

(1962) 04 CAL CK 0002

In the Calcutta High Court

Case No : Appeal from Original Decree No. 127 of 1955

State of West Bengal

APPELLANT

Vs

Indian Iron and Steel Co. Ltd.

RESPONDENT

Date of Decision : 17-04-1962

Acts Referred:

Cess Act, 1880 — Section 102, 35, 4, 5, 6
Civil Procedure Code, 1908 (CPC) — Section 9

Citation : 67 CWN 138

Hon'ble Judges : P.N. Mookerjee, J;BhattaCharya, J

Bench : Division Bench

Advocate : Nirmal Chandra Chakraborty and Sibakali Bagchi, for the Appellant;P.R. Das, B. Das and Ajoy Kumar Basu, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal by the State raises, broadly, two questions of fundamental importance, one relating to liability for cess (including education cess), and the other, concerning the jurisdiction of the Civil Court in the matter of determination of the existence or otherwise of such liability. The answer to the first question, depends, primarily, upon the construction of the relative basic statute, [the Cess Act, 1880 (Bengal Act IX of 1880) hereinafter also referred to for brevity, optness and convenience, as the Bengal Cess Act] and to the second on general principles of jurisprudence, well-settled but often difficult to apply. The answers, again, may have far-reaching consequences, both from the point of view of the State and of the assessee-subject, and require careful and cautious approach, as there is obvious danger of overstepping the mark in either field and landing in grievous error in consequence. It is somewhat strange that the instant questions have arisen only recently although the Statute concerned has been in operation for nearly three quarters of a century and the principles involved are not new but of age-long application and ancient origin. This, however, is probably due, in the main, to the added complexities of modern times and some recent intervening laws, and is obviously, explicable upon and attributable to growing

modern economic consciousness and pressure of changed circumstances. The controversy appeared in its acute form only about two years back before the Patna High Court between this very Company--The Indian Iron and Steel Co. Ltd., hereinafter referred to also as "IISCO" for brevity and convenience,--and the State of Bihar, where the Company lost under a judgment of that Court, since reported in (1) (1960) 8 Bihar Law Journal Reports. Part 13, dated March 29, 1960, page 210 and the matter was taken in appeal to the Supreme Court. The appellant State before us has thus this advantage that it has in its favour a judicial pronouncement of high authority and almost direct on the point, which has to be displaced as erroneous before the Respondent Company can hope to succeed. It is this realisation which led Mr. P.R. Das, leading Counsel for the Company, to devote a considerable part of his time and arguments to a detailed analysis and dissection of the reasons, underlying the aforesaid judgment of the Patna High Court, and a sustained criticism of the same and upon, inter alia, the soundness of this criticism depends, to a large extent, the fate of this appeal and the chance of Mr. Das's client's success herein.

2. The instant suit is a sequel to the assessment of the disputed cess and the connected proceedings before the Revenue authorities and for a proper appreciation of the respective standpoints of the parties in the matter, a brief reference is necessary to the genesis and history of the present controversy. The controversy dates back to the year 1946 and the facts and circumstances, bearing upon it and the institution of the instant suit, are briefly as follows:--

3. The plaintiff-company is a manufacturer of pig-iron and steel materials at their workshops and factories,-- hereafter also referred to as "Works", --at Hirapur and Kulti. It is also the owner of the Ramnagar Colliery,-- with which we are here directly concerned,--and with coal, raised from its said colliery, it runs its above workshops and factories. The major portion of the coal, raised in its aforesaid colliery, is consumed by its above workshops and factories and the balance only is sold to the public and since 1944, this sale is being made strictly in accordance with the Colliery Control Order, 1945, under requisite permits, issued by the appropriate authorities.

4. As owner of the aforesaid Colliery, the plaintiff Company submitted returns under sec. 72 of the Bengal Cess Act for the years 1946-47, 1947-48, and 1948-49. In the said returns, the coal transferred or transported to the Company's aforesaid Hirapur and Kulti workshops and factories, was shown at rates, appearing in the Company's (Colliery's) books, which however, were lower than the actual cost of raising, etc.--as also the controlled rate --of the said coal. The returns so far as this coal is concerned, were not accepted by the Cess authorities, who valued this coal at controlled rate and calculated profits and not profits,-- more precisely, annual net profits under and for purposes of the Bengal Cess Act,--on that, basis for levying cess on this particular Colliery. The result was that, for the coal transferred or transported, as aforesaid, by the plaintiff Company from its above colliery to its aforesaid workshops and factories, cess

(including education cess) levied for the three years in question totaled Rs. 44.428-4-3 and it is this amount, which is sought to be recovered back in the instant suit on declaration that, on this coal, transferred or transported, as aforesaid, to the above workshops and factories, the Ramnagar Colliery earned no profit and accordingly, assessment and levy of cess on "the said colliery in respect of this coal was illegal and without jurisdiction.

5. To add now a few more details for a clearer perspective and picture of the actual dispute between the parties:

6. For the years in controversy (1946-49). although, the raising cost of coal in Ramnagar Colliery show that the disputed coal was sent or transferred to the plaintiffs works at Hirapur and Kulti at Rs. 6-11-5 p. per ton and the Company's returns in question, that is for Road and Public Works Cess for all the three years in dispute and for Education Cess as well for the first two years, namely, 1946-47 and 1947-48. were submitted on that footing. The Cess Deputy Collector, however, took and assessed the price of coal supplied, as aforesaid, at Rs. 12-8-0 per ton. which was the controlled rate for the coal in question according to the aforesaid Colliery Control Order, presumably under and in purported accordance with the said Order and it is this difference which converted the loss, shown in the plaintiff Company's aforesaid returns, into profits and led to the several figures of profits or net profits, from which the annual net profits were calculated for assessing the disputed cesses.

7. The above facts are not disputed but the parties differ widely on their legal consequences.

8. In the first place, they differ on the nature of the transaction involved and on its effect in law under and for purposes of the Bengal Cess Act and on the effect of several provisions of the said Statute. The respondent Company contends,-- and there lies the essence of its case herein,--that the transfer of its coal as aforesaid, to its Hirapur and Kulti workshops and factories resulted in no earning or profit to the Ramnagar Colliery, that it involved no sale and accordingly, no cess was payable in respect of the said coal. Alternatively, it was argued that, even if the aforesaid transfer of coal be viewed as a sale, it was a sale at rates as shown in the Company's books, involving loss to the Ramnagar Colliery, and, there being thus no profit, no question of annual net profit or net annual profit could arise so as to make the particular colliery liable for any cess whatsoever upon the said coal. The appellant State, on the other hand, contends that the transfer of the coal in question, as shown by the plaintiff in its books, was a paper transaction, so far as the rates were concerned, but the transfer was a fact that it was real and so must be held to be a sale at the controlled rate and was liable to cess on that footing. It is argued, further, that, even if there was no real transfer of the above coal, it was still assessable and it became so as soon as it was raised from the mine or Colliery, such profit being represented by the excess of the current value or the prevailing price of the said coal at the particular or relevant time over the working expenses or the cost of raising etc. So far as

merits are concerned, we shall have to examine closely the rival contentions put forward, as aforesaid, in the light inter alia of the relevant provisions of the Bengal Cess Act, in particular,-- and incidentally, of the Colliery Control Order too--for determination of the instant dispute between the parties.

9. Secondly, it was argued on behalf of the appellant State that, whatever might be the answer to the above, the instant suit must fail, as it was not maintainable in law, the Civil Court have no jurisdiction in the matter of the above dispute. For this argument, reliance was placed, inter alia, on Secs. 93 and 102 of the Bengal Cess Act and on certain general principles, to which we shall presently advert. In answer to this contention raised, as and by way of a plea in bar. to strike at the root of the instant suit, Mr. P.R. Das, learned Counsel for the plaintiff-respondent, relied on the terms and construction of the above sections and certain well-established principles of jurisprudence and contended that there was nothing in the above statute or in any relevant principles of law to point to any ouster of the jurisdiction of the Civil Court in or over the instant matter. The controversy on this part of the case thus involves the broad question of the jurisdiction of the Civil Court, so often raised but not always very satisfactorily answered, and it is this controversy which has given us much the greater trouble in the present case.

10. We have seen above that, for a part of the period, the disputed cess comprises also Education Cess, which is levied under the Bengal (Rural) Primary Education Act, 1930, (Vide Secs. 29 and 30). This levy, however, follows, as a matter of course, from the levy of Road and Public Works cess under the Bengal Cess Act [Vide the terms of the above Secs. 28 and 30 of the Bengal (Rural) Primary Education Act, 1930] and is wholly dependent upon the same and it has no independent existence of its own. The above Bengal (Rural) Primary Education Act, 1930, therefore, would not require any separate or independent consideration or treatment and it has, accordingly, not been referred to--except in passing--either in arguments or by us above, where we have set out the points in dispute.

11. It will be convenient at this stage to indicate broadly how we propose to deal with the problem before us. We shall examine first the scheme of the Bengal Cess Act and discuss the broad principles of its contraction- We shall turn next to its several sections, relevant on the point, to determine the question of liability for the disputed cess, after considering the nature of the transaction, if any, involved in the instant case. We shall proceed then to the question of jurisdiction of the Civil Court to entertain the present suit in the light of the relevant authorities and basic underlying principles. Before, however, we take up the above matters, we deem it necessary to say a few words on the Colliery Control Order on which reliance was placed by the appellant State for ascertaining the relevant price of coal for determination of the annual net profits of the mine or colliery concerned for purposes of the disputed cesses.

12. From the above point of view, two clauses of the said Order, namely, Clauses 4 and 5, are relevant and important. Clause 4 authorises the Central Government

to fix by notification in the official Gazette, the price of coal for sale by colliery owners and Clause 5 or, more precisely, sub-clause (1) thereof, prohibits such sale at any different price. To quote the relevant provisions, they stand as follows:--

Clause 4.

The Central Government may by notification in the Gazette of India, fix the price at which coal may be sold by Colliery owners; and in such notification may fix different prices,--(i) for different grades of coal and coke; and (ii) for different collieries.

Clause 5(1).

No colliery owner, and no person acting on behalf of a Colliery owner, shall sell, agree to sell or offer to sell coal at a price different from the price fixed in that behalf under Clause 4.

13. Clearly, then, a Colliery owner was not permitted to sell coal at a price, different from the fixed or controlled price, which, admittedly, was Rs. 12/8/- per ton for the disputed years, so far as the disputed coal was concerned. On the above Clauses, we do not agree with the learned trial Judge that the Colliery Control Order fixed only the ceiling or maximum price for coal but did not touch or restrict the minimum and did not prohibit sale at a price less than the controlled rate. All prices, maximum and minimum, were covered by the above order and it fixed the rate,--the controlled rate,--both" the maximum and minimum rate as well, for the coal concerned and prohibited sale at a price different, be it more or less, from the said rate. The question, however, is what was the effect of this prohibition and what were the consequences of its violation. The Control Order was made under Rule 81 (2) of the Defence of India Rules and Rule 81(4) of the said Rules provided for penalties for violation. These, however, did not authorise the imposition of the control price, as and by way of penalty, as aforesaid, or imposition or consideration of the same in the matter of calculation of cesses or for any purpose whatsoever except for determining the question of violation of the above Order for purposes of the said statutory penalties. To that aspect, we shall revert again at appropriate places. We would only state here further that during, discussion in Court, a point arose, in passing, whether the above Order was *infra vires* the parent Rule [Rule 81(2) of the Defence of India Rules], under which it was made, but as the point was not fully argued and as, in the view, we are taking, it is unnecessary to consider the same, we propose to leave the question open without expressing any opinion thereon.

14. We address ourselves now to the scheme and object of the Bengal Cess Act so far as it is relevant for our present purpose. That Act, as its heading and preamble show, is "an Act to amend and consolidate the law relating to rating, and to the levy of a road cess and public works cess on immovable property". It is obviously a taxing statute and it seeks to tax (Vide Sec. 5) all immovable properties in a district or part of a district subject to certain exceptions specified

therein. For purposes of the levy, however, it classifies immovable properties into "lands" and "mines, quarries, tramways, railways and other immoveable properties" and mentions, for lands, the annual value as the basis of assessment and for all the above other kinds of immovable property the annual net profits (Vide Sec. 6). This latter term is not defined in the Act, although in sec. 4 "annual value of lands" is defined. Secs. 5 and 6 constitute together the charging provision of this taxing statute. Sec. 5 makes, in general, all immoveable property in a district liable to cess and Sec. 6 provides the basis of this liability and assessment of cess, and it has to be read in the case of lands, with the definition section (Sec. 4). Part II of the Act, containing Chapters II to VIIA, may broadly be called the machinery provisions, of "which Chapters II to IV relate to lands and Chapter V. containing secs. 72-84, relates to mines, quarries, tramways, railways and other immoveable properties and is particularly relevant for our present purpose.

15. These Chapters prescribe, inter alia, and in particular, the method and procedure of initial assessment and Chapter VII, headed Miscellaneous and containing secs. 91-107, provides the machinery for its revision and/or finalisation. Undeniably, for levying cess on properties, liable to it, the Act is a self-contained statute-, a complete Code, providing and containing in itself, the entire methods, procedure and machinery for such levy and also the test or tests for the liability. It does not, however, deal with its recovery or realisation, for which recourse is necessary to the Bengal Public Demands Recovery Act nor does it, as we shall presently see, vest in the tribunals or authorities, created or contemplated by it, any exclusive jurisdiction in the matter of determination of the liability,--that is its existence,--for cess. So much now for the scheme and object of the statute, which, as we have said above, is a taxing statute and so amenable, in the matter of construction, to certain broad general principles, which may be usefully and conveniently discussed (sic) stage.

16. Now in construing fiscal statutes and determining the liability of the subject in the matter of taxes or impositions, the first fundamental principle, which has to be kept in view, is that one must have regard to the strict letter of the law and not merely the spirit of the statute or its substance. It is indeed, a well-settled rule of law that the intention to impose a charge upon the subject must be shown by clear and unambiguous language and the subject is not to be taxed unless the language of the statute clearly imposes the obligation and in a case of reasonable doubt, the construction most beneficial to the subject is to be adopted [Vide *Manindra Chandra Nandi, v. Secretary of State for India*, (2) ILR 34 Cal. 257 at p. 268, per Mookerjee, J. citing earlier authorities]. As early as 1869, Lord Cairns in *Partington v. The Attorney General*, (3) (1869) L.R. 4 H.L. 100, at p. 122, observed:--

As I understand the principle of all fiscal legislation it is this:

If the person sought of be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the

other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law, the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the Statute".

In *A.V. Fernandez Vs. The State of Kerala*, , *A.V. Fernandez Vs. The State of Kerala*, , this principle was stressed by Bhagwati, J. and in *C.A. Abraham v. Income Tax Officer, Kottayam*, (5) AIR (1961) S.C. 609, the Supreme Court laid down clearly that the Court cannot proceed to make good deficiencies in a taxing statute but must interpret the statute, as it stands, and in case of doubt, in a manner, favourable to the subject or the tax-payer.

17. A second fundamental principle that underlies taxing matters is that one must look at the real nature of the transaction, whatever be its form and however legal and/or technical that form may be. In other words, Courts must disregard form or technicalities and concentrate on the substance of the transaction. As was observed in the *Commissioner of Income Tax v. Sir Homi Mehta*, (6) 58 Bom. L.R. 112, *Commissioner of Income Tax Excess Profits Tax, Bombay City Vs. Homi Mehta*, , a case under the Indian Income Tax Act, "one must look at the real nature of the transaction. Whatever legal and technical form a transaction may take, the Court must try to determine what the real transaction was and not the form which the transaction took. The transaction must be looked at from a commercial point of view" and one must try to "understand what is the real commercial result of a particular action, taken by a commercial man; and in trying to determine whether a certain transaction resulted in profits one must come to the conclusion that the transaction resulted in real profits, profits which, from the commercial point of view, meant a gain to the person who entered into the transaction, not profits from any narrow, technical or legalistic point of view."

18. In *Patent Castings Syndicate Ltd. v. Etherington* (7) (1919) L.R. 2 Ch. 254, again, "net profits" were held to be and described as the excess of the receipts for one year over the current expenses and outgoing for the same year, and in *Manindra Chandra Nandi v. Secretary of State for India* (2) (I.L.R. 34 Cal. 257) supra, also, which was a case under this very Act, namely, the Bengal Cess Act (Bengal Act IX of 1880), Mookerjee, J. stated that net profits might be taken to be the difference between gross earning and working expenses. The same view was taken in *Motamal Jetkumal v. Commissioner of Income Tax* (8) [I.L.R. 26 Pat. 73 at p. 77, citing *Whimster & Co.* (1925) 12 TC. 813, 823]--

The profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts.

19. Profits and gains must be ascertained on ordinary principles of commercial

trading, in their "natural and proper sense,--in a sense which no commercial man would misunderstand" [Vide per Lord Halsbury, L.C. in *Gresham Life Assurance Society v. Styles* (9) L.R. (1882) A.C. 309 at p. 315, approved by the Privy Council in *Pondichery Railway Case* (1931) 5 I.T.C. 363 (P.C.); see also (8) *Motamal Jethumal's* case at p. 77 supra]. What is particularly important to notice and remember in this connection is that, in all the above cases, profits and net profits were correlated to actual trade or business and actual or real receipts and thus to actual or real transactions too.

20. So far we have dealt with the preliminaries and indicated broadly our line of approach to the problem before us. We have also stressed with sufficient clearness the basic principles in the matter of the said approach. Let us now address ourselves more intimately to the central arguments before us.

21. On the merits, the real controversy in this case centres round the words "annual net profits" in section 6 of the Cess Act (Bengal Act IX of 1880). That section, in its relevant part, runs as follows:--

The road cess and the public works cess shall be assessed on the annual value of lands and "until provision to the contrary is made by Parliament" on the annual net profits from mines, quarries, tramways, railways and other immovable property, ascertained respectively as in this Act prescribed:

22. The impugned assessments appear to have been made by the Cess Authorities u/s 75, read with section 72, of the Cess Act.

23. Section 72 of the Cess Act, in its relevant part, stands as follows:--

On the commencement of this Act in any district and thereafter before the close of each year, the Collector of the district shall cause a notice to be served upon the owner, chief agent, manager or occupier of every mine, quarry, tramway, railway and other immovable property not included within the provisions of Chapter II; such notice shall be in the form in Schedule E contained and shall require such owner, chief agent, manager or occupier to lodge in the office of such Collector within two months a return of the net annual profits of such property calculated on the average of the annual net profits thereof for the last three years for which accounts have been made up. * * * *

Section 75 reads as follows:--

If such return be not furnished within the period of two month from the date on which such notice was served, or within any extended time allowed by the Collector of the district or if such Collector shall deem that any return made in pursuance of such notice is untrue or incorrect, such Collector shall proceed to ascertain and determine by such ways or means as to him shall seem expedient the annual net profits of such property calculated as aforesaid.

24. Mr. P.R. Das, learned Counsel for the respondent Company, has argued that there was no sale of the disputed coal, really speaking, that is sale in a

commercial sense, because there could not be any sale by the plaintiff Company to itself and accordingly, there were no profits, net or otherwise, and no annual net profits so far as that coal was concerned, and the Cess Deputy Collector was in error "as he had no jurisdiction" to fix arbitrarily such net profits on a notional basis, either by inference or by analogy.

25. Elaborating his arguments, Mr. Das submitted that there was no real sale of coal by the Ramnagar Colliery to IISCO for if, as it would appear from the record, the Respondent Company owned the said Colliery and the "Works" as well, to which the disputed coal was supplied, and as owner took the said coal from the said Colliery for its own purpose to the said Works, there was really, speaking, no sale, notwithstanding the paper entries of transfer at stated prices. No question thus arises of any profit from this transaction.

26. As was observed in *Carlisle and Silloch Golf Club v. Smith* (11) (1913) 3 K.B. 75 (at page 82) explaining (12) *New York Life Insurance Co. v. Styles* 14 AC 381, "a man cannot make a profit or loss out of himself" and indeed to hold otherwise "would open the door to abuse" (See (13) *Moore Nettlefield & Company v. The Singer Manufacturing Company* (1904) 1 K.B. 820 at p. 826 (where a landlord empowered to sell, himself bought the goods and it was held that "it was not a proper description of the transaction to call it a sale"). Nearer home, the case of *Sir Kikabhai Premchand v. Commissioner of Income Tax (Central), Bombay*, (1954) 5 S.C.R. 219, is important from this point of view and it throws considerable light on the present case. Sir Kikabhai carried on business in bullions and shares and the method, adopted by him for ascertaining his profits, was to value stocks at the beginning and close at each year at cost price. In the year in question, he withdrew some silver bars and shares from the business and settled them in trust in favour of self, his wife and children and in the accounts of the business, he valued them at the close of the year at cost price. The Supreme Court held that the assessee was entitled to value them at cost price and was not bound to credit the business with their market price at the close of the year for ascertaining his assessable profits for the year, overruling the contentions of the State, inter alia, to the effect (1) "that if a person withdraws an asset from a business he must account for it to the business at the market rate prevailing at the date of the withdrawal" and (2) "that if the act of withdrawal was at a time when the market price was higher than the cost price, then the State was deprived of a potential profit". Bose. J., in delivering the judgment of the Supreme Court, observed inter alia:--

It was not a business transaction and by that act the business made no profit or gain, nor did it sustain a loss and the appellant derived no income from it. * * * As the transactions were not business ones and he derived no immediate pecuniary gain the State cannot tax them, for under the Income Tax Act the State has no power to tax a potential future advantage. All it can tax is in come profits or gains made in the relevant accounting year. ** **" (Vide p. 222).

It is well recognised that in revenue cases regard must be had to the substance

of the transaction rather than to its mere form. In the present case, disregarding technicalities, it is impossible to get away from the fact that the business is owned and run by the assessee himself. In such circumstances we are of opinion that it is unreal and artificial to separate the business from its owner and treat them as if they were separate entities trading with each other and then by means of a fictional sale introduce a fictional profit which in truth and in fact is nonexistent. Cut away the fictions and you reach the position that the man is supposed to be selling to himself and thereby making a profit out of himself which on the face of it is not only absurd but against all canons of mercantile and income tax law. And worse, he may keep it and not show a profit. He may sell it to another at a loss and cannot be taxed because he cannot be compelled to sell at a profit. But in this purely fictional sale to himself he is compelled to sell at a fictional profit when the market rises in order that he may be compelled, to pay to Government to tax which is anything but fictional." (Vide p. 223).

27. Tested in the light of the aforesaid principles and the principles, which have been stated earlier, there is much substance in Mr. Das's contention that, really speaking, there was no sale, so far as the disputed coal is concerned, causing "profits" in the commercial sense and that, accordingly, there were no annual net profits to support the impugned assessments.

28. The question now is whether there is any scope for introducing the idea of notional sale and notional profit in the matter of assessment of cess. This notional concept is the contradiction to the actual; it may be said to be its very antithesis, and it emphasises non-relation to and necessary absence of the actual. The term notional profit, however, is also to be distinguished from notional calculation of profit, in which the notional concept is germane only to the matter of calculation, the notional calculation being based on actual profits or being applied to cases of actual profits and the notional concept emphasising non-relation to but not postulating absence of actual profit. In construing and applying the relevant provisions of the Cess Act, it is well to bear in mind this very pertinent distinction.

29. Broadly speaking, the Bengal Cess Act does not appear to have provided for any notional profit, except, possibly, in the first proviso to sec. 79. It, however, recognises notional calculation of profit and does apply such calculation for determining annual net profit for assessing cess on mines, etc. Indeed, this notional calculation runs throughout the several sections, dealing with the making of the requisite assessment or valuation and there it manifests itself in one or other of its two forms, noted above. Thus, under the primary or the basic section (Section 72), which prescribes the nature of the return, on which the cess on a particular property (mines, etc.) is to be assessed, the return to be submitted, is as already quoted, a return of the net annual profits of such property, calculated on the average of the annual net profits thereof for the last three years for which accounts have been made up. This is clearly a case of notional calculation of the annual net profit from the average of certain actual

annual net profits, as the accounts in question would obviously show actual and not notional profits. The calculation is no doubt, notional as it may have to be made not on the actual profits of the particular accounting year, or, at any rate, not wholly upon the same, but nevertheless, it is to be made on actual net profits as the relevant average has to be taken of the annual net profits of the last three years for which accounts have been made up, which obviously means average of the actual annual net profits of the said three years, as shown in their accounts. This view of sec. 72 is well confirmed--if confirmation be necessary,--by the form of the relative "return" as prescribed in Schedule" and by sec. 74 which, with reference to the returns under the said sec. 72 in respect of properties, situate in two or more States, speaks of the total annual net profits, calculated as aforesaid (that is under sec. 72), accruing from such property", this latter phrase, which we have just underlined, obviously referring to actual profits. Read in the above context,--and it has to be so read as its wording plainly implies,--sec. 75 also would not favour any idea of notional profit. This section has already been quoted and by its relevant part, it authorises, the Collector to "proceed to ascertain and determine by such ways or means as to him shall seem expedient the annual net profits of such property calculated as aforesaid."

30. It thus, in plain terms, refers to ascertainment and determination of the annual net profits of such property "calculated as aforesaid", that is under sec. 72. The ways and means to be adopted are no doubt such as to the Collector shall seem expedient and to that extent, discretion is obviously given to the Collector but the calculation of the annual net profits, which have to be ascertained and determined, will have to be made as aforesaid, that is u/s 72 and thus, as already shown, on actual and not notional profits.

31. Then comes sec. 76 of the Act which at first sight, may seem to support the idea of notional profit but, on closer examination and proper analysis of its terms in the light of the appropriate context, becomes restricted to notional calculation of profits, this notional concept or calculation being applied to cases where actual profit is contemplated, that is to cases, where actual profits have been earned or are supposed or suspected to have been earned. The section does not certainly contemplate levy of cesses in a case, where no profit has been earned, but provides a method for assessing properties, which have earned profits, liable to cess, but where no means exists for ascertaining and determining the actual profits, relevant for the purpose, and authorises notional calculation, or calculation on a notional basis, of such profits by applying the statutory rule of six per centum on the annual value of the property. This, in our view, is the true construction of this section (section 76), which, as quoted below, namely,--

If such Collector be unable to ascertain the annual net profits as aforesaid of any property assessable under this Chapter, he may by such ways or means as to him shall seem expedient, ascertain and determine the value of such property, and shall thereupon determine six per centum on such value to be the annual net profits thereon.

32. lays down, in its first part, the particular contingency or condition for its application and there emphasises, in express terms, the Collector's inability "to ascertain the annual net profits as aforesaid" that is,--and this is very significant,--under section 72. which, as already shown, contemplates only cases of actual profit, and then authorises him to apply the notional concept, prescribed in the section (section 76) in the matter of calculation of annual net profits in such cases. Section 76, therefore, on its true construction would not support the concept of notional profits as distinguished from "notional calculation of profits" and would not apply to a case, where no actual profits have been earned. It clearly contemplates cases of actual profits, where notwithstanding such actual profits, it is not possible for some reason or other, to ascertain the annual net profits u/s 72. We do not think any other view of the section (section 76) would be reasonable.

33. The next section, important for the above point of view, is section 79, or, rather, its first proviso. That, proviso as we have said hereinbefore is possibly the only exception, where, under a deeming part, the calculation of a fictional annual net profit for five future years, based on the current return u/s 72--which, however, as seen above, is not unrelated to actual profits,--is permissible. It may be conceded, therefore, that the theory of notional profit is recognised and applied in this proviso, which, possibly, stands as the only exception to the general rule of its non-recognition, running throughout the other relevant provisions in the matter of valuation or assessment of annual net profits for purposes of Cess. Even in this very section (section 79), however, there is one very illuminating and helpful provision namely, the second proviso thereof, which, in providing for assessment of escaped net profits of previous years uses the significant expression "net profits accrued", thus obviously referring to actual profits and pointing to and supporting the general rule under the Act in the matter of assessment or valuation, as deduced and stated by us earlier.

34. Mr. Das has argued that the decision of a Division Bench (Ramswami, C.J. and Kanhaiya Singh, J.) of the Patna High Court [Indian Copper Corporation Ltd.: Tata Iron and Steel Company Ltd.; Indian Iron and Steel Company Ltd. v. State of Bihar (1) (1960) 8 BLJR 210, supra] to the contrary rested mainly on four cases, in each of which there was either a sale or an exchange or something, similar to sale or exchange unlike the instant case.

35. The first case mentioned in the aforesaid Patna decision, is Californian Copper Syndicate Ltd. v. Harris (15) (1904) 5 T.C. 159. A company was formed for the purpose, inter alia, of acquiring and reselling a mining property, and after acquiring and working various projects, it resold the whole property to a second company, receiving payment in fully paid up shares of the latter company. It was held that the difference between the purchase price of the property and the value of the shares, for which the same was exchanged, was a profit, assessable to income tax. This case was distinguished in (6) Sir Homi Merta's case supra. It was, in fact a case of actual sale. In the second case [The Royal Insurance Co.

Ltd. v. Stephen (16) (1928) 14 L.C. 22], relied on by the Patna High Court, as Insurance Company was required and compelled, under the new Railways Act, to accept new railway stocks in certain amalgamated railways or railway companies in exchange for the stocks, held in the original railways, which were absorbed. A loss having arisen to the company by virtue of this arrangement, it was claimed that the Company was entitled to deduct this loss in making the returns, mainly on the ground that the surrender of the old stocks enabled the result of the company's holding of those investments to be definitely ascertained and was equivalent to a realisation. On facts, this case was differentiated, it may be noticed, in Sir Homi Mehta's case, *supra*, but, apart, from everything else, there can be doubt that this was also a case of actual exchange. The third case, referred to in the aforesaid Patna decision, is (17) *Westminster Bank Ltd. v. Osier*, L.R. (1933) A.C. 139. There the bank had invested large amounts in National War Bonds and in answer to the offer by the Treasury, it exchanged them for Conversion loan, and on the basis of this exchange or conversion, it was held that the Bank had made profit which was liable to tax, as there had been a realisation of the original investment or security (by exchange) inasmuch as new securities were taken in place of the investment in the original War Bonds (which thus came to an end) and a new venture was begun in relation to the new holding. The fourth case, on which their Lordships (Ram-swami, C.J. and Kanhaiya Singh, J.) relied, was *Gold Coast Selection Trust Ltd. v. Humphrey* (18) (1948) 2 All E.R. 379. The ratio decidendi in that case, however, as was pointed out by Viscount Simon, was that the assessee had received a new and valuable asset, not money, no doubt, but capable of being valued in terms of money, as the result of sale or exchange. This difference was stressed by Bose, J. in *Kikabhai's case* (14) (Vide p. 225) and he distinguished the above case on the ground that *Kikabhai's* business received nothing in exchange for the withdrawal of the assets, neither money nor money's worth, whereas, in the said case cited, namely, (18) *Gold Coast Selection Trust Ltd. v. Humphrey*, (1948) 2 All. E.R. 379, the assessee had received a new and valuable asset in exchange for another, which was capable of being valued in terms of money, though the receipt was not money.

36. In the aforesaid Patna decision, it appears to have been recognised and accepted that notional profits were irrelevant for purposes of the Cess Act but it was held, *inter alia*, that profit, obtained in the shape of goods, which had monetary value, was not notional at all. In the present case, however, the disputed transactions between Ramnagar Colliery and its owner IISCO did not certainly result in any profit either monetary or in the shape of goods so far, at least, as the Colliery was concerned. The owner Company might have obtained some benefit, from it but the Ramnagar Colliery had certainly made no profit,-- and cess is leviable in law on property, (Vide *Maharajah Manindra Chandra Nandi v. The Secretary of State for India in Council*, (19) L.R. 38 IndAp 31 at p. 35) that is on the Colliery only in the instant case. There was, as indicated above, no actual sale (or exchange) in a commercial sense and so no question of profit.

With due deference, we are unable to accept the view of the Patna High Court, in the case cited, that " "net profits" of the petitioner u/s 6 of the Cess Act is the difference of the money equivalent of the iron ore, extracted by the petitioner, and the cost of raising that quantity of ore. To do so would be to introduce the idea of notional profits, for which, as pointed out above and as also, apparently, accepted by their Lordships of the Patna High Court no provision has been made in the Cess Act. The Colliery Control Order, referred to above, will not make any difference. If there is no sale, the provisions of the Order will not be applicable. Even if the Order applies it would not authorise or justify the imposition of the controlled price for ascertaining or determining profits, if any, from any particular transaction, as there is no provision in that behalf, though the violation of the order, if any, may be dealt with and penalised in other ways under appropriate provisions of law. if any. The same would be the position if the transport or transfer of the disputed coal from the Colliery to the "Works" were viewed as a sale and accordingly, the price for such sale would be as shown in the Company's books, that is Rs. 6/11/5p. per ton, as there is nothing on the record to show,--and that is not also the State's case.--that any higher or different amount was realised by the Colliery,--either actually or even notion-ally,--so that the result would still be that the Colliery earned no profits from the disputed coal, its raising cost etc. being, admittedly, higher than the said price. If IISCO has received any benefit in the fiscal sense out of the transfer of the disputed coal from Ramnagar Colliery to its works, as aforesaid, that may be the subject-matter if at all, of other proceedings, but would certainly not be relevant for the purpose of imposition or assessment of cess on Ramnagar Colliery.

37. In the above view, we hold that, for the disputed coal, Ramnagar Colliery was not liable to be assessed to cess u/s 6 of the Cess Act (Bengal Act IX of 1880), read with any of its other provisions, or any other law whatsoever [including the Bengal (Rural) Primary (sic) Act 1930-Bengal Act VII. of 1930].

38. The point on the merits is thus answered against the appellant State. But the question still remains whether the instant suit is maintainable so as to enable the plaintiff-Company to get the necessary reliefs herein. As we have said above, this is the technical aspect of the matter in dispute between the parties but it is doubtless, the more difficult part of the case. We are directly concerned here with the question of jurisdiction of the Civil Court. which, for its answer, depends upon the true construction of section 9, of the CPC in the light of certain principles, well-known and well-established but not always easy to apply.

39. Now section 9 of the Code provides, in its relevant part, as follows:

This Court shall.....have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation: A suit in which the right to property.....is contested is a suit of a civil nature.

40. It follows, then, that the Civil Court may try all suits of a civil nature

excepting suits, of which their cognizance is either expressly or impliedly barred. There can be no question that the instant suit is a suit of a civil nature. It is thus entertainable by the Civil Court unless its cognizance is either expressly or impliedly barred. We have to see then whether there is any such bar or whether there has been any such ouster in the instant case.

41. On this point of ouster of jurisdiction of the Civil Court, certain fundamental principles are relevant and well-settled. They have often been stated and restated but it will be enough and convenient to refer to some of the leading judicial authorities on the point for an intelligent understanding and appreciation of the said principles.

42. The point, as we have said above, is difficult and has far-reaching importance and consequence and needs a cautious and careful approach. It is well to start with the celebrated observations of Lord Thankerton oft-quoted and now of classic importance and significance, that

it is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied.

43. (Vide *Secretary of State v. Mask & Company*, (2) L.R. 67 IndAp 222 at p. 236).

44. These are weighty words of caution of great wisdom. No less important also are the words that follow, namely,--

It is also well-settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure" (Vide *Mask's case* supra at p. 236).

45. The extracts quoted emphasise and proclaim the authority and supremacy of Courts and furnish a fitting prelude and an appropriate background for judging the point of ouster of their jurisdiction. Such ouster, as it is too well-known now to admit of any controversy, may well be express or even implied but this implied ouster must be raised or founded upon clear and necessary implication.

46. The appellant argues that the Bengal Cess Act excludes the jurisdiction of the Civil Court in the present matter, that is to entertain and try the instant suit. Reliance is placed in this connection upon two sections of the Act, namely, Secs. 93 and 102, which, for convenience of reference, may be quoted here as follows:--

93. Every valuation under this Part shall be open to revision by the Commissioner or Board of Revenue and not otherwise."

102. Every person who shall deem himself to be aggrieved by any valuation made by a Collector under the provisions of Section 75 or 76 may within one month after the issue of the notice mentioned in Section 78, and every person

who shall deem himself to be aggrieved by, any valuation made by the Collector under the provisions of any other section of this part, may within one month after the posting up of a copy of the valuation-roll as mentioned in section 35.

prefer his objections to the Collector, and if such objections, or any of them, are disallowed, may, within one month of such disallowance, appeal to the Commissioner, against such valuation, and the decision of the Commissioner shall be final.

47. It is urged--and urged very strongly,--that the dispute here relates to the assessment of cess, which is exclusively a matter within the jurisdiction of the Cess Authorities, that is the authorities and tribunals, set up under the above Act, and no challenge is permissible outside the said statute and no appeal lies outside it or to the Civil Court. In short, the plea is ouster of the jurisdiction of the Civil Court in the present matter by or under or by reason of the above special statute.

48. The determination of the above plea rests upon the nature of the subject-matter of dispute and the terms of the particular statute, pleaded in bar as aforesaid. Dispute as to assessment of cess may involve a dispute as to liability for it and/or a dispute as to the amount of that liability. The first envisages a dispute as to the existence of the liability and the second as to its quantum. What is challenged here is the State's right to levy cess on or in respect of the disputed coal. The very liability is denied and the plaintiff Company claims that the disputed coal is not liable to cess and no cess is payable on it. Cess, it is claimed, is payable on the annual net profits of the mine or colliery concerned and in assessing cess and in calculating annual net profits for the purpose, something is included or taken into account which does not and cannot answer that description, the levy itself would be bad; it will have no legal basis; The Statute would provide no sanction for it and it will be outside the same and without jurisdiction. In essence, then, the dispute is as to the existence of the liability--the very basis of the imposition is challenged and not merely its quantum. This view, as we shall presently see, receives support from an examination of the relevant statute. It is important to bear this in mind and stress this real character of the relevant dispute between the parties for a correct and intelligent understanding of the point of jurisdiction, with which we are Here concerned, and for a correct approach of or upon the same.

49. Turning now to the statute before us, namely, the Bengal Cess Act, we have to recall first that secs. 5 and 6 thereof are the charging sections. They impose liability on all immovable property in the district subject to certain Exceptions, not material for our present purpose, and for purposes of the imposition, classify them under two head: "(1) tends and (2) mines, quarries, etc."" and levy cess, in the first case, on the annual value (of land) and in the second, on the annual net profits (of the mines, etc.). We have to recall next that the central idea and underlying scheme of this statute, so far as mines are concerned, is to tax mines, which have earned profits in the particular year, the only exception (Sec.

79, first proviso) not being relevant for our present purpose, and in that context, the dispute in the instant case, as said earlier, is as to the basis or existence of liability and not merely as to the basis or quantum of assessment. It is to be remembered also that the said dispute does not involve or embrace any question of fact, the relevant facts being, as already noted, all admitted and unchallenged.

50. Having ascertained as aforesaid, the true nature of the controversy between the parties, let us now proceed to examine whether the statute in question has excluded the same from the cognisance of the Civil Court. The statute, as we have seen above, is a taxing statute and it seeks to tax, inter alia, mines or collieries with cess upon their annual net profits. Indeed, so far as such properties are concerned, the imposition of cess under the statute is founded on the annual net profits. In the absence of annual net profits, no cess can be imposed on mines. Nor can it be imposed on anything except annual net profits in the case of such properties. The statute does not sanction, but, the plain implication forbids such imposition. Any such imposition would be void and without jurisdiction and the case would fall within the principles, underlying the two leading decisions of the Judicial Committee in *Secretary of State for India in Council v. Srimati Fahamidunnissa Begum and others* (21) L.R. 17 IndAp 40 and *Balkishan Das and others v. Simpson*, (22) L.R. 25 IndAp 151, and normally, in such cases, challenge can be made in the Civil Court and appeal to it is permissible, unless of course, the statute in question or any relevant statute has excluded the same. Such exclusion, however, as we have seen above, is not to be readily inferred and where, as in the instant case, the question is one of liability to taxation, clear words are necessary to warrant such exclusion. "The effect of the authorities" to quote the felicitous language of Lord Reid in (23) *Basnet & White (Calgary) Ltd. v. Municipal District of Sugar City No. 5*, (1951) A.C. 786, at pp. 808-9, "is that a tax-payer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal or a series of appeals--"appeals in the nature of appeals from Caesar to Caesar" (Sir Harries, C.J. in (24) 56 C.W.N. 452 at p. 467)--against assessment to other tribunals is not sufficient to deprive the tax payer of that right". The authorities further establish that the jurisdiction of the Courts to determine questions of liability to taxation can only be ousted by clear words" (Vide p. 812).

51. The point of ouster, thus, ultimately depends on the terms of the particular statute before us. We are fully aware that, in the determination of this question, decisions on other statutory provisions are not of material assistance except in so far as they lay down or contain general principles of constructions but what we have cited above are not anything more than general principles, called from the leading authorities, to aid us in construing the statute before us for deciding one way or the other the question of exclusion or ouster of the jurisdiction of the Civil Court, in the matter of the present dispute. That dispute, as we have seen

above, is as to the basis or existence of the liability for cess as distinct from the basis or quantum of the assessment. We have seen also that, on the admitted facts, the statute properly construed would not support the disputed imposition. Evidently, the said imposition was made on a wrong construction of the basic expression "annual net profits" and on such wrong construction, jurisdiction to impose the levy was assumed and sought to be supported.

52. Now, it is well-known that a tribunal cannot, by a wrong construction of the basic provision, clothe itself with jurisdiction where otherwise it would have none [Vide in this connection (25) AIR 1949 239 (Privy Council) (26) T.C. Basappa Vs. T. Nagappa and Another, and (27) Chaube Jagdish Prasad and Another Vs. Ganga Prasad Chaturvedi, . But the challenge to the wrong assumption of jurisdiction in the instant case is sought to be met by reference to the two sections (Secs. 93 and 102) of the Bengal Cess Act. These two sections have already been quoted and from their quoted terms, it is perfectly clear that they refer to "valuations" and make the same conclusive for purposes of the statute by forbidding challenge in the one case, except in manner, mentioned in the particular section (Sec. 93), and making it final under the other section (Sec. 102). The question of valuation, however, is different from the question of liability and the mere fact that valuation has been made or that such valuation is final and conclusive under the Act does not conclude the point of existence of the liability. From the above point of view, valuation is a much weaker term than "assessment", but the statute has preferred to use the term "valuation" and the word "assessment" is conspicuous by its absence. Even the latter term, however, is not free from ambiguity and may not have been conclusive on the point of liability [Vide (23) Bennet & White (Calgary) Ltd. v. Municipal District of Sugar City No. 5, (1951) A.C. 786, supra].

53. Even otherwise, the answer would go against the appellant. Assume that under the Bengal Cess Act, the cess authorities has jurisdiction,--and exclusive jurisdiction,--to determine the question of liability as a part of the process of assessment of cess. Even, then, however, they had to do it in accordance with the provisions of the said particular statute. This, plainly, has not been done. Accordingly, approach to the Civil Court would not be barred [Vide (20) Mask's case supra, L.R. 67 IndAp 222 at p. 2361. It is both parties" case,--and that is clearly the position under the statute--that cess in the instant case, is to be assessed on "annual net profits". It has, however, been assessed on something, which as already found by us, does not and cannot answer that description.

54. In any view of the matter then, the instant suit would be maintainable and the appellant's objection on the point would fail.

55. The view, we have taken above on the point of jurisdiction, is well supported by (28) Toronto Railway Company v. Corporation of the City of Toronto, (1904) A.C. 809 at p. 815 & 816, (29) Chairman of Giridih Municipality v. Suresh Chandra Mazumdar, ILR 35 Cal. 859 at p. 864, (30) Maharajadhiraj Kameswar Singh v. Kulada Prasad Sahu, 39 C.W.N. 118 at p. 119, (31) Braja Behari Dass v.

Ram Narayan Rai, ILR 17 Pat. 436 at p. 439, (32) Tikendrajit Ghosh and Another Vs. Mritunjoy Mondal and Others, , (24) Assistant Collector of Customs v. Surajmall Nagarmall, 56 C.W.N. 452 at p. 467, (33) Collector of Customs, Madras Vs. Lala Gopikissen Gokuldass, , (4) A.V. Fernandez Vs. The State of Kerala, and (34) Patna Municipal Corporation Vs. Ram Bachan Lal, .

56. It is not also opposed to any of the decisions, cited on behalf of the appellant. They are all distinguishable as, in each of them, it was found by their Lordships, on an examination of the particular statute before them, that the dispute in the case was within the competence,--and exclusive competence,--of the special tribunal concerned and the Civil Court's jurisdiction in the matter was ousted and their Lordships did not find that the special tribunal concerned had acted in violation of the statute in question. This, indeed, plainly appears from an examination of the aforesaid decisions, namely, (20) Secretary of State v. Mask and Company, L.R. 67 IndAp 222, (35) Releigh Investment Company Ltd. v. Governor General in Council L.R. 74 IndAp 40 and (36) Rai Brij Raj Krishna and Another Vs. S.K. Shaw and Brothers, .

57. It is also to be noted that, in (35) L.R. 74 IndAp 40 (Releigh Investment Company Ltd. v. Governor General in Council) the disputed Act (The Indian Income Tax Act) itself provided for a reference to the High Court (Vide sec. 66),--one of the superior courts in the land,--and this express provision for a restricted approach to the Civil Court may well have been taken to be reasonably indicative of the negation of any wider right in that behalf. In (20) L.R. 67 IndAp 222 (Mask's case), again, the dispute was to the rate or question of assessment and not as to the basis or existence of liability and the controversy was essentially one of fact,--that is as to the nature of the particular article for purposes of the rate of duty. In the instant case, upon the admitted facts before us, the disputed imposition is not within the sanction of the statute in question. It is ultra vires and without jurisdiction,-- absolutely or in a limited sense,--as in (30) 39 C.W.N. 118 (Maharajadhiraj Kameswar Singh v. Kuladaprosad Sahu) and the above cases would be distinguishable. We may also add that the stress we have laid on the annual net profits as the foundation of liability for cess in the case of mines will be well supported on principle by the decision of the Supreme Court in (4) A.V. Fernandez Vs. The State of Kerala, , which, though a case of sales tax and thus under the Sales Tax Act, correlates the basis of calculation or assessment, of sales tax to the foundation of liability for the same and treats it as such for purposes of the said imposition.

58. Before we conclude our review of the case-law on the above point of jurisdiction, it is necessary that we should refer to two other decisions which have often been cited in such connection and which have actually been referred to applied and relied upon in some of the cases, already noted and discussed. These two decisions, namely, (37) Wolverhampton New Waterworks Co. v. Hawkesford, (1859) 6 C.B. (N.S.) 336 (per Willes, J.) and (38) The Queen v. The Commissioners for Special Purposes of the Income Tax, (1888) 21 Q.B.D. 313 at

p. 319 (Per Lord Esher, M.R.) lay down certain broad specific tests for determination of the above point of jurisdiction in certain particular types of cases but a closer examination would convince one that, in the ultimate analysis they mean nothing more than what we have indicated hereinbefore, namely, that the determination on the above question of jurisdiction depends upon the nature of the subject matter of dispute and the terms of the particular statute in bar under consideration. This is as true of Lord Esher's observations as of Willes, J.'s as amply demonstrated respectively by the two cases of the Supreme Court and the Privy Council, already cited, namely, (36) Rai Brij Raj Krishna and Another Vs. S.K. Shaw and Brothers, , and (20) Secretary of State v. Mask and Company, L.R. 67 LA. 222.

59. We believe we have dealt with all the cases, cited before us. Upon them, one thing is clear that the relevant law of approach to a matter like the present is contained in the quoted extracts from Mask's case (67 I.A. 222 at p. 236) and Bennet & White (Calgary) Ltd.'s case (1951) A.C. 786 at pp. 808-9 & 812, and the construction we have put upon the sections, pleaded in bar, is in consonance with the traditional judicial view-point, which was consistently refused to surrender the authority of the Court to special tribunals, particularly where taxing statutes are concerned, except upon the clearest legislative mandate to the contrary.

60. In the premises, none of the points, urged in support of this appeal, can succeed and this appeal must fail. We, accordingly, dismiss this appeal with costs.