The State of West Bengal V. Kesoram Industries Ltd., 2004

Supreme Court of India, Judgment of 15 January 2004

CASE NO.:
Appeal (civil) 1532-1533 of 1993

PETITIONER:
The State of West Bengal

RESPONDENT:
Kesoram Industries Ltd. and Ors.

DATE OF JUDGMENT: 15/01/2004

BENCH:
CJI, R.C. LAHOTI, B.N. AGRAWAL & Dr. AR. LAKSHMANAN.

JUDGMENT:
JUDGMENT

C.A. Nos. 1532-1533 OF 1993
(With C.A. Nos.3518-3519 of 1992, 5149-54 of 1992, C.A. No.2350 of 1993, C.A.No.7614 of 1994, C.A. Nos.....of 2004 (Arising out of SLP (C) Nos.3986 of 1993, 11596 and 17549 of 1994).

W.P.(C) Nos. 262 of 1997

The Terai Indian Planters' Association & Anr. ...Appellants

Versus

The State of West Bengal & Ors. ...Respondents
(With W.P.(C) Nos.515, 641,642 of 1997, W.P.(C) Nos.347,360 of 1999, W.P.(C) Nos.50, 553 of 2000, W.P.(C) Nos.207,288,389 of 2001 and W.P.(C) No.81 of 2003)

W.P.(C) No.247/1995

Bengal Brickfield Owners' Assn. & Anr. ... Appellants

Versus

State of West Bengal & Ors. ....Respondents
(With W.P.(C) No.412/1995)

Civil Appeal No.5027/2000

Anil Kumar Singh ... Appellant
Versus

Collector, Sonbhadra District & Ors. ....Respondents

(With C.A.Nos.6643 to 6650 of 2000, 6894 of 2000 and C.A.No.1077 of 2001)

R.C. Lahoti, J.

This batch of matters, some appeals by special leave under Article 136 of the Constitution and some writ petitions filed in this Court, raise a few questions of constitutional significance centering around Entries 52, 54 and 97 in List I and Entries 23,

49, 50 and 66 in List II of the Seventh Schedule to the Constitution of India as also the extent and purport of the residuary power of legislation vested in the Union of India. Cesses on coal bearing land, levied in exercise of the power conferred by State Legislation, have been struck down by a Division Bench of the Calcutta High Court. In exercise of the same power conferred by State legislation whereunder cesses were levied on coal bearing land, cesses have also been levied on tea plantation land which are the subject-matter of writ petitions filed in this Court. The Bengal Brickfield Owners' Association have also come up to this Court by filing a writ petition under Article 32 of the Constitution, laying challenge to the same cesses levied on the removal of brick earth. These three sets of matters arise from West Bengal. The High Court of Allahabad has upheld the constitutional validity of cess levied in the State of U.P. on minor minerals which decisions are the subject-matter of civil appeals filed under Article 136 of the Constitution. For the sake of convenience, we would call these matters, respectively as (A) 'Coal Matters', (B) 'Tea Matters', (C) 'Brick Earth Matters', and (D) 'Minor Mineral Matters'. Inasmuch as the basic constitutional questions arising for decision in all these matters are the same, all the matters have been heard analogously.

We would first set out the facts in brief and so far as relevant for appreciating the issues arising for decision and thereafter deal with the same.

(A) Coal Matters

A Division Bench of the Calcutta High Court has, vide its judgment dated 25.11.92 reported as Kesoram Industries Ltd. (Textiles Division) Vs. Coal India Ltd., AIR 1993 Calcutta 78, struck down certain levies by way of cess on coal as unconstitutional for want of legislative competence in the State Legislature. Feeling aggrieved, the State of West Bengal has come up in appeal by special leave.

The levies which are the subject matter of challenge are as under:
The Cess Act, 1980

"S.5 All immovable property to be liable to a road cess and public works cess. From and after the commencement of this Act in any district or part of a district, all immovable property situate therein except as otherwise in (Section 2) provided, shall be liable to the payment of a road cess and a public works cess."

"S.6 Cesses how to be assessed. The road cess and the public works cess

[shall be assessed___

(a) in respect of lands on the annual value thereof,

(b) in respect of all mines and quarries, on the annual dispatches therefrom, and,

(c) in respect of tramways, railways and other immovable property, on the annual net profit thereof, ascertained respectively as in

this Act prescribed]

and the rates at which such cesses respectively shall be levied for each year shall be determined for such year in the manner in this Act prescribed:

Provided that___

(1) the rates of such road cess and public works cess shall not exceed six paise and twenty-five paise respectively on each rupee of such annual value,

(2) the rates of each of such road cess and public works cess shall not exceed___

(i) fifty paise on each tonne of coal, minerals or sand of such annual dispatches, and

(ii) six paise on each rupee of such annual net profits,

Explanation. ___ For the purposes of this proviso, one tonne of coke shall be counted as one and a quarter tonne of coal."

2. West Bengal Primary Education Act, 1973

"78. Education cess. ___ (1) All immovable properties on which road and public works cesses are assessed, [or all such properties which are liable to such assessment] according to the provisions of the Cess Act, 1880, shall be liable to the payment of education cess.

(2) The rate of the education cess shall be determined by the state Government by notification and shall not exceed___

(a)[in respect of lands, other than a tea estate] ten paise on each rupee of the annual value thereof;

(aa) xxx xxx xxx

(b) in respect of coal mines [five per centum of the value of coal] on the dispatches therefrom;

(c) in respect of quarries and mines other than coal mines, [one rupee on each tonne of materials or minerals other than coal on the annual dispatches therefrom]

Explanation. ___ For the purpose of clause (b) the expression 'value of coal' shall mean___

(i) in the case of dispatches of coal as a result of sale thereof, the prices charged by

the owner of a coal mine for such coal, but excluding any sum separately charged as tax, cess, duty, fee or royalty for payment of such sum to Government to a local body, or any other sum as may be prescribed or

(ii) in the case of dispatches other than those referred to in item(i), the prices chargeable by the owner of a coal mine for such coal if they were dispatched as a result of sale thereof, but excluding any sum separately chargeable as tax, cess, duty, fee or ___ royalty for payment of such sum to Government or a local body or any other sum as may be prescribed:

Provided that if more than one price is chargeable for the same variety of coal, the maximum price chargeable for that variety of coal shall be taken as the basis of valuation for the purpose of this item."

3. West Bengal Rural Employment and Production Act, 1976.

"S.4. Rural employment cess. ___ (1) On and from the commencement of this Act, all immovable properties on which road and public work cesses [are assessed or liable to be assessed] according to the provisions of the Cess Act, 1880, shall be liable to the payment of rural employment cess;

Provided that on raiyat who is exempted from paying revenue in respect of his holding under clause (a) of sub-sec.(1) of S.23B of the West Bengal Land Reforms Act, 1955 shall be liable to pay rural employment cess.

(2) The rural employment cess shall be levied annually___

(a) [in respect of lands, other than a tea estate,] at the rate of six paise on each rupee of development value thereof;

(aa) xxx xxx xxx

(b) in respect of coal mines, at the rate of [thirty-five paise per centum] on each tonne of coal on the xxx dispatches therefrom;

(c) in respect of mines other than coal mines and quarries, [at the rate of fifty paise on each tonne of materials other than coal on the annual dispatches therefrom]

Explanation. ___ For the purpose of clause (b) the expression 'value of coal' shall mean___

(i) in the case of dispatches of coal as a result of sale thereof, the prices charged by the owner of a coal mine for such coal but excluding any sum separately charged as tax, cess, duty, fee or royalty for payment of such

sum to Government or a local body, or any other sum as may be prescribed, or

(ii) in the case of dispatches, other than those referred to in item (i), the prices chargeable by the owner of a coal mine for such coal if they were dispatched as a result of sale thereof, but excluding any sum separately chargeable as tax, cess, duty, fee or royalty for payment of such sum to Government or a local body, or any other sum as may be prescribed:

Provided that if more than one price is chargeable for the same variety of coal, the maximum price chargeable for that variety of coal shall be taken as the basis of valuation for the purpose of this item."

All the three legislations above-referred to are State enactments. The provisions of the West Bengal Primary Education Act, 1973 and the West Bengal Rural Employment and Production Act, 1976, which levied cess were amended by the West Bengal Taxation Laws (Amendment) Act, 1992 with effect from 1-4-1992. The text of the said Amendment Act is as follows:

"West Bengal Act II of 1992

THE WEST BENGAL TAXATION LAWS (AMENDMENT) ACT, 1992.

[Passed by the West Bengal Legislature]

[Assent of the Governor was first published in the Calcutta Gazette, Extraordinary, of the 27th March, 1992.]

An Act to amend the West Bengal Primary Education Act, 1973 and the West Bengal Rural Employment and Production Act, 1976.

WHERAS it is expedient to amend the West Bengal Primary Education Act, 1973 and the West Bengal Rural Employment and Production Act, 1976, for the purposes and in the manner hereinafter appearing:

It is hereby enacted in the Forty-third Year of the Republic of India, by the Legislature of West Bengal, as follows:-

1. (1) This Act may be called the West Bengal Taxation Laws (Amendment) Act, 1992.

(2) It shall come into force on the 1st day of April, 1992.

(Section 2.)

2. In the West Bengal Primary Education Act, 1973,___

(1) in section 78 for sub-section (2), the following sub-section shall be substituted:___

'(2) The education cess shall be levied annually___

(a) in respect of land, except when a cess is leviable and payable under clause (b) or clause (c) of sub-section (2A), at the rate of ten paise on each rupee of annual value thereof as assessed under the Cess Act, 1880;

(b) in respect of a coal-bearing land, at the rate of five per centum of the annual value of the coal-bearing land as defined in clause (1) of Section 2 of the West Bengal Rural Employment and Production Act, 1976;

(c) in respect of a mineral-bearing land (other than coal-bearing land) or quarry, at the rate of one rupee on each tonne of minerals (other than coal) or materials despatched within the meaning of clause (1b) of Section 2 of the West Bengal Rural Employment and Production Act, 1976, from such mineral bearing land or quarry;

Provided that when in the coal-bearing land referred to in clause (b) there is no production of coal for more than two consecutive years, such land shall be liable for levy of cess in respect of any year immediately succeeding the said two consecutive years in accordance with clause (a):

Provided further that where no despatch of minerals or materials is made during a period of more than two consecutive years from the mineral-bearing land or quarry as referred to in clause (c), such land or quarry shall be liable for levy of cess in respect of any year immediately succeeding the said two consecutive years in accordance with clause (a).

Explanation. ___ For the purposes of this chapter, 'coal-bearing land' shall have the same meaning as in clause (1a) of Section 2 of the West Bengal Rural Employment and Production Act, 1976.'.

(2) in section 78A,___

(a) for clause (a), the following clause shall be substituted:-

"(a) the education cess payable for a year under sub-section (1) of section 78 in respect of coal-bearing land referred

to in clause (b) of sub-section (2) of that section shall be paid by the owner of such coal-bearing land in such manner, at such intervals and by such dates as may be prescribed;";

(b) for clause (b), the following clause shall be substituted:-

"(b) every owner of a coal-bearing land shall furnish a declaration relating to a year showing the amount of education cess payable by him under clause (a) in such form and by such date as may be prescribed and to such authority as may be notified by the State Government in this behalf in the Official Gazette (hereinafter referred to as the notified authority);";

(c) in clause (c),__

(i) for the words "coal mine", wherever they occur, the words "coal-bearing land" shall be substituted;

(ii) for the word "return", wherever it occurs, the word "declaration" shall be substituted;

(iii)for the word "period", wherever it occurs, the word "year" shall be substituted;

(d) for clause (d), the following clause shall be substituted:-

"(d) the education cess under clause (b) of sub-section (2) of section 78 shall be assessed by the notified authority in the manner prescribed, and if the declaration under clause (b) is not accepted, the owner of the coal-bearing land shall be given a reasonable opportunity of being heard before making such assessment;";

(e) in clause (g), for the words "coal mine" in the two places where they occur, the words "coal-bearing land" shall be substituted;

(f) for clause (ga), the following clause shall be substituted:-

"(ga) where an owner of a coal-bearing land furnishes a declaration referred to in clause (b) in respect of any year by the prescribed date or thereafter, but fails to make full payment of education cess payable in respect of such period by such date, as may be prescribed under clause (a), he shall pay a simple interest at the rate of two per centum for each English

calendar month of default in payment under clause (a) from the first day of such month next following the prescribed date up to the month preceding the month of full payment of such cess or up to the month prior to the month of assessment under clause (d) in respect of such period, whichever is earlier, upon so much of the amount of education cess payable by him according to clause (a) as remains unpaid at the end of each such month of default;"

(g) for clause (gb), the following clause shall be substituted:-

"(gb) where an owner of a coal-bearing land fails to furnish a declaration referred to in clause (b) in respect of any year by the prescribed date or thereafter before the assessment under clause (d) in respect of such year and, on such assessment, full amount of education cess payable for such year is found not to have been paid in the manner and by the date prescribed under clause (a), he shall pay a simple interest at the rate of two per centum for each English calendar month of default in payment under clause (a) from the first day of the month next following the prescribed date for such payment up to the month preceding the month of full payment of education cess under clause (a) or up to the month prior to the month of such assessment under clause (d), whichever is earlier, upon so much of the amount of education cess payable by him according to clause (a) as remains unpaid at the end of each such month of default:

Provided that where the education cess payable under clause (a) is not paid in the manner prescribed under that clause by the owner of a coal-bearing land, the notified authority shall, while making the assessment under clause (d) in respect of a year, apportion on the basis of such assessment the education cess payable in accordance with clause (a);";

(h) in clause (gc), for the words "coal mine", the words "coal-bearing land" shall be substituted;

(i) in clause (ge), for the words "coal mine", the words "coal-bearing land" shall be substituted;

(j) for clause (gf), the following clause shall be substituted:-

"(gf) interest under clause (ga) or clause (gb) shall be payable in respect of

payment of education cess which falls due on any day after the 30th day of April, 1992, and interest under clause (gc) shall be payable in respect of assessment for which notices of demand of education cess under clause (d) are issued on or after the date of commencement of the West Bengal Taxation Laws (Amendment) Act, 1992:

Provided that interest under clause (ga) or clause (gb) in respect of any period ended on or before the 31st day of March, 1992, or interest under clause (gc) in respect of assessment, for which notices of demand of education cess under clause (d) are issued before the date of commencement of the West Bengal Taxation Laws (Amendment) Act, 1992, shall continue to be payable in accordance with the provisions of this Act as they stood immediately before the coming into force of the aforesaid Act as if the aforesaid Act had not come into force;";

(k) in clause (gh), for the words "coal mine", the words "coal-bearing land" shall be substituted;

(l) in clause (gi), for the words "coal mine", the words "coal-bearing land" shall be substituted;

(m) in clause (gj), for the words "coal mine", the words "coal-bearing land" shall be substituted;

"3. In the West Bengal Rural Employment and Production Act, 1976, ___

(1) in Section 2, ___

(a) for clause (1), the following clauses shall be substituted___
(1) "annual value of coal-bearing land", in relation to a financial year, means one-half of the value of coal, produced from such coal-bearing land during the two years immediately preceding that financial year, the value of coal being that as could have been fetched by the entire production of coal during the said two immediately preceding years, had the owner of such coal-bearing land sold such coal at the price or prices excluding the amount of tax, cess, fee, duty, royalty, crushing charge, washing charge, transport charge or any other amount as may be prescribed, that prevailed on the date immediately preceding the first day of that financial year.
Explanation. ___ Where different prices are prevailing on the date immediately preceding the first date of that financial year

for different grades or qualities of coal, the value of coal of each grade or quality produced during the two years immediately preceding that financial year shall be determined accordingly;

(1a) "coal-bearing land" means holding or holdings of land having one or more seams of coal comprising the area of a coal mine;

(1b) 'despatched', for a financial year, shall, in relation to a mineral-bearing land (other than coal-bearing land) or a quarry, mean one-half the quantity of minerals, or minerals, despatched during two years immediately preceding that financial year from such mineral-bearing land or quarry;

(1c) 'development value' means a sum equivalent to five times the annual value of land as assessed under the Cess Act, 1880;';

(b) after clause (3), the following clause shall be added and shall be deemed always to have been added:-

'(4) 'year' means a financial year as defined in clause (15) of Section 3 of the Bengal General Clauses Act, 1899;';

(2) in section 4, for sub-section (2), the following sub-section shall be substituted:-

"(2) The rural employment cess shall be levied annually___

(a) in respect of land, except when a cess is leviable and payable under clause (b) or clause (c) or sub-section (2A), at the rate of six paise on each rupee of development value thereof;

(b) in respect of a coal-bearing land, at the rate of thirty-five per centum of the annual value of coal-bearing land as defined in clause (1) of Section 2;

(c) in respect of a mineral-bearing land (other than coal-bearing land) or quarry, at the rate of fifty paise on each tonne of minerals (other than coal) or materials despatched therefrom:

(g) for clause (gb), the following clause shall be substituted:-

"(gb) where an owner of a coal-bearing land fails to furnish a declaration referred to in clause (b) in respect of any year by the prescribed date or thereafter before the assessment under clause (d) in respect of such year and, on such assessment, full amount of rural employment cess payable for such year is found not to have been paid in the manner and by the date prescribed under clause (a), he shall pay a simple interest at the rate of two per centum for each English calendar month of default in payment under clause (a) from the first day of the month next following the prescribed date for such payment up to the month preceding the month of full payment of rural employment cess under clause (a) or up to the month prior to the month of such assessment under clause (d), whichever is earlier, upon so much

of the amount of rural employment cess payable by him according to clause (a) as remains unpaid at the end of each such month of default:

Provided that where the rural employment cess payable under clause (a) is not paid in the manner prescribed under that clause by the owner of a coal-bearing land, the notified authority shall, while making the assessment under clause (d) in respect of a year, apportion on the basis of such assessment the rural employment cess payable in accordance with clause (a);";

(h) in clause (gc), for the words "coal mine", the words "coal-bearing land" shall be substituted;

(i) in clause (ge), for the words "coal mine", the words "coal-bearing land" shall be substituted;

(j) for clause (gf), the following clause shall be substituted:-

"(gf) interest under clause (ga) or clause (gb) shall be payable in respect of payment of rural employment cess which falls due on any day after the 30th day of April, 1992, and interest under clause (gc) shall be payable in respect of assessments for which notices of demand of rural employment cess under clause (d) are issued on or after the date of commencement of the West Bengal Taxation Laws (Amendment) Act, 1992:

Provided that interest under clause (ga) or clause (gb) in respect of any period ended on or before the 31st day of March, 1992, or interest under clause (gc) in respect of assessments for which notices of demand of rural employment cess under clause (d) are issued before the date of commencement of the West Bengal Taxation Laws (Amendment) Act, 1992, shall continue to be payable in accordance with the provisions of this Act as they stood before the coming into force of the said Act as if the said Act had not come into force;";

(k) in clause (gh), for the words "coal mine", the words "coal-bearing land" shall be substituted;

(l) in clause (gi), for the words "coal mine", the words "coal-bearing land" shall be substituted;

(m) in clause (gj), for the words "coal mine", the words "coal-bearing land" shall be substituted;

_____

By order of the Governor
R. BHATTACHARYYA,
Secy. to the Govt. of West Bengal."

It is the constitutional validity of the amendment in the two legislations, given effect to from 1.4.92, which was successfully impugned in the High Court and is sought to be restored in these appeals.

The High Court has placed reliance mainly on two decisions of this Court, namely India Cement Ltd. & Ors. Vs. State of Tamil Nadu & Ors., (1990) 1 SCC 12 (Seven-Judges Bench decision) and Orissa Cement Ltd. Vs. State of Orissa & Ors., 1991 Supp.(1) SCC 430 (Three-Judges Bench decision). In both these decisions the levy of cess impugned therein was struck down as unconstitutional. The High Court of Calcutta has held that the levy impugned herein is similar to the one held ultra vires the legislative competence of the State twice by the Supreme Court, and hence the same was liable to be struck down.

In the opinion of the High Court, the cess is assessed and computed on the basis of value of coal produced from the coal bearing land, and coal bearing land has been defined to mean land having one or more seams of coal comprising the area of a coal mine. Therefore, it is the production of coal from a coal mine which is the basic event for the levies and the cess is to be levied at 35 per centum of the 'annual value of the coal bearing land', which, as per definition, is directly related to the value of coal produced from the coal mines. The value of the coal has been related to the price. Explanation to Clause (1) of sub-Section (2) of the 1922 Act, as amended by the 1976 Act, makes the real nature of the levy clearer by providing that where different prices are prevailing on the relevant date for different grades or qualities of coal, the value of coal of each grade or quality shall be relevant. The High Court has concluded that the cess cannot be said to be on land so as to be covered by Entry 49 in Schedule II. On behalf of the writ petitioner__ respondents, the judgment of the High Court has been supported on similar grounds as were successfully urged before the High Court and which we shall presently deal with. On the other hand, the learned counsel for the appellant-State of West Bengal has submitted that having regard to the real nature of the levy, it clearly falls within the legislative field of Entry 49 in List II.

(B) Tea matters

The writ petitions in which the validity of the levy of cesses relatable to tea estates is involved has an interesting legislative history behind it. By virtue of the West Bengal Taxation Laws (Amendment) Act, 1981, amendments were effected in the provisions of the West Bengal Primary Education Act, 1973, and the West Bengal Rural Employment And Production Act, 1976. Cesses were sought to be levied upon certain lands and buildings in the State for raising funds for the purpose of providing primary education throughout the State and to provide for employment in rural areas. Different rates in respect of lands, coal mines and other mines on annual basis were provided. Tea estates were carved out as a separate category and a separate rate was prescribed therefor as under.

"Section 4(2) : The rural employment cess shall be levied

annually -
(a) in respect of lands, other than a tea estate, at the rate of six paise on each rupee of development value thereof;

(aa) in respect of a tea estate at such rate, not exceeding ruppes six 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 :

Provided 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 centers as may be recognized by the State Government by notification in the Official Gazette shall be excluded:

Provided further that the State Government, may fix different rates on despatches of different classes of tea.

Explanation. - For the purpose of this section, 'tea' means the plant Camelia Sinensis (L) O. Kuntze as well as all varities of the product known commercially as tea made from the leaves of the plant Camelia Sinensis (L) O. Kuntze, including green tea and green tea leaves, processed or unprocessed."

Sub-section (4) was introduced in Section 4 which empowered the State Government to exempt "such categories of dispatches or such percentage of dispatches from the liability to pay the whole or any part of the rural employment cess or reduce the rate..." . By another amendment effected in 1982, the first proviso to clause (aa) in Section 4(2) was omitted. Several notifications were issued by the Government from time to time as contemplated by Section 4(2).

The constitutional validity of the abovesaid amendment was challenged successfully in Buxa Dooars Tea Company Ltd. and Ors. Vs. State of West Bengal and Ors. - (1989) 3 SCC 211. The decision is by a Bench of two learned Judges. The levy of cess having been struck down, the State became liable to refund the cess already collected and the relevant schemes which were financed by the cessess so collected came under jeopardy. The West Bengal Taxation Laws (Second Amendment) Act, 1989 was enacted, which is under challenge herein.

Section 2 of the impugned Act contains amendments to West Bengal Primary Education Act while Section 3 sets out the amendments to West Bengal Rural Employment and Production Act, 1976. As mentioned hereinbefore, it would be enough to notice the gist of the amendments made in one of the two Acts of 1976 since the amendments in both are identical.

Clause (aa) in sub-section (2) of Section 4 was omitted with effect from 1.4.1981. After sub-section (2), sub-section (2-A) was introduced with retrospective effect from 1.4.1981. Sub-section (2-A) reads :
(2-A) The rural employment cess shall be

levied annually on a tea estate at the rate of twelve paise for each kilogram of green tea leaves produced in such estate.

Explanation. - For the purposes of this sub-section, sub-section (3) and Section 4-B-

(i) 'green tea leaves' shall mean the plucked and unprocessed green leaves of the plant Camelia Sinensis (L) O. Kuntze;

(ii) 'tea estate' shall mean any land used or intended to be used for growing plant Camelia Sinensis (L) O.Kuntze and producing green tea leaves from such plant, and shall include land comprised in a factory or workshop for producing any variety of the product known commercially as 'tea' made from the leaves of such plant and for housing the persons employed in the tea estate and other lands for purposes ancillary to the growing of such plant and producing green tea leaves from such plant."

Clause (a) in sub-section (3) was also substituted which had the effect of making the owner of the tea estate liable for the said cess. The other provisions require the owner of the tea estate to maintain a true and correct account of green tea leaves produced in the tea estate. Sub-section (4) was also substituted. The substituted sub-section (4) empowered the State Government to exempt from the cess such categories of tea estates producing green tea leaves not exceeding two lakh fifty thousand kilograms and located in such area as may be specified in such notification. Section 4-B contains the validation clause. It says that any cess collected for the period prior to the said Amendment Act shall be deemed to have been validly levied by it and collected under the Amended Act. Any assessment made or other proceedings taken in that behalf for assessing and collecting the said tax were also to be deemed to have been taken under the Amended Act.

Goodricke Group Ltd. & ors. filed a writ petition under Article 32 of the Constitution of India in this Court. The levy of cesses under both the State enactments as amended by the West Bengal Taxation Laws (Second Amendment) Act, 1989 was impugned. A few matters raising a similar challenge and pending in various High Courts were also withdrawn to this Court. All the matters were heard and decided by a three-Judges Bench of this Court, vide judgment dated November 25, 1994, reported as Goodricke Group Ltd. and Ors. Vs. State of West Bengal and Ors. - (1995) Supp. 1 SCC 707. The decision of this Court in India Cement Ltd. and Ors. Vs. State of Tamil Nadu & Ors. (1990) 1 SCC 12 (seven-judges Bench) and Orissa Cement Limited Vs. State of Orissa & Ors. (1991) Suppl.1 SCC 430 (three-judges Bench) were cited before the three-judges Bench in Goodricke. Both the decisions were distinguished and the constitutional validity of the 1989 amendments was upheld. The writ petitions were dismissed.

It appears that a similar cess was levied by a pari materia provision enacted by the State Legislature of Orissa as the Orissa Rural Employment, Education and Production Act, 1982. The cess was on land bearing coal and minerals. Challenge to the constitutional validity of such cess was successfully laid

before this Court, and the Orissa Legislation was struck down as unconstitutional and ultra vires the competence of the State Legislature in State of Orissa Vs. Mahanadi Coal Fields Limited (1995) Suppl.2 SCC 686 decided on April 21, 1995.

On 30.3.1996 a writ petition under Article 32 of the Constitution of India has been filed in this Court laying challenge to the constitutional validity of the very same amendments which were unsuccessfully impugned in the Goodricke's case.

The writ petitioners in the Tea Matters have in their petition stated a few grounds in support of the relief sought for. However, a perusal of the grounds reveals that in substance the challenges is only one, i.e., the decision in Goodricke runs counter to the view of the law taken by Seven-Judges Bench in India Cement and three-Judges Bench in Orissa Cement; Goodricke was rightly not followed in Mahanadi Coal Fields; rather Mahanadi Coal Fields has whittled down the authority of Goodricke and that being the position of law the impugned cess is ultra vires the power of the State Legislature and deserves to be pronounced so. In short, the same challenge as was laid and turned down in Goodricke, is reiterated drawing support from the decisions of this Court previous and subsequent to Goodricke, and seeks the overruling of Goodricke.

(C) Brick-Earth Matters

The Bengal Brickfield Owners' Association, being a representative body of the persons engaged in the activity of brick manufacturing and owning brickfields as also one of the brickfield owners, have joined in filing a writ petition before this Court wherein the constitutional validity of the very same provisions as contained in the Cess Act, 1880, the West Bengal Primary Education Act, 1973 and the West Bengal Rural Employment and Production Act, 1976 (both as amended by the Bengal Taxation Laws Amendment Act, 1992) has been put in issue, as has been subjected to challenge by the coal mine owners and the tea estate owners disputing the levy of cess allegedly on coal and tea. The grounds of challenge, briefly stated, are three in number: firstly, that brick-earth is a minor mineral to which the Mines and Minerals Development and Regulation Act, 1957, applies and by virtue of the declaration made by Section 2 of the Act by reference to Entry 54 in Schedule I of the Constitution, the field relating to such minor minerals is entirely covered by the Central Legislation and hence the State Legislations are not competent to levy the impugned cess; secondly, that the levy is on the dispatch of minor minerals for sale while the process of manufacturing bricks does not involve any dispatch of the brick-earth inasmuch as the brick-earth is consumed then and there, on the brickfield itself, in the process of manufacturing of bricks, and there being no dispatch of brick-earth, the cess is not leviable; and thirdly, that the State Government is not empowered to levy any cess on either the extraction of brick-earth or on the dispatch of brick-earth. In support of these three grounds, it is further submitted that the same quantity of brick-earth is subjected by Central Legislation to payment of royalty which is a tax, and the same quantity of brick-earth is sought to be levied with cess which is incompetent so far as the State Legislature is concerned. The writ petition places reliance on the decisions of this Court in India Cement Ltd. & Ors (supra), Orissa Cement Ltd. (supra) and Buxa Dooars Tea Company Ltd. and Ors.(supra). Some of the members of the petitioner association were served with demand notices. The relief sought for in the petition is striking down of the relevant provisions of the three State Legislations as ultra vires the Constitution and quashing of the demand notices. The

reason for filing the petition in this Court, as stated in the writ petition, is that the provisions sought to be impugned herein have already been declared ultra vires by the High Court of Calcutta in relation to 'tea', an appeal against which decision has been filed in this Court and by an interim order the operation of the judgment of the High Court was stayed.

According to the respondents, the cess sought to be levied by the impugned State Legislation is in the nature of fee and not tax. The purpose of levying fee, as stated in the Preamble to the relevant legislation, is rendering different services to the society and for public benefit. The cesses have been levied by the State Government for securing of welfare to the people by the State as is enshrined in Part IV of the Constitution of India by providing communication facilities, removal of illiteracy and rural employment to the poor living below the poverty line. The impugned legislations levying the cess, do not encroach upon the field covered by the Central legislation. The brick-klin owners extract the brick-earth as an item of trade. From every 100 cft of brick-earth which weighs 5 metric tones, 1382 bricks are manufactured. The dispatch of 1382 bricks means the dispatch of 100 cft or 5 metric tones of brick-earth. A brickfield owner performs dual functions: firstly, he extracts a quantum of brick-earth from the quarry, and secondly, he dispatches the same for manufacture of bricks in the same quarry-field. The brickfield owner is an extractor of brick-earth and also a manufacturer of bricks. The element of dispatch is kept hidden. That is why the cess is now assessed on annual dispatches. Dispatch, in the context of brick-earth, means removal of brick-earth from one place to another which may be within the same complex and for domestic or captive use or consumption. In any case, the removal of brick-earth involved in the process cannot escape assessment.

(D) Minor Mineral Matters

This batch of appeals puts in issue the judgment dated 1.3.2000 delivered by a Division Bench of the Allahabad High Court (reported as Ram Dhani Singh Vs. Collector, Sonbhadra and Ors. - AIR 2001 Allahabad 5), upholding the constitutional validity of a cess on mineral rights levied under Section 35 of the U.P. Special Area Development Authorities Act, 1986, read with Rule 3 of the Shakti Nagar Special Area Development Authority (Cess on Mineral Rights) Rules, 1997 (herein referred to briefly as 'SADA Act' and 'SADA Cess Rules' respectively). There was a bunch of 73 writ petitions filed in the High Court which have all been dismissed. The challenge is being pursued in this Court by ten writ petitioners through these appeals by special leave.

The Governor of Uttar Pradesh promulgated U.P. Ordinance No.15 of 1985, which was repealed by U.P. Special Area Development Authorities Act, 1986 (U.P. Act No.9 of 1986), containing identical provisions as were contained in the preceding Ordinance. The said Act received the assent of the President of India on 19.3.1986 and was published in U.P. Gazette of that day. Section 35 of the Act provides as under :

"35. Cess on mineral rights.-

(1) Subject to any limitations imposed by Parliament by law relating to mineral development, the Authority may impose a cess on mineral rights at such rate as may be prescribed.

(2) Any Cess imposed under this section shall be subject to confirmation by the State

Government and shall be leviable with effect from such date as may be appointed by the State Government in this behalf."

On 24.2.1997, in exercise of the power conferred by Section 35 of the Act, the Governor made the Shakti Nagar Special Area Development Authority (Cess on Mineral Rights) Rules, 1997, which were published on the same day in the U.P. Gazette and came into force. Rule 2(b) and Rule 3(1) and (2), relevant for our purpose, are extracted and reproduced hereunder :

"2. In these rules, unless there is anything repugnant in the subject or context__

(a) xxx xxx xxx

(b) "Mineral Rights" means rights conferred on a lessee under a mining lease granted or renewed for mining operations in relation to Minerals (providing operation for raising, winning or extracting coal) as defined in the Mines and Minerals (Regulation and Development) Act, 1957 (Act No.67 of 1957"

"3.(1) The Authority may, subject to sub-rules (2) and (3) impose a cess on mineral rights on such minerals and minor minerals and at such rates are specified below :

MINERAL/MINOR MINERAL	MINIMUM RATE	MAXIMUM RATE
(1) Cess on Coal	Rs.5.00 (per ton)	Rs.10.00 (per ton)
(2) Cess on Stone, Coarse Sind/Sand	Rs.2.00 (Per Cubic metre)	Rs.5.00 (Per Cubic metre)

(2) The rates shall not be less than the minimum rates or more than the maximum rates specified in sub-rule (1) and shall be determined by the Authority by a special resolution which shall be subject to confirmation by the State Government."

In exercise of the power conferred by the Act and the Rules, the State Government proceeded to levy cess and take steps for recovery thereof by serving notices and issuing citations on the several stone crushers (which the appellants are), who extract stone as mineral and convert the same into metal by a process

of crushing. They filed the writ petitions disputing the levy and the demand by the State Government.

On behalf of the writ-petitioners, the SADA Cess Rules as also the legislative competence of the State Legislature to enact Section 35 of the SADA Act were challenged on the ground that the MMDR Act, 1957, having been enacted containing a declaration under Section 2 as contemplated by Entry 54 of List-I and the Act being applicable to Sonbhadra falling within the State of U.P. as well, the State Legislature was denuded of its power to enact the impugned law and levy the impugned cess. It was also submitted that the impugned cess would have the effect of adding to the royalty already being paid and thereby increasing the same, which was ultra vires the power of the State Government as that power was exercisable only by the Central Government.

The High Court has held the SADA Act, the SADA Cess Rules and the levy of cess thereunder within the competence of State Legislature by reference to Entry 5 in List II.

Reference to Constitution Bench

Since the appeals referable to coal matters and the writ petition referable to tea matters raised common issues, the cases were taken up for hearing together. On 12.10.1999, the conflict amongst several decisions of this Court was brought to the notice of the three-judges Bench hearing the matter which passed the following order :

"Great emphasis has been placed by learned counsel for the State of West Bengal upon the judgment of a Bench of three learned Judges in Goodricke Group Ltd. & Ors. Vs. State of West Bengal & Ors. [1995 Suppl. (1) SCC 707]. Quite apart from the fact that there are pending proceedings in this Court seeking to reconcile the judgment in Goodricke with that in State of Orissa & Ors. V. Mahanadi Coalfields Ltd. & Ors. [1995 Suppl.(2) SCC 686], we find some difficulty in accepting as correct the view taken by Goodricke, particularly having regard to the earlier decision (of a Bench of two learned Judges) in Buxa Dooars Tea Co.Ltd. Vs. State of West Bengal [(1989) 3 SCC 211]. We think, therefore, that these matters should be heard by a Constitution bench.

The papers and proceedings may, accordingly, be placed before the Hon'ble Chief Justice for appropriate directions."

The brick-earth matters were also clubbed with the abovesaid matters for hearing.

The impugned judgment of the High Court of Allahabad in Minor Mineral Matters has placed reliance on the decision of this Court in Goodricke Group Ltd. and Ors. Vs. State of West Bengal and Ors. - (1995) Supp. 1 SCC 707. The correctness of the said decision was in issue in Civil Appeal Nos.1532-33 of 1993 and batch matters and hence these appeals were also directed to be placed before the Constitution Bench for hearing.

This is how the four sets of matters have been listed

before and heard by the Constitution Bench.

Relevant Entries and principles of interpretation
Before we proceed to examine the merits of the submissions and counter submissions made on behalf the parties, it will be useful to recapitulate and summarise a few principles relevant for interpreting entries classified and grouped into the three Lists of the Seventh Schedule of the Constitution. The law is legion on the point and the principles which are being briefly stated hereinafter are more than settled. These principles are referred to in the several decisions which we shall be referring to hereinafter. So far as the principles are concerned they have been followed invariably in all the decisions, however diverse results have followed based on facts of individual cases and manner of application of such principles to the facts of those cases.

The relevant entries to which reference would be required to be made during the course of this judgment are extracted and reproduced herein:-

"SEVENTH SCHEDULE
(Article 246)

List I - Union List

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

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.

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

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

List II - State List
23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

49. Taxes on lands and buildings.

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

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

Article 245 of the Constitution is the fountain source of legislative power. It provides - subject to the provisions of this

Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. The legislative field between the Parliament and the Legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in Seventh Schedule, called the 'Union List'. Subject to the said power of the Parliament, the Legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the 'Concurrent List'. Subject to the abovesaid two, the Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the 'State List'. Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The principles have been succinctly summarized and restated by a Bench of three learned Judges of this Court on a review of the available decisions in M/s. Hoechst Pharmaceuticals Ltd. & Ors. Vs. State of Bihar & Ors., - (1983) 4 SCC 45. They are-

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

(2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(3) Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deduced from a general legislative entry as an ancillary power.

(4) The entries in the List being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest possible interpretation. This is because, to quote V.Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeratio of broad categories. A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.

(5) Where the legislative competence of a Legislature of any State is questioned on the ground that it encroaches upon

the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in Lists I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three Lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other Legislature is of no consequence. The Court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the Legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

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

Tax Legislation
The abovestated are general principles. Legislations in the field of taxation and economic activities need special consideration and are to be viewed with larger flexibility in approach. Observations of the Constitution Bench in R.K. Garg Vs. Union of India & Ors., (1981) 4 SCC 676, are apposite, wherein this Court has emphasized a greater latitude - like play in the joints - being allowed to the Legislature because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula. In this field the Court should feel more inclined to give judicial deference to legislative judgment. Their Lordships quoted with approval the following statement of Frankfurter, J. in Morey Vs. Doud, (1957) 354 US 457:-

"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events, self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability".

Their Lordships further observed that the Courts ought to adopt a pragmatic approach in solving problems rather than measuring the propositions by abstract symmetry. The exact wisdom and nice adaptations of remedies may not be possible. Even crudities and inequities have to be accommodated in complicated tax and economic legislations.

We now proceed to enter a deeper dimension in the field of tax legislation by considering the problem of devising the measure of taxation. This aspect has been dealt with in detail in Union of India & Ors. Vs. Bombay Tyre International Ltd., (1983) 4 SCC 210. Tracing the principles from the leading authority of Re.: a reference under the Government of Ireland Act 1920 and Section 3 of the Finance Act (Northern Ireland) 1934, (1936) A.C. 352, passing through Ralla Ram Vs. Province of East Punjab, 1948 FCR 207, and treading through the law as it has developed through judicial pronouncements one after the other, this Court has made subtle observations therein. It has been long recognized that the measure employed for assessing a tax must not be confused with the nature of the tax. A tax has two elements: first, the person, thing or activity on which the tax is imposed, and secondly, the amount of tax. The amount may be measured in many ways; but a distinction between the subject matter of a tax and the standard by which the amount of tax is measured must not be lost sight of. These are described respectively as the subject of a tax and the measure of a tax. It is true that the standard adopted as a measure of the levy may be indicative of the nature of the tax, but it does not necessarily determine it. The nature of the mechanism by which the tax is to be assessed is not decisive of the essential characteristic of the particular tax charged, though it may throw light on the general character of the tax.

Here we may refer to certain illustrative cases of well settled authority - the authority which has not been shaken so far and has rather withstood the test of times.

Taxation - measure of levy not suggestive of nature of tax - illustrative cases

In Ralla Ram (supra) the Federal Court held that a tax on buildings under Section 3 of the Punjab Urban Immovable Property Tax Act, 1940, measured by a percentage of the annual value of such building, remained a tax on buildings even though the measure of annual value of a building was also adopted as a standard for determining income from property under the Income Tax Act. The same standard was adopted as a measure for the two levies, yet the levies remained separate imposts by virtue of their distinctive nature. The measure adopted, it was held, could not be identified with the nature of the tax levied.

In M/s. Sainik Motors, Jodhpur Vs. State of Rajasthan, (1962) 1 SCR 517, a tax on passengers and goods was assessed as a rate on the fares and freights payable by the owners of the motor vehicles. The contention that the levy was a tax upon income and not upon passengers and goods was repelled by this Court. The Court pointed out that though the measure of the tax is furnished by the fares and freights it does not cease to be a tax on passengers and goods.

In D.G. Gouse & Co. Vs. State of Kerala, (1980) 2 SCC 410, the Court examined the different modes available to the Legislature for measuring the levy of tax on buildings. The Court upheld the provision made by the Legislature linking the levy

with the annual value of the building and prescribing a uniformed formula for determining its capital value and for calculating the tax.

In The Hingir-Rampur Coal Co. Ltd. Vs. State of Orissa, (1961) 2 SCR 537, the form in which the levy was imposed was held to be an impermissible test for defining in itself the character of the levy. It was argued that the method of determining the rate of levy was by reference to the minerals produced by the mines and, therefore, it was levy in the nature of a duty of excise. This Court held that the method thus adopted may be relevant in considering the character of the impost but its effect must be weighed alongwith and in the light of the other relevant circumstances. Referring to Bombay Tyre International Ltd. (supra), the Court further held that it is clear that when enacting a measure to serve as a standard for assessing the levy, the Legislature need not contour it along lines which spell out the character of the levy itself. A broader based standard of reference is permissible to be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy.

Meaning of 'Lands' - as used in Entry 49 in List II

The word 'land' __ as used in Entry 49 in List II, came up for the consideration of this Court in Anant Mills Vs. State of Gujarat, (1975) 2 SCC 175. It was held that the word 'land' cannot be assigned a narrow meaning so as to confine it to the surface of the earth. It includes all strata above or below. In other words, the word 'land' includes not only the surface of the earth but everything under or over it, and has in its legal significance an indefinite extent upward and downward. The four-Judges' Bench upheld the validity of the law levying tax in respect of area occupied by underground lines by reference to Entry 49 in List II, holding it to be a tax on land only.

Ample authority is available for the concept that under Entry 49 in List II the land remains a land without regard to the use to which it is being subjected. It is open for the Legislature to ignore the nature of the user and tax the land. At the same time it is also permissible to identify, for the purpose of classification, the land by reference to its user. While taxing the land it is open for the Legislature to consider the land which produces a particular growth or is useful for a particular utility and to classify it separately and tax the same. Different pieces of land identically situated otherwise, but being subjected to different uses, or having different potential, are capable of being classified separately without incurring the wrath of Article 14 of the Constitution. The Constitution Bench in Kunnathat Thathunni Moopil Nair etc. Vs. State of Kerala & Anr. (1961) 3 SCR 77, held that the land on which a forest stands is not to be excluded necessarily from Entry 49. The erstwhile Entry 19 of Schedule II applied to 'forest'. Their Lordships held that the use of the word 'forest' in Entry 19 could not be pressed into service to cut down the plain meaning of the word 'land' in Entry 49. It was permissible to tax the land on which a forest stands by reference to Entry 49. In Ajoy Kumar Mukherjee Vs. Local Board of Barpeta, (1965) 3 SCR 47, the appellant, a land holder, held a hatt (or market) on his land. The Local Board asked the appellant to take out a licence and pay Rs.600/-, later Rs.700/-, by way of licence fee for holding the market. It was urged that the impost was unconstitutional, inter alia, on the ground that the tax was actually imposed on the market, which infringed Article 14 of the Constitution, and also because the

State Legislature had no legislative competence to tax a market. The Local Board relied on Entry 49 in List II. The appellant urged that Entries 45 to 63 which deal with taxes do not contemplate a tax on markets. Repelling the plea, the Constitution Bench held that the tax was on the land though the charges arise only when the land is used for a market. The tax remained a tax on land in spite of the imposition being dependant upon the user of the land as a market. The tax was an annual tax as contrasted to a tax for each day on which the market was held. The owner or occupier of the land was responsible for payment of tax on an annual basis. The amount of tax depended upon the area of the land on which the market was held and the importance of the market. Thus, the tax was held to be a tax on land, though the incidence depended upon the use of the land as a market.

In Vivian Joseph Ferreira & Anr. Vs. The Municipal Corporation of Greater Bombay & Ors., (1972) 1 SCC 70, the tax was confined to the residential tenanted buildings. The classification was held to be valid. In The Government of Andhra Pradesh & Anr. Vs. Hindustan Machine Tools Ltd., (1975) 2 SCC 274, house tax was levied on the buildings. The new definition of 'house' included 'a factory'. However, the house tax was levied only on the building occupied by the factory and not on the machinery and furniture. The State Legislature claimed competence to do so under Entry 49, List II. The power to tax a building, exercisable without reference to the use to which the building is put, was held to be valid. In the opinion of the Court, it was irrelevant that the building was occupied by a factory which could not conduct its activities without the machinery and furniture.

Once it is held that the land or building is available to be taxed, it does not matter to what use the land is being subjected though the nature of the user may enable land of one particular user being classified separately from the land being subjected to another kind of user. The tax would remain a tax on land. It cannot be urged that what is being taxed is not the land but the nature of its user. So also it is permissible to adopt myriad forms and methods of valuation for the purpose of quantifying the tax.

In Ralla Ram Vs. The Province of East Punjabu - 1948 FCR 207, the Federal Court made it clear that every effort should be made as far as possible to reconcile the seeming conflict between the provisions of the Provincial Legislation and the Federal Legislation. Unless the court forms an opinion that the extent of the alleged invasion by a Provincial Legislature into the field of the Federal Legislature is so great as would justify the view that in pith and substance the impugned tax is a tax within the domain of the Federal Legislature, the levy of tax would not be liable to be struck down. The test laid down in Sir Byramjee Jeejeebhoy's case (AIR 1940 Bom 65) by the Full Bench of Bombay High Court was approved.

In Assistant Commissioner of Urban Land Tax Madras and Ors. etc. Vs. Buckingham and Carnatic Co. Ltd. etc. - (1969) 2 SCC 55, for the purpose of attracting the applicability of Entry 49 in List II, so as to cover the impugned levy of tax on lands and buildings, the Constitution Bench laid down twin tests, namely, (i) that such tax is directly imposed on lands and buildings, and (ii) that it bears a definite relation to it. Once these tests were satisfied, it was open for the State Legislature, for the purpose of levying tax, to adopt the annual value or the capital value of the lands and buildings for determining the

incidence of tax. Merely, on account of such methodology having been adopted, the State Legislature cannot be accused of having encroached upon Entries 86, 87 or 88 of List I. Entry 86 in List I proceeds on the Principle of Aggregation and tax is imposed on the totality of the value of all the assets. It is quite permissible to separate lands and buildings for the purpose of taxation under Entry 49 in List II. There is no reason for restricting the amplitude of the language used in the Entry 49 in List II. The levy of tax, calculated at the rate of a certain per centum of the market value of the urban land was held to be intra vires the powers of the State Legislature and not trenching upon Entry 86 in List I. So is the view taken by another Constitution Bench in Shri Prithvi Cotton Mills Ltd., etc. Vs. Broach Borough Municipality and Ors., (1969) 2 SCC 283, where the submission that the levy was not a rate on lands and buildings as appropriately understood, but rather a tax on capital value was discarded.

M/s. R.R. Engineering Co., etc. Vs. Zila Parishad, Bareilly and Anr. etc. - (1980) 3 SCC 330, is a case of circumstance and properties tax levied on the basis of income which the assessee receives from his profession, trade, calling or property. The plea that the tax was a tax on income was discarded. The test propounded by the Constitution Bench is that an excessive levy on circumstance may tend to blur the distinction between a tax on income and a tax on circumstances. Income will then cease to be a measure or yardstick of the tax and will become the very subject-matter of the tax. Restraint in this behalf is a prudent prescription for the local authorities to follow. The Constitution Bench observed that it was only a matter of convenience that income was adopted as a yardstick or measure for assessing the tax and the evolvement of such mechanism was not conclusive on the nature of tax.

We are inclined to make a reference to a few selected Full Bench decisions of different High Courts which have been cited with approval before this Court in many of the decisions to which we are making reference during the course of this judgment.

In Sir Byramjee Jeejeebhoy Vs. Province of Bombay and Ors. - A.I.R. 1940 Bombay 65 (F.B.) the Provincial Government levied a tax at the rate of 5% of the annual letting value in the City of Bombay on the buildings and lands. The buildings were classified by reference to their annual letting value, and exception from payment of tax was also carved out in favour of such buildings as remained vacant and unproductive of rent for the specified period. It was urged that the impugned tax purported or desired to tax the value. Placing reliance on the Federal Court's decision in 'In Re: C. P. Motor Spirit Act , 1939' (1939 FCR 18) Chief Justice Beaumont held that the impugned tax was a tax on lands and buildings. Three submissions were made in support of the challenge: (i) that the tax is graded by reference to the annual value of the property charged, (ii) that an allowance was available to be made in respect of vacant properties, and (iii) that the basis of the tax was the same as the basis on which tax on income from property was imposed by Sections 6 and 9 of Income Tax Act and, therefore in reality the rate was a tax on income. Beaumont, C.J. held that regard must be had to the pith and substance of the impugned tax and not merely to the form. All the items in the Provincial List must be so construed as to exclude taxes on income. The tax is charged on lands and buildings and it is based on the estimated rent which the property would fetch. Such a value may bear very little relation to the actual income of the property. It is imposed without any relation to the capital

value except insofar as such value can be ascertained by reference to the rateable value. It did not make any difference if the arbitrary basis which was adopted for the purpose of the rate might as well be applied for ascertaining the capital value as for ascertaining income. The fact that some concession is allowed to the small owner, a concession which may be based as much on political as on economic considerations and that an allowance may be made where the property is shown to produce no income, a fact which may be taken to show that the estimated value was found to be erroneous, cannot alter the nature of the tax. The concept that in case of conflict between the Federal List and Provincial List, an entry in the Federal List may be given a more restricted meaning, was endorsed. The legality of the levy was upheld.

In District Board of Farrukhabad Vs. Prag Dutt and Ors. - AIR 1948 Allahabad 382 (F.B.), a tax on 'circumstances and property' was under challenge. It was urged that it was a tax on income. Chief Justice Malik held that the fundamental difference between the tax on 'income' and a tax on 'circumstances and property' is that income tax can only be levied if there is income and if there is no income, no tax is payable. But in the case of 'circumstances and property' tax, where a man's status has to be determined, his total business turnover may be considered for purposes of taxation, though he may not have earned any taxable income.

The State of Punjab Vs. The Union of India through the Secrtary to Government Finance Department, Government of India, New Delhi - AIR 1971 Punjab & Haryana 155 (F.B.), is a Five-Judges Bench decision delivered by Chief Justice Harbans Singh. Conflict was noticed between List I, Entry 86 and List II, Entry 49. Dealing with the scope of Entry 49 in List II, it was held that it empowers the State Legislatures to directly tax lands and buildings, and for determining the basis of the tax the State Legislature may take either the area, annual rental value, market value or the capital value of the land as a basis for calculating and quantifying the tax on land. Merely because tax was calculated on the basis of annual rental value, it will not turn it into a tax on income, and if it is based on capital value, it will not turn it into a tax on capital value.

Yet another angle which the Constitutional Courts would advisedly do better to keep in view while dealing with a tax legislation, in the light of the purported conflict between the powers of the Union and the State to legislate, which was stated forcefully and which was logically based on an analytical examination of constitutional scheme by Jeevan Reddy, J. in S.R. Bomai and Ors. Vs. Union of India, (1994) 3 SCC 1, may be touched. Our Constitution has a federal structure. Several provisions of the Constitution unmistakably show that the Founding Fathers intended to create a strong centre. The historical background relevant at the time of the framing of the Constitution warranted a strong centre naturally and necessarily. This bias of the framers towards the centre is found reflected in the distribution of legislative heads between the Centre and the States. More important heads of legislation are placed in List I. In the Concurrent List the parliamentary enactment is given primacy, irrespective of the fact whether such enactment is earlier or later in point of time to a State enactment on the same subject matter. The residuary power to legislate is with the Centre. By the Forty-second Amendment a few of the entries in List II were omitted or transferred to other lists. Articles 249 to 252 further demonstrate the primacy of Parliament, allowing it liberty to encroach on the field meant exclusively for the State

legislation though subject to certain conditions being satisfied. In the matter of finances, the States appear to have been placed in a less favourable position. True, the Centre has been given more powers but the same is accompanied by certain additional responsibilities as well. The Constitution is an organic living document. Its outlook and expression as perceived and expressed by the interpreters of the Constitution must be dynamic and keep pace with the changing times. Though the basics and fundamentals of the Constitution remain unalterable, the interpretation of the flexible provisions of the Constitution can be accompanied by dynamism and lean, in case of conflict, in favour of the weaker or the one who is more needy. Several taxes are collected by the Centre and allocation of revenue is made to States from time to time. The Centre consuming the lion's share of revenue has attracted good amount of criticism at the hands of the States and financial experts. The interpretation of Entries can afford to strike a balance, or at least try to remove imbalance, so far as it can. Any conscious whittling down of the powers of the State can be guarded against by the Courts. "Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle - the outcome of our own historical process and a recognition of the ground realities." Quoting from M.C. Setalvad, Tagore Law Lectures "Union and State relations under the Indian Constitution" (Eastern Law House, Calcutta, 1974), Jeevan Reddy, J. observed - "It is enough to note that our Constitution has certainly a bias towards the Centre vis-'-vis the States.....It is equally necessary to emphasise that Courts should be careful not to upset the delicately-crafted constitutional scheme by a process of interpretation."

The Conflict - a cautious evaluation of "India Cement"

We will now refer to and deal with those cases which have led to the three learned Judges of this Court, placing the matter for consideration by a Constitution Bench. We would refer to the cases mentioned in the order of reference and also to those cases which were heavily relied upon on behalf of the respondents, disputing the validity of the impugned tax. Immediately, we take up India Cement.

In India Cement Ltd. and Ors. Vs. State of Tamil Nadu and Ors. - (1990) 1 SCC 12, what was impugned was a levy of cess on royalty and the question was, whether such cess on royalty is within the competence of the State Legislature. The appellant was required to pay, by the Madras Panchayats Act, 1958, local cess at the rate of 45 paise per rupee of the royalty already being paid. The question formulated by the Court, as arising for decision was : is cess on royalty a demand of land revenue or additional royalty? The Court found that the royalty was payable by the appellant as prescribed under the lease deed. The rates of the royalty were fixed under the Mines and Minerals (Development and Regulation) Act, 1957, which is a Central Act, passed under Entry 54 in List I, by which the control of mines and minerals has been taken over by the Central Government. The State Legislature sought to justify and sustain the levy by reference to Entry 49, 50 or 45 in List II. Cess is a tax and is generally used when the levy is for some special administrative expense, suggested by the name of the cess, such as health cess, education cess, road cess etc. This is a well-settled position of law. The levy was sought to be justified under Entry 45 in List II by including it within the meaning of land revenue, and in the alternative under Entry 49 in List II as tax on lands. The challenge to the constitutional validity of the levy was upheld. We would briefly state the reasoning which prevailed with the learned Judges.

G.L. Oza, J. delivered a separate concurring opinion. The majority opinion expressed through Sabyasachi Mukharji, J. (as his Lordship then was), first clarified the distinction between 'royalty' and 'land revenue'. 'Land revenue' is connotative of the share in the produce of land which the king or the Government is entitled to receive. 'Royalty' is a charge payable on the extraction of minerals from the land. A cess on royalty cannot, therefore, be called additional land revenue and as such the State was disabled from imposing tax on royalty. There is a clear distinction between 'tax directly on land' and 'tax on income arising from land'. Royalty is indirectly connected with land and a cess on royalty cannot be called a tax directly on land as a unit. The levy could also not be sustained under Entry 50 in List II which deals with taxes on mineral rights subject to limitation imposed by Parliament relating to mineral development. Assuming that the tax in pith and substance fell to Entry 50 in List II, it would be controlled by a legislation under Entry 54 in List I.

A Division Bench decision of Mysore High Court in M/s Laxminarayana Mining Co., Bangalore and Anr. Vs. Taluk Development Board and Anr. - AIR 1972 Mysore 299 was cited with approval in India Cement. The Mysore High Court struck down as violative of MMDR Act, 1957 a licence fee on mining manganese or iron ore etc. imposed by a State Legislation. A perusal of the judgment of the Mysore High Court shows that the impost was by way of licence fee on the mining of certain minerals. Regulation and development of mines and minerals was undertaken by the Central Legislation and therefore the power of the State Legislature under Entries 23 and 52 in List-II got denuded in the field of regulation and development covered by the Central Legislation. The Division Bench vide para 6 held "it is therefore clear that to the extent the Central Act makes provision regarding the regulation and development of minerals, the powers of the State Legislatures under Entry 23 of List II stand curtailed". The State Government had sought to defend the licence fee on the ground that it was in the nature of a tax and not a licence fee. This plea has been specifically noted by the High Court and dealt with. However, what is significant to note is the revelation, made by careful reading of the judgment, that provision for licence fee was made in the Central Legislation and licence fee was sought to be imposed by the State too. In fact, the licence fee was a step trenching upon the field of regulation and therefore was liable to be struck down on this ground alone. Yet, another reasoning which prevailed with the High Court was that Section 143 of the State Act, which was not inconsistent with the Central Act, was relied on by the State Government as conferring power on it to levy the impugned licence fee. On that plea the High Court formed an opinion that on the framing of Section 143 of the State Act it did not in express terms authorize a levy of fee or tax. The High Court observed - "It (Section 143) cannot also be construed as conferring such a power on the respondents to levy a tax or fee on mining, in view of the well-settled and statutory construction that a Court construing a provision of law must presume that the intention of the authority in making it was not to exceed its power but to enact it validly". The ratio of the decision of the Mysore High Court is that provision for licenses and license fees, operating in the field of regulation of mines and minerals is not available to be made by State legislation - in view of the declaration in terms of Entry 54 in List I.

In our view, the decision by Mysore High Court cannot be

read so widely as laying down the law that Union's power to regulate and control results in depriving the States of their power to levy tax or fee within their legislative competence without trenching upon the field of regulation and control. There is a distinction between power to regulate and control and power to tax, the two being distinct and that difference has not been kept in view by the Mysore High Court.

(A diversion from main issue) Royalty, if tax?

We would like to avail this opportunity for pointing out an error, attributable either to a stenographer's devil or to sheer inadvertence, having crept into the majority judgment in India Cement Ltd.'s case (supra). The error is apparent and only needs a careful reading to detect. We feel constrained - rather duty-bound - to say so, lest a reading of the judgment containing such an error - just an error of one word - should continue to cause the likely embarrassment and have adverse effect on the subsequent judicial pronouncements which would follow India Cement Ltd.'s case, feeling bound and rightly, by the said judgment having the force of pronouncement by seven-Judges Bench. Para 34 of the report reads as under :

"In the aforesaid view of the matter, we are of the opinion that royalty 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 covers the field and the State legislature is denuded of its competence under Entry 23 of List II. In any event, we are of the opinion that cess on royalty cannot be sustained under Entry 49 of List II as being a tax on land. Royalty on mineral rights is not a tax on land but a payment for the user of land."

(underlining by us)

In the first sentence the word 'royalty' occurring in the expression - 'royalty is a tax', is clearly an error. What the majority wished to say, and has in fact said, is - 'cess on royalty is a tax'. The correct words to be printed in the judgment should have been 'cess on royalty' in place of 'royalty' only. The words 'cess on' appear to have been inadvertently or erroneously omitted while typing the text of judgment. This is clear from reading the judgment in its entirety. Vide para 22 and 31, which precede para 34 above said, their Lordships have held that 'royalty' is not a tax. Even the last line of para 34 records 'royalty on mineral rights is not a tax on land but a payment for the user of land'. The very first sentence of the para records in quick succession '.....as such a cess on royalty being a tax on royalty, is beyond the competence of the State legislature....'. What their Lordships have intended to record is '.....that cess on royalty is a tax, and as such a cess on royalty being a tax on royalty is beyond the competence of the State Legislature.....'. That makes correct and sensible reading. A doubtful expression occurring in a judgment, apparently by mistake or inadvertence, ought to be read by assuming that the Court had intended to say only that which is correct according to the settled position of law, and the apparent error should be ignored, far from making any capital out of it, giving way to the correct expression which ought to be implied or necessarily read in the context, also having regard to what has been said a little before and a little after. No learned Judge would consciously author a judgment which is self-inconsistent or incorporates passages repugnant to each other. Vide para 22, their Lordships have clearly held that there is no entry in Schedule II which enables the State to

impose a tax on royalty and, therefore, the State was incompetent to impose such a tax (cess). The cess which has an incidence of an additional charge on royalty and not a tax on land, cannot apparently be justified as falling under Entry 49 in List II.

It is of significance for the issue before us, to determine the nature of royalty and whether it is a tax, and if not, then, what it is. Until the pronouncement of this Court in India Cement (supra), it has been the uniform and unanimous judicial opinion that royalty is not a tax.

First we will refer to certain dictionaries oft-cited in courts of law.
Words and Phrases, Permanent Edition (Vol.37A, page 597)-
""Royalty" is the share of the produce reserved to owner for permitting another to exploit and use property. The word "royalty" means compensation paid to landlord by occupier of land for species of occupation allowed by contract between them. "Royalty" is a share of the product or profit (as of a mine, forest, etc.) reserved by the owner for permitting another to use his property."

Stroud's Judicial Dictionary of Words and Phrases (Sixth Edition, 2000, Vol.3, page 2341) -
"the word "royalties" signifies, in mining leases, that part of the reddendum which is variable, and depends upon the quantity of minerals gotten or the agreed payment to a patentee on every article made according to the patent. Rights or privileges for which remuneration is payable in the form of a royalty"

Words and Phrases, Legally Defined (Third Edition, 1990, Vol.4, page 112) -
"A royalty, in the sense in which the word is used in connection with mining leases, is a payment to the lessor proportionate to the amount of the demised mineral worked within a specified period"

Wharton's Law Lexicon (Fourteenth Edition, page 893) -
"Royalty, payment to a patentee by agreement on every article made according to his patent; or to an author by a publisher on every copy of his book sold; or to the owner of minerals for the right of working the same on every ton or other weight raised."

Mozley & Whiteley's Law Dictionary (Eleventh Edition, 1993, page 243) -
"A pro rata payment to a grantor or lessor, on the working of the property leased, or otherwise on the profits of the grant of lease. The word is especially used in reference to mines, patents and copyrights."

Prem's Judicial Dictionary (1992, Vol.2, page 1458) - "royalties are payments which the Government may demand for the appropriation of minerals, timber or other property belonging to the Government. Two important features of royalty have to be noticed, they are, that the payment made for the privilege of removing the articles is in proportion to the quantity removed, and the basis of the payment is an agreement."

Black's Law Dictionary (Seventh Edition, p.1330) -

"Royalty - A share of the product or profit from real property, reserved by the grantor of a mineral lease, in exchange for the lessee's right to mine or drill on the land.

Mineral Royalty : A right to a share of income from mineral production."

In D.K. Trivedi & Sons. & Ors. Vs. State of Gujarat & Ors., 1986 (Supp) SCC 20, a Bench of two learned Judges of this Court dealt with "rent", "royalty" and "dead rent" and held as follows. Rent is an integral part of the concept of a lease. It is the consideration from the lessee to the lessor for the demise of the property to him. In a mining lease the consideration usually moving from the lessee to the lessor is the rent of the area leased (often called surface rent), dead rent and royalty. Since the mining lease confers upon the lessee the right not merely to enjoy the property as under an ordinary lease but also to extract minerals from the land and to appropriate them for his own use or benefit, in addition to the usual rent for the area demised, the lessee is required to pay a certain amount in respect of the minerals extracted proportionate to the quantity so extracted. Such payment is called "royalty". It may, however, be that the mine is not worked properly so as not to yield enough return to the lessor in the shape of royalty. In order to ensure for the lessor a regular income, regardless of whether the mine is worked or not, a fixed amount is provided to be paid to him by the lessee. This is called "dead rent". "Dead rent" is calculated on the basis of the area leased while "royalty" is calculated on the quantity of minerals extracted or removed. Thus, while dead rent is a fixed return to the lessor, royalty is a return which varies with the quantity of minerals extracted or removed. Since dead rent and royalty are both a return to the lessor in respect of the area leased, looked at from one point of view dead rent can be described as the minimum guaranteed amount of royalty payable to the lessor but calculated on the basis of the area leased, and not on the quantity of minerals extracted or removed. In H.R.S. Murthy Vs. Collector of Chittor, (1964) 6 SCR 666, too the Constitution Bench of this Court had defined Royalty to mean 'the payment made for the materials or minerals won from the land'.

The judicial opinion as prevailing amongst the High Courts may be noticed. A Full Bench of the High Court of Orissa held in Laxmi Narayan Agarwalla & Ors. Vs. State of Orissa & Ors., AIR 1983 Orissa 210, 'Royalty is the payment made for the minerals extracted; it is not tax'. In Surajdin Laxmanlal Vs.

State of M.P., Nagpur and Ors. - AIR 1960 M.P. 129, a Division Bench of the High Court of Madhya Pradesh referred to the Wharton's Law Lexicon and Mozley & Whiteley's Law Dictionary and said - "royalties are payments which the Government may demand for the appropriation of minerals, timber or other property belonging to the Government." The High Court opined that there are two important features of royalty: (i) the payment is in proportion to the quantity removed; and (ii) the basis of the payment is an agreement.

Drawing a distinction between 'royalty' and 'tax', a Division Bench of the High Court of Punjab and Haryana High Court held in Dr. Shanti Saroop Sharma and Anr. Vs. State of Punjab and Ors. - AIR 1969 Punjab & Haryana 79 as under - "if a person is merely in occupation of land which contains minor minerals, he is not liable to pay any royalty, but it is only when he holds a mining lease and by virtue of that extracts one or more minor minerals that he is called upon to pay royalty to the Government where the lease is in respect of the land in which minor minerals vest in the Government. Royalty thus has its basis in the contract. For payment to the owner of the minerals for the privilege of extracting the minor minerals computed on the basis of the quantity actually extracted and removed from the leased area. It is more akin to rent or compensation payable to an owner by the occupier or lessee of land for its use or exploitation of the resources contained therein. Merely because the provision with regard to royalty is made by virtue of the rules relating to the regulation of the mining leases and a uniform rate is prescribed, it does not follow that it is a compulsory exaction in the nature of tax or impost."

A Division Bench of Gujarat High Court in Saurashtra Cement & Chemical Industries Ltd., Ranavav Vs. Union of India and Anr. - AIR 1979 Gujarat 180, emphatically said - "royalty may not be a fee but it is not a tax. It is a payment for the mineral which is removed or consumed by the holder of the mining lease. The minerals themselves, - the property beneath the soil - belong to the Union. When the holder of a mining lease removes these minerals or consumes them, he can do so only on payment of its price or value. Therefore, royalty is a share which the Union claims in the minerals which have been won from the soil by the lessee and which otherwise belong to it. Royalty is a share in such minerals and not a tax in the form of a compulsory exaction. It is not compulsory because anyone who applies for a mining lease to win minerals for being removed or consumed must pay its price. If he does not want to pay the price, he may not apply for a mining lease. Royalty which is a share of the owner of the minerals - the Union - won by the lessee from the soil with the authority of the Union can never be said to be an imposition on the holder of a mining lease.

We need not further multiply the authorities. Suffice it to say that until the pronouncement in India Cement, nobody doubted the correctness of 'royalty' not being a tax.

Such has been the position even subsequent to the pronouncement in India Cement.

In Inderjeet Singh Sial & Anr. Vs. Karam Chand Thapar & Ors. - (1995) 6 SCC 166, a Bench of two learned judges held that -

"In its primary and natural sense 'royalty', in the legal world, is known as the equivalent or translation of jura regalia or jura regia. Royal rights and prerogatives of a sovereign are covered thereunder. In its secondary sense the word 'royalty' would signify, as in mining leases, that part of the reddendum, variable though, payable in cash or kind, for rights and privileges obtained. It is found in the clause of the deed by which the grantor reserves something to himself out of that which he grants. It may even be a clause reserving rent in a lease, whereby the lessor reserves something for himself out of that which he grants."

In Ajit Singh Vs. Union of India & Ors. - 1995 Supp. (4) SCC 224, another Bench of two learned Judges held that the grant of mining lease involves grant of a privilege by the State. In both these decisions India Cement's is not noticed.

In Quarry Owners' Association Vs. State of Bihar & Ors. - (2000) 8 SCC 655, a Bench of two learned Judges was faced with a submission, based on India Cement and subsequent decisions following it, that royalty is a tax. The learned Judges found it difficult to accept the concept but tried to wriggle out of the situation by observing - "royalty includes the price for the consideration of parting with the right and privilege of the owner, namely, the State Government who owns the mineral. In other words, the royalty/dead rent, which a lessee or licensee pays, includes the price of the minerals which are the property of the State. Both royalty and dead rent are integral parts of a lease. Thus, it does not constitute usual tax as commonly understood but includes return for the consideration for parting with its property."

In India Cement (vide para 31, SCC) decisions of four High Courts holding 'Royalty is not tax' have been noted without any adverse comment. Rather, the view seems to have been noted with tacit approval. Earlier (vide para 21, SCC) the connotative meaning of royalty being 'share in the produce of land' has been noted. But for the first sentence (in para 34, SCC) which we find to be an apparent error, no where else has the majority judgment held royalty to be a tax.

How the abovenoted inadvertent error in India Cement has resulted into throwing on the loop line the movement of later case law on this point may be noticed. In State of M.P. Vs.

Mahalaxmi Fabric Mills Ltd. and Ors. - 1995 Supp. (1) SCC 642 (decision by a Bench of three learned Judges) and Saurashtra Cement and Chemicals Industries and Anr. etc.etc. Vs. Union of India and Ors. - (2001) 1 SCC 91 (decision by a Bench of two learned Judges) para 34 (from SCC) in India Cement has been quoted verbatim and dealt with. In Mahalaxmi Fabric Mills Ltd. and Ors.'s case (supra), the Court noticed several dictionaries defining royalty and also the decisions of High Courts available and stated that traditionally speaking royalty is an amount which is paid under contract of lease by the lessee to the lessor, namely, the State Governments concerned and it is commensurate with the quality of minerals extracted. But then (vide para 12), the Court felt bound by the view taken in India Cement, reiterated in Orissa Cement, to hold that royalty is a tax. The point that there was apparently a 'typographical error' in para 34 in India Cement was specifically raised but was rejected. In Saurashtra Cement and Chemicals Industries and Anr.(supra) too the Court felt itself bound by the decision in Mahalaxmi Fabric Mills Ltd. and Ors (supra), backed by India Cement, and therefore held royalty to be tax.

We have clearly pointed out the said error, as we are fully convinced in that regard and feel ourselves obliged constitutionally, legally and morally to do so, lest the said error should cause any further harm to the trend of jurisprudential thought centering around the meaning of 'royalty'. We hold that royalty is not tax. Royalty is paid to the owner of land who may be a private person and may not necessarily be State. A private person owning the land is entitled to charge royalty but not tax. The lessor receives royalty as his income and for the lessee the royalty paid is an expenditure incurred. Royalty cannot be tax. We declare that even in India Cement it was not the finding of the Court that royalty is a tax. A statement caused by an apparent typographical or inadvertent error in a judgment of the Court should not be misunderstood as declaration of such law by the Court. We also record our express dissent with that part of the judgment in Mahalaxmi Fabric Mills Ltd. and Ors. which says (vide para 12 of SSC report) that there was no 'typographical error' in India Cement and that the said conclusion that royalty is a tax logically flew from the earlier paragraphs of the judgment.

Inter-relationship of Schedule I Entry 54 and Schedule II Entry 23

With the abovesaid reflection of ours on clarifying India Cement, clarification now we proceed to examine the the inter-relationship of Schedule I Entry 54 and Schedule II Entry 23 which have been quoted and reproduced in the earlier part of this judgment.

Conflict in Entries (in the three Lists in Seventh Schedule)

The analysis of decided cases as made by eminent constitutional jurist H.M. Seervai in his work on Constitutional Law of India (Fourth/Silver Jubilee Edition, Vol.3) is apposite. Vide para 22.168, he states __ "In Gov.-Gen. in Council Vs. Madras, 1945 FCR 179, the Privy Council laid down important principles for interpreting apparently conflicting legislative entries in general, and apparently conflicting tax entries in particular. The Privy Council held, first, that though a tax in List I (e.g. a duty of excise) and a tax in List II (e.g. a tax on the sale of goods) of the Government of India Act, 1935, may overlap, in fact there would be no overlapping in law, if the taxes were separate and distinct imposts; secondly, that the

machinery of tax collection did not affect the real nature of a tax. Another principle for reconciling apparently conflicting tax entries follows from the fact that a tax has two elements : the person, thing or activity on which the tax is imposed, and the amount of the tax. The amount may be measured in many ways; but decided cases establish a clear distinction between the subject matter of a tax and the standard by which the amount of tax is measured. These two elements are described as the subject of a tax and the measure of a tax. In D.G. Gouse Vs. Kerala - (1980) 2 SCC 410, which is considered later, the above passage was quoted with approval by the Supreme Court as stating precisely the two elements involved in almost all tax cases, namely, the subject of a tax and the measure of a tax."

It is necessary to examine the scheme underlying the Seventh Schedule of the Constitution. We are relieved of the need of embarking upon any maiden voyage in this direction in view of the availability of a Constitution Bench decision in M.P.V. Sundararamier & Co. Vs. The State of Andhra Pradesh & Anr., (1958) SCR 1422. Venkatarama Aiyar, J., speaking for the Constitution Bench, traced the history of legislations preceding the Constitution, analysed the scheme underlying the division of legislative powers between the Centre and the States and then succinctly summed up the quintessence of the analysis. It was held, inter alia:

1. In List I, Entries 1 to 81 mention the several matters over which Parliament has authority to legislate. Entries 82 to 92 enumerate the taxes which could be imposed by a law of Parliament. An examination of these two groups of Entries shows that while the main subject of legislation figures in the first group; a tax in relation thereto is separately mentioned in the second.

2. In List II, Entries 1 to 44 form one group mentioning the subjects on which the States could legislate. Entries 45 to 63 in that List form another group, and they deal with taxes.

3. Taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Art.248, Cls.(1) and (2) and of Entry 97 in List I of the Constitution. Under the scheme of the Entries in the Lists, taxation is regarded as a distinct matter and is separately set out.

4. The entries in the Legislative Lists must be construed broadly and not narrowly or in a pedantic manner.

5. The entries in the two Lists - List I and II - must be construed, if possible, so as to avoid conflict. Faced with a suggested conflict between entries in List I and List II, what has first to be decided is whether there is any conflict. If there is none, the question of application of the non-obstante clause 'subject to' does not arise. And, if there be conflict, the correct approach to the question is to see

whether it was possible to effect a reconciliation between the two Entries so as to avoid a conflict and overlapping.

Illustration

If it is possible to construe Entry 42 in List I as not including tax on inter-state sales it should be so construed and the power to levy such tax must be held to be included in Entry 54 in List II (Entries as they existed pre-Forty Second Amendment, 1976) (See: Governor General in Council Vs. Province of Madras - AIR 1945 PC 98, and Province of Madras Vs. Bodder Paidenna & Sons - AIR 1942 FC 33)

6. In the event of a dispute arising it should be determined by applying the doctrine of pith and substance to find out whether between two Entries assigned to two different legislatures the particular subject of the legislation falls within the ambit of the one or the other. Where there is a clear and irreconcilable conflict of jurisdiction between the Centre and a provincial legislature it is the law of the Centre that must prevail.
[underlining by us]

Referring to M.P.V. Sundararamier & Co. (supra) Sabyasachi Mukharji, J. (as his Lordship then was) speaking for six out of the seven Judges constituting the Bench in Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors. - (1990) 1 SCC 109 held that under the constitutional scheme of division of powers in the Seventh Schedule, there are separate entries pertaining to taxation and other laws. A tax cannot be levied under a general entry.

The abovesaid principles continue to hold the field and have been followed in cases after cases.

General power of 'Regulation and Control' does not include power of taxation

One thing, which too is well settled by a series of decisions is that the power of "regulation and control" is separate and distinct from the power of taxation. How this principle has been applied in myriad situations may be illustratively noticed.

The Constitution Bench in The Hingir-Rampur Coal Co.Ltd. & Ors. Vs. The State of Orissa & Ors. etc. - (1961) 2 SCR 537, was faced with a challenge to the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952. The petitioner-company was engaged in producing and selling coal excavated from its collieries at Rampur in the State of Orissa. The Act and the Rules framed and the notification issued thereunder levied the payment of cess on the petitioner's Rampur Colliery. The cause of action had arisen to the petitioner therein on account of the communications made to the company in March 1959 calling upon them to file monthly returns for the assessment of the cess which was levied by issuance of a notification dated June 24, 1958.

The challenge to the constitutional validity of the levy imposed by the impugned Act came to be examined by reference

to Entry 54 in List I read with the Mines and Minerals (Regulation and Development) Act, 1948 (Act No. 53 of 1948) as also by reference to Entry 52 in List I read with the Industries (Development and Regulation) Act, 1951 (Act No.65 of 1951). On behalf of the State of Orissa, the levy was defended as a fee relatable to Entries 23 and 66 in List II. The Constitution Bench entered into an enquiry as to what is the primary object of the levy and the essential purpose which it is intended to achieve. It was observed that its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences, as that is the true test in determining the character of the levy. The submission that the impugned levy could be either duty of excise or tax, was dismissed. The Constitution Bench held that the form in which the levy is imposed and the extent of the levy, i.e., being too high, do not alter the character of the levy from a fee into that of a duty of excise. The Constitution Bench laid down the features which would distinguish excise from a tax or fee and also the features which distinguish a tax from a fee though there is no generic difference in a tax and a fee, both being compulsory exactions of money by public authorities.

The scheme of the impugned Orissa Act was examined in-depth and their Lordships found that the cess levied by the impugned Act was a fee. The Act was passed for the purpose of the development of mining areas in the State. Orissa is a poor State carrying in its womb a lot of mineral wealth of great potential value, but the areas where its mineral wealth is located lack infrastructure which would enable the exploitation of minerals. The primary and the principal object of the Act was to develop the mineral areas in the State and to assist more efficient and extended exploitation of its mineral wealth. The cess levied did not become a part of the consolidated fund and was not subject to an appropriation in that behalf ; it went into the special fund earmarked for carrying out the purpose of the Act and thus its existence established a correlation between the cess and the purpose for which it was levied, satisfying the element of quid pro quo in the scheme. The scheme of the Act showed that the cess was levied against the class of persons owning mines in the notified area and to enable the State Government to render specific services to the said class by developing the notified mineral area. Its application was regulated by a statute and was confined to its purposes. There was a definite correlation between the impost and the purpose of the Act which was to render services to the notified area. These features of the Act impressed upon the levy the character of a fee as distinct from a tax.

The inter-relationship of Entries 23 and 66 in List II qua Entry 54 in List I was so stated by the Constitution Bench:-

> "The effect of reading the two Entries together is clear. The jurisdiction of the State Legislature under Entry 23 is subject to the limitation imposed by the latter part of the said Entry. If Parliament by its law has declared that regulation and development of mines should in public interest be under the control of the Union, to the extent of such declaration the jurisdiction of the State Legislature is excluded. In other words, if a Central Act has been passed which contains a declaration by Parliament as required by Entry 54, and if the said declaration covers the field

occupied by the impugned Act the impugned Act would be ultra vires, not because of any repugnance between the two statutes but because the State Legislature had no jurisdiction to pass the law. The limitation imposed by the latter part of Entry 23 is a limitation on the legislative competence of the State Legislature itself."

The Constitution Bench then proceeded to test the validity of the cess by reference to two Central Acts, namely (A) the Mines and Minerals (Regulation and Development) Act, 1948 (Act No.53 of 1948) and (B) The Industries (Development and Regulation) Act, 1951 (Act No.65 of 1951).

(A) Act No.53 of 1948 is a pre-constitutional piece of Central legislation. It was found that the applicability of the Act which was initially attracted to mines as well as oil fields remained confined to oil fields in view of the subsequent parliamentary enactment, i.e., the MMDR Act, 1957 (Act No.67 of 1957). Therefore, the question which remained to be examined was only for the year 1952 as at that time the Act No.53 of 1948 applied to mines as well as oil fields. The factual constitutional position was that Act No.53 of 1948 ceased to apply to Orissa post-constitution and assuming it applied yet there was no such declaration post-constitution made by Parliament as is referred to in Entry 23 in List II read with Entry 54 in List I and therefore in either case the validity of the said State Legislation was not impaired in spite of the finding recorded by the Court that 'there can be no doubt that the field covered by the impugned (State) Act is covered by the Central Act 53 of 1948'.

(B) What is significant for our purpose is the law laid down by the Constitution Bench as to the validity of the impugned State legislation by reference to Act No. 65 of 1951, Section 2 whereof contained a declaration - "it is hereby declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule" as contemplated by Entry 52 in List I to which Entry 23 in List II is subject. The first schedule included coal as an article as to which the industry engaged in the manufacture or production was brought within the purview of the Act. Section 9 empowered the Central Government to levy cess for the purpose of the Act on all goods manufactured or produced in any scheduled industries including coal. The Constitution Bench held that the Central Act was passed to provide for the development and regulation of certain industries one of which undoubtedly is coal mining industry. The declaration made by Section 2 of the Act covered the same field as is covered by the impugned State Act. Then the Constitution Bench held :-

> ".....but in dealing with this question it is important to bear in mind the doctrine of pith and substance. We have already noticed that in pith and substance the impugned Act is concerned with the development of the mining areas notified under it. The Central Act, on the other hand, deals more directly with the control of all industries including of course the industry of coal. Chapter II of this Act provides for the constitution of the Central Advisory Council and Development Councils, Chapter III deals

with the regulation of scheduled industries, Chapter IIIA provides for the direct management or control of industrial undertakings by Central Government in certain cases, and Chapter IIIB is concerned with the topic of control of supply, distribution, price, etc. of certain articles. The last chapter deals with miscellaneous incidental matters. The functions of the Development Councils constituted under this Act prescribed by S.6(4) bring out the real purpose and object of the Act. It is to increase the efficiency or productivity in the scheduled industry or group of scheduled industries, to improve or develop the service that such industry or group of industries renders or could render to the community, or to enable such industry or group of industries to render such service more economically. Section 9 authorises the imposition of cess on scheduled industries in certain cases. Section 9(4) provides that the Central Government may hand over the proceeds of the cass to the Development Council there specified and that the Development Council shall utilize the said proceeds to achieve the objects mentioned in cls. (a) to (d). These objects include the promotion of scientific and industrial research, of improvements in design and quality, and the provision for the training of technicians and labour in such industry or group of industries. It would thus be seen that the object of the Act is to regulate the scheduled industries with a view to improvement and development of the service that they may render to the society, and thus assist the solution of the larger problem of national economy. It is difficult to hold that the field covered by the declaration made by S.2 of this Act, considered in the light of its several provisions, is the same as the field covered by the impugned Act. That being so, it cannot be said that as a result of Entry 52 read with Act LXL of 1951 the vires of the impugned Act can be successfully challenged.

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 the 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."
[Underlining by us]

In spite of having held that the Central Act of 1951 was attracted to coal industries, their Lordships, by applying the doctrine of pith and substance, refused to annul the levy of cess under the impugned Orissa Act based on the following distinction:-

Central Act, 1951	State Legislation of 1952
Deals more directly with the control of all industries including the industry of coal with a view to improvement and development of the service that they may render to the society and thus assist the solution of the larger problem of national economy.	Is concerned with the development of the mining areas notified under it.

Though both were cesses, one levied by the Central Act and the other levied by the State Act, inasmuch as they had different fields to operate, Entries 52 and 54 in List I were held not to have any adverse or denuding effect on the legislative competence of the State referable to Entries 23 and 66 in List II.

As a result, the writ petitions laying challenge to the constitutional validity of Orissa Act of 1952 were directed to be dismissed.

The distinction: Here we will pause for a moment with a view to highlight a feature of singular significance in The Hingir-Rampur Coal Co. as it would be the decisive factor for the applicability of the ratio of the case ___ where it would apply and where it would not. Section 6 of Act No.43 of 1948 which came up for the consideration of the Constitution Bench, specifically provides:-

"6. Power to make rules as respects minerals development __ (1) The Central Government may, by notification in the official Gazette, make rules for the conservation and development of minerals.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

xxx xxx xxx xxx

(i) the levy and collection of royalties, fees or taxes in respect of minerals mined, quarried, excavated or collected;

xxx xxx xxx xxx

10. Rules to be laid before the Legislature__ All rules made under any of the provisions of this Act shall be laid before the Central Legislature as soon as may be after they are made."

Thus, the power to levy and collect fees or taxes in respect of minerals mined, quarried, excavated or collected was expressly conferred on the Central Government by a specific provision made in that regard by the Act itself. Because the power to levy tax or fee was appropriated to itself by a Central Legislation it was held that the impugned Orissa Act - a State Legislation, could not have provided for the levy of a fee as by virtue of the Central Legislation, the Union having exercised its power to legislate, the field was covered and excepted from the legislative competence of the State. Yet the recovery was held not liable to be annulled inasmuch as the Central Act No.53 of 1948 was a pre-Constitution Legislation and as to which a declaration in terms of Entry 54 in List I was not made by the Parliament after the coming into force of the Constitution.

As to the Central Act of 1951, though it contained a declaration as contemplated by Entry 52 of List I, and though it applied to several goods including coal, the doctrine of pith and substance when correctly applied showed that the Central Act was intended for improvement of service while the State Act of 1952 was intended to deal with development of mining areas and the latter was valid.

The MMDR Act, 1957, which we are called upon to deal with, stands on much better footing for the writ petitioners herein as it does not contain any provision similar to Sections 6 and 10 of the Central Act No.53 of 1948 or Section 9 of the Central Act No.65 of 1951.

Challenge to levy under the abovesaid Orissa Act 27 of 1952 did not come to an end with Hinger-Rampur Coal Co.. It was once again raised in the High Court with success and the State of Orissa came up in appeal which was heard and decided by a Constitution Bench in State of Orissa & Anr. Vs. M/s M.A. Tulloch and Co. - (1964) 4 SCR 461. The respondent writ-petitioner was working a manganese mine in the State of Orissa under a lease granted under the provisions of the MMRD Act, 1948. The fee levied under the Orissa Act for the period of six quarters from September 30, 1956, to March 31, 1958, was under challenge. The MMDR Act 1957 came into force w.e.f. June 1, 1958. The recovery impugned, therefore, related to the period pre-MMDR Act 1957 i.e. for the period during which Industries (Development and Regulation) Act 1951 was applicable. The recovery was sought to be effected after the enactment and coming into force of the Act No.67 of 1957, though the recovery was referable to the period prior to it. It was held that the demand was liable to be raised for the period for which it was raised and the validity of the demand was an issue concluded by Hingir-Rampur Coal Co.. The demand having validly accrued prior to June 1, 1958, the recovery thereof could be validly enforced, notwithstanding the repeal of Act No.65 of 1951, on the general principles of interpretation of statutes as also under Section 6 of the General Clauses Act. Reiterating the findings in Hingir-Rampur Coal Co. the Constitution Bench held that the impugned Act empowered the State Government to levy a fee on a percentage of the value of the mined ore at the pit's mouth, the collections being intended for the development of the "mining areas" in the State. This finding is very significant.

The Constitution Bench laid down the following principles which are relevant for our purpose :-

(1) Entry 23 of the State List vests in the State Legislature power to enact laws on the subject of 'regulation of mines

and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union'. It would be seen that "subject to" the provisions of List I the power of the State to enact Legislation on the topic of "mines and mineral development" is plenary. The relevant provision in List I is, as already noticed, Entry 54 of the Union List.

(2) To the extent to which the Union Government had taken under its control the regulation and development of minerals that much (i.e. to that extent) was withdrawn from the ambit of the power of the State Legislature under Entry 23 and legislation of the State which had rested on the existence of power under that entry would, to the extent of that control, be superseded or rendered ineffective, for here we have a case not of mere repugnancy between the provisions of the two enactments but of a denudation or deprivation of State legislative power by the declaration which Parliament is empowered to make, and has made.

(3) The States would lose legislative competence only to the "extent to which regulation and development under the control of the Union has been declared by Parliament to be expedient in the public interest".

(4) It would be logical first to examine and analyse the State Act and determine its purpose, width and scope and the area of its operation and then consider to what "extent" the Central Act cuts into it or trenches on it.

As to the MMDR Act, 1957, the Constitution Bench in M.A. Tulloch observed by reference to Section 18 of the Act that the intention of Parliament was to cover the entire field and thus to leave no scope for the argument that until rules were framed there was no inconsistency and no supersession of the State Act.

The following holding of the above Constitution Bench is again worth noting :

"......that technically speaking the power to levy a fee is under the entries in the three lists treated as a subject-matter of an independent grant of legislative power, but whether it is an incidental power related to a legislative head or an independent legislative power it is beyond dispute that in order that a fee may validity be imposed the subject-matter or the main head of legislation in connection with which the fee is imposed is within legislative power. The material words of the Entries are : "Fees in respect of any of the matters in this List". It is, therefore, a prerequisite for the valid imposition of a fee that it is in respect of "a matter in the List". If by reason of the declaration by Parliament the entire subject-matter of "conservation and development of minerals" has been taken over, for being dealt with by Parliament, thus depriving the State of the power which it therefor possessed, it would follow that the "matter" in the State List is, to the extent of the declaration, subtracted

from the scope and ambit of Entry 23 of the State List. There would, therefore, after the Central Act of 1957, be "no matter in the List" to which the fee could be related in order to render it valid."

In the last but one para of M.A. Tulloch this sentence occurs:- "If this were the true position about the effect of the Central Act 67 of 1957 as the liability to pay the fee which was the subject of the notices of the demand had accrued prior to June 1, 1958, it would follow that these notices were valid and the amounts due thereunder could be recovered notwithstanding the disappearance of the Orissa Act by virtue of the superior legislation by the Union Parliament". This observation, read out of the context and facts of the case alongwith the Court having referred to Sections 18 and 25 of the MMDR Act 1957, creates an impression that the power to levy fee having been appropriated by the Central Legislation to the Central Government, the cess levied by the State would stand obliterated or repealed, is the holding by the Court. But that is not the ratio of the case and it could not have been because in Hingir-Rampur Coal Co. the Constitution Bench has clearly held to the contrary and the Constitution Bench in M.A. Tulloch has squarely followed the holding in Hingir-Rampur Coal Co.. Nobody should act on an assumption that in M.A. Tulloch the Constitution Bench has held - much less as a ratio of the decision - that under Act No. 67 of 1957 the Central Government has appropriated to itself the power to levy tax or cess on minerals or mineral bearing land. All that the Court has said is that the 1957 enactment covers the field of legislation as to the regulation of mines and the development of minerals. As Section 2 itself provides and indicates, the assumption of control in public interest by the Central Government is on (i) the regulation of mines, (ii) the development of minerals, and (iii) to the extent hereinafter provided. The scope and extent of declaration cannot and could not have been enlarged by the Court nor has it been done. The effect is that no State Legislature shall have power to enact any legislation touching (i) the regulation of mines, (ii) the development of minerals, and (iii) to the extent provided by Act No.67 of 1957. The Preamble to the Central Act 67 of 1957 itself speaks ___ "An Act to provide for the development and regulation of mines and minerals under the control of the Union". Tax and fee is not a subject dealt with by Act No.67 of 1957. Let us demonstrate the same from the provisions of the Act and for that purpose relevant part of Section 13, sub-Section (1) and relevant part of sub-Section (2) of Section 18, sub-Section (3) of Section 18 and Section 25 are extracted and reproduced as under :

"13. Power of Central Government to make rules in respect of minerals. -

(1) The Central Government may, by notification in the Official Gazette, make rules for regulating the grant of reconnaissance permits, prospecting licences and mining leases in respect of minerals and for purposes connected therewith.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) to (h) *** ***

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

18. Mineral development. - (1) It shall be the duty of the Central Government to take all such steps as may be necessary for the conservation and systematic development of minerals in India and for the protection of environment by preventing or controlling any pollution which may be caused by prospecting or mining operations and for such purposes the Central Government may, by notification in the Official Gazette, make such rules as it thinks fit.

(2) In particular, and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely:

(a) to (o) - (Not reproduced)

(p) the procedure for and the manner of imposition of fines for the contravention of any of the rules framed under this section and the authority who may impose such fines; and

(q) the authority to which, the period within which, the form and the manner in which applications for revision of any order passed by any authority under this Act and the rules made thereunder may be made, the fee to be paid and the documents which should accompany such applications.

(3) All rules made under this section shall be binding on the Government.

25. Recovery of certain sums as arrears of land revenue. - Any rent, royalty, tax, fee or other sum due to the Government under this Act or the rules made thereunder or under the terms and conditions of any reconnaissance permit, prospecting licence or mining lease may, on a certificate of such officer as may be specified by the State Government in this behalf by general or special order, be recovered in the same manner as an arrear of land revenue.

We have three comments to offer on M.A. Tulloch. Firstly, the provisions of the Act No.67 of 1957 did not directly come up for the scrutiny of the Constitution Bench as there was no demand raised after the commencement of this Act which was put in issue before the Constitution Bench; the Constitution Bench was only adjudicating upon the issue whether a liability to pay cess incurred under the previous Act could be enforced under Act No.67 of 1957 or in other words if Act No.67 of 1957 had any castigating effect on the demand validly raised under the previous enactment. Secondly, the extent to which power to legislate by the States was excluded by the Central Act No.65 of 1951 was not a question dealt with in-depth as it was done in Hingir-Rampur Coal Co.. Thirdly, M.A. Tulloch, if not correctly read, creates a wrong impression that Act No.67 of 1957 provides for levy of tax and fee, which in fact it does not.

Section 13(2)(i) cannot be read as empowering the Central Government to levy any tax or fee. The expression "other fees and charges" have to be interpreted ejusdem generis taking colour from other words and phrases employed in the same clause. The word "charges" cannot and does include within its meaning any tax. The expression "other fees or charges" must be assigned such meaning as to include therein only such fees and charges as are meant for regulation or development.

We are clear in our minds that a power to levy tax or fee cannot be spelled out from sections 13, 18 and 25 of the Act No.67 of 1957. It is well-settled that power to tax cannot be inferred by implication; there must be a charging section specifically empowering the State to levy tax. Section 18 (2)(q) speaks of fee to be paid on applications for revision and not on minerals, mineral rights or mining land. Section 25 speaks of 'recovery of tax and fee' amongst others. Two observations are spontaneous. Firstly, a provision for recovery, being a machinery provision, cannot be read as empowering the levy of tax or fee. Secondly, it speaks of tax or fee being due to the Government without defining the same and without qualifying the word 'Government' with Central or State. A perusal of several provisions of the Act and in particular Sections 9-A, 15, 15 (1-A) (a) and (g), 15(3), 17(3), 21(5), 25 goes to show that the power of recovery is invariably given to the State Government and obviously the word 'Government' in Section 25 refers to the State Government, which only is empowered to recover the sums due as arrears of land revenue.

The relevant principles of law laid down in M.A. Tulloch, which we have extracted and reproduced hereinabove, do not run contrary to the view we are taking in the present case. The recovery of fee could have been held to be vitiated in that case because the field of mining activity in manganese ore was fully covered by the MMDR Act, 1957, and the levy under the impugned State Act, as found by the two Constitution Benches in Hingir-Rampur Coal Co. and M.A. Tulloch was being collected for the development of the mining areas in the State. The doctrine of pith and substance noted and applied in Hingir-Rampur Coal Co. has been restated in M.A. Tulloch wherein the Constitution Bench had said, as noted hereinabove, that the Orissa Act was concerned with the development of the mining areas notified under the Act while the Central Act on the other hand dealt more directly with the control of all industries including of course the industry of coal and the object of the Central Act was to regulate the scheduled industry with a view to make improvement and development of the service that they may render to the society and thus assisting the solution of the

larger problem of the national economy. In spite of the declaration made by Section 2 of the Central Act of 1951 considered in the light of its several provisions it was found difficult to hold that the field covered by the Central Act was the same as the field covered by the impugned Orissa Act. None of the two Constitution Benches have held that power to regulate and develop with which the Central Act of 1951 was concerned would include the power to levy tax and fee, which power shall have to be traced to some other entry in List I. List I contains a general entry i.e. Entry 96 for levy of fee in respect of matters in List I but so far as levy of tax is concerned there are separate and specific entries (see Entries 82 to 92B in List I and Entries 45 to 63 in List II). Further in view of Entry 50 of List II, Parliament can by any law relating to mineral development limit or place limitations on the power of the State Legislatures to impose taxes on mineral rights.

Power to tax not a residuary power

Article 265 mandates - no tax shall be levied or collected except by authority of law. The scheme of the Seventh Schedule reveals an exhaustive enumeration of legislative subjects, considerably enlarged over the predecessor Government of India Act. Entry 97 in List I confers residuary powers on Parliament. Article 248 of the Constitution which speaks of residuary powers of legislation confers exclusive power on Parliament to make any law with respect to any matter not enumerated in the Concurrent List or the State List. At the same time, it provides that such residuary power shall include the power of making any law imposing a tax not mentioned in either of those Lists. It is, thus, clear that if any power to tax is clearly mentioned in List - II the same would not be available to be exercised by Parliament based on the assumption of residuary power. The Seven-Judges Bench in Union of India Vs. Harbhajan Singh Dhillon, (1971) 2 SCC 779, ruled, by a majority of 4:3, that the power to legislate in respect of a matter does not carry with it a power to impose a tax under our constitutional scheme. According to Seervai (Constitutional Law of India, Fourth/Silver Jubilee Edition, Vol.3, para 22.191):- "Although in Dhillon's case conflicting views were expressed about the nature of the residuary power, the nature of that power was stated authoritatively in Kesvananda's Case, (1973) 4 SCC 225. Earlier, in Golak Nath's case (AIR 1967 SC 1643), Subha Rao C.J. (for himself, Shah, Sikri, Shelat and Vaidyalingam JJ) had held that Art. 368 only provided the procedure for the amendment of the Constitution, but that the power to amend the Constitution was to be found in the residuary power conferred on Parliament by Arts. 245 and 246(1) read with entry 97, List I and by Art. 248. Seven out of the nine judges who overruled Golak Nath's Case held, inter alia, that the power to amend the Constitution could not be located in the residuary powers of Parliament. Hegde and Mukherjea JJ held that -

"It is obvious that these Lists have been very carefully prepared. They are by and large exhaustive. Entry 97 in List I was included to meet some unexpected and unforeseen contingencies. It is difficult to believe that our Constitution-makers who were keenly conscious of the importance of the provision relating to the amendment of the Constitution and debated that question for several days, would have left the important power hidden in entry 97 of List I leaving to the off chance of the courts locating that power in that entry. We are unable

to agree with those learned judges when they sought to place reliance on Arts. 245, 246 and 248 and entry 97 of List I for the purpose of locating the power of amendment in the residuary power conferred on the Union." (italics supplied)

Similar views were expressed by five other judges. According to Seervai, "the law laid down in Kesavananda's Case is that if a subject of legislation was prominently present to the minds of the framer of our Constitution, they would not have left it to be found by courts in the residuary power; a fortiori, if a subject of legislative power was not only present to the minds of the framers but was expressly denied to Parliament, it cannot be located in the residuary power of Parliament."

Vide para 22.194 the eminent jurist poses a question: "Does Art. 248 add anything to the exclusive residuary power of Parliament under Art. 246 (1) read with Entry 97 List I to make laws in respect of "any other matter" not mentioned in List II and List III including any tax not mentioned in those Lists?" and answers by saying __ "The answer is 'No'."

As to the riddle arising in the context of mines and minerals development legislation by reference to the Entries in List I and List II, Seervai states ____ "the regulation of mines and mineral development is a subject of exclusive State legislation, but for the limitation placed upon that power by making it subject to the provisions in that behalf in List I. If Parliament does not exercise its power under Entry 54, List I, the States' power under Entry 23, List II would remain intact. If Parliament exercised its power under Entry 54, List I, only on a part of the field, as for example, major minerals, the States' legislative power over minor minerals would remain intact." (para 22.195 at p. 2433)

Power to tax must be express, else no power to tax

There is nothing like an implied power to tax. The source of power which does not specifically speak of taxation cannot be so interpreted by expanding its width as to include therein the power to tax by implication or by necessary inference. States Cooley in Taxation (Vol.1, Fourth Edition) ___ "There is no such thing as taxation by implication. The burden is always upon the taxing authority to point to the act of assembly which authorizes the imposition of the tax claimed." (para 122 at p.278).

Justice G.P. Singh in Principles of Statutory Interpretation (Eighth Edition, 2001) while dealing with general principles of strict construction of taxation statutes states __ "A taxing statute is to be strictly construed. The well-established rule in the familiar words of Lord Wensleydale, reaffirmed by Lord Halsbury and Lord Simonds, means : "The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words". In a classic passage Lord Cairns stated the principle thus : "If the person sought to 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 law the case might otherwise appear to be. In other words, if there is 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. Viscount Simon quoted with approval a passage from Rowlatt, J. expressing the principle in the following words : "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." (at p.635)

The judicial opinion of binding authority flowing from several pronouncements of this Court has settled these principles: (i) in interpreting a taxing statute, equitable considerations are entirely out of place. Taxing statutes cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency; (ii) before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the Section; and (iii) if the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject. There is nothing unjust in the tax-payer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly. (See, Justice G.P. Singh, ibid, pp.638-639).

Power to tax is not an incidental power. According to Seervai, although legislative power includes all incidental and subsidiary power, the power to impose a tax is not such a power under our Constitution. It is for this reason that it was held that the power to legislate in respect of inter-state trade and commerce (Entry 42, List I, Schedule 7) did not carry with it the power to tax the sale of goods in inter-state trade and commerce before the insertion of Entry 92A in List I and such power belonged to the States under Entry 54 in List II. Entry 97 in List I also militated against the contention that the power to tax is an incidental power under our Constitution (See: Constitutional Law of India, H.M. Seervai, Fourth/Silver Jubilee Edition, Vol.3, para 22.20).

Power to regulate and control and power to tax ___ determining the nature of legislation by reference to the power exercised

It is of paramount significance to note the difference between 'power to regulate and develop' and 'power to tax'.

The primary purpose of taxation is to collect revenue. Power to tax may be exercised for the purpose of regulating an industry, commerce or any other activity; the purpose of levying such tax, an impost to be more correct, is the exercise of sovereign power for the purpose of effectuating regulation though incidentally the levy may contribute to the revenue. Cooley in his work on Taxation (Vol.1, Fourth Edition) deals with the subject in paragraphs 26 and 27. "There are some cases in which levies are made and collected under the general designation of taxes, or under some term employed in revenue laws to indicate a particular class of taxes, where the imposition of the burden may fairly be referred to some other authority than to that branch of the sovereign power of the state under which the public revenues are apportioned and collected. The reason is that the imposition has not for its object the raising of revenue but looks rather to the regulation of relative rights, privileges and duties as between individuals, to the conservation of order in the political society, to the encouragement of industry, and the discouragement of pernicious employments.

Legislation for these purposes it would seem proper to look upon as being made in the exercise of that authority which is inherent in every sovereignty, to make all such rules and regulations as are needful to secure and preserve the public order, and to protect each individual in the enjoyment of his own rights and privileges by requiring the observance of rules of order, fairness and good neighborhood, by all around him. This manifestation of the sovereign authority is usually spoken of as the police power. The power to tax must be distinguished from an exercise of the police power. (State Vs. Tucker, 56 U.S. 516). The political power 'is a very different one from the taxing power, in its essential principles, though the taxing power, when properly exercised, may indirectly tend to reach the end sought by the other in some cases."(p.94) "The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance." (p.95). The distinction between a levy in exercise of police power to regulate and the one which would be in nature of tax is illustrated by Cooley by reference to a license. He says - "So-called license taxes are of two kinds. The one is a tax for the purpose of revenue. The other, which is, strictly speaking, not a tax at all but merely an exercise of the police power, is a fee imposed for the purpose of regulation." (p.97)

"Suppose a charge is imposed partly for revenue and partly for regulation. Is it a tax or an exercise of the police power? Other considerations than those which regard the production of revenue are admissible in levying taxes, and regulation may be kept in view when revenue is the main and primary purpose. The right of any sovereignty to look beyond the immediate purpose to the general effect neither is nor can be disputed. The government has general authority to raise a revenue and to choose the methods of doing so; it has also general authority over the regulation of relative rights, privileges and duties, and there is no rule of reason or policy in government which can require the legislature, when making laws with the one object in view, to exclude carefully from its attention the other. Nevertheless cases of this nature are to be regarded as cases of taxation. If revenue is the primary purpose, the imposition is a tax. Only those cases where regulation is the primary purpose can be specially referred to the police power. If the primary purpose of the legislative body in imposing the charge is to regulate, the charge is not a tax even if it produces revenue for the public." (Cooley, ibid, pp.98-99)

This Court in seven-Judges Bench decision in Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors. - (1990) 1 SCC 109, agreed that regulation is a necessary concomitant of the police power of the State. However, it was an American doctrine and in the opinion of the Court it was not perhaps applicable as such in India. The Court endorsed recognizing the power to regulate as a part of the sovereign power of the State exercisable by the competent legislature. Brushing aside the need for discussion on the question - whether under the Constitution the States have police power or not, the Court accepted the position that the State has the power to regulate. However, in the garb of exercising the power to regulate, any fee or levy which has no connection with the cost or expenses of administering the regulation, cannot be imposed; only such levy can be justified as can be treated as part of regulatory measure. Thus, the State's power to regulate perhaps not as emanation of police power but as an expression of the sovereign power of the State has its limitations. In our opinion, these observations of the Court lend support to the view which we have formed that a power to regulate, develop or control would not include within its

ken a power to levy tax or fee except when it is only regulatory. Power to tax or levy for augmenting revenue shall continue to be exercisable by the Legislature in whom it vests i.e. the State Legislature in spite of regulation or control having been assumed by another legislature i.e. the Union. State Legislation levying a tax in such manner or of such magnitude as can be demonstrated to be tampering or intermeddling with Center's regulation and control of an industry can perhaps be the exception to the rule just stated.

In Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors. - (1990) 1 SCC 109 the question before the seven-Judges Bench was as to the power of State to legislate on industrial alcohol as a subject. Entry 8 in List II and Entry 33 in List III came up for consideration. Their Lordships noticed the provisions of Industries (Development and Regulation) Act, 1951 (as amended in 1956), especially Section 18-G thereof, and held that the provisions evinced clear intention of the Union to occupy the whole field relating to industrial alcohol and therefore the State could not claim to regulate it. The power with regard to the control of alcoholic industries was considered and their Lordships concluded that in spite of the Central Legislation operating in the field the State was left with the following powers available to legislate in respect of alcohol -

"(a) It may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of List II and regulating powers.

(b) It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.

(c) The State may charge excise duty on potable alcohol and sales tax under Entry 52 of List II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol.

(d) However, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. See in this connection, the observation of Indian Mica case, (1971) 2 SCC 236."

It may be seen that the power to levy sales tax on industrial alcohol was available to the State but for the provisions of the Ethyl Alcohol (Price Control) Orders on account of which the State could not charge sales tax on industrial alcohol. The State could levy any fee based on quid pro quo. The seven-Judges Bench decision lends support to the view we are taking that in the field occupied by the Centre for regulation and control, power to levy tax and fee is available to the State so long as it does not interfere with the regulation - the power assumed and occupied by the Union.

Before a seven-Judges Bench in The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan & Ors., (1963) 1 SCR 491, the question arose if State could make

laws imposing regulatory restrictions on free trade, commerce and intercourse guaranteed by Article 301 of Constitution and whether a State tax could be treated as impeding freedom under Article 301 of Constitution. The following statement of law by majority speaking through S.K. Das, J. (at pp.524-525) is very much in point for our purpose:-

"Such an interpretation would, in our opinion, seriously affect the legislative power of the State Legislatures which power has been held to be plenary with regard to subjects in list II. The States must also have revenue to carry out their administration and there are several items relating to the imposition of taxes in list II. The Constitution-makers must have intended that under those items the States will be entitled to raise revenue for their own purposes. If the widest view is accepted, then there would be for all practical purposes, an end of State autonomy even within the fields allotted to them under the distribution of powers envisaged by our Constitution. An examination of the entries in the lists of the Seventh Schedule to the Constitution would show that there are a large number of entries in the State list (list II) and the Concurrent list (list III) under which a State Legislature has power to make laws. Under some of these entries the State Legislature may impose different kinds of taxes and duties, such as property tax, sales tax, excise duty etc., and legislation in respect of any one of these items may have an indirect effect on trade and commerce. Even laws other than taxation laws, made under different entries in the lists referred to above, may indirectly or remotely affect trade and commerce. If it be held that every law made by the Legislature of a State which has repercussion on tariffs, licensing, marketing regulations, price-control etc., must have the previous sanction of the President, then the Constitution in so far as it gives plenary power to the States and State Legislatures in the fields allocated to them would be meaningless."

Their Lordships also observed (at p.526-527) that the freedom guaranteed by Article 301 does not mean freedom from taxation. The power of levying tax is essentially for the very existence of Government, though its exercise may be controlled by constitutional provisions made in that behalf. Power to tax is not outside constitutional limitations. It is for Parliament to exercise power in the field made available to it by Entry 52 and 54 in List I. It is also for Parliament to state by law the limitations - and the sweep thereof - which it may choose to impose on field available to State for taxation by reference to Entry 50 in List II. It may not be for Courts to venture into enquiry in just an individual case to find and hold what tax would hamper mineral development if Parliament has chosen to observe silence by not legislating or failed to say something explicit.

A reasonable tax or fee levied by State legislation cannot, in our opinion, be construed as trenching upon Union’s power and freedom to regulate and control mines and minerals.

India Cement and decisions post India Cement, based

thereon :

India Cement is clearly distinguishable so far as the present cases are concerned. As we have already pointed out it was a case of cess levied by Sate Legislature on royalty and not on mineral rights or land and buildings. That is why the levy was held ultra vires. Seervai's comment and objective criticism on India Cement is noteworthy (See - ibid, para 22.257 C). Royalty is income and State Legislatures are not competent to tax an income. This single ground was enough to strike down the levy of cess impugned in India Cement. Nothing more was needed. The Orissa Cement Ltd. (supra) also, as the very opening part of the report shows, dealt with the levy of a cess by the State based on the royalty derived from mining lands which was held to be directly and squarely governed by India Cement and, therefore, struck down.

In State of Orissa & Ors. Vs. Mahanadi Coalfields Ltd. and Ors., 1995 Supp. (2) SCC 686, the impugned levy by the State Legislature was a tax of Rs.32 per thousand acre on coal bearing lands. It was sought to be defended as falling under Entry 49 or in the alternative under Entry 23 or Entry 50 in List II. The attack was that the legislation being one on mineral lands and mineral rights and the Parliament having enacted the Mines and Minerals (Development and Regulation) Act, 1957, the field was entirely covered and the State Legislature was incompetent to levy the tax. Reliance was placed on India Cement, Orissa Cement and Buxa Dooars Tea Co.Ltd. (supra). Only mineral bearing land and coal bearing land were the subject of the levy of tax. The three-Judges Bench speaking through K.S. Paripoornan, J., concluded that the charging section of the impugned Act imposed a tax on the minerals also, and was not confined to a levy on land or surface characteristic of the land. All non-mineral bearing lands and non-coal bearing lands were left out of the levy. The levy was struck down as levying a tax not on land (related to surface characteristic of the land) but on minerals and mineral rights. Goodricke's case (supra) was cited before their Lordships and it was observed that in Goodricke's case the impugned levy was held to be a tax on land and that makes all the difference.

We find it difficult to subscribe to the reasoning adopted in Mahanadi Coalfields Ltd..

Buxa Dooars Tea Co. Ltd. and Ors. Vs. State of West Bengal and Ors. - (1989) 3 SCC 211 is a two-Judges Bench decision. Rural employment cess was levied at the rate of Rs.5 per kg. on all dispatches of tea. The rate was changed from time to time but that is not very material. A careful reading of the report shows that the primary challenge was on the ground of the impugned cess being violative of Article 14 and 301 of the Constitution as it had the direct and immediate effect of impeding the movement of goods throughout the territory of India. The challenge was sustained. Incidentally, and very briefly, their Lordships have in one paragraph also dealt with the question of legislative competence of the State Government by reference to Entry 49 in List II. Their Lordships have observed, "if the legislation is in substance legislation in respect of dispatches of tea, legislative authority must be found for it with reference to some other entry. No Entry in Lists II and III is pertinent. Moreover, the Union had, in public interest, assumed control over the tea industry including the tea trade and control of tea prices." Therefore, the Court concluded that the impugned legislation was also void for want of legislative competence as it pertained to a covered field. Suffice it to

observe that to the extent the learned Judges have dealt with the challenge by reference to legislative competence of the State Legislature under Entry 49 in List II, there is not much of discussion and is just incidental and the observations are too wide to be countenanced. Another distinguishing feature common to these decisions is that the distinction and demarcation of fields of operation between Central and State Acts by reference to the doctrine of pith and substance seems to have been not adverted to.

From Baijnath Kadio to Eastern Coalfields

Before we proceed to deal with Goodricke, it will be necessary to complete the chain of thought by referring to four decisions and the law which developed therewith between the years 1970 and 1982 which can be termed a period by itself on the issues at hand.

In Baijnath Kadio Vs. The State of Bihar and Ors.- (1969) 3 SCC 838, the writ-petitioners were holding mining leases for minor minerals. The State of Bihar amended the Bihar Minor Mineral Concession Rules, 1964, whereby with effect from 27.1.1964 the rates of dead rent, royalty and surface rent were revised. Additional demands were raised. It was submitted that in view of the provisions contained in the MMDR Act, 1957 incorporating (vide, Section 2 thereof) a declaration within the meaning of Entry 54 in List I, it was not competent for the State Legislature to revise the rates as abovesaid. This Court held that the whole of the legislative field relating to minor minerals was covered by the Central Legislation by virtue of the declaration made by Section 2 and the enactment of Section 15 in the Act, thereby leaving no scope for the enactment of the second proviso to Section 10 of the Bihar Land Reforms Act whereunder the powers to increase the royalty, dead rent and surface rent were sought to be exercised. There were pre-existing old leases which could have been modified only by a legislative enactment made by the Parliament on the lines of Section 16 of Act No.67 of 1957. Any attempt to regulate such old mining leases will fall not in Entry 18 but in Entry 23 of List II even though the regulation incidentally touches them. The pith and substance of the amendment of Section 10 of the Bihar Land Reforms Act falls within Entry 23 although it incidentally touches land and not vice versa. Entry 18 did not come to the rescue of the State Government and Entry 23 was subject to the provisions of List I. The impugned provision and the action taken thereunder were held ultra vires the Constitution. The decisions of this Court in The Hingir-Rampur Coal Co.Ltd. & Ors. and M/s M.A. Tulloch and Co. were referred to. However, the law laid down by the Constitution Bench (vide para 13) is significant. It held :-

".....It is open to Parliament to declare that it is expedient in the public interest that the control should rest in Central Government. To what extent such a declaration can go is for Parliament to determine and this must be commensurate with public interest. Once this declaration is made and the extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. Any legislation by the State after such declaration and trenching upon the field disclosed in the declaration must necessarily be unconstitutional because that field is abstracted from the legislative competence of the State Legislature."

[underlining by us]

H.R.S. Murthy Vs. The Collector of Chittoor and Anr. - (1964) 6 SCR 666 was a writ petition filed under Article 32 of the Constitution laying challenge to the validity of notices of demand for the payment of land cess under the Madras District Boards Act, 1920. The mining lease dated September 15, 1953, authorised the lessee to work and win iron ore in a tract of land in Chittoor; dead rent, royalty and surface rent were payable under the mining lease. The District Board levied land cess on the annual rental value of all occupied lands. The challenge to the constitutional validity of the land cess was dismissed. The Court held:-

(1) It is therefore not possible to accept the contention, that the fact that the lessee or licensee pays a royalty on the mineral won, which is in excess of what he would pay if his right over the land extended only to the mere use of the surface land, places it in a category different from other types where the lessee uses the surface of the land alone. In each case the rent which a lessee or licensee actually pays for the land being the test, it is manifest that the land cess is nothing else except a land tax.

(2) When a question arises as to the precise head of legislative power under which a taxing statute has been passed, the subject for enquiry is what in truth and substance is the nature of the tax. No doubt, in a sense but in a very remote sense, it has relationship to mining as also to the mineral won from the mine under a contract by which royalty is payable on the quantity of mineral extracted. But that, does not stamp it as a tax on either the extraction of the mineral or on the mineral right. It is unnecessary for the purpose of this case to examine the question as to what exactly is a tax on mineral rights seeing that such a tax is not leviable by Parliament but only by the State and the sole limitation on the State's power to levy the tax is that it must not interfere with a law made by Parliament as regards mineral development. Our attention was not invited to the provision of any such law enacted by Parliament. In the context of Ss.78 and 79 and the scheme of those provisions it is clear that the land cess is in truth a "tax on lands" within Entry 49 of the State List.

The only decisions referred to in H.R.S. Murthy were Hingir-Rampur Coal Co.Ltd. & Ors. and M.A. Tulloch.

In State of Haryana and Anr. Vs. Chanan Mal - (1977) 1 SCC 340, referring to the provisions of the MMDR Act, 1957 and a State enactment of Haryana, (the constitutional validity whereof was under challenge) the Constitution Bench held that subject to the overall supervision of the Central Government, the State Government has a sphere of its own power and can take legally specified action under the Central Act and rules made thereunder. Thus, the whole field of control and regulation under the provisions of the Central Act 67 of 1957 cannot be said to be reserved for the Central Government.

Western Coalfields Ltd. Vs. Special Area Development Authority, Korba and Anr. - (1982) 1 SCC 125 is a Division Bench decision. The M.P. Municipality Act, a State enactment, levied property tax payable by the owner of the land or buildings and could also be recovered from the occupier of the

land or the building in certain contingencies. The validity of the property tax was upheld by reference to Entry 5 (Local Government) read with Entry 49 (Taxes on lands and buildings) in List II. The availability of the MMDR Act, 1957, and the declaration incorporated in Section 2 thereof did not come in the way of the validity of the property tax inasmuch as the property tax levied by the State Government through municipalities had nothing to do with the development of mines. The Court opined that the functions, powers and duties of municipalities did not become part of the occupied field by virtue of declaration under Section 2 of the Act No.67 of 1957 and the competence of the State to enact laws for municipal administration will remain unaffected by that declaration. Baijnath Kadio was distinguished.

Goodricke's case

Now, we come to Goodricke's case. The impugned provisions were incorporated by the West Bengal Taxation Laws (Second Amendment) Act 1989 into the West Bengal Primary Education Act, 1973 and the West Bengal Rural Employment and Production Act, 1976. Both the amendments were identical and have been set out in the earlier part of this judgment.

While the State sought to justify the levy of impugned cess by reference to Entry 49 of List II, the writ petitioner laid challenge to the validity of levy on very many grounds. It was submitted, firstly, that to bring the levy within the field of Entry 49 of List II it must be directly upon the land whereas the levy in question is really a tax on production of tea, a subject covered by Entry 84 of List I; secondly, that a tax on land must be a constant figure whereas the impugned levy varies from year to year based as it is on the quantity of tea produced in a tea estate in a given year and where there is no production of tea leaves at all in a particular year, no cess would be payable by tea estate in that year; thirdly, that the definition of 'tea estate' further establishes the absence of any nexus between 'cess' and the 'land'; land covered by the factory and building and even fallow land, is included within the meaning of 'tea estate' and if no tea leaves are produced and plucked, there would not be levy on the estate at all; and fourthly, that the levy is clearly invalid in view of the seven-Judges Bench decision of this Court in India Cement and the three-Judges Bench decision in Orissa Cement. It was urged that the impugned amendment was brought to remove the defect in the levy pointed out in Buxa Dooars, but the flaw was persisting. Jeevan Reddy, J., spoke for the three-Judges Bench, placing on record their unanimous opinion. The Court noticed, vide para 10, the real factual situation as generally obtains about the tea estate. The definition of 'tea estate' as incorporated by the amendment is a well-understood entity and hence is legitimately and reasonably capable of being classified as a separate category for the purpose of taxation and the rate of tax. The Court, on a near - exhaustive review of the available decisions on the point, arrived at a few conclusions which, so far as relevant for our purposes, are summed up as under:

(i) a financial levy must have a mode of assessment but the mode of assessment does not determine the character of a tax. The nature of machinery for assessment is often complicated and is not of much assistance except insofar as it may throw light on the general character of the tax. The annual value is not necessarily an actual income but only a standard by which income may be measured. Merely because the same standard or

mechanism of assessment has been adopted in a legislation covered by an entry under the Union List and also by a legislation covered by an entry in the State List, the latter legislation cannot be said to have encroached upon the field meant for the former;

(ii) the subject of tax is different from the measure of the levy;

(iii) merely because a tax on land or building is imposed by reference to its income or yield, it does not cease to be a tax on land or building. The income or yield of the land/building is taken merely as a measure of the tax; it does not alter the nature or character of the levy. It still remains a tax on land or building. No one can say that a tax under a particular entry must be levied only in a particular manner. The legislature is free to adopt such method of levy as it chooses. So long as the essential character of levy is not departed from within the four corners of the particular entry, the manner of levying the tax would not have any vitiating effect;

(iv) ample authority is available to hold that a tax on land within the meaning of Entry 49 of List II can be levied with reference to the yield or income. Whether an agricultural land or an orchard or a tea estate, they do require some capital and labour to make them yield or to produce income which yield or income can without difficulty be taken as measure for quantifying the tax which would undoubtedly be a levy on the land;

(v) it is not an essence of a tax, nor a condition of its validity, that the tax must be constant and uniform for all the years or for a particular number of years. The tax on land or building can be levied and assessed by reference to previous year's income or yield. In short, it is open to the State Legislature to adopt such formula as it thinks appropriate for levying the tax and so long as the character of the tax remains the same as contemplated by the entry, it does not matter how the tax is calculated, measured or assessed;

(vi) it is permissible to classify land by reference to its user as a separate unit for the purpose of levy of cess. Tea estate, as a separate category of land, is a valid classification;

(vii) the fact that the Tea Act empowers the Central Government to levy a duty or cess upon tea or tea leaves for the purposes of that Act, can in no manner deprive the State Legislature of its power to tax the land comprised in a tea estate. By levying the cess the State Legislature is not seeking to control the cultivation of tea but only to levy the tax on land comprised in a tea estate. The fact

that ultimately the tax may have to be borne by the tea industry is no ground for holding that the said levy is upon the tea industry. The State Legislature is not denuded of its power to levy a tax upon the land or upon a building merely because such land or building is held or owned by an industry which is governed by a central legislation.

On applying the abovesaid principles the Court concluded that taking the quantum of yield of a tea estate for measuring the amount of tax is perfectly valid and cannot be equated to the situation in India Cement. We may observe that the reasoning adopted in Goodricke accords with the reasoning in Hingir-Rampur.

Having made an independent review of several judicial decisions and the several settled legal principles, as dealt with hereinabove, we are satisfied that the Goodricke's case (supra) was correctly decided and the law laid down therein is correct and supported by authority in abundance. The distinguishing features which exclude the applicability of law laid down in India Cement and Orissa Cement to the fact situations like the ones we are called upon to deal with, were rightly pointed out in Goodricke and those very reasons additionally explained by us do not permit the cases on hand being ruled by India Cement and Orissa Cement.

In a nutshell

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

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

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

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

(4) Entries 52, 53 and 54 in List I are not heads of taxation.

They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of Union having enacted laws by reference to Entries 52, 53, 54 in List I. It is for the Union to legislate and impose limitations on States otherwise plenary power to levy taxes on mineral rights or taxes on lands (including mineral bearing lands) by reference to Entry 50 and 49 in List II and lay down the limitations on State's power, if it chooses to do so, and also to define the extent and sweep of such limitations.

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

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

and

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

(6) 'Land', the term as occurring in Entry 49 of List II, has a wide connotation. Land remains land though it may be subjected to different user. The nature of user of the land would not enable a piece of land being taken out of the meaning of land itself. Different uses to which the land is subjected or is capable of being subjected provide basis for classifying land into different identifiable groups for the purpose of taxation. The nature of user of one piece of land would enable that piece of land being classified separately from another piece of land which is being subjected to another kind of user, though the two pieces of land are identically situated except for the difference in nature of user. The tax would remain a tax on land and would not become a tax on the nature of its user.

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

(8) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of State Legislature cannot be annulled as unconstitutional merely because it may have an affect on the price of the commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of

'regulation and control' belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods. Entry 23 in List II speaks of regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union. Entries 52 and 54 of List I are both qualified by the expression "declared by Parliament by law to be expedient in the public interest". A reading in juxtaposition shows that the declaration by Parliament must be for the 'control of industries' in Entry 52 and 'for regulation of mines or for mineral development' in Entry 54. Such control, regulation or development must be 'expedient in the public interest'. Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming subject matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament. In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the declaration. The legislative power to tax by reference to Entries in List II is plenary unless the entry itself makes the field 'subject to' any other entry or abstracts the field by any limitations imposable and permissible. A tax or fee levied by State with the object of augmenting its finances and in reasonable limits does not ipso facto trench upon regulation, development or control of the subject. It is different if the tax or fee sought to be levied by State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental.

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

The Result - individual cases

(A) Coal Matters

The amendments incorporated by the West Bengal Taxation Laws (Amendment) Act 1992 w.e.f. 1.4.1992 into the provisions of the West Bengal Primary Education Act 1973 and the West Bengal Rural Employment and Production Act 1976 classify the land into three categories: (i) coal-bearing land, (ii) mineral bearing land (other than coal-bearing land) or quarry

and (iii) land other than the preceding two categories. These three are well-defined classifications by reference to the user or quality and the nature of product which it is capable of yielding. The cess is levied on the land. The method of quantifying the tax is by reference to the annual value thereof. It is well-known that one of the major factors contributing to the value of the land is what it produces or is capable of producing. Merely because the quantum of coal produced and dispatched or the quantum of mineral produced and dispatched from the land is the factor taken into consideration for determining the value of the land, it does not become a tax on coal or minerals. Being a tax on land it is fully covered by Entry 49 in List II. Assuming it to be a tax on mineral rights it would be covered by Entry 50 in List II. Taxes on mineral rights lie within the legislative competence of the State Legislature "subject to" any limitation imposed by Parliament by law relating to mineral development. The Central legislation has not placed any limitation on the power of the States to legislate in the field of taxation on mineral rights. The challenge to constitutional validity of State legislation is founded on non-availability of legislative field to State; it has not been the case of any of the writ petitioners that there are limitations enacted by Central legislation and the State of West Bengal has breached or crossed those limits. Simply because incidence of tax is capable of being passed on to buyers or consumers by the mine owners with an escalating affect on the price of the coal, it cannot be inferred that the tax has an adverse effect on mineral development. Entry 23 in List II speaks of regulation of mines and mineral developments, subject to the provisions of List I with respect to regulation and development under the control of the Union. The Central Legislation has taken over regulation and development of mines and mineral development in public interest. By reference to Entry 50 of List II and Entry 54 in List I, the Central legislation has not cast any limitations on the State Legislature's power to tax mineral rights, or land for the matter of that. The impugned cess is a tax on coal-bearing and mineral-bearing land. It can at the most be construed to be a tax on mineral rights. In either case, the impugned cess is covered by Entries 49 and 50 of List II. The West Bengal Taxation Laws (Amendment) Act 1992 must be and is held to be intra vires the Constitution.

We also hold that Mahanadi Coalfields was not correctly decided in as much as India Cement Ltd. and Orissa Cement Ltd. were applied to the levy of a cess to which they did not apply. The learned Judges, deciding Mahanadi Coalfields Ltd. were, with respect, not right in forming the opinion that the cess was levied on minerals and mineral rights and not on land and hence the conclusion reached therein that the State Legislature did not have the legislative competence and that the State legislation trenched upon a field already occupied by Mines and Minerals (Regulation and Development) Act 1957, a Central Legislation is incorrect. State of Orissa & Ors. Vs. Mahanadi Coalfields Ltd. and Ors., 1995 Supp. (2) SCC 686, is overruled.

(B) Tea Matters

Inasmuch as we have held Goodricke Group Ltd. and Ors. Vs. State of West Bengal and Ors. - (1995) Supp. 1 SCC 707 to have been correctly decided the impugned levy on tea estates as levied by the West Bengal Taxation Laws (Second Amendment) Act 1989, is held to be intra vires the Constitution. However, in brief, we may state that the impugned levy is of cesses on tea estates i.e. the land forming part of tea estates as defined in the impugned Act. The land forming part of the tea estates is a well-defined classification. Simply because the

method for quantifying the tax is by reference to the yield of the land determinable by taking into account the quantum of tea produced and dispatched, it does not become a cess on tea or a tax on production of tea or a tax on income of land. The Tea Act of 1953 contains a declaration vide Section 2 thereof that it is expedient in the public interest that the Union should take under its control the tea industry. The declaration is in terms of Entry 52 in List I. Union's assumption of control of tea as industry and as being expedient in the public interest, does not amount to vesting the power to tax or levy fee in the Central Government by reference to tea or on tea estates. Section 25 of Tea Act empowers the Central Government to levy and collect excise duty on tea produces, which on collection shall be credited to the Consolidated Fund of India. There is no other provision in Tea Act empowering levy of any tax or fee on tea or tea bearing land. The impugned cess is a tax on tea-bearing land, a well-defined classification and is covered by Entry 49 in List II. We uphold the logic and reasoning assigned and conclusions drawn by this Court in Goodricke on all the counts.

(C) Brick Earth Matters

Brick earth is a minor mineral. What we have stated about the impugned cess by reference to coal applies to brick earth as well. The field as to taxation cannot be said to have been covered by Central Legislation by reference to Entry 54 in Schedule I. Quantification of levy by reference to quantity of brick earth dispatched is a methodology adopted for the purpose of finding out the quantity of brick earth removed from the land. It has a definite and direct co-relation with the land. There is no particular charm about the challenge developed by the writ petitioners laying emphasis on the meaning of the word "dispatched". The gist and substance of what the legislature is taking into account is the brick earth actually removed. "Dispatched" has the effect of taking into account the brick earth "removed" and not simply "moved" and left behind. The average quantity of brick earth utilized in making bricks whether on the brick field itself or on a place nearby, does involve removal - and consequently dispatch __ of the brick earth from the place where it was to the place where it is captively consumed in making bricks. The fact that methodology for working out the royalty payable and the cess payable is the same, does not have any detrimental effect on the constitutional validity of the cess whether it be treated as one on the land - classified by reference to its production, i.e., the brick earth or as one on mineral rights in brick earth. In either case it would be covered by Entries 49 or 50 in List II. None of the pleas raised has any merit.

(D) Minor Mineral Matters

While narrating the facts, we have quoted in the earlier part of the judgment Section 35 of the U.P. Special Area Development Authorities Act, 1986 (SADA Act, for short) which is the charging section and the Rules framed under the Act. We refer to other relevant provisions of the Act in brief.

Section 3 of the SADA Act authorizes the State Government to declare by notification an area to be a special development area upon its forming an opinion that any area of special importance in the State needs to be developed in a planned manner. The authority is empowered to prepare a master plan for the special development area, to provide for the development of lands in the area, to compulsorily acquire land and so on. The powers are drastic and all-oriented with the object of effecting a planned intensive and extensive development of an area as to which the State Government may have formed an opinion that it was an area of special

importance. Declaring an area as a special development area in view of its special importance and constituting an authority for the administration and management of the area entrusted with the obligation of its development is not a matter of empty formality. The empowerment of the authority is accompanied by an obligation cast on it by the State Government through the special legislation of fulfilling the object behind the declaration of special area and constitution of the authority. The Act has been given an over-riding effect by virtue of Section 52 thereof. Not only the area is taken out of the administration by the other bodies of local self-government such as municipality or panchayat, but any other master plan or development plan formulated by any other authority ceases to apply to such area.

It was contended on behalf of the writ petitioners-appellants that whether a major or a minor mineral, by virtue of the provisions contained in the MMDR Act, 1957 and U.P. Mine & Minerals Concession Rules 1963, framed in exercise of the power conferred by Section 15 of the MMDR Act, the mineral rights in any land are subject to payment of royalty which is fixed. Sections 8 and 9 of the MMDR Act confer the power to enhance or reduce the rate at which royalty or dead rent shall be payable in respect of any mineral. Any cess levied by the State Government would have the effect of increasing the royalty. Section 2 of the MMDR Act makes the requisite declaration 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'. Such declaration is in the terms contemplated by Entry 54 of List I. It was submitted that the levy of cess by the State Government would be clearly repugnant to the power reserved by the Constitution and the MMDR Act to be exercised only by the Central Government and hence the impugned levy of cess is repugnant to the central legislation. To test the validity of the submission we have to examine the real nature of the levy and find out if such levy encroaches upon the field reserved for central legislation.

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

It is well settled that it is for the legislature to draft a piece of legislation by making the choicest selection of words so as to give expression to its intention. The ordinary rule of interpretation is that the words used by the legislature shall be given such meaning as legislature has chosen to assign them by coining definitions contained in the interpretation clause and in absence thereof the words would be given such meaning as they are susceptible of in the ordinary parlance, may be by having recourse to dictionaries. However still, the interpretation is the exclusive privilege of the Constitutional Courts and the Court embarking upon the task of interpretation would place such

meaning on the words as would effectuate the purpose of legislation avoiding absurdity, unreasonableness, incongruity and conflict. As is with the words used so is with the language employed in drafting a piece of legislation. That interpretation would be preferred which would avoid conflict between two fields of legislation and would rather import homogeneity. It follows as a corollary of the abovesaid statement that while interpreting tax laws the Courts would be guided by the gist of the legislation instead of by the apparent meaning of the words used and the language employed. The Courts shall have regard to the object and the scheme of the tax law under consideration and the purpose for which the cess is levied, collected and intended to be used. The Courts shall make endavour to search where the impact of the cess falls. The subject matter of levy is not to be confused with the method and manner of assessment or realisation.

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

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

then government which became conscious of its obligations under the SADA Act and commenced identifying special areas requiring development such as Sonbhadra. The imposition of cess envisaged through the SADA Act and the Rules was a step towards developing the special area. It is a matter of common knowledge, and does not need any evidence to demonstrate, that mining activity carried on the land within the special area involves extraction, removal, loading-unloading, and transportation of the minerals accompanied by its natural consequences entailed on the environment and the infrastructure such as roads, water and power supply etc. within the special area. The impugned cess can, therefore, be justified as a fee for rendering such services as would improve the infrastructure and general development of the area the benefits whereof would be availed even by the stone crushers. Entry 66 in List II is available to provide protective constitutional coverage to the impugned levy as fee.

As held in Goodricke Group Ltd., 1995 Supp.(1) SCC 707, which we have held as correctly decided, this Court has noted the principle of law well established by several decisions that the measure of tax is not determinative of its essential character. The same transaction may involve two or more taxable events in its different aspects. Merely because the aspects overlap, such overlapping does not detract from the distinctiveness of the aspects. In our opinion, there is no question of conflict solely on account of two aspects of the same transaction being utilized by two legislatures for two levies both of which may be taxes or fees or one of which may be a tax and other a fee falling within two fields of legislation respectively available to the two.

As we have pointed out earlier, a cess may be tax or fee. So far as the present case is concerned, this distinction does not need any further enquiry by reference to the facts of the case inasmuch as the impugned cess is constitutionally valid considered whether a tax or a fee. We do not propose to continue dealing therewith any more inasmuch as it would be an exercise in futility. We would only place on record briefly our reasons for upholding the validity of the impugned levy whether a tax or a fee.

As a tax the impugned levy of cess is clearly covered by Entry 5 of List II (as the High Court has held, and we add) read with Entries 49, 50 and 66 of List II. There is no challenge to the declaration of the area as a special development area and the constitution of Special Area Development Authority for the administration thereof. In other words, the constitutional validity of the enactment as a whole and the rules framed thereunder is not put in issue. What is under challenge is only the levy of cess. There is nothing wrong in the state legislation levying cess by way of tax so as to generate its funds. Although it is termed as a 'cess on mineral right', the impact thereof falls on the land delivering the minerals. Thus, the levy of cess also falls within the scope of Entry 49 of List II. Inasmuch as the levy on mineral rights does not contravene any of the limitations imposed by the Parliament by law relating to mineral development, it is also covered by Entry 50 of List II. The power to levy any tax or fee lying within the legislative competence of the State Legislature can be delegated to any institution of local government constituted by law within the meaning of Entry 5 in List II. The Entries 5, 23, 49, 50 and 66 of List II provide adequate constitutional coverage to the impugned levy of cess. True it is that the method of quantifying the cess is by reference to the quantum of mineral produced. This would not alter the

character of the levy. There are myriad methods of calculating the value of the land for the purpose of quantifying the tax reference whereto has already been made by us in the other part of this judgment. Validity of cess upon the land quantified by reference to the quantity of its produce was held to be a levy on the land and hence constitutional in Ralla Ram, AIR 1949 FC 81, Moopil Nair, AIR 1961 SC 552 and Ajoy Kumar Mukherjee, AIR 1965 SC 1561. It does not become excise duty on manufacture and production of goods merely on account of having relation with the quantity of product yielded of the land. Rather it is a safe, sound and scientific method of determining the value of the land to which the product relates. The levy of cess considered as a tax is constitutionally valid.

In Western Coalfields Ltd. Vs. Special Area Development Authority, Korba & Anr., (1982) 1 SCC 125, the levy of a cess almost similar to the one in issue in the present case, came up for the consideration of this Court. The levy was for the purpose of enabling the municipal administration to exercise its power and discharge its functions under the Act. It was held that the declaration contained in Section 2 of the MMDR Act does not have the effect of bringing the powers, duties and functions of the local authority within the purview of occupied field. The power to levy tax on lands and buildings within their jurisdiction by the local authority was upheld by this Court.

The following observations of Constitution Bench in Hingir-Rampur Coal Co. squarely apply to SADA Act and SADA Rules for upholding their constitutional validity -
".....in pith and substance the impugned Act is concerned with the development of the mining areas notified under it. The Central Act, on the other hand, deals more directly with the control of all industries including of course the industry of coal."

"The functions of the Development Councils constituted under this Act prescribed by Section 6(4) bring out the real purpose and object of the Act. It is to increase the efficiency of productivity in the scheduled industry or group of scheduled industries, to improve or develop the service that such industry or group of industries renders or could render to the community, or to enable such industry or group of industries to render such service more economically."

".....the object of the (Central) Act is to regulate the scheduled industries with a view to improvement and development of the service that they may render to the society, and thus assist the solution of the larger problem of national economy. It is difficult to hold that the field covered by the declaration made by Section 2 of this Act, considered in the light of its several provisions, is the same as the field covered by the impugned Act. That being so, it cannot be said that as a result of Entry 52 read with Act LXV of 1951 the vires of the impugned Act can be successfully challenged."

"Our conclusion, therefore, is that the

impugned Act is relatable to Entries 234 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."

As stated earlier also, the impugned cess can be justified as fee as well. The term cess is commonly employed to connote a tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary that the services rendered by the fee collected should remain confined to the persons from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged. The levy of the impugned cess can equally be upheld by reference to Entry 66 read with Entry 5 of Schedule II.

Royalty is not a tax. The impugned cess by no stretch of imagination can be called a tax on tax. The impugned levy also does not have the effect of increasing the royalty. Simply because the royalty is levied by reference to the quantity of the minerals produced and the impugned cess too is quantified by taking into consideration the same quantity of the mineral produced, the latter does not become royalty. The former is the rent of the land on which the mine is situated or the price of the privilege of winning the minerals from the land parted by the government in favour of the mining lessee. The cess is a levy on mineral rights with impact on the land and quantified by reference to the quantum of minerals produced. The distinction, though fine, yet exists and is perceptible.

In our opinion Ram Dhani Singh Vs. Collector, Sonbhadra & Ors. - AIR 2001 All. 5 has been correctly decided. We uphold and affirm the same.

End Result

C.A. Nos.1532-33 of 1993 (Coal Matters) are allowed. The decision by Calcutta High Court [Kesoram Industries Ltd. (Textile Division) Vs. Coal India Ltd. - AIR 1993 Calcutta 78] is set aside. The writ petitions filed in the High Court of Calcutta shall stand dismissed.

Leave granted in SLP (C) Nos.3986 of 1993, 11596 and 17549 of 1994.

C.A. Nos.....of 2004 (Ambuja Cement Ltd. & Anr. Vs. State of West Bengal & Ors.) and C.A. Nos.3518-3519, 5149-54 of 1992, C.A. No.2350 of 1993, C.A. No.7614 of 1994 (Coal Matters) are directed to be dismissed.

W.P.(C) Nos.262 of 1997 (Tea matters) W.P.(C) Nos.515, 641, 642 of 1997, W.P.(C) Nos.347, 360 of 2000, W.P.(C) Nos.50, 553 of 2000, W.P.(C) Nos.207,288,389 of 2001 and W.P.(C) No.81 of 2003 are directed to be dismissed.

W.P.(C) No.247 of 1995 and W.P.(C) No.412 of 1995 (Brick Earth Matters) are directed to be dismissed.

C.A.Nos.5027 of 2000, C.A.Nos.6643, 6644, 6645, 6646, 6647, 6648, 6649, 6650, 6894 of 2000 and C.A.No.1077 of 2001 (Minor Mineral Matters) are dismissed. The decision by the Allahabad High Court (Ram Dhani Singh Vs. Collector, Sonbhadra & Ors. - AIR 2001 Allahabad 5) is affirmed.

It would be useful to notice a few other relevant provisions of the SADA Act. The Act provides for the establishment of Special Area Development Authorities for the planned development of certain areas of Uttar Pardesh and for matters ancillary thereto. The State Government, when it is of the opinion that any area of special importance in the State needs to be developed in a planned manner, may, under Section 3 by issuing a notification, declare such area to be a special development area. On such declaration the area is to be administered by the Special Area Development Authority. The functions and the powers of the Authority have been enumerated under Sections 6 and 7 as under :

"6. Functions of the Authority : - The functions of the Special Area Development Authority shall be -

(i) to promote and secure development in a planned manner of the special development area for which it has been constituted;

(ii) to prepare development plan for the special development area;

(iii) to implement the development plan after its approval by the State Government;

(iv) for the purpose of implementation of the plan, to acquire, hold, develop, manage and dispose of land and other property;

(v) to carry out building, engineering, mining operations and other operations and other construction activity;

(vi) to execute works in connection with the supply of water and electricity and to provide such utilities and amenities as water, electricity, drainage and the like;

(vii) to dispose of sewage and to provide and maintain other services and amenities;

(vii) to provide for the municipal management of the special development area in the same manner as is done by Nagar Mahapalika under the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959;

(ix) to otherwise perform all such functions as are necessary or expedient for the purpose of the planned development of the special development area and for purposes

incidental thereto;

Provided that the functions specified in Clauses (viii) and (ix) shall not be performed unless so required by the State Government."

"7. Powers of the Authority.- The Special Area Development Authority shall. -

(a) for the purpose of municipal administration have the powers which a Nagar Mahapalika has under the Uttar Pradesh Nagar, Mahapalika Adhiniyam, 1959;

(b) for the purpose of taxation have the powers which a Nagar Mahapalika has in relation to a city under the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959."

Under Section 18, all the money received by the Authority by way of cess have to be deposited in a fund which fund shall be applied towards meeting the expenses to be incurred by the Authority in the administration of the Act and for no other purpose.

On behalf of the petitioners reliance was placed on Entries 53 and 54 of List I (Union List) of the Seventh Schedule to the Constitution for the purpose of submitting that the regulation and development of mines and minerals was within the legislative competence of the Parliament which reads as under :
"List I - Union List.
Entry No.53. Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

Entry No.54. Regulation of mines and minerals 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."

On behalf of the State Government reliance was placed on Entries 5, 49, 50 and 66 of List II (State List) of the Seventh Schedule to the Constitution which reads as under :
"List II - State List
Entry No.5. Local government, that is to say, the Constitution and powers of municipal corporations, improvement trust district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

Entry No.49. Taxes on lands and buildings.

Entry No.50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

Entry No.66. Fees in respect of any of the matters in this List, but not including fees taken in any Court."

Having noticed the relevant entries and the statutory provisions as contained in the Act and the Rules, we may proceed to examine what the term 'cess' means. Straightway we refer to the decision of this Court in Kunwar Ram Nath and Ors. Vs. The Municipal Board, Pilibhit - (1983) 3 SCC 357, wherein placing reliance on the Constitution Bench in The Hingir-Rampur Coal Co., Ltd. and Ors. Vs. The State of Orissa and others - AIR 1961 SC 459, it was held that a 'cess' may either be a tax or fee. Where a 'cess' in a given context is a tax or a fee depends upon the purpose for which it is levied. The primary object and the essential purposes of the levy must be distinguished from its ultimate or incidental results or consequences. Between a tax and a fee there is not generate difference as both are compulsory exertion of money by public authorities. However, a tax is imposed for public purposes and is not, and need not be supported by any consideration of service rendered in return; on the other hand, a fee is levied essentially for purposes rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. The tax recovered goes into the consolidated fund which is utilize for all public purposes whereas a cess levied by way of fee does not become a part of the consolidated fund; it is earmarked and set apart for the purposes of services for which it is levied. This conceptual distinction between the tax and the fee is to be kept in view but the fact remains that the scheme of the several entries in the three Lists empowers the appropriate legislatures to levy taxes and also empowers specifically the same legislature to levy fees in respect of the matters covered in the said Lists. It is the fees taken in any court which only has been treated as a distinct Head. Once we find the impugned cess within the legislative competence of the State Legislature, it would not be of much consequence whether it is in the nature of tax or fee. By a separate judgment pronounced today in ..... we have set out and dealt with in framing details several principles of interpretation of entries contained in the three Lists of the Seventh Schedule to the Constitution and the powers exercisable by the Union and the States particularly in relation with the laws dealing with taxes. Those principles may be kept in view and we do not propose to repeat and restate those principles here.

tagged with the said C.A. Nos.1532-33/93 and others. These appeals were heard along with the said appeals, as directed and listed. However, we are disposing of the present appeals by a separate judgment as the facts of the case are little different though the principles of law governing the decision would almost be the same. A reference to the said decision delivered by us is, therefore, necessary.

Para as deleted by HL in the draft

(kept for safe side for the time-being)

Provided that when in the coal-bearing land referred to in clause (b), there is no production of coal for more than two consecutive years, such land shall be liable for levy of cess in respect of any year immediately succeeding the said two consecutive years in accordance with

clause (a):

Provided further that where no dispatch of minerals or materials is made during a period of more than two consecutive years from the mineral-bearing land or quarry as referred to in clause (c), such land or quarry shall be liable for levy of cess in respect of any year immediately succeeding the said two consecutive years in accordance with clause(a)."

How the abovesaid error has resulted into shaping the development of case law needs to be noted and dealt with. In State of M.P. Vs. Mahalaxmi Fabric Mills Ltd. and Ors. - 1995 Suppl. (1) SCC 642 what was put in issue was the enhancement of royalty by the Central Government in exercise of the power conferred by Section 9(3) of the MMRD Act. Based on the decision of India Cement cess on coal levied by State legislation was struck down by this Curt in the case of Orissa cement. The State Governments were starved for revenue and therefore the Central Government stepped in to revise upwards the rates of royalty to augment the revenue of the States. In exercise of its power under Section 9(3) the Central Government increased the rates of royalty. The cealing for enhancement of rates of royalty was removed by amending Section 9(3). The vires of the provision were put in issue. A bench of three learned Judges of this Court decided Mahalaxmi Fabric Mills Ltd. and Ors.'s case (supra).

P. Kannadasan Vs. TISCO

Our dealing with the available decisions may not be complete unless we make a reference to P. Kannadasan & Ors. Vs. State of T.N. & Ors., (1996) 5 SCC 670 and District Mining Officer & Ors. Vs. Tata Iron and Steel Co. & Anr., (2001) 7 SCC 358, the latter being a three-Judge Bench decision which has over-ruled the former being a decision by two-Judge Bench. At the very outset we make it clear that the question which arose for decision in the said two decisions does not directly arise for decision in the cases before us. However, it becomes necessary to deal with a few principles of constitutional significance dealt with therein by the two Benches in so far as relevant for our purpose. We are not making any detailed statement of facts and the contentions advanced as it is not necessary and if necessary the reference can be had to the law reports of the two decisions.

Levy of a local cess at the rate of 45 p. on every rupee of land revenue payable to the government in respect of any land levied by Section 115 of the Tamil Nadu Panchayat Act 1958 was declared ultra vires the constitution in India Cement. Following the said decision Orissa Cement declared incompetent the identical levies imposed by the States of Orissa, Bihar and Madhya Pradesh through State legislations. These two decisions had a serious impact on the revenue of several State governments. The Parliament stepped in coming to the rescue of the State governments. Initially the President of India promulgated Cess and Other Taxes on Minerals (Validation) Ordinance 1992 on 15.2.1992, which was recognized by Act No.16 of 1992 w.e.f. 4.4.1992. The ordinance and the Central Act both are brief legislations consisting of three sections merely the purpose whereof has been to provide constitutionally valid base for the sustainability of the cess for the period for which the

State legislations had remained in operation until struck down by India Cement and Orissa Cement. In substance, the two decisions referred to hereinabove which led to the promulgation of the ordinance and the enactment of the central legislation had struck down the State legislations by forming an opinion that the field of legislation having been appropriated to the Union of India, the States were not competent to enact the laws. The ordinance and the Act removed the infirmity and altered the bases of legislations. India Cement and Orissa Cement both have held that the State legislations would have been constitutionally valid if the subject matter thereof would have been enacted by the Parliament and that _____ was made good by promulgation of ordinance and the Act. Thus, it is not correct to say that the ordinance and the Act had the effect of nullifying the judgments of the Courts; rather they adopted the devise of curing the defect as pointed out by this Court by removing the flawed foundation and substituting the constitutionally valid bases for the validity of the same legislation. The other constitutionally valid devise of legislation by incorporation was adopted by the Parliament. The Central Act did not re-enact of the contents of the struck down State legislations in the Central Act and instead couched the Central Act in such language which has effect of all the relevant provisions of the scheduled State legislations being individually and specifically enacted by Parliament as being necessarily read forming part of the contents thereof and having been enacted with retrospective effect by the Parliament. the existence of constitutional power vesting in the Parliament to enact tax laws having retrospective operation cannot be denied and was not denied. The submission that the Central Act was only a piece of temporary legislation having a limited life to live was rejected and it was held that the Act, ever since the date of its enactment, became operative and would continue to remain in force until the Parliament chose to repeal it.

The constitutional validity of the same Cess Validation Act came to be examined once again in TISCO case wherein the Bench of three learned Judges examined the issue from the point of view of its applicability in the State of Bihar. A perusal of the judgment of this Court in TISCO case shows that the Court has proceeded on certain premises which, with respect, we find difficult to sustain. The Court held that the Parliament never re-enacted the eleven Acts mentioned in the Schedule, but merely provided the legislative competence for those provisions in those Acts which related to cesses or taxes on minerals; that the Validation Act merely had the effect of validating the collections already made so that the States shall not be burdened with the liability of refunding the amount already collected under void law but the Validation Act cannot be construed to have conferred a right to make levy and collection of cesses or taxes on minerals which were collectable upto 4.4.1991; and that the Validation Act was a piece of temporary legislation which did not expressly conferred a right to levy and collect the cess for any period subsequent to 4.4.1991. Suffice it to say that all the three reasonings, in our humble opinion and with respect to the learned Judges deciding the case, suffer from in-built fallacy. Firstly, it is not necessary to examine whether the Central Act is a temporary or permanent legislation. The correct approach should have been to examine the impact and effect of the validating Act. Does it give rise to any substantive rights and obligations? If yes, the rights and obligations created thereby would continue to survive till satisfied. The language of the validating Act did not create any distinction between the right of the States to retain the amount of cesses already realised and the right of the States to collect the cesses which having been

validated were yet to be collected. The text of the validating Act has been reproduced in P. Kannadasan case. It is significant to note that TISCO has not struck down the Validation Act as constitutionally invalid; in spite of upholding the constitutional validity of the Act as was done by Patna High Court in the judgment impugned before this Court; all that this Court has done is to construe the effect of the Validation Act by expressing an opinion that the amount collected by the States was not liable to be refunded though fresh notices for collection and levy of dues in respect of liability accrued till 4.4.1991 could not be countenanced upon an interpretation of provisions of the Validation Act. We find it difficult to countenance the view taken. Once the Validation Act has been held to be constitutionally valid not only the action already taken thereunder but also the action subsequently taken for enforcing the rights and obligations incurred prior to the coming into force of the Act by operation of those laws which were validated would be constitutionally valid on the language of the Validation Act. The States were enforcing the liabilities validly incurred by the persons liable to cesses on behalf of the central government as the scheme of the MMDR Act 1957 is. There is nothing like deliberate and conscience omission of the saving clause by the Parliament in the Validation Act. The authority of law in the States to raise demand and make collection of cess and tax on minerals under the validated provisions of the State laws clearly and necessarily follows. In our opinion, P. Kannadasan was correctly decided. Tata Iron and Steel Co. does not lay down the correct law.

The upshot of the above discussion is that levy of cess is held to be valid. The West Bengal Primary Education Act, 1973 and West Bengal Rural Employment and Production Act, 1976, as amended by the West Bengal Taxation Laws (Amendment) Act, 1992, with effect from 1.4.1992 are held intra vires the Constitution. 'Land' has been classified into three categories, i.e. coal bearing land, mineral bearing land (other than coal bearing land) or quarry, and land other than the said two. The classification into three categories is by reference to the character, quality and productivity of the land, i.e. what the land is capable of delivering. The three categories of land are well defined classifications. The classification serves the purpose sought to be achieved, that is, by levying cess at different rates consistently with the value of the land, determinable by the quality and nature of productivity offered by the land. What is won from the land and what it delivers, is capable of being assessed, in terms of money, by finding out the quantity of coal or mineral or material extracted and dispatched. The period of non-production qualifies for concession. The mechanism for assessment of value of land cannot be determinative or decisive of the nature and character of tax which essentially remains a cess on land. The impugned cess successfully withstands the test of constitutional validity on the principles laid down in Goodricke. India Cement and Orissa Cement do not apply.

C.A. Nos.1532-33 of 1993 - The State of West Bengal Vs. Kesoram Industries Ltd. and Ors., are allowed. The impugned judgment of the High Court is set aside. The writ petitions filed in the High Court by the respondents are directed to be dismissed.

W.P.(C) No.262 of 1997 - The Terai Indian Planters' Association & Anr. Vs. The State of West Bengal and Ors., is devoid of any merit. The challenge, led to the constitutional validity of levy of cess on tea estates, must be

repelled in the light of the decision of this Court in Goodricke's case (supra) which we have held as laying down the correct position of law. The abovesaid writ petition is dismissed.