

Allahabad High Court

J.K. Construction Engineers And ... vs The Union Of India (Uoi) Through ... on 28 February, 2006

Author: R Agarwal

Bench: R Agrawal, S Bala

JUDGMENT

R.K. Agarwal, J.

1. In this batch of writ petitions, all the petitioners have questioned the jurisdiction and competence of the State of U.P. to levy/demand royalty on ordinary earth and other minor minerals which they supply to the Government Departments and other undertakings pursuant to the contract entered between the parties. We are treating Civil Misc. Writ Petition No. 47754 of 2005 as the leading writ petition and, therefore, are giving its facts for proper appreciation of the issues involved in these writ petitions.

Facts of the case :

2. The petitioner in the writ petition, M/s J.K. Constructions Engineers and Contractor, Hyderabad, is a partnership firm and is engaged in various works awarded by the Ministry of Railways for construction of broad gauge lines, earth work and embankment. According to the petitioner, while constructing the broad gauge railway lines, it made embankment, platform after doing earth work maintaining level according to the specification of the Engineers of the Railways. The ordinary earth is used for leveling, embankment and also for making heap of earth to cover the shortfall in the surface level of the earth. The petitioner claims that it is neither the lessees under the U.P. Minor Minerals (Concession) Rules, 1963 (hereinafter referred to as "the Concession Rules") nor carrying out any mining operation under the Concession Rules. The petitioner is not even a permit holder nor prospective licensees as defined under the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter referred to as "the 1957 Act"). According to the petitioner, it has been awarded a contract on 23.9.2004 by the North Central Railway for earth work and embankment and cutting including the side drains and ancillary work between Ch.00.00 to 32675 including Lalitpur yard in Lalitpur-Udaipura section in connection with Lalitpur-Khajuraho-Singrauli new broad gauge line. The contract value for the work is Rs. 9,29,97,332/-. Pursuant to the aforesaid contract, the petitioner is carrying out the earth work. The respondent Nos. 3 and 4 are demanding royalty @ Rs. 4/- per cubic meter under Item No. 10 of the First Schedule of the Concession Rules, as amended by the U.P. Minor Minerals (Concession) (24th Amendment) Rules, 2001 (hereinafter referred to as "the Amendment Rules"). The Government of India, Department of Mines, vide notification dated 3.2.2000, had declared the ordinary earth used for filling or leveling purposes in the construction of embankment, road, railways, building to be a minor mineral in addition to the minerals already declared as minor mineral hereinbefore under Clause (e) of Section 3 of the 1957 Act. In exercise of powers under Section 15 of the 1957 Act, the State of U.P, has amended the First Schedule of the Concession Rules by the Amendment Rules and had fixed royalty payable on ordinary earth at the rate of Rs. 4/- per cubic meter. The Government of Uttar Pradesh, vide order dated 30.1.2001, had directed all the District Magistrates and the Divisional Commissioners to ensure that ordinary earth which is being supplied to the Government Departments/public undertakings for being used in the construction work, is excavated/transported only after issuance of the necessary permits and payment of royalty. In order to effectuate the amendment made in the Concession Rules by the Amendment Rules and to check evasion of payment of royalty, the Government of Uttar Pradesh has issued an order on 2.2.2001 and 5.8.2002 wherein it has directed all the Principal Secretaries/Secretaries of the Government of Uttar Pradesh to ensure that the minor minerals, like ordinary earth, sand, morrum, ordinary clay, stone, etc which is being supplied by the contractors and are used in construction work, are transported only after payment of due royalty and accompanied by a valid form MM 11. The payment of royalty should be ensured by asking the supplier to produce the certified copy of the treasury challan evidencing payment of royalty and in cases where the royalty has not been paid on such goods, the requisite amount of royalty be deducted from the payment of the bills to the suppliers and deposited in the relevant government account.

3. The validity of the notification dated 3.2.2000 issued by the Government of India by which ordinary earth has been included in the definition of 'minor minerals' in Clause (e) of Section 3 of the 1957 Act as also the Government Orders dated 2.2.2001 and 5.8.2002 are under challenge.

4. We have heard Sarvashri S.P.Singh, H.N.Singh, learned Counsels and B.D.Mandhyan, learned senior counsel, assisted by Sri Satish Mandhyan, Advocate, on behalf of the petitioner and Sri A.N.Shukla, learned Standing Counsel, on behalf of the State of U.P. and other State respondents.

Rival submissions:

5. Sri S.P.Singh, learned Counsel, who led the arguments, submitted that ordinary earth is an item of common use by natives and by no stretch of imagination it can be treated as a minor mineral. According to him, before declaring any item to be a minor mineral under Clause (e) of Section 3 of the 1957 Act, the first and foremost requirement is that the item should answer the description of the term 'mineral', and as ordinary earth being a commodity of every day and common use does not answer the description of the term 'mineral' under the aforesaid provision. He further submitted that the notification dated 3.2.2000 issued by the Government of India has specified ordinary earth vis-avis certain uses, i.e. when the ordinary earth is used for the specified purposes only then it would be treated to be a minor mineral otherwise not, which amounts to hostile discrimination and is violative of Article 14 of the Constitution of India. He further submitted that the word 'embankment' mentioned in the aforementioned notification dated 3.2.2000, has been used in a very wide sense and would also cover embankment which is made by a villager to demarcate and protect his land and if such a wide meaning is given then every individual including the small villager would be under an obligation to take out permit and pay royalty which could not have been the intention of the Government of India.

6. Sri S.P. Singh further submitted that the Notification dated 3.2.2000 nowhere specifies distinction between ordinary clay and ordinary earth and if these two words have been used in distinct capacity, then they carry different meaning and certainly ordinary clay and ordinary earth are two different minor minerals. According to him, there is no system or mechanism or scientific process to differentiate between ordinary clay and ordinary earth. He further submitted that in the wisdom of legislature, ordinary clay and ordinary earth are two different things. According to him, ordinary clay was first included in the category of minor mineral and then by means of the notification dated 3.2.2000 ordinary earth has been included in this category.

7. Sri S.P. Singh further submitted that the State Government of Uttar Pradesh while exercising the power under Section 15 of the Act, by the Amendment Rules at serial No. 10 fixed the royalty @ Rs. 4/ per cubic meter on ordinary clay or ordinary earth and before fixing the rate of royalty for ordinary clay or ordinary earth any specific distinction has not been given that what shall constitute ordinary clay and what shall constitute ordinary earth. According to him, for ordinary clay or ordinary earth, the Hindi word used is SADHARAN MITTI but two different English words have been used i.e. ordinary clay or ordinary earth. This clearly indicate that the State Government is not clear to the meaning of the words ordinary clay and ordinary earth as for both Hindi words used is SADHARAN MITTI and this doubt is also there with the Central Government that after using the word ordinary earth it has been used as a distinct mineral other than the ordinary clay.

8. Sri S.P. Singh further submitted that under Rule 3 of the Concession Rules, mining operation can be undertaken under the mining lease or mining permit which clearly indicate that no person shall undertake the mining operation in any mining area within the State of any minor mineral to which the Concession Rules are applicable except in accordance with the terms and conditions of a mining lease or mining permit granted under the Concession Rules. Thus, any farmer for the purpose of embankment and MEDBANDI of his field is compelled to obtain mining lease or mining permit under the Concession Rules if the intent of the notification dated 3.2.2000 are applied because the word used in the Notification is leveling and construction of embankments.

9. Sri S.P. Singh further submitted that Article 39(b) of the Constitution of India provides that the ownership and control of the material resources of the community are so distributed as to best subserve the common goods whereas Article 39(c) of the Constitution of India provides that State shall, in particular, direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. According to him, this command of the Constitution of India is supreme and the notification dated 3.2.2000 has to pass the litmus test of natural justice and the command enshrined under Article 39 of the Constitution of India. According to him, the State machinery for the purpose of realizing more money included ordinary earth in the category of minor mineral and the realization of royalty in view of the impugned notification dated 3.2.2000 is running contrary to the interest of common persons and the action results to the common detriment. Thus, the Notification dated 3.2.2000 is violative of Articles 14 and 39(b) & (c) of the Constitution of India.

10. Sri S.P. Singh further submitted that ordinary earth and ordinary clay are found on the surface of the earth. Any owner of the land is owner of surface of the earth. The various laws in the State of Uttar Pradesh gives protection to owner of the land for using the Bhumidhari land both for agriculture and non-agriculture purposes. The owners of the land are paying revenue (Malguzari) to the State Government. By the notification if the ordinary earth of their fields are used for building purposes, embankment, raising of construction including the earth fencing (MED), then first they have to take permission of the District Magistrate/District Officer and then he will be liable to pay royalty @ Rs. 4/- per cubic meter. This situation will result in chaos and unrest and it will affect the livelihood, thus, the impugned notification is hit by Articles 39(a) and 21 of the Constitution of India.

11. Sri S.P. Singh further submitted that by the impugned notification the user of ordinary earth shall be put to double taxation. The Government of Uttar Pradesh in exercise of the powers conferred under Article 246(3) of the Constitution of India read with Section 15 of the Act made amendment to the Concession Rules and issued notification dated 20.3.2001 and imposed royalty on SADHARAN MITTI @ Rs. 4/- per cubic meter but the inclusion of words "ordinary earth" in the definition of Minor Minerals for certain purpose is a phenomena other than the imposition of royalty by the Government of Uttar Pradesh. According to him, the State Government of Uttar Pradesh did not obtain permission of the Central Government while imposing royalty on ordinary earth @ Rs. 4/- per cubic meter as the power of the State Government under Entry 23 of the State list is subject of the provisions of Entry 54 of the Union list. Thus, without having any permission and prior sanction of the Union Government, there cannot be imposition of royalty on ordinary earth @ Rs. 4/- per cubic meter.

12. Sri S.P. Singh further submitted that before making any amendment in any provision of the 1957 Act, the Objects and Reasons should be given and without having any distinct and specific objects and reasons, any amendment is wholly unjustified. The Notification has been issued in exercise of powers contained in Clause (e) of Section 3 of the 1957 Act but the objects and reasons have not been given. Thus, without disclosing the objects and reasons, the amendment brought in the Concession Rules is wholly illegal and violative of principle of natural justice and the same is hit by Article 14 of the Constitution.

13. Sri S.P. Singh further submitted that each of the items mentioned in the definition of 'minor minerals' is a component of ordinary earth, and the same cannot said to be identical with any one or more of those various items. If the legislature intended to cover ordinary earth within definition of minor minerals to be covered by the Act, it would simply have said so, by using the words "ordinary earth" and not by specifying some of its components and, therefore, by the notification ordinary earth has been included in the definition of minor mineral without specifying the cogent reason and the exception given in the notification cannot be given the limited meaning but a larger meaning, as different construction processes are included there including the general use for limited purpose without qualifying the limited and unlimited purpose of use of the ordinary earth.

14. Sri S.P. Singh further submitted that the petitioner being a contractor/Government Supplier, there is no liability for payment of royalty under the Concession Rules and it is only upon the lessee. In support of his aforesaid pleas, he has relied upon the following decisions:

(i) Civil Misc. Writ Petition No. 31891 of 1995, Mohd. Idris v. State of U.P. and Ors., decided on 7 1.11.1996; and

(ii) Civil Misc. Writ Petition No. 1447 of 1998, Rajendra Kistoan Lal Sanhoti, Nagpur v. Union of India and Ors., decided by the Nagpur Bench of the Bombay High Court on 19.7.1989 against which Petition for Special Leave to Appeal (Civil) Mo. 13092 of 1989 had been dismissed by the Apex Court vide order dated 7.12.1989.

15. Sri H.N.Singly learned Counsel, submitted that there is no power with the Government of Uttar Pradesh either in the 1957 Act or the Concession Rules to compel the Government contractor to ensure the payment of royalty if the same has not been paid by the lessee. According to him, the Government Order, referred to above, ultimately creates a liability for payment of royalty upon the Government contractor which deprives them of their right to property and is hit by the provisions of Articles 31A and 300A of the Constitution of India. He further submitted that fee power to impose, levy and collect the taxes, fees or charges can be done only by an authority of law as provided under Article 265 of the Constitution of India and it cannot be done under an executive fiat by invoking the provisions of Article 73 or Article 162 of the Constitution of India. According to him, the 1957 Act and the Concession Rules prescribe a particular procedure for levy and collection of royalty and, therefore, it has to be done in that manner alone. The person by whom the royalty is payable and the manner in which it has to be collected, is covered by the 1957 Act and, therefore, the State Government cannot exercise it by issuing orders. The Government Order, referred to above, places unreasonable restrictions under Article 19(1)(g) of the Constitution of India. He also invited the attention of the Court to the second proviso to Article 31A of the Constitution of India and submitted that in view of the provisions of Section 142 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 the Bhumidhars have exclusive right over the land in their possession which includes the ordinary earth on its surface and, therefore, such Bhumidhars are not required to pay the royalty on the ordinary earth available on the surface of their land. In any event, he submitted that the State ought to have provided compensation as required under the second proviso, referred to above.

16. Sri H.N. Singh referred to Section 9 of the 1957 Act which fixed the liability for payment of royalty on the holder of a mining lease and the consumer is not liable. Referring to Section 13 of the 1957 Act, he submitted that the Central Government has been empowered to make Rules in respect of the minerals whereas under Section 15 the State Government has been empowered to make Rules in respect of the minor minerals. Referring to Clause (g) of Sub-section (1-A) of Section 15 of the 1957 Act he submitted that the State Government has been empowered to make Rules by notification in the official gazette for fixing and collection of rent, royalty etc. including the time within which and the manner in which these shall be payable. He, thus, submitted that when the Concession Rules had been framed by the Government of Uttar Pradesh in exercise of the powers conferred under Section 15 of the 1957 Act, care has been taken to specify every aspect relating to mining operations in respect of a minor mineral, payment of royalty, grant of permit, lease and collection thereof. He referred to Rules 3, 21, 54, 55, 58, 67, 70 and 71 of the Concession Rules and submitted that from a reading of the Concession Rules it would be seen that if a person is not doing any mining, such person is not within the purview of the 1957 Act or the Concession Rules. According to him, even if a person is found to be transporting any minor mineral without any valid form MM 11, there is no provision for realisation of royalty or imposition of penalty except for imposition of fine and imprisonment upon such person. In support of his aforesaid submissions, he has relied upon the following decisions:

(i) Kailash Nath and Anr. v. State of U.P. and Ors. ;

(ii) State of Kerala and Ors. v. P.J. Joseph ;

- (iii) B.N. Nagarajan and Ors. v. State of Mysore and Ors. ;
- (iv) Chief Settlement Commissioner, Punjab and Ors. v. Om Prakash and Ors. ;
- (v) Bishambar Dayal Chandra Mohan etc. etc. v. State of U.P. and Ors. ;
- (vi) State of Sikkim v. Dorjee Tshering Bhutia and Ors. ;
- (vii) Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla and Ors. ;
- (viii) Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala and Ors. ;
- (ix) Hindustan Times and Ors. v. State of U.P. and Anr. ; and
- (x) Captain Sube Singh and Ors. v. The Lt. Governor of Delhi and Ors. .

17. Sri B.D. Mandhyan, learned Senior Counsel, submitted that ordinary earth is not a minor mineral for which he has relied upon the decision of the Nagpur Bench of the Bombay High Court in the case of Rajendra Kishan Lal Sanhoti (supra). He further submitted that the Government of India as also the State of U.P. lack legislative competence in issuing notification declaring ordinary earth as a minor mineral. According to him, there is no agreement regarding charging of royalty on ordinary earth in the contract and, therefore, the petitioners are not liable to pay any royalty nor the contractee can deduct any amount towards the alleged royalty on ordinary earth supplied by the contractor. According to him, there is no provision in the Concession Rules regarding liability for payment of royalty on non-permit holder or non-lease holder and, therefore, the petitioners are not liable to pay any royalty. In support of his aforesaid submissions, he has relied upon the following decisions:

- (i) Sharma & Co. and Ors. v. The State of U.P. and Ors. ;
- (ii) Banarasi Dass Chadha and Bros. v. Lt. Governor, Delhi Administration and Ors. ;
- (iii) State of Orissa and Ors. v. Mahanadi Coalfields Ltd. and Ors. ;
- (iv) Vir Singh @ Mitthu Lal v. State of U.P. and Ors. 2003 (50) ALR 148; and
- (v) The State of West Bengal and Anr. v. Kesoram Industries Ltd. and Ors. .

18. Sri A.N. Shukla, learned Standing Counsel, submitted that the Government of India, vide notification dated 3.2.2000, had declared ordinary earth used for certain specific purpose to be minor mineral within the meaning of Clause (e) of Section 3 of the 1957 Act. The Government of Uttar Pradesh has consequently amended the Concession Rules by the Amendment Rules providing the rate of royalty @ Rs. 4 per cubic meter on ordinary earth. The amendment has been made in exercise of the powers conferred under Section 15 of the 1957 Act and not in exercise of the powers conferred under Entry 23 of List 11 of the Seventh. Schedule. He submitted that ordinary earth is a mineral and, therefore, has rightly been declared to be a minor mineral. It makes no difference whether it is used by the villagers or any body else. The moment it is used for the purpose specified in the Government of India notification dated 3.2.2000, viz. filling or leveling purposes in construction of embankment, roads, Railways, buildings, it would be a minor mineral and the provisions of the 1957 Act and the Concession Rules would be applicable. He further submitted that the royalty is not a tax and, therefore, the provisions of Article 265 of the Constitution of India would not be applicable. It does not impose any unreasonable restriction on the petitioners' right to carry on trade or business. According to him, the provisions of Articles 31A and 300A of the Constitution of India are not at all attracted. He, therefore, submitted that the State of U.P. is within its competence/jurisdiction to charge royalty on ordinary earth and

further to issue directions/orders for ensuring that due royalty is paid on such item. By the Government Order, he submitted, the supplier is only required to carry the original form MM 11 which is a prerequisite for transporting any minor mineral if excavated within the State of U.P. and for producing the certified/attested copies of the treasury challan evidencing payment of royalty on such goods failing which the amount of royalty has to be deducted by the contractee/Government Department while making payment to the contractor. In support of his aforesaid submissions, he has relied upon the following decisions.:

(i) Banarasi Dass Chadha and Bros., v. Lt. Governor, Delhi Administration and Ors. ;

(ii) The Land Acquisition Officer, City Improvement Trust Board v. H. Narayanaiah and Ors. (1976) 4 SCC 10; and

(iii) State of Bihar and Anr. v. Bal Mukund Sah and Ors. (2000) 4 SCC 640.

19. We have given our thoughtful consideration to the various pleas raised by the learned Counsel for the parties.

20. For the proper appreciation of the controversy involved in the present case, it is necessary to reproduce below the provisions of the Constitution of India and of various enactments:

Provisions:

Constitution of India:

14. Equality before law.-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India,

19. Protection of certain rights regarding freedom of speech, etc.-(1) All citizens shall have the right-

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

and

(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in Sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in Sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in Sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in Sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to. or prevent the State from making any law relating to,-

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

21. Protection of life and personal liberty.-No person shall be deprived of his life or personal liberty except according to procedure established by law.

31A. Saving of laws providing for acquisition of estates, etc.-

(1) Notwithstanding anything contained in Article 13, no law providing for-

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for

the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

(2) In this article,-

(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include-

(i) any jagir, inam or muafi or other similar grant and in the States of Tamil Nadu and Kerala, any janmam right;

(ii) any land held under ryotwari settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;

(b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue.

39. Certain principles of policy to be followed by the State.-The State shall, in particular, direct its policy towards securing-

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

73. Extent of executive power of the Union.-

(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend-

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in Sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

162. Extent of executive power of State.-Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

246. Subject-matter of laws made by Parliament and by the Legislatures of States.- (1) Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

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

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

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

265. Taxes not to be imposed save by authority of law.-No tax shall be levied or collected except by authority of law.

300A. Persons not to be deprived of property save by authority of law.- No person shall be deprived of his property save by authority of law.

SEVENTH SCHEDULE

(Article 246)

List I-Union List

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.

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.

The U.P.Zamindari Abolition and Land Reforms Act, 1950:

142. Right of a Bhumidhar to the exclusive possession of all land in his holding. -- (1) A bhumidhar with transferable rights shall, subject to the provisions of this Act, have the right to exclusive possession of all land of which he is a bhumidhar and to use it for any purpose whatsoever.

(2) A bhumidhar with non-transferable rights shall, subject to the provisions of this Act, have the right to exclusive possession of all land of which he is such bhumidhar and to use such land for any purpose connected with agriculture, horticulture or animal husbandry which includes pisciculture, poultry farming and social forestry.

The Mines and Minerals (Regulation and Development) Act, 1957:

2. Declarations as to expediency of Union Control.-It is hereby declared that it is expedient in the public interest that the union should take under its control and regulation of mines and the development of minerals to the extent hereinafter provided.

3. Definitions....

(e) "minor minerals" means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral.

7. Periods for which prospecting licences may be granted or renewed. -(1) The period for which (reconnaissance permit or prospecting licence) may be granted shall not exceed three years. (2) A prospecting licence shall, "if the State Government is satisfied that a longer period is required to enable the licensee to complete prospecting operations, be renewed for such period or periods as that Government may specify:

Provided that the total period for which a prospecting licence is granted does not exceed five years.

Provided further that no prospecting licence granted in respect of a mineral included in Part A and Part B to the First Schedule shall be renewed except with the previous approval of the Central Government.

9. Royalties in respect of mining lease. - (1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral removed by or consumed by him or by his agent, manager, employee, contractor or sub-lease from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2) The holder of a mining lease granted on or after commencement of this Act shall pay royalty in respect of [any mineral removed by or consumed by him or by his agent, manager, employee, contractor or sub-lessee] from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2-A) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulations and Development) Amendment Act, 1972 shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one third of a tonne per month.]

(3) The Central Government may, by notification in Official Gazette amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:

Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of three years.

15. Power of State Government to make rules in respect of minor minerals. -

(1) The State Government may, by notification in the Official Gazette, make Rules for regulating the grant of quarry leases and mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith.

(1-A) 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) the person whom and the manner in which, applications for quarry leases and mining leases or other mineral concessions may be made and the fees to be paid therefore;

(b) the time within which, and the form in which, acknowledgement of the receipt of any such applications may be sent;

(c) the matters which may be considered where applications in respect of the same land are received within the same day;

(d) the terms on which, and the conditions subject to which and the authority by which quarry leases, mining leases or other mineral concession may be granted or renewed;

(e) the procedure for obtaining quarry leases, mining leases or other mineral concessions;

(f) the facilities to be afforded by holders of quarry leases, mining leases or other mineral concession to person deputed by the Government for the purpose of undertaking research or training in matters relating to mining operation;

(g) the fixing and collection of rent, royalty, fees, dead rent, fines or other charges and the time within which and the manner in which these shall be payable;

(h) the manner in which rights of third parties may be protected (whether by way of payment of compensation or otherwise) in cases where any such party is prejudicially affected by reason of any prospecting or mining operations;

(i) the manner in which rehabilitation of flora and other vegetation of any quarrying or mining operation shall be made in the same area or in any other area selected by the State Government (whether by way of reimbursement of the cost of rehabilitation or otherwise) by the person holding the quarrying or mining lease;

(j) the manner in which and the conditions subject to which, a quarry lease, mining lease or other mineral concession may be transferred;

(k) the construction, maintenance and use of roads, power transmission lines, tramways, aerial, ropeways, pipelines and the making of passage for water for mining purposes on any land comprised in a quarry of mining lease or other mineral concession;

(l) the form of registers to be maintained under this Act;

(m) the report and statement to be submitted by holders of quarry or mining leases or other mineral concession and the authority to which such reports and statements shall be submitted.

(n) the period within which and the manner in which and the authority to which applications for revision of any order passed by any authority under these rules may be made, the fees to be paid therefore, and the

powers of the revisional authority; and

(o) any other matter which is to be, or may be prescribed.

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

(3) The holder of a mining lease or any other mineral concessions granted under any rule made under Sub-section (1) shall pay royalty or dead rent whichever is more in respect of minor mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee at the rate prescribed for the time being in the rules framed by the State Government in respect of minor minerals:

Provided that the State Government shall not enhance the rate of royalty or dead rent in respect of any minor mineral for more than once during any period of three years.

The Uttar Pradesh Minor Minerals (Concession) Rules, 1963:

2. Definitions. -

(7) "Minor Minerals" means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government has declared from time to time or may declare, by notification in the Official Gazette, to be a minor mineral, under Clause (e) of Section 3 of the Mines and Minerals (Regulation and Development) Act, 1957 (Act No. 67 of 1957)

3. Mining operations to be under a mining lease or mining permit.- (1) No person shall undertake any mining operations in any area within the State of any minor mineral to which this rules are applicable except under and in accordance with the terms and conditions of a mining lease or mining permit granted under these rules:

Provided that nothing shall affect any mining operations undertaken in accordance with the terms and conditions of a mining lease or permit duly granted before the commencement of these rules.

(2) No mining lease or mining permit shall be granted otherwise than in accordance with the provisions of these rules.

21. Royalty- (1) The holder of a mining lease granted on or after the commencement of these rules shall pay royalty in respect of any mineral removed by him from the leased area at the rate for the time being specified in the First Schedule to these rules.

(2) The State Government may, by notification, in the Gazette amend the First Schedule so as to include therein or exclude therefrom or enhance or reduce the rate of - royalty in respect of any mineral with effect from such date as may be specified in the notification.

Provided that the State Government shall not enhance the rate of royalty in respect of any mineral for more than once during any period of three years and shall not fix the royalty at the rate of more than 20 per cent of the pit's mouth values.

(3) Where the royalty is to be charged on the pit's mouth value of the mineral the State Government may assess such value at the time of the grant of the lease and the rate of royalty will be mentioned in the lease deed. It shall be open to the State Government to reassess not more than once in a year the pit's mouth value, if it considers that an enhancement is necessary.

54. Deposit of royalty- (1) When an order granting a mining permit has been made under Rule 53, the applicant shall, within fifteen days of the communication of the order, deposit the royalty for the total quantity of the mineral permitted in the said order at the rate of the time being specified in the First Schedule to these rules and if the holder of the permit, due to any reason attributable on this part, could not remove the mineral within the permitted time, any amount deposited as royalty shall not be refunded.

(2) If the applicant fails to deposit the royalty within the period mentioned in Sub-rule (1) or within such further period as may be allowed by the officer granting the permit shall stand revoked and the fee mentioned in Clause (1) of Rule 52 shall be forfeited to the State Government.

55. Issue of mining permit.- A mining permit in Form MM-10 with such additional terms and conditions subject to which the order is made under Rule 53 shall be issued to the applicant within fifteen days of the deposit of the royalty in accordance with Sub-rule (1) of Rule 54 and the permit so issued shall be valid until the date of expiry of the period specified in the permit or till such date when the permitted quantity of the mineral is removed whichever is earlier.

58. Consequences of non-payment of royalty, rent or other dues.- (1) The State Government or any officer authorized by it in this behalf may determine the mining or auction lease after serving a notice on the lessee to pay within thirty days of the receipt of the notice any amount due or dead rent under the lease including the royalty due to the State Government if it was not paid within fifteen days next after the date of fixed for such payment. This right shall be in addition to and without prejudice to the right of the State Government to realize such dues from the lessee as arrears of land revenue, (2) Without prejudice to the provisions of these rules, simple interest at the rate of 24 per cent per annum may be charged on any rent royalty, demarcation fee and any other dues under these rules, due to the State Government after the expiry of the period of the notice under Sub-rule (1).

64. Mode of payment of fees and deposit. - Any amount payable under these rules shall be paid in such manner as the State Government may specify in this behalf.

66. Power of assessment, entry and inspections. - (1) For the purpose of assessment of royalty and for ascertaining the position of the working, actual or prospective, of any mine or abandoned mine or for any purpose connected with these rules, the District Officer or the Officers of the Directorate of Geology and Mining, Uttar Pradesh, not below the rank of Mines Inspector appointed for such purposes by the Director or any other officer authorized in this behalf by the State Government by general or special order, may-

(a) enter and inspect any mine,

(b) survey and take measurement in any such mine,

(c) weigh, measure or take measurement of the stock of mineral lying at any mine.

(d) examine any document book, register or record in the possession or power of any person having the control of or connected with any mine and place marks of identifications thereon and take extracts from or, make copies of such document, book register or records.

(e) summon or order the production of any such document, book, register or record as is referred to in Clause (d),

(f) summon or examine any person having the control of, or connected with any mine, and

(g) call for such information or return as may be considered necessary.

(2) Every person authorized by the State Government under Sub-rule (1) shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code and every person to whom an order of summons is issued by virtue of powers conferred by Clause (e) or Clause (f) of the said sub-rule shall be legally bound to comply with such order or summons, the case may be.

67. No restriction etc. to be imposed by owner of land on mining operation except demand of compensation. -

(1) No person, who has right in any capacity on the land covered by a mining lease or mining permit, shall be entitled to impose any prohibition or restriction on the mining operation by the holder or such lease or permit of such land or to demand any sum by way of premium or royalty for the removal of minor mineral;

Provided that such person shall be entitled to get annual compensation from the said holder of mining lease or permit for the use of surface of the land for mining operations, as may be agree upon between them.

(2) Where the holder of a mining lease or permit and the owner of the surface of the land could not agree upon the amount of annual compensation and a dispute arises in respect thereof, it shall be determined by the District Officer in such manner that-

(a) in the case of agricultural land, the amount of annual compensation shall be worked out on the basis of average annual net income from the cultivation of similar land for the past three years, and

(b) in the case of non-agricultural land, the amount of annual compensation shall be worked out on the basis of average annual letting value of similar land for the previous three years.

70. Restriction of transport of minerals.- (1) The holder of mining lease or permit or a person authorized by him in this behalf may issue a pass in Form MM-11 to every person carrying a consignment of minor mineral by a vehicle, animal or any other mode of transport. The State Government may, through the District Officer, make arrangements for the supply of printed MM-11 Form books on payment basis.

(2) No person shall carry, within the State, a minor mineral by a vehicle, animal or any other mode of transport excepting railway, without carrying a pass in Form MM-11 issued by Sub-rule (1).

(3) Every person carrying any minor mineral shall, on demand by any officer authorized under Rule 66 or such officer as may be authorized by the State Government in this behalf, show the said pass to such officer and allow him to verify the correctness of the particulars of the pass with reference to quantity of the minor mineral.

(4) The State Government may establish a check post for any area included in any mining lease or permit, and when a check post is so established public notice shall be given of this fact by publication in the Gazette and in such other manner as may be considered suitable by the State Government.

(5) No person shall transport a minor mineral for which these rules apply from such area without first presenting the mineral at the check post established for that area for verification of the weight or measurement of the mineral.

(6) Any person found to have contravened any provision of this rule shall, on convictions, be punishable with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

71. Delegation. - The State Government may, by notification direct that any power exercisable by it under these rules may in relation to such matters and subject to such conditions, as may be specified in the notification, be exercisable also by such officer or authority subordinate to the State Government as may be specified in the notification.

FIRST SCHEDULE

Minerals Rate of Royalty

10. Ordinary clay or Ordinary earth Rs. 4.00 per cubic meter

Findings and discussions:

Presumption regarding constitutionality:

21. It is well settled that an Act is presumed to have been enacted within the four corners of the provisions of the Constitution. There is a presumption regarding its constitutionality.

22. In the case of Charanjit Lal Chowdhury v. The Union of India and Ors. , and Shri Ram Krishna Dalmia and Ors. v. Shri Justice S.R. Tendolkar and Ors. , the Apex Court has held that it is well founded that the presumption is always in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been clear transgression of the constitutional principles.

23. In the case of The State of Bombay and Anr. v. F.N. Balsara AIR 1951 SC 318, and Mahant Modi Das v. S.P. Sahi , the Apex Court has held that the presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

24. The aforesaid decisions have been followed by the Apex Court in the case of Hamdard Dawakhana and Anr. v. The Union of India and Ors. .

25. In the case of Jalan Trading Co. Pvt. Ltd. v. Mill Mazdoor Sabha , the Apex Court has held that there is a presumption regarding constitutionality of a statute when the challenge is founded on Article 14 of the Constitution and the onus of proving unconstitutionality lies upon the person challenging it.

26. The Apex Court in the case of The Superintendent and Remembrancer of Legal Affairs, West Bengal v. Girish Kumar Navalakha and Ors. , has held that approach of judicial restraint and presumption of constitutionality requires that the legislature is given the benefit of doubt about its purpose.

27. In the case of State of Bihar v. Bihar Distillery Ltd. , the Apex Court has held that the approach of the Court while examining the challenge to the constitutionality of an enactment is to start with the presumption of constitutionality and the Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Apex Court has further held that the Court should not approach the enactment with a view to pick hole or to search defects for drafting much less inexactitude of language employed. Indeed any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. Unconstitutionality must be plainly and clearly established before the enactment is declared as void.

28. In the case of Union of India v. Elphinstone Spinning and Weaving Co. Ltd. and Ors. , the Apex Court has held that a statute is construed so as to make it effective and operative.

29. There is always a presumption that the legislature does not exceed its jurisdiction and the burden of establishing that the legislature has transgressed constitutional mandates such as, those relating to fundamental rights is always on the person who challenges its vires. Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the

Constitution it must be allowed to stand as the true expression of the national will.

30. In view of the settled principle as laid down by the Apex Court in the aforementioned cases, we have to proceed on the premises that the notification dated 3.2.2000 issued by the Central Government, the Amendment Rules are valid unless it is otherwise proved by the petitioners.

Legislative competence of Parliament or the

State Legislature to enact laws:

31. So far as the legislative competence of the Parliament or the State Legislature to enact laws relating to regulations of mines and mineral development is concerned, it may be mentioned here that Article 245 of the Constitution of India is the fountain source of the legislative powers.

32. In the case of Kesoram Industries Ltd. (supra) the Constitution Bench of the Hon'ble Supreme Court had occasion to deal with the legislative power under Article 245 of the Constitution of India, The Apex Court has held as follows:

31. 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 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 the Seventh Schedule, called the "Union List". Subject to the said power of 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 summarised and restated by a Bench of three learned Judges of this Court on a review of the available decision in Hoechst Pharmaceuticals Ltd. v. State of Bihar. 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 lists 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 the 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 List 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 Anr. 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.

33. The 1957 Act has been enacted by the Parliament under Entry 54 of List I. i.e., the Union List, of the Seventh Schedule. Section 2 of the 1957 Act empowers the Union to make a declaration taking under its control and regulation of the mines and development of minerals to the extent provided therein. Under the scheme of the 1957 Act, the Union has taken under its control the regulation of mines and development of all minerals. However, in respect of minor minerals which have been defined in Clause (e) of Section 3 of the 1957 Act, the State Government have been entrusted to regulate. Under Clause (e) of Section 3 of the 1957 Act, building stone, gavel, ordinary clay, ordinary sand other than sand used for the prescribed purpose, have been defined to mean minor minerals. It also empowers the Central Government to declare any other mineral by a notification in the official gazette to be a minor minerals.

34. By Section 15 of the 1957 Act the State Government has been empowered by notification in the official gazette to make Rules for regulating the grant of quarry leases and mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith. Clause (g) of Sub-section (1-A) of Section 15 of the 1957 Act empowers the State Government to make Rules for fixing and collection of rent, royalty, fee, dead rent, fine or other charges and the time within which and the manner in which these shall be payable.

35. The Government of Uttar Pradesh in exercise of the powers conferred under Section 15 of the 1957 Act has framed the Concession Rules. Sub-rule (7) of Rule 2 of the Concession Rules defines 'minor minerals'. It has adopted the definition of the words 'minor minerals' as that given in Clause (e) of Section 3 of the 1957 Act. Rule 3 mandates a person not to undertake any mining operation or any minor minerals except and in accordance with the terms and conditions of a mining lease or a mining permit granted under the Concession Rules. Rule 21 prescribes the payment of royalty by the holder of a mining lease. It empowers the State Government to fix the royalty payable by the holder of a mining lease. Sub-rule (2) thereof empowers the State Government to reduce or enhance or to exclude payment of royalty in respect of any mineral. Rule 54 deals with manner in which the royalty has to be deposited whereas Rule 55 deals with the issue of mining permit. Rule 58 provides for the consequences of non-payment of royalty, rent or other dues. Rule 64 provides the mode of payment of fee and deposit which the State Government may specify in this behalf. Rule 66

empowers the authorities for making assessment, enter and inspect any mine whereas Rule 67 provides that the owner of the land cannot place any restriction on mining operation except for demand of compensation. Rule 70 deals with the restriction on transport of minerals. It specifically provides that a pass in form MM 11 has to be carried by every person carrying a minor mineral by a vehicle, animal or any other mode of transport, excepting railway, without carrying a pass in form MM 11 and the person contravening such provision would be punished with imprisonment which may extend to six months or fine which may extend to Rs. 1,000/- or with both. Rule 71 provides for delegation of power upon such authority as may be specified in the notification.

36. In the case of India Cement Ltd. and Ors. v. State of Tamil Nadu and Ors., a seven Judges Constitution Bench of the Apex Court had occasion to consider the scope of various entries in the three Lists and has held as follows:

17. In Re C.P. and Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938 Bwyer, C.J. of the Federal Court of India relied on the observations of Lord Wright in James v. Commonwealth of Australia and observed that a Constitution must not be construed in any narrow or pedantic sense, and that construction most beneficial to the widest possible amplitude of its powers, must be adopted. The learned Chief Justice emphasized that a broad and liberal spirit should inspire those whose duty it is to interpret the Constitution, but they are not free to stretch or pervert the language of the enactment in the interest of any legal or constitutional theory, or even for the purposes of supplying omissions or correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law but it may rightly reflect that a Constitution of a country is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat* - 'It is better that it would live than that it should perish'.

18. Certain rules have been evolved in this regard, and it is well settled now that the various entries in the three lists are not powers but fields of legislation. The power to legislate is given by Article 246 and other articles of the Constitution. See the observations of this Court in Calcutta Gas Co. v. State of West Bengal. The entries in the three lists of the Seventh Schedule to the Constitution, are legislative heads or fields of legislation. These demarcates the area over which appropriate legislature can operate. It is well settled that widest amplitude would be given to the language of these entries, but some of these entries in different lists or in the same list may overlap and sometimes may also appear to be in direct conflict with each other. Then, it is the duty of the court to find out its true intent and purpose and to examine a particular legislation in its pith and substance to determine whether it fits in one or the other of the lists. See the observations of this Court in H.R. Banthia v. Union of India and Union of India v. H.S. Dhillon. The lists are designed to define and delimit the respective areas of respective competence of the Union and the States. These neither impose any implied restriction on the legislative power conferred by Article 246 of the Constitution, nor prescribe any duty to exercise that legislative power in any particular manner. Hence, the language of the entries should be given widest scope, to find out which of the meaning is fairly capable because these set up machinery of the government. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other one in the same list. It is in this background that one has to examine the present controversy.

37. In the case of Kesoram Industries Ltd. (supra) the Constitution Bench of the Hon'ble Supreme Court had occasion to examine the inter-relation of Entry 54 of List I and Entry 23 of List II of the Seventh Schedule. The Apex Court has held as follows:

73. The analysis of decided cases as made by eminent constitutional jurist H.M. Seervai in his work on Constitutional Law of India (4th/Silver Jubilee Edn., Vol.3) is apposite. Vide para 22.168, he states:

22.168. In *Governor General in Council v. Province of Madras* AIR 1945 PC 98 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 of 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. Gose & Co. (Agents) (P) Ltd. v. State of 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.

(emphasis in original)

74. 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. v. State of A.P.* AIR 1958 SC 468. 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. (AIR p.493, para 51)

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 Article 248 Clauses (1) and (2) and of Entry 97 in List 1 of the Constitution. Under the scheme of the entries in the lists, taxation is regarded as a distinct matter and is separately set out. (AIR 494, paras 51 & 55)

4. The entries in the legislative lists must be construed broadly and not narrowly or in a pedantic manner. (AIR p.494, para 56)

5. The entries in the two lists-Lists 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 much 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 v. Province of Madras* AIR 1945 PC 98 and *Province of Madras v. Boddu Paidanna & Sons*. AIR p.495, paras 56-57)

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.(AIR pp.494-95, para 56)

(italicised by us)

75. Referring to M.P. V. Sundararamier & Co. [M.P.V. sundaramier & Co. v. State of A.P.] Sabyasachi Mukharji, J. (as His Lordship then was) speaking for six out of the seven Judges constituting the Bench in Synthetics and Chemicals Ltd. v. State of U.P. AIR 1990 SC 1927 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.

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

38. Referring to the Constitution Bench decision of the Apex Court in the case of Hingir Ranipur Coal Company Limited v. State of Orissa AIR 1961 SC 459, the Apex Court has further held as follows:

92. The Constitution Bench laid down the following principles winch 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 the the power of the State to enact legislation on the topic of "mines and mineral development" is plenary. The relevant provision in List 1 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.(AIR p. 1287, para 5)

(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.(AIR p. 12887, para 6)

(emphasis supplied)

39. The Apex Court in the case of Kesoram industries Ltd. (supra) has culled out the relevant principle in paragraph 129 of the report as follows:

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

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

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

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

(4) Entries 52, 53 and 54 in List I are not heads of taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of the Union having enacted laws by reference to Entries 52, 53 and 54 in List I. It is for the Union to legislate and impose limitations on the States' otherwise plenary power to levy taxes on mineral rights or taxes on lands (including mineral-bearing lands) by reference to Entries 50 and 49 in List II, and lay down the limitations on the States' 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 the 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 the 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 the State Legislature cannot be annulled as unconstitutional merely because it

may have an effect 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 the 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 the 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 the 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 92-B 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 % 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 Parliament by law relating to mineral development 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.

40. Applying the principle laid down in the aforesaid case, we find that the 1957 Act has been enacted by the Parliament which is referred to Entry 54 of List I of the Seventh Schedule and the Concession Rules have not been framed by the State Legislature under Entry 23 of List II. On the other hand, it has been framed under Section 15 of the 1957 Act as a delegatee of the Union with regard to minor minerals.

41. This leaves us to the challenge to the validity of the notification dated 3.2.2000 issued by the Government of India including ordinary earth used for specified purposes to be a minor mineral. In order to appreciate the submission it is necessary for us to deal as to what is ordinary earth. This word has not been defined either under the 1957 Act or the Concession Rules. So we have to fall on the dictionary meaning.

42. In the New Shorter Oxford English Dictionary, 1993 Edition, at page 775, "earth" has been given various meanings. The meanings which is relevant for our purpose, are given as follows:

1. The material of the ground.

2. The soil as suitable for cultivation,
3. The material which makes up the earth's surface, soil, mould, dust, clay.
4. A particular substance having properties of stability, dryness, non-volatility, lack of taste or smell, etc. associated with the material of the ground, spec, in Chem., a metallic oxide with these properties.

43. In Words and Phrases, Permanent Edition, Volume 14, at page 44, "earth" has been mentioned as follows:

Earth" is defined as soil of all kinds including gravel, clay, loam, and the like, in distinction from firm rock. The term also includes hardpan, which is a hard stratum of earth. *Highley v. Phillips*, 5 A.2d. 824, 828, 176 Md. 463.

Earth", in Chemistry, is a metallic oxide, inodorous, dry, unflammable, and infusible. *Jenkins v. Johnson*, C.C.N.Y., Fed. Cas No. 7, 271, 9 Blatchf. 516, 5 Fish.Pat.Cas. 433.

44. In Law Lexicon by P. Ramanatha Aiyar, 1997 Edition, at page 611, the following meaning has been given:

Earth includes clay however "Ordinary Earth" is not identical with "Ordinary clay. Whereas "Ordinary clay" is a minor mineral under Schedule I, "Ordinary earth" is not a mineral. *State of West Bengal v. Jagadamba Prasad Singh* .

45. In the case of *Banarasi Dass Chadha and Bros.* (supra) the Apex Court has held that there is no reason why the earth used for the purpose of making bricks should not be comprehended within the meaning of the word "any other mineral", which may be declared as a minor mineral by the Government of India. It has held in paragraphs 4, 5 and 6 as follows:

4. We agree with the learned Counsel that the substance must first be a mineral before it can be notified as a minor mineral pursuant to the power vested in the Central Government under Section 3(e) of the Act. The question, therefore, is whether brick-earth is a mineral. The expression "Minor Mineral" as defined in Section 3(e) includes 'ordinary clay' and 'ordinary sand'. If the expression "minor mineral" as defined in Section 3(e) of the Act, includes 'ordinary clay and 'ordinary sand', there is no reason why earth used for the purpose of making bricks should not be comprehended within the meaning of the words "any other mineral" which may be declared as a "minor mineral" by the Government. The word "mineral" is not a term of art. It is a word of common parlance, capable of a multiplicity of meanings depending upon the context. For example the word is occasionally used in a very wide sense to denote any substance that is neither animal nor vegetable. Sometimes it is used in a narrow sense to mean no more than precious metals like gold and silver. Again the word "minerals" is often used to indicate substance obtained from underneath the surface of the earth by digging or quarrying. But this is not always so as pointed out by Chandrachud, J, (as he then was) in *Bhagwan Dass v. State of Uttar Pradesh* where the learned Judge said (at p. 874 (of SCR): at P. 1397 of AIR):

It was urged that the sand and gravel are deposited on the surface of the land and not under the surface of the soil and therefore they cannot be called minerals and equally so, any operation by which they are collected or gathered cannot properly be called a mining operation. It is in the first place wrong to assume that mines and minerals must always be sub-soil and that there can be no minerals on the surface of the earth. Such an assumption is contrary to informed experience. In any case, the definition of mining operations and minor minerals in Section 3(d) and (e) of the Act of 1957 and Rule 2(5) and (7) of the Rules of 1963 shows that minerals need not be subterranean and that mining and that mining operations cover every operation undertaken for the purpose of "winning" any minor mineral. "Winning does not imply a hazardous or perilous activity. The word simply means "extracting a mineral" and is used generally to indicate any activity by which a mineral is secured. "Extracting" in turn, means drawing out or obtaining. A tooth is 'extracted' as much as is

fruit juice and as such as a mineral. Only that the effort varies from tooth to tooth, from fruit to fruit and from mineral to mineral.

5. We may also refer to Northern Pacific Railway Company v. John A. Sedrbarg (1902) 47 Law Ed 575, where the Supreme Court of United States observed as follows (at p. 581):

the word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definition of the dictionary throw but little light upon its signification in a given case. Thus, the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore, could not be excepted from the grant without being destructive of it. Upon the other hand, a definition which would confine it to the precious metals - gold and silver - would so limit its application as to destroy at once half the value of the exception. Equally subversive of the grant would be the definition of minerals found in the Century Dictionary; as "any constituent of the earth's crust;" and that of Bainbridge on Mines: "All the substances that now form, or which once formed, a part of the solid body of the earth." Nor do we approximate such more closely to the meaning of the word by treating minerals as substances which are "mined" as distinguished from those which are "quarried", since many valuable deposits of gold, copper, iron and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such for instance, as the Caen-stone in France, is excavated from mines running far beneath the surface, This distinction between underground mines and open workings was expressly repudiated in Midland R.C. v. Haunchwood Brick and Tile Co. ((1882) 20 Ch. Div. 552) and in Hext v. Gill (1972) 7 Ch 699.

6. The Supreme Court of United States also referred to several English cases where stone for road making or paving was held to be 'minerals', as also granite, sandstone, flint stone, gravel, marble, fire clay, brick-clay, and the like. It is clear that the word "mineral" has no fixed but a contextual connotation.

46. It has further held that in the context of the Mines and Minerals (Regulation and Development) Act, they have no doubt that the word 'mineral' is of sufficient amplitude to include 'brick-earth'. The Apex Court has also observed, if the expression 'minor mineral' as defined in the Act includes 'ordinary clay' and "ordinary sand", there is no earthly reason why 'brick-earth' should not be held to be 'any other mineral' which may be declared as a 'minor mineral'. The Apex Court has approved of the views taken by the Patna High Court in the case of Laddu Mal v. State of Bihar , Amar Singh Modilal v. Stte of Haryana (F.B.) and Sharma & Co. v. State of U.P. AIR 1973 Allahabad 386 and had disapproved the view of the Calcutta High Court in the case of State of West Bengal v. Jagadamba Prasad , It may be mentioned here that the Calcutta High Court had held that as no body speaks of ordinary earth as a mineral, it is not a mineral as defined in the 1957 Act.

47. From the aforesaid it is seen that even ordinary earth is a mineral provided it has been so declared by the Union under Clause (e) of Section 3 of the 1957 Act. The Government of India having notified ordinary earth used for the specific purposes to be a minor mineral, it cannot be said that it is wholly without jurisdiction or lacks legislative competence.

Directive Principles vis-a-vis Fundamental Rights :

48. It may be mentioned here that a Constitution Bench of the Apex Court in the case of State of Bombay v. F.N. Balsara AIR 1951 SC 318, had ruled that in judging the reasonableness of the restrictions imposed on the fundamental rights, one has to bear in mind the directive principles of State policy set forth in Part IV of the Constitution, while examining the challenge to the constitutional validity of law by reference to Article 19(1)(g) of the Constitution.

49. In the case of Waman Rao and Ors. v. Union of India and Ors. , the Apex Court has held that mere abridgement, that is to say curtailment, and not necessarily abrogation, that is to say deprivation, is enough to produce the consequences provided for by Article 13(2), It has further held that it is impossible to conceive

that any law passed for the purpose of giving effect to Sub-clauses (b) and (c) of Article 39 which are vital to the well being of the country and welfare of its people, at all violated Article 14 or 19 of the Constitution and in fact far from damaging the basic structure of the Constitution, laws passed truly and bona fide for giving effect to the directive principles will fortify that structure.

50. Again the Apex Court in M.R.F. Ltd. v. Inspector, Kerala Govt. , on a conspectus of its various prior decisions summed Up the principles as "clearly discernible", out of which three that are relevant for our purpose, are extracted and reproduced hereunder (SCC p.233, para 13):

13. On a conspectus of various decisions of this Court, the following principles are clearly discernible:

(1) While considering the reasonableness of the restrictions, the court has to keep in mind the directive principles of State policy.

... ..

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

... ..

(6) There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise. (See K.K. Kochuni v. State of Madras and Kerala ; O.K. Ghos v. E.X. Joseph .)

51. In the case of Indian Handicrafts Emporium v. Union of India , the Apex Court while dealing with the case of a total prohibition reiterated that "regulation" includes "prohibition" and in order to determine whether total prohibition would be reasonable, the Court has to balance the direct impact on the fundamental right of the citizens as against the greater public or social interest sought to be ensured. Implementation of the directive principles contained in Part IV is within the expression of "restriction in the interests of the general public.

52. In the case of Indira Sawhney etc. etc. v. Union of India and Ors. , the Apex Court has held as follows:

4. The doctrine of equality has many facets. It is a dynamic, and an evolving concept. Its main facets, relevant to Indian Society, have been referred to in the preamble and the articles under the sub-heading "Right to equality" - (Articles 14 to 18). In short, the goal is "equality of status and of opportunity". Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of the several articles in Part IV (Directive Principles of State Policy). "Justice, Social, Economic and Political" is the sum total of the aspirations incorporated in part IV.

53. A seven Judges Constitution Bench of the Apex Court in the case of State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Ors. , had considered the Kesavananda Bharati case

regarding determination of the position of directive principles vis-a-vis fundamental rights and has observed as follows:

Post Kesavananda Bharati, , so far as the

determination of the position of directive principles, vis-a-vis fundamental rights are concerned, it has been an era of positivism and creativity. Article 37 of the Constitution while declaring the directive principles to be unenforceable by any court goes on to say, "that they are nevertheless fundamental in the governance of the country". The several clauses of Article 37 themselves need to be harmoniously construed assigning equal weightage to all of them. The end part of Article 37 - "it shall be the duty of the State to apply these principles in making laws" is not a pariah but a constitutional mandate. The series of decisions which we have referred to hereinabove and the series of decisions which formulate the three stages of development of the relationship between directive principles and fundamental rights undoubtedly hold that, while interpreting the interplay of rights and restrictions, Part III (Fundamental rights) and Part IV (Directive principles) have to be read together. The restriction which can be placed on the rights listed in Article 19(1) are not subject only to Article 19(2) or 19(6); the provisions contained in the chapter on directive principles of State policy can also be pressed into service and relied on for the purpose of adjudging the reasonability of restrictions placed on the fundamental rights.

54. The Apex Court in the case of Mirzapur Moti Kureshi Kassab Jamat (supra) has further held that for testing the constitutional validity of any statutory provision or an executive act or for testing the reasonableness of any restriction cast by law on the exercise of any fundamental right by way of regulation, control or prohibition, the Directive Principles of State Policy and fundamental duties as enshrined in Article 51A of the Constitution play a significant role.

55. However, in the present case we find that the provision of Clauses (b) and (c) of Article 39 of the Constitution of India are not at all attracted inasmuch as the levy of royalty on ordinary earth when used for specified purposes, the ownership of the land or material resources are not being affected at all and such persons are required to pay royalty at the rate of Rs. 4/- per cubic meter on ordinary earth.

Statute whether can be challenged on the ground of being harsh or tax imposed is excessive :

56. It is also well settled that a statute cannot be challenged on the ground that it is harsh or the tax imposed thereunder is excessive as held by the Apex Court in the cases of Collector of Customs v. Nathella Sampathu Chetty ; Hari Krishna Bhargav v. Union of India and Shyam Kishore v. Municipal Corporation of Delhi . Thus, the plea that the levy and demand of royalty on ordinary earth used for the embankment and filling would operate harshly upon the farmers and common man who may use for filling their own land or making embankment in their fields, cannot be accepted as a valid ground of challenge to the notification dated 3.2.2000 or the Amendment Rules.

Possibility of the provision being misused :

57. It is also well established that mere possibility of abuse of a provision of law does not per se invalidate the legislation. It must be presumed unless the contrary is proved, that the administration and application of a particular law would be done not with an evil eye and unequal hand, as held by the Apex Court in the case of A. Thangal Kunju Musaliar v. M. Venkatichalam Potti .

58. In the case of Budhan Chowdhry v. State of Bihar , a contention was raised that a provision of law may not be discriminatory but it may lend itself to abuse bringing about discrimination between the persons similarly situated. The Apex Court repelled the contention holding that on the possibility of abuse of a provision by the authority, the legislation may not be held arbitrary or discriminatory and violative of Article 14 of the Constitution.

59. In the case of Mafatlal Industries Ltd. v. Union of India (1997) 3 SCC 536, a Bench of nine Hon'ble Judges of the Apex Court observed that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding a provision procedurally or substantively unreasonable.

60. In the case of Collector of Customs v. Nathella Samapthu Chetty (1962) 3 SCR 786, the Apex Court observed that the possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity.

61. In the case of State of Rajasthan v. Union of India, the Apex Court has held that it must be remembered that merely because power may sometime be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a Government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief. (See Commissioner, H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt).

62. The Apex Court in the case of Maulavi Hussein Haji Abraham Umarji v. State of Gujarat; Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corporation; and Padma Sundara Rao v. State of T.N., while interpreting a provision has held that the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary.

63. The Apex Court in the case of Sushil Kumar Sharma v. Union of India and Ors., has held that from the decided cases in India as well as in the United States of America, the principle appears to be well settled that if a statutory provision is otherwise intra vires, constitutional and valid, mere possibility of abuse of power in a given case would not make it objectionable, ultra vires or unconstitutional. In such cases, action and the section may be vulnerable. If it is so, the Court by upholding the provision of law, may still set aside the action, order or decision and grant appropriate relief to the person aggrieved.

64. In view of the settled principles as mentioned above, we cannot hold a provision to be ultra vires or unconstitutional merely because there is a possibility of it being misused.

65. It is well settled by the Apex Court in the case of State of Gujarat and Ors. v. Akhil Gujarat Pravasi V.S. Mahamandal and Ors., that the Courts lean more readily in favour of upholding the constitutionality of taxing law in view of the complexities involved in the social and economic life of the community. Unless the fiscal law in question is manifestly discriminatory, the Court should refrain from striking it down on the ground of discrimination.

66. In the case of Kesoram Industries Ltd. (supra) the Apex Court has held as follows -

Legislation in the field of taxation and economic activities need special consideration and are to be viewed with larger flexibility in approach. A greater latitude - like play in the joints - being allowed to the legislature is necessary because it has to deal with complex problems which do not admit of solutions through any doctrinaire or straitjacket formula. In this field the Court should feel more inclined to give judicial deference to legislative judgment. The Courts ought to adopt a pragmatic approach in solving problems rather than measuring the propositions by abstract symmetry. The exact wisdom and nice adaptation of remedies may not be possible. Even crudities and inequities have to be accommodated in complicated tax and economic legislation.

67. It has further held that -

It has been long recognised that the measure/mode/machinery 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 (the subject of tax) and second, 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. 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.

68. Applying the principle laid down in the aforesaid cases to the facts of the present case, we find that the Central Government has notified ordinary earth used for specified purposes as a minor mineral which classification does not violate any of the provisions of Article 14 of the Constitution of India nor it results in hostile discrimination.

Interpretation of taxing statute :

69. So far as the interpretation of taxing statute is concerned the principles have been well settled by the numerous decisions of the Apex Court. A taxing statute is to be strictly construed. The Apex Court in the case of the Member Secretary, Andhra Pradesh State Board for Prevention and Control of Water Pollution v. Andhra Pradesh Rayons Ltd. and Ors. has held as follows: -

6. It has to be borne in mind that this Act with which we are concerned is as Act imposing liability for cess. The Act is fiscal in nature. The Act must, therefore, be strictly construed in order to find out whether a liability is fastened on a particular industry. 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 its natural construction of words. See the observations in *Re Nicklethwait*, (4885) 11 Ex 452 at p. 456. Also see the observations in *Tenant v. Smith* (1982) AC 150 and Lord Halsbury's observations at page 154. See also the observations of Lord Simonds in *St. Aubyn v. Att. Gen.* (1951) 2 All ER 473 at p. 485. Justice Rowlatt of England said a long time ago, that 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. Nothing is to be read in, nothing is to be implied. One has to look fairly at the language used. See the observations in *Cape Brandy Syndicate v. IRC* 1921-1 KB 64 at p. 71) this Court has also reiterated the same view in *Gursahai Saigal v. C.I.T., Punjab* , C.I.T. Madras v. V. M.R.P. Firm, Muar , Controller of estate

Duty, Gujarat v. Kantilal Trikamal .

70. The aforesaid decision was followed by the Apex Court in the case of Saraswati Sugar Mills v. Haryana State Board and Ors. .

71. In the case of Commissioner of Income-tax, Madras v. Kasturi and Sons Ltd. the Apex Court has referred to the view expressed by Justice G.P.Singh in his famous book *Principle of Statutory Interpretation* while holding that the taxing statute should be strictly construed in the following words:

...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 be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute". 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" Relying upon this passage LORD UPJOHN said : "Fiscal measures are not built upon any theory of taxation".

72. In the case of The Federation of Andhra Pradesh Chambers of Commerce and Industry and Ors. v. State of Andhra Pradesh and Ors. AIR 2000 SC 2905 the Apex Court has held as follows:

It is trite law that a taxing statute has to be strictly construed and nothing can be read into it. In the classic passage from Cape Brandy Syndicate (1921 (1 KB 64) which was noticed in the judgment under appeal, it was said:

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 a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used.

This view has been reiterated by this Court time and again. Thus, in The State of Bombay v. Automobile and Agricultural Industries Corporation, Bombay (1961) 12 STC 122, this Court said:

But the Court in interpreting a taxing statute will not be justified in adding words thereto so as to make out some presumed object of the Legislature.... If the legislature has failed to clarify its meaning by the use of appropriate language, the benefit thereof must go to the taxpayer. It is settled law that in case of doubt, that interpretation of a taxing statute which is beneficial to the taxpayer must be adopted.

73. In the case of Hansraj and Sons v. State of Jammu & Kashmir and Ors., the Apex Court after referring to its earlier decisions has held that Courts have to interpret provisions of fiscal statute strictly so as to give benefit of doubt to the litigants which is well established and admits of no doubt.

74. Ordinarily, the rule of benevolent construction has been applied while construing the welfare legislations or provisions relating to the relationship between weaker and stronger contracting parties. Thus, the question of applying the rule of benevolent construction as canvassed by the learned Counsel for the petitioners would not be attracted in the present case.

75. In the case of Commissioner of Income Tax, Bombay v. Gwalior Rayons Silk Mfg. Co. Ltd., the Apex Court has held that it is settled law that the expression used in a taxing statute would ordinarily be understood in the sense in which it is harmonious with the object of the statute to effectuate the legislative animation and it is to be read and understood according to its language and logic alone will not be determinative of a controversy arising from a taxing statute.

76. In the case of Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corporation and Ors., the Apex Court has held as follows:

11. It is well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature, The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said, "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them" (See Lenigh Valley Coal Co. v. Yensavage 218 FR 547). This view was reiterated in Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama.

12. In D.R. Venkatachalam v. Dy. Transport Commr. it was observed that, courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative, function under the disguise of interpretation.

13. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See *Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd.*, . The legislative casus omisus cannot be supplied by judicial interpretative process...

77. In the case of Petron Engineering Construction Pvt. Ltd. and Anr. v. Central Board of Direct Taxes and Ors., the Apex Court has held that when two interpretations are possible to be made, the interpretation which is favourable to the assessee should be adopted.

78. The principles relating to interpretation of a taxing statute as laid down in the various cases by the Apex Court, referred to above, would apply only if the royalty payable on ordinary earth and other minor minerals in question is held to be a tax.

Royalty whether Tax :

79. First we will refer to certain dictionaries oft-cited in courts of law:

Words and Phrases. Permanent Edn. (Vol.37-A, p.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 (6th Edn., 2000 Vol.3, p. 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 royalty.

Words and Phrases, Legally defined (3rd Edn., 1990, Vol. 4, 0.112):

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 (14th Edn., p.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 (11th Edn., 1993, p.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 or lease. The word is especially used in reference to mines, patents and copyrights.

Prem's Judicial Dictionary (1992, Vol.2,1458):

Royalties are payments which the Government may demand for the appropriate of minerals, timber or to her 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 (7th Edn., 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.

80. In *D.K. Trivedi & Sons v. State of Gujarat* 1986 Supp SCC 20, the Apex Court dealt with "rent", "royalty" and "dead rent" and held as follows: SCC pp.53-54, paras 38-39)

38. Rent is an integral part of the concept of a lease. It is the consideration moving from the lessee to the lessor for demise of the property to him.

39. In a mining lease the consideration usually moving from the lessee to the lessor is the rent for 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.

81. In *H.R.S. Murthy v. Collector of Chittoor*, the Constitution Bench of the Apex Court had defined royalty to mean "the payment made for the materials or minerals won from the land".

82. A Full Bench of the High Court of Orissa held in *Laxmi Narayan Agarwalla v. State of Orissa* "[Royalty is the payment made for the minerals extracted. It is not tax" In *Surajdin Laxmanlal v. State of M.P., Nagpur*, a division bench of the High Court of Madhya Pradesh referred to Wharton's Law Lexicon and Mozley & Whiteley's Law Dictionary and said (at AIR p. 130, para 7) "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.

83. Drawing a distinction between "royalty" and "tax", a Division Bench of the High Court of Punjab and Haryana held in *Shanti Saroop Sharma (Dr.) v. State of Punjab* as under: (AIR p.90, para 45)

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.

84. A Division Bench of the Gujarat High Court in Saurashtra Cement & Chemical Industries Ltd. v. Union of India ,

emphatically said (AIR p. 184, para 7):

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.

85. However, in the case of India Cement (supra) the Apex Court has held that royalty is a tax. The aforesaid question came up for consideration before the Apex Court in the case of Kesoram Industries Ltd. (supra). The Apex Court has held that in the aforesaid decision there has been some error attributable either to typing error or sheer inadvertence while holding royalty as a tax. The Apex Court has held as follows:

56. We would like to avail this opportunity for pointing out an error, attributable either to the stenographer's devil or to sheer inadvertence, having crept into the majority judgment in India Cement Ltd v. State of T.N. . 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. case, feeling bound and rightly, by the said judgment having the force of pronouncement by a seven-Judge Bench. Para 34 of the Report reads as under: (SCC p.30)

34. 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 and land but a payment for the user of land.

57. 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 the judgment. This is clear from reading the judgment in its entirety. Vide paras 22 and 31, which precede para 34 aforesaid, 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 List 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.

58. 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 it has been the uniform and unanimous judicial opinion that royalty is not a tax.

... ..

66. In Inderjeet Singh Sial v. Karam Chand Thapar, a bench of two learned Judges held that (SCC p. 168, para 2)

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 redendum, 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.

67. In Ajit Singh v. Union of India 1995 Supp (4) 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 [India Cement Ltd. v. State of T.N., is not noticed.

68. In Quarry Owners' Assn. v. State of Bihar, a Bench of two learned Judges was faced with a submission, based on India Cement [India Cement Ltd. v. State of T.N. , 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: (SCC pp.683, para 34)

..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.

69. In India Cement [India Cement Ltd. v. State of T.N. , (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, nowhere else has the majority judgment held royalty to be a tax.

70. How the above-noted inadvertent error in India Cement [India Cement Ltd. v. State of T.N. . has resulted in

throwing on the loop line the movement of later case-law on this point may be noticed. In State of M.P. v. Mahalaxmi Fabric Mills Ltd. (decision by a bench of three learned Judges) and Saurashtra Cement and Chemical Industries Ltd. v. Union of India (2001) 1 SCC 91 (decision by a Bench of two learned Judges) para 34 (of SCC) in India Cement [India Cement Ltd. v. State of T.N. , has been quoted verbatim and dealt with. In

Mahalaxmi Fabric Mills Ltd. case, 1995 Supp (1) SCC 642, 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 120, the Court felt bound by the view taken in India Cement [India Cement Ltd. v. State of T.N.]

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 [India Cement Ltd. v. State of T.N.] was specifically raised but was rejected. In Saurashtra Cement and Mahalaxmi Fabric Mills Ltd. , backed by India

Cement [India Cement Ltd. v. State of T.N. , and therefore held royalty to be a tax.

71. 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 a 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 [India Cement Ltd. v. State of T.N. 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. (2001) 1 SCC 91 which says (vide para 12 of SCC report) that there was no "typographical error" in India Cement [India Cement Ltd. v. State of T.N. and

that the said conclusion that royalty is a tax logically flew from the earlier paragraphs of the judgment.

86. In view of the aforesaid decision which has explained the view that royalty is a tax held in India Cements case to be an inadvertent error, and it being not a tax, the principles regarding strict interpretation of a taxing statute referred to in the foregoing paragraphs would not apply in the present case.

Executive Power :

87. It is well settled that the executive power of the Union and the State extends to the matter with respect to which the Legislature of the State has power to make laws. However, it is subject to the provision of the Constitution.

88. In the case of B.N. Nagrajan (supra) the Apex Court has held as follows:

We are unable to accept this contention. First it is not obligatory under proviso to Article 309 to make rules of recruitment, etc. before a service can be constituted or post created or filled. This is not to say that it is not desirable that ordinarily rules should be made on all matters which are susceptible of being embodied in rules. Secondly, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of List II, Entry 41, State Public Services. It was settled by this Court in Ram Jawaya Kapur v. State of Punjab 1955-2 SCR 225 : AIR 1955 SC 549, that it is not necessary that there must be a law already in existence before the executive is enabled to function and that the powers of the executive are limited merely to the carrying out of these laws. We see nothing in the terms of Article 309 of the Constitution which abridges the power of the executive to act under Article 162 of the Constitution without a law. It is hardly necessary to mention that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot in exercise of the executive power under Article 162 of the Constitution ignore or act contrary to that rule or act.

89. In the case of Chief Settlement Commissioner (supra) the Apex Court has held as follows:

6. In this contest it is essential to emphasize that under our constitutional system the authority to make the law is vested in the Parliament and the State Legislatures and other law making bodies and whatever legislative power the executive administration possesses must be derived directly from the delegation of the legislature and exercised validly only within the limits prescribed. The notion of inherent or autonomous law-making power in the executive administration is a notion that must be emphatically rejected. As observed by Jackson, J. in a recent American case - *Youngstown Sheet and Tube Co. v. Sawyer* (1952) 343 US 579 at p. 655- "With all its defects, delays and inconveniences men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations". In our constitutional system, the central and most characteristic feature is the concept of the rule of law which means, in the present context, the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court. The rule of law rejects the conception of the Dual State in which governmental action is placed in a privileged position of immunity from control by law. Such a notion is foreign to our basic constitution concept.

90. In the case of *Bishamber Dayal Chandra Mohan* (supra) the Apex Court has held as follows:

The executive power of a modern State is not capable of any precise definition. In *Ram Jawaya Kanpur v. State of Punjab*, Mukherjea, C.J. dealt with the scope of Articles 73 and 162 of the Constitution. The learned Chief Justice observed that neither of the two Articles contains any definition as to what the executive function is or gives an exhaustive enumeration of the activities which would legitimately come within its scope. It was observed: "Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away." It is neither necessary nor possible to give an exhaustive enumeration of the kinds and categories of executive functions which may comprise both the formulation of the policy as well as its execution. In other words, the State in exercise of its executive power is charged with the duty and the responsibility of carrying on the general administration of the State. So long as the State Government does go against the provisions of the Constitution or any law, the width and amplitude of its executive power cannot be circumscribed. If there is no enactment covering a particular aspect, certainly the Government can carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf. Otherwise, the administration would come to a standstill.

91. In the case of *Dorjee Tshering Bhutia* (supra) the Apex Court has held as follows:

15. The executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provisions, is without jurisdiction and is a nullity.

92. In the case of *Bal Mukund Sah* (supra) the Apex Court has held that no rule or law made by the delegatee can supercede or override the powers exercised or the law made by the delegator of power, the sovereign legislature,

93. From the aforesaid decisions, it is now well settled by the Apex Court that the executive power of the State under Article 162 of the Constitution of India extends to the matter with respect to which the Legislature of the State has power to make laws. However, such executive power cannot override or be in derogation to the existing laws.

94. The question still is as to whether the notification issued by the Government of Uttar Pradesh by which it has amended the Concession Rules by the Amendment Rules, is in exercise of the executive powers under Article 162 of the Constitution of India or not. From a plain reading of the Amendment Rules, we are of the considered that the amendment has been made in exercise of the powers conferred under Section 3(e) of the

1957 Act and not under the executive power under Article 162 of the Constitution of India.

95. So far as the three Government Orders issued by the State Government providing for carrying of declaration in Form MM 11 and copies of treasury challan evidencing payment of royalty are concerned, it may be mentioned here that Rule 64 of the Concession Rules specifically provides the manner for payment of fee and deposit under the Concession Rules as may be specified. The Government Order only specifies the requirement of carrying the declaration in form MM 11. which is also otherwise required under Rule 70 of the Concession Rules and, in the absence thereof, copies of the treasury challan evidencing payment of royalty in respect of the minor minerals carried or transported making them liable to pay the same. Such a requirement can be justified by them under Rule 64 of the Concession Rules as also under Article 162 of the Constitution of India.

An act to be done in a particular manner :

96. If under the provisions of the Act an authority is required to exercise powers or to do an act in a particular manner, then that power has to be exercised and the act has to be performed in that manner alone and not in any other manner. The Apex Court in the case of Dhanajaya Reddy v. State of Karnataka (2001) 4 SCC 9, Commissioner of Income tax Mumbai v. Anjum M.H. Gaswala and Ors., Mehsana District Central Cooperative Bank Ltd. and Ors. v. State of Gujarat and Ors. and Ram Phal Kundu v. Kamal Sharma has held that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. The Apex Court in the case of Ram Phal Kundu (supra) has held as follows:

The rule laid down in Taylor v. Taylor that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, was adopted for the first time in India by the Judicial Committee of the Privy Council in Nazir Ahmad v. King Emperor. The question for consideration was whether the oral evidence of a Magistrate regarding the confession made by an accused, which had not been recorded in accordance with the statutory provisions viz. Section 164 Cr.P.C. would be admissible. The First Class Magistrate made rough notes of the confessional statements of the accused which he made on the spot and thereafter he prepared a memo from the rough notes which was put in evidence. The Magistrate also gave oral evidence of the confession made to him by the accused. The procedure of recording confession in accordance with Section 164 Cr.P.C. had not been followed. It was held that Section 164 Cr.P.C. having made specific provision for recording of the confession, oral evidence of the Magistrate and the memorandum made by him could not be taken into consideration and had to be rejected. In State of U.P. v. Singhara Singh a Second Class Magistrate not specifically empowered, had recorded confessional statement of the accused under Section 164 Cr.P.C. The said confession being impossible, the prosecution sought to prove the same by the oral evidence of the Magistrate, who deposed about the statement given by the accused. Relying upon the rule laid down in Taylor v. Taylor and Nazir Ahmad v. King Emperor it was held that Section 164 Cr.P.C. which conferred on a Magistrate the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him. This principle has been approved by this Court in a series of decisions and the latest being by a Constitution Bench CIT v. Anjum M.H. Ghaswala SCC para 27

97. Similar view has been taken by the Apex Court in the case of " Captain Sube Singh (supra).

98. Coming to the challenge regarding violation of the provisions of sub Clause (g) of Clause (1) of Article 19, Article 31A and Article 300A of the Constitution of India, we may mention here that royalty fixed on ordinary earth is only Rs. 4/- per cubic meter. It is not such an amount which would deprive the petitioner of their property or restrict their right to carry on their trade or business. The petitioners have not placed any material to show that the royalty @ Rs. 4/- per cubic meter payable on ordinary earth shall operate harshly upon them or they would be compelled to close down their business. In our considered opinion, it does not place any unreasonable restriction on the petitioners' right to carry out their trade or business.

99. In the case of Kailash Nath (*supra*) the Apex Court has held that if a tax is levied without due legal authority, then it is open to the citizen to approach the Court since his right to carry on a trade is violated or infringed by the imposition and Article 19(1)(g) comes into play.

100. In the case of P.J. Joseph (*supra*) the Apex Court has held that an impost not authorised by law cannot possibly be regarded as a reasonable restriction and, therefore, it infringes the right to carry on business which is guaranteed under Article 19(1)(g) of the Constitution of India.

101. The two decisions relied upon by the learned Counsel for the petitioner, namely Kailash Nath and P.J. Joseph (*supra*) would not be applicable in the present case.

102. The decision in the case of Ahmedabad Urban Development Authority (*supra*) relied upon by the learned Counsel would not be attracted in the present case. It may be mentioned here that in the aforesaid case the Apex Court has held as follows:

In a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee, In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will, not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power.

103. In the case of Hindustan Times (*supra*) the Apex Court has held that the expression law within the meaning of Article 300A would mean a Parliamentary Act or an Act of the State Legislature or a statutory order having the force of law. In the present case, we find that the Concession Rules as amended by the Amendment Rules has the force of law.

104. In the present case, we find that royalty has been fixed at Rs. 4/-per cubic meter by the State Government under the Amendment Rules. Thus, it cannot be said to be without authority of law as the Concession Rules have been framed in exercise of the powers under Section 3(e) of the 1957 Act.

105. Now coming to the question as to whether the amount of royalty can be recovered from the petitioners who are the contractors and suppliers of ordinary earth and other minor minerals, we are of the considered opinion that the royalty is payable on excavation of any minor minerals. The liability is primarily of the person holding the mining lease or a mining permit but if a person does not hold any mining lease or mining permit, the liability does not cease. Any person dealing in a minor mineral is required to maintain and keep documents to show that the royalty has been paid and in order to ensure that due royalty on minor minerals has been paid within the State of U.P., the State Government by the three Government Orders have provided for producing copies of declaration in form MM 11 and treasury challan evidencing deposit of royalty. It cannot be said that any undue restrictions have been placed upon the right to carry on trade or business or it is without the authority of law.

106. It is well settled that the power to legislate on a particular topic includes the power to legislate on subjects which are ancillary to or incidental thereto, or for purposes necessary to give full effect of the power conferred by the entry as held by the Apex Court in the case of P.N. Krishna Lal and Ors. v. Government of Kerala and Anr. 1995 Supp. (2) SCC 187.

107. Under Section 19-A of the U.P. General Clauses Act, 1904, it has been provided that where any Uttar Pradesh Act, a power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers shall be deemed also to be given as are necessary to enable that person, officer or functionary to do or enforce the doing of the act or thing. Even though the aforesaid provision speaks of Uttar Pradesh Act, it would be true by necessary corollary in respect of the Rules framed by the State of U.P. and, therefore,

the provisions made by the Government of Uttar Pradesh by issuing the Government Order for checking evasion and compliance of the provisions of the Concession Rules, i.e., carrying of declaration form MM 11 and producing copies of the treasury challan evidencing payment of royalty, is well within its competence and jurisdiction. The same would be true for the State's power to check evasion and to realise its due from the concerned persons.

108. No doubt, this Court in the case of *Sharma & Co.* (supra) has held that the royalty for a period for which they have removed minerals without mining lease is not payable by them or recoverable from them under Rule 21. However, they are liable to be prosecuted under Rule 57. In our considered opinion, the said decision does not lay down the correct law on this point for the reason that it has not considered the provisions of Rule 64 of the Concession Rules nor the provisions of Article 162 of the Constitution of India.

109. In the case of *Mohd. Idris* (supra) a Division Bench of this Court has held that in the absence of any specific provision that royalty should also be charged from the Government contractor/supplier, there is no liability. It had not taken into consideration the provisions of Rule 64 and Article 162 of the Constitution of India.

110. The doctrine of per incuriam is applicable where by inadvertence a binding precedent or relevant provisions of the Statute have not been noticed by the Court.

111. In *Halsbury's Laws of England* (4th Edn.) Vo.1. 26 on pages 297-98, para 578 per incuriam has been stated as follows:

A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument, and, as a general rule, the only cases in which decision should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous 'decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake.

112. In the case of *Mamleshwar Prasad v. Kanhaiya Lal* (1975) 2 SCC 232, the Apex Court has held as follows:

Certainty of law, consistency of rulings and comity of courts- all flowering from the same principle-converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reaching, it may not have the sway of binding precedent. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgment per incuriam.

Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law indistinguishably identical and that ruling must bind.

113. In the case of *A.R. Antulay v. R.S. Nayak*, the Apex Court has quoted the observations of Lord Goddard in *Moore v. Hewitt* (1947) 2 All ER 270 (KBD) and *Penny v. Nicholas* (1950) 2 All ER 89 (KBD) to the following effect:

'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding' on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.

114. In the case of State of U.P. v. Synthetics & Chemicals Ltd. , the Apex Court has observed as follows:

'Incuria' literally means 'carelessness', In practice per incuriam appears to mean per ignorantium. English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignorantium of a statute or other binding authority' Young v. Bristol Aeroplane Co. Ltd. (1944) 2 All ER 293.

115. In the case of Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. , the Apex Court has held that a prior decision of this Court on identical facts and law binds the Court on the same points of law in a latter case. This is not an exceptional case by inadvertence or oversight of any judgment or statutory provisions running counter to the reason and result reached. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment 'per incuriam'.

116. In the case of Government of A.P. v. B. Satyanarayana Rao (2000) 4 SCC 462, the Apex Court held that the rule of per incuriam can be applied where a Court omits to consider a binding precedent of the same Court or the superior Court rendered on the same issue or where a Court omits to consider any statute while deciding that issue.

117. In the case of State of Bihar v. Kalika Kuer alias Kalika Singh and Ors. , the Apex Court has held that per incuriam would mean such element of rendering a decision in ignorance of any provision of the statute or the judicial authority of binding nature and earlier decision cannot be said to have been rendered per incuriam and liable to be ignored on the ground that a possible aspect of the matter was not considered or not raised before the Court or more aspect should have been gone into by the Court deciding the matter earlier.

118. Thus, the aforesaid decision can safely be said to be per incuriam.

119. Heavy reliance placed by the learned Counsel for the petitioner on the Division Bench decision of the Nagpur Bench of the Bombay High Court in the case of Rajendra Kishan Lal Sanhoti (supra) is misplaced for the reason that in the aforesaid case it appears that ordinary earth had not been notified by the Union to be a minor mineral but the State of Maharashtra was demanding royalty on ordinary earth under the provisions of the Maharashtra Rules, 1966.

120. The language of Section 142 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 cannot be pressed into service. this Court in the case of Sharma & Co. (supra) has considered the applicability of Section 142 of the aforesaid Act and has held as follows:

10. As a consequence of the notification issued under Section 4 of U.P. Act No. 1 of 1951, all rights, title and interest of all the intermediaries in such estates as had vested in the State including rights in any mines or minerals, whether being worked or not ceased and vested in the State including rights in any mines or minerals, whether being worked or not ceased and vested in the State of Uttar Pradesh free from all encumbrances. As would appear from Section 39, Clauses (f) and (g), the mines and minerals existing in the estates which vested in the State were taken into account for the assessment of compensation to the intermediaries concerned. As a consequence of Section 18, Bhumidhari rights were created in favour of the class of persons mentioned therein. Bhumidhars are not owners of the land forming subject matter of their Bhumidhari and are merely tenure holders and as disclosed by Section 130 of U.P. Act No. 1 of 1951 have all the rights and are subject to all the liabilities conferred or imposed upon them by or under that. Act. By conferment of Bhumidhari rights, the State did not divest itself of rights which had vested in it in mines and minerals by reason of Section 6 of U.P. Act No. 1 of 1951.

Section 142 on which reliance has been placed by the learned Counsel for the petitioners merely gives rights to Bhumidhars as tenure holders to the exclusive possession of al land in respect of which they are Bhumidhars and to use it for any purposes whatsoever. It does not give rights to Bhumidhars to use up (emphasis supplied) the land forming subject matter of Bhumidhari. The ownership of the corpus remains with the State and Bhumidhars are only entitled to use it as tenure-holders. If a Bhumidhar desires to use his holding or part thereof for a purpose not connected with agriculture horticulture or animal husbandry, the Assistant Collector incharge of the sub-division may sue motu or on an application, after making such enquiry as may be prescribed, make a declaration to that effect under Section 143(1). As soon as a Bhumidhar decides to start mining operations on his Bhumidhari land, he must obtain a declaration from the Assistant Collector incharge of the sub-division under Section 143(1) of U.P. Act No. 1 of 1951.

As long as this declaration subsists, the land concerned would not be treated as Bhumidhari land subject to the provisions of U.P. Act No. 1 of 1951. As soon as the erstwhile Bhumidhari land ceases to be 'land' within the meaning of Section 3(14) of U.P. Act No. 1 of 1951 and is brought in use for purposes connected with any industry or mining, its use will be governed by relevant enactments governing such industry or mining. It is thus clear that by mere reason of the fact that the petitioners are Bhumidhars, they acquired no right to appropriate minerals existing on their Bhumidhari land.

11. The conclusion arrived at by me in further borne out by Chapter VI of U.P. Act No. 1 of 1951. If an intermediary has acquired Bhumidhari rights in respect of his Sir and Khudkasht land, he cannot continue to work mines subsisting thereon by mere reason of the fact that he is a Bhumidhar of the land on which the mines exist, as is obvious from Section 107 of U.P. Act No. 1 of 1951. It is unreasonable to hold that a Bhumidhar who was already working a mine on the date of vesting on land which has become his Bhumidhari property can continue to work only on the basis of a lease on terms and conditions thereof but an intermediary who has become a Bhumidhari can start a new mine after the date of vesting as a matter of right on account of his being bhumidhar thereof.

121. In view of the foregoing discussions, we do not find any merit in these petitions. They are dismissed. However, the parties are left to bear their own costs.