

**(1994) 04 OHC CK 0027**

**In the Orissa High Court**

**Case No :** O.J.C. No's. 2015, 5362, 5814, 6760, 8652 and etc. etc. of 1993, 9, 10, 125, 599 and 600 of 1994 and etc.

Mahanadi Coalfields Ltd. and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

**Date of Decision :** 26-04-1994

**Acts Referred:**

Constitution of India, 1950 — Article 14, 285  
Mines and Minerals (Development and Regulation) Act, 1957 — Section 9A  
Orissa Cess Act, 1962 — Section 2  
Sales of Goods Act, 1930 — Section 64A

**Citation :** AIR 1994 Ori 258 : (1995) 1 OLR 544

**Hon'ble Judges :** R.K. Patra, J;G.B. Patnaik, J

**Bench :** Division Bench

**Advocate :** K. Parasaran, A.K. Ganguli, A.N. Sahay, D. Mandal, S. Mandal, Sanjit Mohanty, Shanti Bhusan, Gobind Das, Karunakar Jena, B.P. Das, G. Rath, A.K. Panja, S.P. Saranriji, G.K. Misra, P. Palit, B. Agarwal, M.L. Agrawal, Pradipta Mohanty, P.C. Patnaik, K.V. Sharma, R.P. Kar, A.S. Naidu, Satrughana Das, S. Sarangi, I. Mohanty, Y.S.N. Murthy, G.S. Rath, B.S. Tripathy, Jagannath Das, N.R. Agrawal, K.N. Jena, S.K. Das, S.B. Agarwal, Deepak Misra, B.B. Mohanty, S.K. Padhi, B. Ray, Kishore Jena, U.K. Samal, B.N. Panda, S. Mallick, H.S. Misra, J. Sahoo, S.C. Ghose, A. Mahapatra, P. Mohanty, Sidhartha Das, P.K. Khunitia, B. Misra, J.N. Mohanty, A.C. Mohanty, L. Pongari, B. Mohanty, A.K. Misra, D.P. Das, Y. Mohanty, N. Patra, D.N. Misra, S.K. Patra, S.K. Nayak, B.P. Pradhan, R. Behera, P.K. Mallick, A. Swain, S.K. Dash, B.K. Dash, Sradhananda Misra, P.K. Misra and P.K. Parida, for the Appellant; S.C. Roy, General, B. Routray, Additional Government Advocate, A.B. Misra, Senior Standing Counsel (Central), Gobind Das and K.K. Jena, S. Mohanty and S. Pal, for the Respondent

**Final Decision :** Allowed

## Judgement

G.B. Patnaik, J.—The constitutional validity of the Orissa Rural Employment, Education and Production Act, 1992 (Orissa Act 36 of 1992) (hereinafter referred to as the "impugned Act") has been challenged in this batch of writ applications. The petitioners are the Mahanadi Coalfields Ltd., a Government Company, with

whom the land in question vests in accordance with Section 11 of the Coal Bearing Areas (Acquisition and Development) Act, 1957 (Central Act 20 of 1957) (hereinafter referred to as the "Acquisition Act") and some Consumers of coal who purchase coal from the Mahanadi Coalfields Ltd. for their own consumption as well as some Traders in coal. While all the petitioners assail the constitutional validity of the Act, the consumers and traders, in addition, urge that even if the Act is valid, the levy in question being on land, the said burden cannot be passed on to the consumers and traders in fixation of the price of coal since price of coal is fixed by the Government of India under the Colliery Control Order, 1945, which continue in force by virtue of Section 16 of the Essential Commodities Act, 10 of 1955. In those cases levy of tax under the Act on "coal-bearing land" is the subject-matter of dispute. The main grounds of attack are the lack of legislative competence of the State Legislature; the Act in question is ultra vires Article 285 of the Constitution; the Act is arbitrary and results in gross discrimination attracting Article 14 of the Constitution; and lastly in the absence of any provision for assessment and on account of vagueness, the Act is invalid.

2. The earlier history of legislation up to the decision of the Supreme Court in *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, as has been stated in the said judgment may be briefly reiterated. The validity of levy of cess under the Orissa Mining Areas Development Fund Act, 1952 (Orissa Act 27 of 1952) was challenged by the coal company in the case of *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, . Under the said Act, the State imposed and collected "cess" or "fee" on the minerals extracted at the rate which shall not exceed 5 per cent of the valuation of the minerals at pit's mouth. The fee so collected was to be utilised to meet the expenditure incurred in connection with such development measures as the State Government might draw up for the purpose. The validity of the levy was challenged on the ground that it was not a fee, but a duty of excise of coal and therefore, was covered by Entry 84 of List I of the Seventh Schedule and also repugnant to the Central Act 32 of 1947. It had also been attacked on the ground that it was hit by the provisions of the Mines and Minerals (Regulation and Development) Act, 1948 (Central Act 53 of 1948) which has been enacted in exercise of power under Entry 54 of List I. The Supreme Court came to hold that the method in which the fee is recovered is a matter of convenience and by itself cannot fix upon the levy the character of a duty of excise and, therefore, the cess levied by the impugned Act was neither a tax nor a duty of excise but a fee. The Court further observed that declaration by Parliament in terms of Entry 54 of List I and the enforcement of Mines and Minerals (Regulation and Development) Act, 1948, would operate as a limitation on the power of the State Legislature to levy a fee under Entry 66, in List II, as the field is an occupied field by the Central Act and on examining the provisions of the Central Act as well as the State Act, the Court came to the conclusion that the field covered by the impugned Act (the State Act) is covered by Central Act 53 of 1948. But since the declaration made by Section 2 of the 1948 Act does not constitutionally amount to the requisite declaration by

Parliament, the limitation imposed by Entry 54 does not come into operation and in the absence of the requisite Parliamentary declaration, the legislative competence of the Orissa State Legislature under Entry 23 read with Entry 66 is not impaired. The ultimate conclusion of the majority judgment is to the following effect (at p. 473 of AIR):--

"Our conclusion, therefore, is that the impugned Act is relatable to Entries 23 and 66 in List II of the Seventh Schedule, and its validity is not impaired or affected by Entries 52 and 54 in List I read with Act LXV of 1951 and Act LIII of 1948 respectively. In view of this conclusion it is unnecessary to consider whether the impugned Act can be justified under Entry 50 in List II, or whether it is relatable to Entry 24 in List III and as such suffers from the vice of repugnancy with the Central Act XXXII of 1947."

The validity of the self-same Orissa Act 27 of 1952 came up for consideration before the Supreme Court in the case of State of Orissa Vs. M.A. Tulloch and Co., in relation to the enactment of the Mines and Minerals (Regulation and Development) Act, 67 of 1957 (hereinafter referred to as the "1957 Act"). The 1957 Act contained a declaration of the Parliament to the effect 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 hereinafter provided". In view of the aforesaid declaration in the Act of Parliament, the Supreme Court considered the question whether the competence of the State Legislature to make the legislation under Entry 23 read with Entry 66 of the State List got impaired. The Court came to the conclusion that the 1957 Act fully covers the field and, therefore, the State Legislature cannot make any legislation in respect of a covered field. The levy of cess under the State Act was, therefore, declared to be unconstitutional and it was further declared that on and from 1-6-1958, the date on which the 1957 Act came into force, the Orissa Act should be deemed to be non-existent for every purpose.

Shortly thereafter the case of H.R.S. Murthy Vs. Collector of Chittoor and Another, , came up for consideration before the Supreme Court. In the said case, the levy of land cess made under Sections 78 and 79 of the Madras District Boards Act (14 of 1920) was under challenge on the ground that it amounts to levy of royalty on minerals for which the Central legislation is operative, namely the Mines and Minerals (Regulation and Development) Act, 1957. The Supreme Court, however, held the levy to be valid on a finding that the levy under Sections 78 and 79 of the State Act has nothing to do and is not connected with the development of mines and minerals or their regulations and it is purely a tax on land within Entry 49 of the State List and not a tax on minerals rights within Entry 50 of the State List and, therefore, the Central Act does not cover the field.

Next came the case of India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, . In this case, the levy made under Sections 115 and 116 of the Tamil Nadu Panchayats Act was under challenge and the case had been heard by a Seven Judge Bench of the Supreme Court as the correctness of the decision of

the Supreme Court in H.R.S. Murthy Vs. Collector of Chittoor and Another, was involved. The Supreme Court overruled its earlier decision in Murthy's case on a conclusion that royalty on mineral rights is a tax and as such a cess on royalty being a tax on royalty is beyond the competence of the State Legislature because Section 9 of the Central Act (1957 Act) covers the field and the State Legislature is denuded of its competence under Entry 23 of List II of the Seventh Schedule of the Constitution. It was also held that the levy cannot be held to be a tax on land within Entry 49 of List II. While coming to the aforesaid conclusion and striking down the levy in question, the Supreme Court examined the provisions of the Act and held that the royalty which is connected with the land cannot be said to be a tax strictly on land as a unit and no tax can be levied or is leviable under the impugned Act if no mining activities are carried on. Hence, it is manifest that it is not related to land as unit which is the only method of valuation of land under Entry 49 of List II, but is relatable to minerals extracted.

After the aforesaid judgment of the Supreme Court in India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, the validity of the Orissa Cess Act came up for consideration before the Supreme Court in M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, . The Orissa Cess Act (Orissa Act 2 of 1962) was amended by Orissa Act 42 of 1976. The Act was enacted for the purpose of simplifying the existing law by consolidating different enactments, customs and usages relating to levy of cess in the State and to introduce a uniformity on levy of cess throughout the State by curing the defects and deficiencies. Under the Act it was proposed to adopt a uniform rate of Re. 0.25 paise in the rupee of annual rental value and to distribute the entire collection without making any deduction towards collection charges among the Zilla Parishads, Panchayat Samities and Grama Panchayats in the ratio of 5:8:12 respectively thus providing them with enhanced revenue to enable them to discharge their statutory responsibilities more efficiently by taking up development works. u/s 4 of the Orissa Cess Act, all lands were made liable to payment of cess determined and payable as provided under the Act and by virtue of 1976 Amendment, even the lands held for carrying on mining operation were not exempted from the levy of cess. Section 5 of the Act which dealt with the rate of cess, assessment thereof and fixation of cess-year was amended from time to time and by virtue of Amendment Act 17 of 1989, it was provided that in case of land held for carrying on mining operations in relation to any mineral, such per centum of the annual value as the State Government, by notification may specify from time to time in relation to such mineral would be levied. Thus, in place of a fixed rate in the original Act, an elasticity was provided. The Act also further provided that all amounts collected as cess would be utilised for the purpose of primary education, contribution to Grama Panchayats and contribution to Samities. Similar legislation passed by the Bihar Legislature as well as Madhya Pradesh Legislature also came up for consideration in the Orissa Cement case and all the cases were heard together. On examining the different provisions of the Orissa Act, the apex Court came to the conclusion that the cess imposed

under the Act cannot be treated as tax on land within the meaning of Entry 49 of List II. It also came to the conclusion that such imposition of cess cannot be justified even having recourse to Entry 50 of List II and further the 1957 Act which is a Central Act is a clear bar on the State Legislature to levy tax on royalty.

The levy under the Orissa Cess Act having been struck down by the Supreme Court in the aforesaid case AIR 1991 SC 176, the State of Orissa sustained a loss of revenue to the extent of Rs. 150 crores as indicated by the Law Minister while introducing the impugned Act on the floor of the legislature and ultimately the Orissa Rural Employment, Education and Production Act, 1992 (the impugned Act) was passed by the State Legislature. It would be appropriate at this stage to extract the speech of the Law Minister in introducing the Bill which later on was passed and became the impugned Act:--

"The Orissa Rural Employment and Production Bill, 1992.

Shri Narasingh Mishra (Minister): Sir, I beg to move that the Orissa Rural Employment and Production Bill, 1992 as suggested by the Select Committee may be taken into consideration.

Sir, to remind the Hon"ble Members, in the last session this Bill was introduced and the House felt that it should be sent to the Select Committee. The Bill was thoroughly discussed by the Committee and the Committee has given certain suggestions. In accordance with the suggestions the Bill has been amended. The views expressed by different Members have been taken into consideration. There has been no dissenting note and this Bill has been brought to increase the income of the State or to compensate the loss that the State Exchequer has lost due to Orissa Cement Case, a judgment pronounced by the Supreme Court. By virtue of that judgment, the State lost nearly Rs. 150.00 crores and for a State like ours losing Rs. 150.00 crores is not a small thing. Even though the Central Government later on revised the rate of royalty on coal and thereby loss could be compensated to the extent of Rs. 30 to Rs. 40 crores still we are in short of Rs. 100.00 crores, because of that judgment. Government has come out with this Bill for imposing tax on all types of land, agriculture, non-agriculture including mineral bearing lands. You know under Item 49 of the State List of the Constitution of India, the State is empowered to impose tax on lands and exercising that power this Bill has been brought, wherein Government once assume the power of imposing tax on all lands. However, State have taken all steps to safeguard the interest of the cultivators and agriculturists. Provision has been made in the Bill that under the Orissa Cess Act, 1962, one who has paid tax/cess will not be further liable to pay tax under the present Bill. Therefore, there should be no apprehension in the mind of the Hon"ble Members that either it will be double taxing or the cultivators who have already overburdened with tax will be further liable to pay any tax. Stress has been given on imposing tax particularly on the mineral bearing lands. You know Sir, ours is a State which is full of mineral resources. Even though we are rich in that way we are unable to exploit our minerals and increase the income of the State because of several

legal hindrances, constitutional and statutory. Therefore, we have to act within the purview of the law which authorises the State Government to impose tax and take resort to that and keeping in view the Orissa Cement case and India Cement case, the two judgments of the Supreme Court, this Bill has been introduced. I hope, for the interests of the State, to increase the revenue of the State, for the development of the rural areas particularly backward areas of the State, this Bill should be approved unanimously and should be passed by the House."

The salient features as well as the necessity for enacting the impugned Act, as apparent from the Minister's Speech on the floor of the Legislature, are: --

- (i) to compensate the loss that the State Exchequer has suffered due to Orissa Cement case;
- (ii) Though the Act intends to impose tax on all types of land, but stress has been given on imposing tax on the "mineral-bearing land";
- (iii) The imposition of the impugned tax on "agricultural land" has been excluded since on those lands cess is payable under the Orissa Cess Act.

Though the impugned Act apparently purports to levy tax on all lands except those agricultural lands in respect of which cess is leviable under the Orissa Cess Act, for all practical purposes, the impugned Act levies a tax on "coal-bearing land" alone and this fact will be discussed later while details of the impugned Act are discussed and analysed.

Shortly after coming into force of the impugned Act, demands having been raised on the Mahanadi Coalfields, the said Company filed O.J.C. No. 2105 of 1993. Mahanadi Coalfields in its turn having demanded the additional burden from the consumers and traders, they also filed independent writ applications and all these writ applications were heard together.

3. Mr. Parasaran appearing for Mahanadi Coalfields raises the following contentions in assailing the validity of the Act in question:--

- (i) Though the Act purports to levy a tax on land within Entry 49 of List II of Seventh Schedule, yet the nomenclature itself is not conclusive in ascertaining the true character of the tax and if the substance and true impact of the levy is examined, the conclusion is irresistible that the tax is not on land but on minerals like coal and, therefore, the State Legislature lacks legislative competence to enact the legislation in question. According to the learned counsel, a tax on land within the ambit of Entry 49 of List II must be directly a tax on land and land as a unit must have definite relationship with land, and, therefore, the measure of tax on land must be on the well-known basis of either annual value or rental value or capital value of the land. But the determination of Rs. 32,000/- per acre per annum has absolutely no nexus at all and, therefore, the levy in question is not what it purports to be.

(ii) The fact that the tax is levied under the impugned Act only on coal-bearing land and the Speech of the Minister in moving the Bill having indicated that to compensate the loss of State revenue on account of the judgment of the Supreme Court in *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, and file argument of the learned Advocate General that determination of Rs. 32,000/- per acre per annum is arrived at on the basis of the loss sustained to the State Exchequer on account of the decision of the Supreme Court divided by the total area of coal-bearing land in the State, makes it explicitly clear that the tax in question is not on land, but on coal itself and, therefore, the State Legislature has no competence to make the legislation in question under Entry 49 of List II of the Seventh Schedule.

(iii) In view of the declaration made by the Parliament by reason of Section 2 of the Mines & Minerals (Regulation & Development) Act, 1957, the entire field of legislation in relation to mines and minerals development having been taken over by the Parliament under Entry 54 of List I, the State Legislature cannot have any power to make any legislation on mines or minerals and impugned legislation being one on coal-bearing land which, in turn, on coal mines or the coal as mineral, the same is invalid and inoperative. In other words, the learned counsel urges that the State's power to legislate including the power to impose tax in so far as it relates to mines and all properties which constitute mines including surface area is denuded.

(iv) Admittedly, all the coal-bearing lands do not belong to the same class, because they bear coal of different qualitative grades having different prices. Fixing of a flat rate of Rs. 32,000/- per acre in such circumstances, results in discrimination as unequals have been treated as equals and, therefore, the levy in question is hit by Article 14 of the Constitution.

(v) The coal-bearing land having vested in the Central Government by reason of Section 10(1) of the Coal Bearing Areas (Acquisition and Development) Act, 1957 (20 of 1957), free from all encumbrances, the properties are the properties of the Union and, therefore, there cannot be any levy since the property of the Union is exempt from State taxation under Article 285 of the Constitution.

(vi) A taxing statute must provide the two essential ingredients, namely who is to pay and the procedure for assessment and a scrutiny of the impugned Act having shown that there is no reference to coal-bearing land when it identifies as to who will pay and there being no procedure for assessment in respect of coal-bearing land, the levy in question is inoperative so far as coal-bearing land is concerned and, therefore, the demand is invalid and in operative.

4. Mr. Shanti Bhushan appearing for the Consumers of coal while reiterating the contentions raised by Mr. Parasaran with regard to the validity of the Act in question, raises a further contention that the tax in the present case, so far as coal-bearing land is concerned, is, in fact, a tax on mineral rights coming within Entry 50 of List II and such a legislation can be passed by the State Legislature

subject to any limitations imposed by the Parliament by law relating to mineral development. Under Article 246(1) of the Constitution, the Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule. The Mines and Minerals (Regulation and Development) Act, 1957, having been enacted by the Parliament in exercise of powers under Entry 54 of List I and a declaration having been made by the Parliament by virtue of Section 2 of the said Act, the impugned legislation where tax has been purported to be levied on minerals on the basis of area, is hit by Section 9A of the M.M.R. & D. Act and, therefore, the field being covered by the Central legislation, the State Legislatures are not entitled to make any law levying tax on mineral rights within the ambit of Entry 50 of List II. According to the learned counsel; in the garb of levying tax on land, tax is levied on minerals or mineral rights by the impugned legislation.

Mr. Shanti Bhushan further urges that though the impugned levy in the force or outward appearance appears to be a tax on land, yet, in substance, is a levy in respect of mineral rights covered by the coal-bearing land and in view of Article 246 of the Constitution read with Entry 50 of List II of the Seventh Schedule, the State Legislatures have no power to legislate the impugned legislation in view of the M.M.R. & D. Act. So far as the challenge to the legislation on the ground of Article 14 is concerned, Mr. Shanti Bhushan contends that in the return filed by the State it has not been indicated as to why coal-bearing land has been grouped as a class by itself having any nexus with the object sought to be achieved by the Act. According to the learned counsel, if raising of additional resources for promotion of education and employment in rural areas is the object and a tax is levied on land for that purpose, then there is no rationale as to why such a tax is levied only on coal-bearing land, inasmuch as though the Act provides for levy of tax on mineral bearing land, yet no rate has been prescribed for the levy in question and there is no category of land coming within the ambit of Section 3(2) (a) of the impugned Act. He further urges that even in respect of coal-bearing land by fixing a flat rate of Rs. 32,000/- per acre, unequals have been treated as equals as the different varieties/ grades of coal have not been taken into account and such treatment is discriminatory on the face of it.

Mr. Shanti Bhushan then contends that the levy in question being on land, the Mahanadi Coalfields cannot pass on that burden to the consumer or trader, since the price of coal is fixed by the Government of India, under the provisions of the Coal Control Order. According to the learned counsel if the tax is not on the article, namely the mineral in question, the question of passing on the burden to the consumer or trader does not arise.

5. Mr. G. Rath, the learned Senior Advocate, appearing for the petitioners in O.J.C. Nos. 5641/93, 5877/93 and 5642/93, raises a contention that the definition of "coal-bearing land" in Section 2 (a-1) of the impugned Act is indicative of the fact that the levy is on mining of coal and not on the land and, therefore, is not referable to the competence of the Legislature under Entry 49 of



List II. He also raises a contention that it is only when the land is acquired, for is declared under any law for the purpose of obtaining coal, then it will be "coal-bearing land" and since there has been no acquisition or declaration as contemplated u/s 2(a-1), the definition clause is not attracted to the leasehold property and, therefore, no levy can be made by the impugned legislation.

6. Mr. Indrajeet Mohanty appearing for the traders in coal challenges the action of Mahanadi Coalfields in demanding the additional burden from the traders on the ground that what could be charged was only a tax on goods and not a tax on land. If it is held to be a tax on goods, namely the coal, then the levy itself is invalid as the State Legislature has no competence to make such legislation. If, on the other hand, it is held to be a tax on land, then the same cannot be taken into account for the purpose of the price of the goods, which has already been fixed by the Government of India in exercise of a statutory power. In support of this contention, he also places reliance on Section 64A of the Sale of Goods Act.

7. M/s. I.S.N. Murty, Jagannath Das and B. Agrawal, learned counsel appearing for petitioners in some of the writ applications also advance their arguments in support of the contentions raised by Mr. Parasaran.

8. Learned Advocate General appearing on behalf of the State strenuously urges that the levy in question under the impugned Act is a tax on land for which the State Legislature has legislative competence under Entry 49 of List II of the Seventh Schedule. According to the learned Advocate-General, these legislative entries should be given their widest amplitude and so long as the levy retains the character of a tax on land and is not confiscatory in nature, the Court is not entitled to embark upon any enquiry to find out the reasonableness of the taxation in question. According to the learned Advocate General, the impugned levy cannot be held to be discriminatory and the legislative wisdom in arriving at the rate of Rs. 32,000/- per acre of coal-bearing land cannot be a subject-matter of investigation by Courts. The learned Advocate General further contends that the impugned Act is no way concerned with the mineral development or regulation of any mine and accordingly does not encroach upon the provisions of the M.M.R. & D. Act, 1957. He also contends that the legislature has got the fullest freedom to choose the subject of tax, the method of tax, the rate of tax and the articles of tax in these respects, no judicial interference is permissible. Learned Advocate General submits that the constitutionality of an Act is to be presumed and unless the Court on examining the provisions of the Act comes to a conclusion that either there is lack of legislative competence or that it contravenes any of the constitutional provisions, the Act should not be struck down. He also contends that even if "pith and substance" theory is applied, unless and until it is found that the State legislation really encroaches upon the legislation framed by the Union, the State legislation cannot be struck down so long as, in substance, the legislation is referable to the power of the legislature under Entry 49 of List II. Learned Advocate General ultimately contends that the tax on coal-bearing land having no relation or reference to the quantum or value

of mineral recovered or the quantum of royalty paid by the lessee in respect of extraction of the minerals in question, the same is essentially a tax on land bearing coal and, therefore, cannot be said to be a tax beyond the legislative power of the State legislature. According to the learned Advocate-General imposition of flat rate ipso facto does not make the levy discriminatory and what impelled the State legislature to fix Rs. 32,000/- per acre cannot be a ground to held the levy to be discriminatory. So far as the argument advanced on behalf of the petitioners in relation to Article 285 of the Constitution is concerned, learned Advocate General contends that the land having been vested in a Central Government Company, it no longer retains the character of property of the Union and, therefore, Article 285 cannot be attracted.

9. In view of the rival submissions at the Bar, the following questions really arise for our consideration:--

(i) Is the impugned tax really a tax on land or a tax on coal mines and coal (as contended by Mr. Parasaran or even a tax on mineral rights in respect of the land coming within Entry 50 of List II of the Seventh Schedule, and if so, is there any limitation imposed by Parliament in respect of such legislation? Whether it is beyond the competence of the State Legislature to enact the Act in question?

(While considering the aforesaid question, certain settled principles with regard to the interpretation of the legislative entry have to be borne in mind.)

(ii) Can the Impugned Act levying tax on coal bearing land alone be said to be discriminatory in nature and does it have any nexus with the object sought to be achieved under the Act?

(iii) Does the land remain the property of the Union thereby it is exempt from tax imposed by the State, within the meaning of Article 285 of the Constitution?

(iv) Can the taxation burden on the land be passed on to the consumer or trader in fixing up the price of coal, in view of such fixation having been made by the Union Government under the Colliery Control Order?

10. Coming to the first question, we are concerned with the following Entries in List I and List II of the Seventh Schedule. Entry 54 of List I is to the effect:--

"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."

It is under this Entry, the Mines & Minerals (Regulation and Development) Act, 1957, has been enacted by the Parliament and a Declaration has been made u/s 2 of the said Act that the regulation and development of mines should be in public interest under the control of the Union.

Entry 49 of List II is to the effect:--

"49. Taxes on lands and buildings."

According to the learned Advocate-General, the impugned levy is a "tax on land". Entry 50 of List II is to the effect:--

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

According to Mr. Shantibhushan, the impugned levy is essentially a tax on mineral rights and, therefore, in view of limitations imposed by Parliament by enacting the M.M.R. & D, Act, the State Legislature is denuded of its power to make the levy in question.

At this stage, it would be appropriate also to extract Article 246 of the Constitution:--

"246. Subject-matter of laws made by Parliament and by the Legislature of States.-

(1) Notwithstanding anything in Clauses (2) and (3) Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in Clause (3), Parliament, and, subject to Clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to Clauses (1) and (2), the legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

At the outset, it may be stated that the Entries in the three legislative lists have to be interpreted in their widest amplitude and, therefore, if a tax can reasonably be held to be a "tax on land", then it will come within Entry 49 of List II. The power to legislate is given by Article 246 of the Constitution and the entries in the three Lists of the Seventh Schedule to the Constitution are legislative heads or fields of legislation and they demarcate the area over which the appropriate legislature can operate. As has been stated by the Supreme Court in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , though widest amplitude should be given to the language of the entries, but when these entries in different Lists or in the same list may overlap and sometimes may also appear to be in direct conflict with each other, then it is the duty of the Court to find out its true intent and purpose and to examine a particular legislation in its pith and substance to determine whether it fits in one or the other of the Lists. It would be appropriate to extract a passage from the judgment of the Supreme Court in

the case of Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others, (at p. 1458):--

"....The power to legislate is given to the appropriate legislature by Article 246 of the Constitution. The entries in the three lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate. It is well established that the widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of the Court to reconcile the entries and bring about a harmonious construction. ...."

The Federal Court while interpreting the Government of India Act in the case of AIR 1944 51 (Federal Court) , observed:-- .

"It would not be right to derive the power to legislate on this topic merely from the reference to it in the list, because the purpose of the Lists was not to create or confer powers, but only to distribute between the Federal and the provincial legislatures the powers which had been conferred by Sections 99 and 100 of the Act."

It is in this context, Justice Sabyasachi Mukharji (as he then was), observed in India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, (at p. 91):--

". . . .The lists are designed to define and delimit the respective areas of respective competence of the Union and the States. These neither impose any implied restriction on the legislative power conferred by Article 246 of the Constitution, nor prescribe any duty to exercise that legislative power in any particular manner. Hence, the language of the entries should be given widest scope. ...."

Learned Advocate General in course of his submissions emphasised the point that there is a presumption in favour of constitutionality of a statute and that must be borne in mind while deciding the validity of the impugned Act. Dealing with this question in the case of Diamond Sugar Mills Ltd. and Another Vs. The State of Uttar Pradesh and Another, , it was observed by the apex Court:--

"Our task being to ascertain the limits of the powers granted by the Constitution, we cannot extend these limits by way of interpretation. But if there is any difficulty in ascertaining the limits, the difficulty must be resolved so far as possible in favour of the legislative body. The presumption in favour of constitutionality which was stressed by the learned counsel for the respondents does not take us beyond this."

Bearing in mind these principles, we would now examine the further contentions advanced by the counsel for the parties in attacking and defending the provisions of the impugned statute.

11. The learned Advocate General appearing for the State in defending the

validity of the statute argues with vehemence that the levy in question being purely a "tax on land" it is neither necessary nor permissible for the Court to apply the "pith and substance" theory or to find out the impact of the legislation and then come to a conclusion that it is a tax on mineral or mineral bearing land, thereby the State Legislature is incompetent to pass the legislation in question and in support of the stand, he places reliance on the decision of the Supreme Court in the case of *The State of Karnataka and Another Vs. Shri Ranganatha Reddy and Another*, , as well as the decision of the Gujarat High Court in the case *Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality* AIR 1968 Guj 124, and the decision of the Bombay High Court in the case of *Municipal Commissioner, the Municipal Corporation of the City of Ahmedabad Vs. Gordhandas Hargovandas and Others*, . But the very Supreme Court decision on which the learned Advocate General places so much reliance unequivocally states:

".... .There are numerous decisions of the Privy Council, the Federal Court and the Supreme Court in support of the proposition that the pith and substance of the Act has to be looked into and an incidental trespass would not invalidate the law. ...."

In the Gujarat case AIR 1968 Guj 124, the question for consideration was whether the impost in question is a tax on lands and buildings coming within Entry 49 of List II, or it is on the capital value of assets other than agricultural lands, coming within Entry 86 of List 1. The Court having found that the impugned house tax definitely levies a tax on the basis of capital value on lands and buildings, and that such a tax is directly within the competence of the State Legislature, held that there is no necessity to consider the application of doctrine of pith and substance in construing the impugned house tax in view of the fact that it does not trespass or purport to trespass upon the legislative field delineated by Entry 86. When the question in the present case is whether the levy in question is really a tax on land or a tax on minerals like coal, or a tax on mineral rights within Entry 50 of List II of the Seventh Schedule, the aforesaid decision is of no assistance.

In the *Municipal Commissioner, the Municipal Corporation of the City of Ahmedabad Vs. Gordhandas Hargovandas and Others*, on which learned Advocate General places strong reliance, what the Court had said was that the words used in describing the entry should be given their largest denotation and should be construed liberally and in their broad sense, and it as a result of such construction conflict between two entries in the two lists appears inevitable, the attempt should be made to put a narrower and more restricted construction on the words used so as to avoid the conflict. It is only when on no reasonable construction the conflict between the two entries can be avoided, then the question of trespass has to be faced and considered. Construing Entry 42 of List 11 of the Government of India Act, 1935, which corresponds to Entry 49 of List II of the Seventh Schedule of the Constitution, the learned Judges held that the Entry 42 of List II which confers power to levy tax on lands on the provincial

legislature introduces no terms of limitation and does not provide for any particular manner in which the tax should be levied. In other words, the power of the Provincial Legislature to levy the tax on lands is unqualified and absolute. There is no dispute with the aforesaid proposition, but the real controversy in the present case is whether the impugned tax is actually a "tax on land". In the very Bombay case, relying upon the observations of the Federal Court in the case of AIR 1949 81 (Federal Court) , it was held that the character of the means or machinery devised by the Legislature for levying a tax would not by itself determine the character of the tax as such. The Courts must examine the essential features of the tax and consider the pith and substance of the legislation before they decide whether it is a tax as such or it amounts to a tax on the capital value. In the very judgment, it has been further held:--

"It is well established that in interpreting items in the Lists in Schedule VII to the Government of India Act, it is open to the Courts to consider legislative history in order to give proper meaning to the words used in the items....."

The aforesaid decision, therefore, runs contrary to the submission of the learned Advocate General that when prima facie the impugned levy is a "tax on land", it is not open for the Court to examine either the Speech of the Minister on the floor of the Legislature or any other matter to decide the essential features of the tax in question.

12. On the other hand, in the case of Shashikant Laxman Kale v. Union of India , when validity of Section 10(10C) of the Income Tax Act, as introduced by the Finance Act, 1987, had been challenged, their Lordships held (at p. 2119 of AIR) :--

"For determining the purpose or object of the legislation, it is permissible to look into the circumstances which prevailed at the time when the law was passed and which necessitated the passing of that law. For the limited purpose of appreciating the background and the antecedent factual matrix leading to the legislation, it is permissible to look into the Statement of Objects and Reasons of the Bill which actuated the step to provide a remedy for the then existing malady....."

In the case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, , when certain provisions of the Income Tax Act had been challenged, the Supreme Court had observed (at p. 1930 of AIR) :--

"Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in Western countries but also in India that interpretation of a

statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. .... ."

In AIR 1949 81 (Federal Court) , the learned Judges approved the observations of Lord Thankerton, in *In re, A Reference under the Government of Ireland Act, 1920*; *In re Section 3, Finance Act (Northern Ireland) (1936)* 2 All ER 111 to the effect :--

"It is the essential character of the particular tax charged that is to be regarded, and the nature of the machinery, often complicated by which the tax is to be assessed is not of assistance except in so far as it may throw light on the general character of the tax."

The learned judges of the Federal Court held :--

".....It shows that there are other factors to be taken into consideration and that it is the essential nature of the tax charged and not the nature of the machinery which is to be looked at."

In *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, , it was also stated (at p. 1696 of AIR):--

". . . .it is not the form or the statutory machinery that matters; one has to look at the real substance and true impact of the levy. If this is done, it is said, there can be no doubt that the cess impugned here suffers from the same vice that vitiated the levy in *India Cement*."

In the case of *Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others*, , where the question for consideration was whether the levy is in respect of tea estates or is a levy on despatches of tea, it was observed:--

". . . .To determine whether the levy is in respect of tea estates or is a levy on despatches of tea, the substance of the legislation must be ascertained from the relevant provisions of the statute. It cannot be disputed that the subject of the levy, the nature of which defines the quality of the levy must not be confused with the measure of the liability, that is to say, the quantum of the tax. ...."

After examining the relevant provisions of the Act, to ascertain the essential substance of it, the learned Judges held that although the impugned provision speaks of a levy of cess in respect of tea estates, but what it contemplates is a levy on despatches of tea instead. . The aforesaid pronouncements of the different Courts with regard to the interpretation of the legislative entry where a particular statute is challenged on the ground of lack of legislative competence should be borne in mind in the case in hand and the true nature of the tax under the Act has to be ascertained.

13. We would be failing in our duty if we do not notice a few other decisions cited at the Bar which have direct bearing in answering the very first question posed by us. In the case of *Union Colliery Company of British Columbia, Limited v. Bryden, etc.* (1899) Ap C 580, the validity of Section 4 of the British Columbia

Coal Mines Regulation Act, 1890, had been assailed on the ground that it was ultra vires the Provincial Legislature. In the said case by Section 4 of the Coal Mines Regulation Act, 1890, no boy under the age of 12 years and no woman or girl of any age and Chinaman would be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground, and the Provincial Legislature had passed the legislation in question. What was contended before the Court was that by Section 91, Subsection (25), the Dominion Parliament has the exclusive legislative authority over aliens and, therefore, by enacting the impugned legislation, the Provincial Legislature had trespassed into the legislative field of the Dominion Legislature. The Privy Council held ;--

"Their Lordships see no reason to doubt that, by virtue of Section 91, Subsection (25), the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of Section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore, trench upon the exclusive authority of the Parliament of Canada....."

Ultimately, their Lordships advised Her Majesty to reverse the judgment appealed from and to declare that the provision of Section 4 of the British Columbia Coal Mines Regulation Act in so far as it relates to Chinamen is ultra vires the Provincial Legislature.

In the case of *In re, The Insurance Act of Canada (1932) AC41*, the validity of Section 16 of the Special War Revenue Act of Canada was under challenge and the principal question that arose for consideration was whether under the guise of a legislation in respect of aliens, the impugned Act intermeddles with the conduct of insurance business which lies within the exclusive jurisdiction of the Provincial Legislature. The Privy Council held:--

". . . What has got to be considered is whether this is in a true sense of the word alien legislation, and that is what Lord Haldane meant by "properly framed legislation". Their Lordships have no doubt that the Dominion Parliament might pass an Act forbidding aliens to enter Canada or forbidding them so to enter to engage in any business without a license, and further they might furnish rules for their conduct while in Canada, requiring them, i.e., to report at stated intervals. But the sections here are not of that sort, they do not deal with the position of an alien as such; but under the guise of legislation as to aliens they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to Provincial Law. Their Lordships have, therefore, no hesitation in declaring that this is not "properly framed" alien legislation."



(Underlining is ours)

In Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others, , the State of West Bengal sought to raise additional resources from two sources -- "surcharge on land revenue; and rural employment cess -- u/s 4 of the W. B. Rural Employment and Production Act, 1976. u/s 4 of the Act, the rural employment cess was to be levied annually in respect of lands other than a tea estate at the rate of 06 paise on each rupee of development value thereof and in respect of a tea estate at such rate not exceeding Rs. 6/- on each kilogram of tea on the despatches from such tea estate of tea grown therein, as the State Government may, by notification in the Official Gazette, fix in this behalf. A proviso to the said section had been added to the effect that in calculating the despatches of tea for the purpose of levy of rural employment cess, such despatches for sale made at such tea auction centres as may be recognised by the State Government by notification in the Official Gazette shall be excluded. A second proviso had also been added to the effect that the State Government may fix different rates on despatches of different classes of tea. The said Section 4 was also further amended and Sub-section (4) was inserted. The point of controversy was whether the levy was a levy on tea estate as it appears to be, or a levy on despatches of tea and it is in that connection, it was observed by the Supreme Court:--

". . . .To determine whether the levy is in respect of tea estates or is a levy on despatches of tea, the substance of the legislation must be ascertained from the relevant provisions of the statute. It cannot be disputed that the subject of the levy, the nature of which defines the quality of the levy must not be confused with the measure of liability, that is to say, the quantum of the tax....."

The learned Judges on examining the provisions of the Act came to the conclusion:--

". . . .It seems to us that although the impugned provisions speak of a levy of cess in respect of tea estates, what is really contemplated is a levy on despatches of tea instead. The entire structure of the levy points to that conclusion. If the levy is regarded as one in respect of tea estates and the measure of the liability is defined in terms of the weight of tea despatched from the tea estate there must be a nexus between the two indicating a relationship between the levy on the tea estate and the criteria for determining the measure of liability. If there is no nexus at all can conceivably be inferred that the levy is not what it purports to be. ... ."

The learned Judges then held:--

"Another aspect of the matter may be considered, and that relates to legislative competence. If the impugned legislation were to be regarded as a levy in respect of tea estates, it would be referable to Entry 49 in List 2 of the Seventh Schedule of the Constitution which speaks of "taxes on lands and buildings". But if the legislation is in substance legislation in respect of despatches of tea, legislative

authority must be found for it with reference to some other entry. We have not been shown any entry in List II or in List III of the Seventh Schedule which would be pertinent. It may be noted that Parliament had made a declaration in Section 2 of the Tea Act, 1953 that it was expedient in the public interest that the Union should take under its control the tea industry. Under the Tea Act, Parliament has assumed control of the tea industry including the tea trade and control of tea prices. u/s 25 of the Act a cess on tea produced in India has also been imposed. It appears to us that the impugned legislation is also void for want of legislative competence as it pertains to a covered field."

In *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , the Seven-Judge Bench came to the conclusion that the cess on royalty on mineral right is a tax and a tax on royalty is beyond the competence of the State Legislature because Section 9 of the Central Act (M.M.R. & D. Act) covers the field and the State Legislature is denuded of its competence under Entry 23 of List II and in any event, cess on royalty cannot be sustained under Entry 49 of List II as being a tax on land. It was also held that royalty on mineral rights is not a tax on land, but a payment for the user of land.

In *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, examining the scheme of taxation and taking note of the fact as to how the annual value of land is determined, more particularly Section 7(3) of the amended Act of 1989, the apex Court held that it was apparently intended to regulate the cess on coal in respect of which the pit's mouth value had been determined and it further came to the conclusion that it was a case where the levy had no reference to land at all but only to the income from the land in the case of Government lands got by way of land revenue or otherwise. In that context, the learned Judges also observed :--

".....A tax on land may be levied, inter alia, with reference to its annual value. One realistic measure of such capital or annual value will be the income that the land will yield just as, for property tax purposes, the annual value is based on the amount for which the property can reasonably be let from year to year. The income from the land may be more or less due to a variety of reasons. In the case of agricultural lands, it may depend on the fertility of the soil, the sources of irrigation available, the nature of crops grown and other such factors. Likewise, where the land is one containing minerals, naturally the value (whether annual or capital value) will be more if it contains richer minerals and can be legitimately measured by reference to the royalties paid in respect thereof. ...."

Finally, the Court held (para. 34):--

".....The change in the scheme of taxation under Section 7 in 1976; the importance and magnitude of the revenue by way of royalties received by the State; the charge of the cess as a percentage and, indeed, as multiples of the amount of royalty; and the mode and collection of the cess amount along with the royalties and as part thereof are circumstances which go to show that the

legislation in this regard is with respect to royalty rather than with respect to land."

In the latter part of paragraph 35 of the judgment, the Court observed:-

- ". . . .The manner in which the levy, initially introduced a uniform cess on all land was slowly converted qua mining lands, into a levy computed at multiples of the royalty amounts paid by the lessees thereof seem to bear out the contention that it is being availed of as a tax on the royalties rather than one on the annual value of the land containing the minerals. ...."

And on this conclusion, the contention of the State seeking to justify the levy under Entries 45, 49 and 50 of List II of the Seventh Schedule was repelled. What has been observed by the Supreme Court in Orissa Cement case (supra) on examining the provisions of the Orissa Cess Act so far as the levy on coal mines is concerned would equally apply to the case in hand which we are examining.

Learned Advocate General throughout in course of his arguments had stressed on the fact that under the Orissa Rural Employment, Education and Production Act, the tax is levied on "land" directly and, therefore, it comes within the power of the State Legislature under Entry 49 of List II. But we are unable to accept this contention.

14. An examination of the provisions of the impugned Act reveals that "coal-bearing land" has been taken as a class and has been defined separately u/s 2(a-1) of the Act. The rate of tax on such land has been separately mentioned as per the Schedule and that too at a flat rate of Rs. 32,000/- per acre. Though the Act contemplates of levy of tax also on "land other than mineral bearing land" as well as on "mineral bearing land" apart from "coal-bearing land", but there has been no levy or possibility of any levy on any other land excepting the "coal-bearing land". The levy is confined to area covered by mining leases of coal. In fact, the form has been changed but the substance of the levy remains the same as was in M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, . The Speech of the Minister concerned while introducing the Bill on the floor of the Legislature, which has been extracted in this judgment, clearly indicates that to make good the loss sustained by the State on account of the judgment of the Supreme Court in Orissa Cement case and though the Central Government by enhancing the royalty in coal compensated a part of the loss, the State came forward with the impugned Act for recouping the loss of Rs. 150 crores. The fact that a flat rate of tax at the rate of Rs. 32,000/- per acre has been determined as levy as on "coal-bearing land" having no reference to either the capital value or annual value of the land which is a normal mode of levy of tax on land and the statement of the learned Advocate General in course of his arguments that the sum of Rs. 32,000/- per acre which is the tax on "coal-bearing land", was determined by taking into account the loss sustained by the State from the cess on coal on account of the judgment of the Supreme Court in Orissa Cement case divided by the total acreage of coal-bearing land which is 50,000 acres and on

calculation it comes to Rs. 32,000/- per acre, leave no room for doubt that the tax in question is not actually on "land", but on "coal" or the "land bearing coal". Looking at the essential nature and character of tax; the substance of the legislation; its effect directly on coal; the object sought to be achieved as given out by the concerned Minister while introducing the Bill; the manner in which the rate of Rs. 32,000/- per acre has been arrived at; singling out coal-bearing land from other mineral-bearing land and levy being only on coal-bearing land and not any other land though the Act purports to tax on all land, it can be said without hesitation that though the State Legislature apparently purports to act within its powers under Entry 49 of List II, in substance and in reality it transgressed the powers as it has sought to tax on coal and, therefore, the decision in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, as well as *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, would also apply to the case in hand and it must be held that the State Legislature did not have the competence to levy a tax on "coal".

At this stage it would be also appropriate to notice that a similar levy under the Rajasthan Land Tax Act (6 of 1985) came up for consideration before the Supreme Court in the case of *The Federation of Mining Associations of Rajasthan, and Vs. State of Rajasthan and Another*, , and the Supreme Court struck down the said levy. Further, a similar levy made by the Gujarat State was also struck down by the Supreme Court in Writ Petitions Nos. 100 to 116 of 1991.

In the aforesaid premises, our answer to the first question posed by us in paragraph 9 of this judgment is that the impugned tax is really a tax on "coal" or "land bearing coal" and not a tax on "land" and, therefore, the State Legislature did not have the competence within Entry 49 of List II to legislate the impugned Act.

15. It would be appropriate at this stage to examine the alternative submission of Mr. Shantibhushan, namely that the impugned legislation is a legislation for levy of tax on mineral rights coming under Entry 50 of List II and, therefore, such a legislation would be subject to any limitations imposed by the Parliament by law relating to mineral development. Admittedly, the M.M.R. and D. Act, 1957 (Act 9 of 1957) deals with the regulation of mines and minerals and either royalty or dead-rent is levied under the said Act and there is a declaration made by the Parliament u/s 2 of the said Act. The levy in question though apparently appears to be a "tax on land" but for the reasons already indicated, it is essentially a "tax on minerals, or mineral rights in land". In this view of the matter, even though the levy of tax is area wise or on the basis of acreage, the said levy would be hit by Section 2-A of the M.M.R. & D. Act. The entire object of the levy is to tax the minerals whether extracted or not and the field being fully covered by the Central legislation under the M.M.R. & D. Act, what has been stated by the Supreme Court in *Orissa Cement* case in respect of the provisions of the *Orissa Cess Act* levying cess on coal mines to the effect that it is ultra vires Section 9 of the M.M.R. & D. Act would apply to the present case, the same

being hit by Section 9A of the M.M.R. & D. Act and on this ground also, the impugned levy is bad in law.

16. Coming to the next question as to whether the challenge to the Act is made on the basis of discrimination and lack of classification, the sum and substance of the arguments advanced on behalf of the counsel appearing for the various sets of petitioners is that although "coal-bearing land" has been included as a class by itself on which there has been levy of Rs. 32,000/- per acre per annum, but there is no nexus for such classification with the object sought to be achieved by the Act in question and in the return filed by the State not an iota of material has been pleaded to establish why "coal-bearing land" has been grouped as a separate class by itself. That apart, fixing a flat rate of Rs. 32,000/- per acre in respect of "coal-bearing land" tantamounts to treating unequals as equals, inasmuch as there are different categories of coal and that has not been taken into account while fixing the flat rate of Rs. 32,000/- per acre. According to the counsel for the petitioners, this is discriminatory and hit by Article 14 of the Constitution.

Learned Advocate General appearing for the State, on the other hand, contends that though there are different categories of coal, but in Orissa, out of the "coal-bearing lands", the majority is of a particular category and, therefore, fixation of Rs. 32,000/- per acre cannot be said to be arbitrary and he further contends that fixation of Rs. 32,000/- per acre is the wisdom of the legislation which cannot be scrutinised by the Court.

17. It is no doubt true that the State enjoys a considerably wide discretion in the matter of classification for taxation purposes in view of the complexity of fiscal adjustments of diverse elements. The legislature has ample freedom to select and classify persons, goods, properties, incomes and objects which it would tax and which it would not tax and so long as the classification made within this wide and flexible range does not transgress the fundamental principles underlying the doctrine of equality, it is not vulnerable on the ground of discrimination, as has been laid down by the Supreme Court in the case of *I.T.O. v. N. Tatin Roy Rymbai* AIR 1976 SC 670. But even in the said case, their Lordships of the Supreme Court had observed that when within the range of selection, the law operates unequally and cannot be justified on the basis of a valid classification, then that would be a violation of Article 14 of the Constitution. This question came up for consideration recently in *Shashikant Laxman Kale's* case, where Section 10(10-C) of the Income Tax Act was under consideration. It was laid down by their Lordships :--

"We must, therefore, look beyond the ostensible classification and to the purpose of the law and apply the test of "palpable arbitrariness" in the context of the felt needs of the times and societal exigencies informed by experiences to determine reasonableness of the classification. It is clear that the role of public sector in the sphere of promoting the national economy and the context of felt needs of the times and societal exigencies informed by experience gained from its functioning

till the enactment are of significance. There is no dispute that the impugned provision includes all employees of the public sector. The question is whether those left out are similarly situated for the purpose of the enactment to render the classification palpably arbitrary. It is only in this test of palpable arbitrariness applied in this manner is satisfied, that the provision can be faulted as discriminatory but not otherwise. Unless such a defect can be found, the further question of construing the provision in such a manner as to include all employees and not merely employees of public sector companies does not arise."

The Court had further observed in the said case that the validity of the classification can be tested when the purpose and object of the impugned enactment is examined to find out whether there exists any rational nexus of the differentia on which the classification is based. If the aforesaid dictum is applied to the case in hand, the apparent object of the impugned Act, as has been given in the preamble of the Act itself, is to secure additional recourse for promotion of education and employment in rural areas and for implementing the rural employment, education and production programme. If that is the object for which the enactment has been made, then we fail to understand as to what reasonable nexus is there to classify or group "coal-bearing land". At any rate, the return filed by the State is totally silent on this aspect. Then, though the Act is intended to levy the tax in respect of all mineral bearing lands as well as non-mineral bearing lands subject to the exclusion of agricultural land for which the Orissa Cess Act applies, but in practice, the levy as on today can only be made on the coal-bearing land alone in accordance with the rates specified in the Schedule and not on the two other classified groups of land within the ambit of Section 2(a) and (b) of the Act, as the annual value of land other than mineral-bearing land is incapable of being determined and there has been no prescription for the mineral-bearing land other than coal-bearing land, as is required u/s 2(b) of the Act. It is further to be noticed that though the levy is purported to be made on all lands on the basis of the annual value of the land to be determined in accordance with the prescribed procedure, but it is not so in respect of coal-bearing land. Then again, in view of the conceded position that the quality of coal is not the same underneath of coal-bearing lands and the value of the coal varies from place to place, but yet that has not been taken into account, in consequence of which unequals have been treated as equals. An analysis of the provisions of the Act unhesitatingly points out to the one conclusion that the legislatures have merely taken steps by the impugned Act to compensate the loss suffered to the State on account of striking down of the provisions of the Orissa Cess Act by which cess on coal was being levied, without having any nexus in classifying "coal-bearing land" as a separate class, with the object of the Act and without bearing in mind the fact that underneath the coal-bearing land, different categories of coal are available which in turn would make the annual value of the land to be different and thus making the provision discriminatory. Levy of tax on coal-bearing land alone, providing different modes of quantification, one for coal-bearing land and the other for mineral-bearing

land, without having any nexus for such differentiation; and even making flat rate of Rs. 32,000/- per acre though different categories of coal are available, thereby treating unequals as equals; are sufficient to indicate the levy to be discriminatory and hit by Article 14 of the Constitution.

Learned Advocate General relying upon the observations of their Lordships of the Supreme Court in the famous case of Khyerbari Tea Co. Ltd. v. State of Assam AIR 1904 SC 925, argues with vehemence that imposition of the levy at a flat rate of Rs. 32,000/- per acre in respect of coal-bearing land ipso facto does not make the levy unreasonable, arbitrary or discriminatory. In this connection, the learned Advocate General relies upon the following observations of the Supreme Court in the aforesaid case:--

"..... .The law of taxation is on the ultimate analysis the result of the balancing of several complex considerations, and so, it would be unreasonable to insist upon the application of a general rule that if a tax is levied at a flat rate, it must be treated as unreasonable....."

The learned Advocate General also places before us another observation of the apex Court from the same case, to the effect that the power conferred on the Court to strike down a taxing statute if it contravenes the provisions of Article 14 19 or 301 has to be exercised with circumspection, bearing in mind that the power of the State to levy taxes for the purpose of governance and for carrying out its welfare activities is a necessary attribute, of sovereignty and in that sense it is a power of paramount character. But he fails to notice the subsequent observation made by the Court in the same judgment that if the Court is satisfied that the Act imposes unreasonable restrictions on the fundamental rights of the citizens or confers unbridled power on the appropriate authorities or introduces unconstitutional discrimination and, in consequence, amounts to a colourable exercise of legislative power, then in such a case the Court can strike down the statute. On examining the impugned levy by the impugned Act and for the reasons already indicated, we are of the opinion that the levy on "coal-bearing land" alone is grossly discriminatory and is hit by the provision of Article 14 of the Constitution.

18. Coming to the third question, namely, the applicability of Article 285 of the Constitution, the entire argument of Mr. Parasaran appearing for the petitioners in Mahanadi Coalfields case (OJC No. 2015/93) is that under the Coal-bearing Areas (Acquisition and Development) Act, 1957 (Central Act 20 of 1957), the so-called vesting u/s 11 is different from "vesting of land or rights in the Central Government" u/s 10 and according to the learned counsel, an order of the Central Government in terms of Sub-section (1) of Section 11 directing vesting with the Government Company is not a total vesting of all rights as is contemplated u/s 10 and consequently, the Central Government continues to be the owner of the land and, therefore, Article 285 of the Constitution prohibits State Legislatures from making any levy on the land of the Union Government and the property of the Union is exempted from taxes imposed by the State. In

this connection, Mr. Parasaran places reliance on the decision of the Supreme Court in the case of Fruit and Vegetable Merchants Union Vs. Delhi Improvement Trust, , and contends that the word "vest" is a word of variable import and it has not got a fixed connotation and, as has been observed by the Supreme Court in the aforesaid case, it may vest in title, or it may vest in possession, or it may vest in a limited sense, as indicated in the context in which it may have been used in a particular piece of legislation. Mr. Parasaran thus urges that absence of the expression "shall vest absolutely in the Central Government free from all encumbrances" in Section 11, though it subsists in Section 10, makes it clear that a notification u/s 11(1) does not vest the property in the Government Company, and the Union Government continues to be the owner of the property. Though the argument appears attractive, but does not sustain a deeper scrutiny and a careful reading of both the provisions of Sections 10 and 11 of the Coal-bearing Areas (Acquisition and Development) Act, 1957 makes it crystal clear that on an order being passed in writing by the Central Government under Sub-section (1) of Section 11, the land or the rights in or over the land shall vest in the Government Company instead of vesting in the Central Government u/s 10 and, therefore, the prohibitions contained in Article 285 of the Constitution cannot apply to the said property in question. A similar question came up for consideration before their Lordships of the Supreme Court in the case of Western Coalfields Limited Vs. Special Area Development Authority, Korba and Another, , where the Coalfields was seeking exemption under Article 285 of the Constitution in respect of a levy under the M. P. Municipalities Act. Chandrachud, C. J., speaking for the Court, came to hold :--

".....even though the entire share capital of the appellant-companies has been subscribed by the Government of India, it cannot be predicated that the companies themselves are owned by the Government of India. The companies, which are incorporated under the Companies Act, have a corporate personality of their own, distinct from that of the Government of India. The lands and buildings are vested in and owned by the companies, the Government of India only owns the share capital."

And, therefore, Article 285 of the Constitution cannot have any application. In that very case, the learned Judge had also observed :--

"..... The appellant Companies were incorporated under the Companies Act for a lawful purpose. Their property is their own and it vests in them. u/s 5(1) of the Coal Mines (Nationalisation) Act, 26 of 1973, which applies in the instant case, the right, title and interest of a nationalised coal mine vest, by direction of the Central Government, in the Government company. If the lands and building on which respondent 1 has imposed the property tax cannot be regarded as the property of the Central Government for several other purposes like attachment and sale, there is no reason why, for taxing purposes, the property can be treated as belonging to that Government as distinct from the company which has a juristic personality."



The aforesaid observations and the dictum apply with full force to the present case.

In the aforesaid premises, we are of the considered opinion that Article 285 of the Constitution has no application and the arguments of Mr. Parasaran on this score cannot be sustained.

19. The only other question that remains for consideration is whether the taxation burden in question can be passed on to the consumer or trader in fixing the price of coal by the owner of the property, namely Mahanadi Coalfields. According to Mr. Parasaran, the learned counsel appearing for Mahanadi Coalfields, the notification issued by the Government of India in the Ministry of Coal, in exercise of powers under Clauses 3 and 4 of the Colliery Control Order, 1945, fixing the price of coal which has been annexed as Annexure 1/A, clearly stipulates in Note 11 of Table VI to the Notification that "the pit-head prices fixed in Tables II, III and IV are exclusive of royalty cesses, taxes and levy, if any, levied by Government, local authorities or other bodies, duties of excise and sales tax" and, therefore, if the State Legislature levies a tax, then the price already fixed cannot take away the power of the owner to include that tax for fixing the sale price in view of the language used in Note 11 of Table VI of the Notification issued in pursuance to the Colliery Control Order, 1945.

Mr. Shantibhushan appearing for the Consumers and several other counsel appearing for traders, on the other hand, contend that if the levy is on coal then certainly, the said levy can be passed on to the consumer or trader, but if the levy is on the land having no relation with the coal, then that levy cannot be passed on to the consumer or trader, though it may be open to the Union Government to re-fix the prices of coal taking the aforesaid levy into account. On examining the Note 11 of Table VI of the aforesaid Government notification fixing the price of coal, we are persuaded to accept the submission made by Mr. Shantibhushan, as in our view, the provision of Note 11 is susceptible of the only construction that the pit-head price fixed in Tables II, III and IV in respect of coal is exclusive of royalty, cess, tax and levy, if any, levied by the Government, local authorities, or other bodies on coal. By the notification in question, while the Government of India has fixed the sale price of coal, it has authorised the seller or the owner of the coal to add the tax or royalty or cess on coal, if so levied by the Government or local authorities. But if the tax is really on "land" or if the State Legislature levies a "tax on land" which may have an indirect impact on the price of coal, but that tax cannot be passed on either to the consumer or trader by taking recourse to Note 11 of the Notification fixing the price of coal. In other words, what can be passed on to the consumer and trader is a direct tax on the mineral in question and not any tax or levy.

In this connection, it would be appropriate also to notice the provision of Section 64A of the Sale of Goods Act (3 of 1930) which authorises that in the event of any tax of the nature described in Sub-section (2) thereof being imposed, the same becomes payable and the seller may add so much to the contract price as

will be equivalent to the amount paid or payable in respect of such tax or increase of tax. But Sub-section (2) thereof clearly indicates that Sub-section (1) would apply only in respect of duty of customs or excise on goods and any tax on the sale or purchase of goods. Therefore, if no levy is made on the goods itself, Sub-section (1) of Section 64A cannot have any application. In this view of the matter, if the tax is on the mineral, then certainly, the burden can be passed on to the consumer and trader, but if tax is on the "land" then the burden cannot be passed on to the consumer or trader.

In view of our conclusion that the levy in question is one on the mineral and as we strike down the said levy, the question of passing on the burden would not arise. But if it is held that the tax is on "land" as contended by the learned Advocate General appearing for the State, then certainly, the burden cannot be passed on to the consumer or trader. Mr. Parasaran's argument on this score, therefore, cannot be sustained.

20. In view of our conclusions, as aforesaid, the provision of Section 3(2)(c) of the impugned Act as well as the Schedule attached to the impugned Act levying tax Rs. 32,000/- per acre of "coal-bearing land" is struck down and further the consequential notices issued in Form V as well as the demand notices in Form VII are quashed and the certificate proceedings, if any, pending before any forum for realisation of the dues under the impugned Act are also quashed. Necessarily, therefore, the demands raised by the Mahanadi Coalfields against the traders and consumers on account of the additional burden of tax on land are also quashed.

21. The writ applications are accordingly allowed, but in the circumstances, there will be no order as to costs.

R.K. Patra, J.

22. I agree.