of February 18, 1950, but, in view of the absence of any distinct provision in section 21 that the power of amendment and modification conferred on the State Government may be so exercised as to have retrospective operation the order of April 26, 1950, viewed merely as an order of amendment or modification cannot, by virtue of section 21, have that effect.

This decision is, therefore, an authority for the position that unless a statute confers on the Government an express power to make an order with retrospective effect, it cannot exercise such a power. The Mysore High Court in a considered judgment in *India Sugar & Refineries Ltd. vs. State of Mysore* (2) dealt with the question that now arises for consideration. There, the Government issued (1) *Strawboard Manufacturing Co. Ltd. Vs. Gutta Mill Workers' Union*, there notifications dated 9-4-1956, 15-10-1957 and 13-2-1958 purporting to act under s. 14 (1) of the Madras Sugar Factories Control Act, 1949, whereby cess was imposed on sugarcane brought and crushed in Petitioner's factory for the crushing season 1955-56, 1956-57 and 1957-58 respectively. One of the question raised was whether under the said section the Government had power to issue the notifications imposing a cess on sugarcane brought and crushed in petitioner's factory for a period prior to the date of the said notifications. Das Gupta, C. J., delivering the judgment of the division Bench, held that it could not. The learned Advocate General, who appeared for the State, argued, as it is now argued before us, that in a case where power to make rules is conferred on the Government and if the provision conferring such a power does not expressly prohibit the making of rules with retrospective operation, the Government in exercise of that power can make rules with retrospective operation. In rejecting that argument, the learned Chief Justice, delivering the judgement of the division Bench, observed at p. 332:

In my opinion a different principle would apply to the case of an executive Government exercising subordinate and delegated legislative powers. In such oases, unless the power to act retrospectively is expressly conferred by the Legislature on the Government, the Government cannot act retrospectively.

With respect, I entirely agree with the said observations. The same question was again raised and the same view was expressed by the Kerala High Court in *C. W. Motor Service (P) Ltd. vs. State of Kerala* (1). There the Regional Transport

Authority, Kozhikode, granted a stage carriage permit to the third respondent therein in respect of a proposed (1) Calicut-Wynad Motor Service (Private) Ltd. Vs. State of Kerala and Others, . Ghat route. The grant of the permit was challenged on the ground that when that order was passed there was no constituted Regional Transport Authority for the district. It was contended on behalf of the contesting respondent that the said defect was cured by a subsequent notification issued by the Government whereby Government ordered the continuance of the Road Transport Authority from the date of the expiry of the term of the said Authority till its successor was appointed. The High Court held that the notification with retrospective operation was bad. In that context, Varadaraja Iyengar, J., observed:

"The rule is well-settled that even in a case where the executive Government acts as a delegate of a legislative authority, it has no plenary power to provide for retrospective operation unless and until that power is expressly conferred by the parent enactment." The House of Lords in *Howell vs. Folmouth Boat Construction Co. Ltd.* (1) expressed the same opinion and also pointed out the danger of conceding such a power to a delegated authority. There, a licence was issued to operate retrospectively and to cover works already done under the oral sanction of the authority. Their Lordships observed:

It would be a dangerous power to place in the hands of Ministers; and their subordinate officials to allow them, when, ever they had power to license, to grant the licence *ex post facto*; and a statutory power to license should not be construed as a power to authorise or ratify what has been done unless the special terms of the statutory provisions clearly warrant the construction.

It is true that this is a case of a licence issued by an authority in exercise of a statutory power conferred on it, but the same principle must apply to a byelaw made by an authority in exercise of a power conferred under a statute. Our Constitution promises to usher in a welfare State. It involves conferment of powers of subordinate legislation on government and governmental agencies affecting every aspect of human activity. The regulatory process is fast becoming an ubiquitous element in our life. In a welfare State, perhaps, it is inevitable, for the simple reason that Parliament or Legislature cannot be expected to provide for all possible contingencies. But there is no effective machinery to control the rule-making powers, or to prevent its diversion through authoritarian channels. If the conferment of power to make delegated Legislation proportion vigor carried with it to make a rule or bye-law with retrospective operation, it may become an instrument of oppression. In these circumstances, it has been rightly held that the provision conferring such a power must be strictly construed and unless a statute expressly confers a powers to make a rule or bye-law retrospectively, it must be held that it has not conferred any such power. It is said that such a strict construction may prevent a rule making authority from making a rule in an emergency, though the occasion demands or justifies a rule with retrospective effect. The simple answer to this alleged difficulty is that if the Legislature

contemplates or visualizes such emergencies, calling for the making of such rules or bylaws with retrospective effect, it should expressly confer such power. It is also said that the Government can be relied upon to make such rules only on appropriate occasions. This Court cannot recognize implied powers pregnant with potentialities for mischief on such assumptions. That apart, the scope or ambit of a rule cannot be made to depend upon the status of a functionary entrusted with a 768 rule making power. In public interest the least the court can do is to construe provisions conferring such a power strictly and to confine its scope to that clearly expressed therein.

78. In *Hukam Chand etc. Vs. Union of India (UOI) and Others*, , the Apex Court considered the difference between the subordinate legislation and statutory laws. The Apex Court considered the power to make the rules with retrospective effect and laid down that unless the Legislature authorized the Central Government to make the rules with retrospective effect, it could not have done so. The Apex Court has laid down thus:

8. Perusal of section 40 shows that although the power of making rules to carry out the purposes of the Act has been conferred upon the Central Government, there is no provision in the section which may either expressly or by necessary implication show that the Central Government has been vested with power to make rules with retrospective effect. As it is section 40 of the Act which empowers the Central Government to make rules, the rules would have to conform to that section. The extent and amplitude of the rule making power would depend upon and be governed by the language of the section. If a particular rule were not to fall within the ambit and purview of the section, the Central Government in such an event would have no power to make that rule. Likewise, if there was nothing in the language of section 40 to empower the Central Government either expressly or by necessary implication, to make a rule retroactively, the Central Government would be acting in excess of its power if it gave retrospective effect to any rule. The underlying principle is that unlike Sovereign Legislature which has power to enact laws with retrospective operation, authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the same. The initial difference between subordinate legislation and the statute laws lies in the fact that a subordinate law making body is bound by the terms of its delegated or derived authority and that court of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled (see *Craies on Statute Law*, p. 297 Sixth Edition).

9. The learned Solicitor General has not been able to refer to anything in section 40 from which power of the Central Government to make retrospective rules may be inferred. In the absence of any such power, the Central Government, in our view, acted in excess of its power in so far as it gave retrospective effect to the Explanation to rule-49. The Explanation, in our opinion, could not operate

retrospectively and would be effective for the future from the, date it was added in February 1960.

10. In the case of Cannapore Spinning and Weaving Mills Ltd. vs. Collector of Customs and Central Excise, Cochin and Ors. (1) this Court dealt with an explanation which had been added by the Central Government in purported exercise of the power vested under the Central Excise and Salt Act, 1944. Question arose (1) The Cannanore Spinning and Weaving Mills Ltd. Vs. Collector of Customs and Central Excise Cochin and Others, whether the explanation had a retrospective effect. The Court referred in this context to the rule making power of the Central Government under the aforesaid Act and observed:

Dr. Seiyed Muhammad, learned Counsel for the department did not support the impugned demand on the basis of the retrospective effect purported to have been given to the explanation referred to earlier by the notification dated February 16, 1963 (Exh. P-12) for obvious reasons. The rule making authority had not been vested with the power under the Central Excise and Salt Act to make rules with retrospective effect. Therefore the retrospective effect purported to be given under Exh. P-12 was beyond the powers of the rule making authority.

11. In the case of The Income Tax Officer, Alleppy vs. M.C. Ponnose and Others etc. (1) this Court dealt with a notification dated August 14, 1963 which empowered the revenue officials, including the Tehsildar, to exercise the powers of a tax recovery officer under the Income Tax Act, 1961 in respect of arrears. The notification was given retrospective effect. Question which arose for determination was whether the State Govt. could invest the Tehsildar with such powers retrospectively. Answering this question in the negative, this Court observed:

The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the Legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the persons or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect.

Reference was made in the above cited case to an earlier decision of this Court in B. S. Vadera etc. vs. Union of India & Others (2) wherein it had been observed with reference to rules framed under the proviso to Art. 309 of the Constitution that those rules, could be made with retrospective operation. Yadera's case was distinguished on the ground that the view expressed therein was based upon the language employed in the proviso to article 309 that any rules so made shall have effect subject to the provisions of any such Act. It was also observed:

As the Legislature can legislate prospectively as well as retrospectively there can be hardly any justification for saying that the President or the Governor should not be able to make rules in the same manner so as to give them prospective as well as retrospective operation. For these reasons the ambit and content of the rule making power under article 309 can furnish no analogy or parallel to the present case.

12. We are, therefore, of the opinion that the Explanation added to rule 49 in the present case cannot be given retrospective operation.

79. In *State of Haryana Vs. Anil Pesticides Limited and Another*, , the Apex Court has also considered the question of subordinate or delegated legislation with retrospective effect and it has been reiterated that a right whether vested or accrued, cannot be taken away by subordinate or delegated legislation. The Apex Court has laid down thus:

9. Accepting the said plea of the dealer, this Court in *Mahabir Vegetable Oils (P) Ltd. vs. State of Haryana* held that afore extracted Note 2 could not be given retrospective effect. It was observed thus: (SCC p. 633. Para 44)

44. By reason of Note 2, certain rights were conferred. Although there lies a distinction between vested rights and accrued rights as by reason of a delegated legislation, a right cannot be taken away. The amendments carried out in 1996, as also the subsequent amendments made prior to 2001, could not, thus, have taken away the rights of the appellant with retrospective effect.

80. In *Collector of Central Excise, Ahmedabad Vs. Ashoka Mills Ltd.*, , the Apex Court also considered the question of applicability of duty on yarn for which notification was issued on 24.7.1972. It was held that it cannot be retrospectively applied to the yarn which had been authorizedly removed from the spindles for captive consumption prior to that date. The Apex Court has laid down thus:

We may also point out that the best that can be said for the department is that the system of compounded levy ceased only on 24.7.1972. This means that the normal rules will become applicable. But the normal duty on yarn, effective from 24.7.72, cannot be retrospectively applied to the yarn which had been authorisedly removed from the spindles for captive consumption prior to that date. The fact that the clearance of the fabrics made of such yarn was, after 24.7.72 would be irrelevant in computing such normal duty for yarn. There is no principle or statutory language that compels an assessee to be deprived of the concessional rate that has been made available to it, under a special procedure, in respect of the yarn produced by it and utilised for captive consumption.

81. The Apex Court in *Reliance Jute and Industries Ltd. Vs. Commissioner of Income Tax, West Bengal*, , has held that it is a cardinal principle of the tax law that the law to be applied is that in force in the assessment year unless otherwise provided expressly or by necessary implication.

82. Reliance has been placed upon a decision by the learned counsel appearing on behalf of the respondents in Commissioner of Wealth Tax vs. M/s. Shravan Kumar Swarup, JR 1994 (6) SC 446, in which the mode of valuation of house property was prescribed for ascertaining the wealth under the Wealth Tax Act, 1957. The Apex Court held that the mode of valuation of house property wholly or mainly used for residential purposes for ascertaining the net wealth under the wealth tax act 1957 is essentially a rule of evidence. Rule 1BB was merely procedural and was attracted to all pending cases. However, there is no dispute with the aforesaid proposition that procedural/machinery provision can be applied retrospectively but not the charging provision.

83. One of the essential ingredients as to tax rate itself is until & unless the rate is specified, merely enabling provision providing for tax to be charged as per the notification, it could not be said that the rate was fixed by the State Government after the provision was enacted. Thus, in the absence of very foundation of the charging provision to fix the rate retrospectively, the subordinate legislation could not have been made with retrospective effect. A bare reading of Section 16 of the Finance Act, 2008, quoted above, makes it clear that there is no provision to fix either expressly or by necessary implication, the rate of cess retrospectively. The State Govt. could not have fixed the enhanced rate of cess retrospectively. Upto December, the rate of cess which was realized as per the previous notification dt. 25.2.2008 was Rs. 35/- per tonne of the mineral dispatched. Thereafter, the notification was issued on 23.1.2009 enhancing the environment and health cess retrospectively with effect from 1.4.2008 at the rate of Rs. 500/-, which could not have been done.

84. On behalf of the respondents, reliance was placed on a decision of the Apex Court in Bhim Singh Vs. Union of India (UOI) and Others, to contend that while making judicial review of the State legislation, the court should be slow to interfere and viability or veracity of a scheme or law has to be decided by the legislature and not by the court. Judicial review is maintainable only on issues of vires or unconstitutionality of a scheme or law.

85. In the instant case, the question involved is of competence of the subordinate legislation to impose the rate of cess (tax) with retrospective effect, which could not have been done, unless the main legislature itself has authorized it expressly or by necessary implication. Thus, the aforesaid ratio counters the submission raised by the respondents as to viability or veracity of the Scheme or law. Applying the aforesaid decision, we are of the view that the court can make interference in such a matter and it is not viability or veracity of the Scheme, which is involved in the instant case but the question is as to the competence to make subordinate legislation with retrospective effect without statutory authorization.

86. The respondents have relied upon the case of Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, , wherein the Apex Court has laid down that recovery can be validated by enacting specific legislation. It is not the question

involved in the instant case. The legislature has not validated the recovery in the instant case. In fact, the Legislature has not authorized the recovery with retrospective effect and, therefore, the rate of cess could not have been revised with retrospective effect on rock phosphate.

87. The Apex Court in the case of Commissioner of Income Tax, U.P.-II, Lucknow Vs. Bazpur Co-operative Sugar Factory Ltd., Bazpur, Distt. Nainital, has laid down thus:

13. In the light of the decisions discussed earlier, it appears to us that the respondent society had no authority in law to amend bye-law 50 with retrospective effect as it purported to do. We have already pointed out the power of the society to amend its bye-laws arises from the provisions of Rule 11 of the United Provinces Co-operative Societies Rules, 1936, which rule has been made under the powers conferred by Section 43 of the United Provinces Co-operative Societies Act, 1912. There is nothing expressly or impliedly in Rule 11 which confers any power on the society to amend its bye-laws with retrospective effect and in the absence of any such power being conferred, either expressly or by implication, it cannot be said that the society had any power to amend its bye-laws with retrospective effect. Mr. Manchanda, learned counsel for the respondent-society placed strong reliance on the decision of this Court in Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others, where it was held that the substituted bye-law 52AA of the East India Cotton Association made by the Central Government in exercise of the power conferred upon it u/s 12 of the Forward Contracts (Regulation) Act, 1952 and which, very shortly stated, conferred power on the Forward Markets Commission, after notifying with the Chairman of the Board of the East India Cotton Association, to close hedge contracts in the eventualities mentioned in the said rule was not invalid in law or ultra vires the Constitution. On a proper construction, the amended or substituted bye-law applied not only to contracts to be entered into future but also to subsisting contracts. This Court pointed out that, in that case, the power to make bye-laws so as to affect the rights in subsisting contracts followed as a necessary implication from the terms of Section 11 of the Forward Contracts (Regulation) Act, 1952. In the case before us, however, there is nothing in Section 43 of the U.P. Co-operative Societies Act, 1912 or Rule 11 of the United Provinces Co-operative Societies Rules, 1936 to indicate that there is any power, express or by implied, in a cooperative society registered under that Act to make bye-laws with retrospective effect in respect of its business.

14. In view of the above discussion, in our view, the amendment of bye-law 50 of the respondent society cannot have any retrospective effect and the amounts deducted from the amounts payable to members for the supply of sugarcane, will have to be dealt with as if they were deducted under the provisions of bye-law 50 as it stood in the relevant accounting period.

88. The essential components of a particular concept of tax have to be inter related having nexus with each other. Measure or value to which rate is applied,

until & unless the rate is specified, it could not be said that charging provision has prescribed the rate of Rs. 500/-, in the instant case, Section 16 of the Finance Act, 2008 is the charging section, which authorizes the State Government to levy and collect environment and health cess on mineral rights in respect of such minerals, while issuing the notification from time to time prescribing such rates as it may deem fit. The power could have been exercised time to time but not with retrospective effect. Resultantly, we find that Section 16 of the Finance Act, 2008 with provisions contained in Chapter VII of the Finance Act, 2008 and the Rules of 2008 framed thereunder, cannot be said to be ultravires the competence of the State legislature. However, with respect to the notification dt. 23.1.2009 amending the earlier notification dt. 25.2.2008 with retrospective effect from 1.4.2008 with regard to cess on Rock Phosphate, so far as it prescribes the rate of cess of Rs. 500/- per tonne on Rock Phosphate, such rate can be realized prospectively under the said notification and not with retrospective effect.

All the writ petitions stand disposed-of as aforesaid.