

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE HRISHIKESH ROY
HON'BLE MR. JUSTICE ABHAY S. OKA
HON'BLE MRS. JUSTICE B.V. NAGARATHNA
HON'BLE MR. JUSTICE J.B. PARDIWALA
HON'BLE MR. JUSTICE MANOJ MISRA
HON'BLE MR. JUSTICE UJJAL BHUYAN
HON'BLE MR. JUSTICE SATISH CHANDRA SHARMA
HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Civil Appeal No. 4056-4064/1999

MINERAL AREA DEVELOPMENT AUTHORITY ETC.
Petitioner(s)

VERSUS

M/S STEEL AUTHORITY OF INDIA & ORS
Respondent(s)

TRANSCRIPT OF HEARING

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1 **CJI DY CHANDRACHUD:** Yes Mr. Dwivedi. Just before Mr. Dwivedi begins with, the
2 timelines which have been indicated by the Respondents are a little ambitious. I don't think
3 you can hear arguments in response for close to 17, 16-17 days, which is what it comes down
4 to. So, I think all of you will need to sit down together.

5

6 **RAKESH DWIVEDI:** Three days response, three days response, seventeen days, My Lords.

7

8 **HARISH SALVE:** I forgot in my defence, I thought we would be opening, because the
9 question was, was *Kesoram*, was rightly decided or not. If *Kesoram* is there, we have to
10 peruse to Your Lordship, if it's wrongly decided. So that's why I said four. Whoever starts first
11 obviously gets more. My learned friend speaking [INAUDIBLE]. So he'll be doing all the initial
12 reading. So I can drop it straight from four to few days, we will be done.

13

14 **TUSHAR MEHTA:** So we will take a realistic call and give a amended...

15

16 **CJI DY CHANDRACHUD:** All of you on that, if you all sit together and take a realistic call,
17 I think we'll be able to get a revised, revised statement by tomorrow, I think.

18

19 **T. HARISH KUMAR:** My Lord, with permission My Lord, with the permission of senior, My
20 Lord one item, that is Item number 24 in 901, that is Dalmia Cements. There were two sets of
21 matters, one from Tamil Nadu and the other from Kerala, both for heard together, but only
22 the Tamil Nadu matters been posted, whereas the Kerala matter has been left out, so I can give
23 a number...

24

25 **ARVIND DATAR:** ... is a matter, there is a slight nuance there, My Lords, we are the
26 *pattadars*, owners of the land under the Tamil Nadu Act, 50%, if you the owner, the tax was
27 50, then it became 100.

28

29 **CJI DY CHANDRACHUD:** Right.

30

31 **CLAIMANT'S COUNSEL:** Then the question is whether *Thressiamma Jacob* applies,
32 whether the land mineral belongs to me or not. Those issues are particular... peculiar to
33 *pattadar* lands and *Janmi* lands. Lordships may not take it up just now, I think now the eleven
34 questions can be considered.

35

1 **CJI DY CHANDRACHUD:** Exactly, we look at the questions which have been formulated,
2 the reference.

3

4 **TUSHAR MEHTA:** Then matters will go to the regular bench.

5

6 **CJI DY CHANDRACHUD:** What we will do is, whoever wants to argue. If Kerala the matter
7 is not here. We are not going to look at the individual acts really.

8

9 **ARVIND DATAR:** From Tamil Nadu, Dalmia and Madras Cement are from Tamil Nadu. My
10 humble submission is...

11

12 **CJI DY CHANDRACHUD:** ...we will hear you on this.

13

14 **T. HARISH KUMAR:** Basically, the question is, as to whether questions is as to whether...

15

16 **HARISH SALVE:** If your Lordships look at the questions and deal with the questions and
17 then leave it to individual benches, to resolve it. Because if you go Act by Act, question by
18 question...

19

20 **CJI DY CHANDRACHUD:** Then it'll can never be resolved. Then we will...

21

22 **HARISH SALVE:** ... how long this will take.

23

24 **ARVIND DATAR:** And My Lord what there are separate land laws in every state from the
25 British days, land settlements...

26

27 **CJI DY CHANDRACHUD:** And that individual bench will, in the light of the answer to the
28 reference, look at the action question.

29

30 **T. HARISH KUMAR:** ... the only thing is that same question...

31

32 **CJI DY CHANDRACHUD:** We made it clear, I think let Mr. Dwivedi open.

33

34 **RAKESH DWIVEDI:** May I please, My Lord?

35

36 **CJI DY CHANDRACHUD:** Yes.

37

1 **RAKESH DWIVEDI:** My Lord, there are various petitions which are arising from Odisha,
2 Jharkhand and other states, out of these My Lord, the laws made by State of Odissa and State
3 of Jharkhand were struck down by the High Court. I am appearing in the matter of State of
4 Jharkhand which is civil appeal 4056-4064 of 1999, ***Mineral Area Development***
5 ***Authority versus M/s Steel Authority of India Limited*** and so far as State of Andhra
6 Pradesh is concerned, it is against an interim order granted by the High Court and
7 Chhattisgarh. Madhya Pradesh, Rajasthan, Tamil Nadu, and UP, the laws were upheld, on the
8 basis of the judgment of this Court in ***Kesoram***. So therefore, there are five appeals, My Lord,
9 and before... in a sense both sides are appellants. But the reference was made in the State of
10 Jharkhand's case, that is MADA, My Lord. In short, MADA, M A D A. If I may place, My Lord,
11 the reference order. Page 9. May I place the referring order, My Lord? Having heard the
12 matters for considerable length of time, we are of the view, that the matter needs to be
13 considered by a bench of nine judges. The questions of law to be decided by the larger bench
14 are as follows. One, whether 'royalty' determined under Section 9 read with 15(3), of the Mines
15 and Minerals (Development and Regulation) Act, 1957, is in the nature of tax. Can the state
16 legislature, while levying a tax on land under List II, Entry 49 of the Seventh Schedule of the
17 Constitution, adopt a measure of tax based on the value of produce of land. If yes, then would
18 the Constitutional position be any different, insofar as the tax on land is imposed, on mining
19 land on account of List II Entry 50 and its interrelationship with List I and Entry 54. Three,
20 what is the meaning of the expression "Taxes on mineral rights, subject to any limitations
21 imposed by Parliament, by law relating to mineral development" within the meaning of
22 Schedule Seven, List II, Entry 50 of the Constitution of India? Does the Mines and Minerals
23 (Development and Regulation) Act, 1957, contain any provision, which operates as a limitation
24 on the field of legislation prescribed in List II Entry 50 of the Seventh Schedule of the
25 Constitution? In particular, whether Section 9 of the aforementioned Act, denudes or limits
26 the scope of List II Entry 50. Four, what is the true nature of royalty, dead rent payable on
27 minerals produced, mined, extracted from mines? This four is actually subsumed in one, My
28 Lord. Five, whether the majority decision in ***State of West Bengal versus Kesoram***,
29 could be read as departing from the law laid down in seven judges bench decision in ***India***
30 ***Cement Limited versus State of Tamil Nadu***. Six, whether "taxes on lands and
31 buildings" in List II, Entry 49 of the 7th Schedule, to the Constitution, contemplates a tax
32 levied directly, on the land as a unit, having definite relationship with land? Up to this really
33 no problem about six, My Lord, is the correct answer given by the question itself. The only
34 issue will be, what do we understand from this. Seven, what is the scope of the expression
35 "taxes on mineral rights" in List II Entry 50, of the 7th Schedule to the Constitution? Eight,
36 whether the expression "subject to any limitation imposed by Parliament by law relating to
37 mineral development" in List II Entry 50, refers to the subject matter in List I Entry 54 of the

1 Seventh Schedule to the Constitution? Whether List II, Entry 50, read with List I Entry 54 of
2 the Seventh Schedule to the Constitution, constitute an exception to the general scheme of
3 entries relating to taxation being distinct from other entries in all the three lists of the Seventh
4 Schedule as enunciated in *M.P.V. Sundararamier & Co. versus State of Andhra*
5 *Pradesh*? Ten, whether in view of the declaration under Section 2 of the Mines and Minerals
6 (Development Act) 1957, made in terms of List I, Entry 54 of the Seventh Schedule to the
7 Constitution and the Provisions of the said Act, the state legislature is denoted of its power
8 under List II, Entry 23 and/or List II, Entry 50. What is the effect of the expression subject to
9 any limitations imposed by Parliament by law relating to mineral development on the taxing
10 power of the state legislature in List II Entry 50, particularly in view of the uniqueness in the
11 sense that it is the only entry, in all the entries in the three lists, where the taxing power of the
12 state legislature has been subjected to any limitations imposed by Parliament by law, relating
13 to mineral development ? Before concluding, we clarify that normally the bench does award
14 the number of benches... Although My Lord, eleven questions have been framed, but in my
15 respectful submission, there are only five questions which are arising. The first and the most
16 important question is, what is the true nature of 'royalty', determined under Section 9, read
17 with Section 15(1) of of MMDR Act 1957?

18

19 **CJI DY CHANDRACHUD:** Determined under Section 9?

20

21 **RAKESH DWIVEDI:** Read with Section 15(1) of the MMDR Act, if I may use this,

22

23 **CJI DY CHANDRACHUD:** Yes.

24

25 **RAKESH DWIVEDI:** ...1957; and whether 'royalty' is in the nature of tax? That's the first
26 question. Now, Issue number 1 and 4 will be subsumed in this. The second question will be -
27 what is the scope of Entry 50 List II, of Seventh Schedule of the Constitution of India ?

28

29 **CJI DY CHANDRACHUD:** What is scope of entry...

30

31 **RAKESH DWIVEDI:** What is the scope of Entry 50 List II, of Seventh Schedule of
32 Constitution of India?

33

34 **CJI DY CHANDRACHUD:** Yes.

35

36 **RAKESH DWIVEDI:** And connected will be - what is the ambit of 'limitations imposable by
37 Parliament', in exercise of its legislative power, under Entry 54, List I ? My Lord, I will not be

1 referring to a Seventh Schedule of the Constitution every time, only entry I'll... for
2 convenience.

3

4 **CJI DY CHANDRACHUD:** Yes.

5

6 **RAKESH DWIVEDI:** Does Section 9, or any other provision...

7

8 **CJI DY CHANDRACHUD:** This is besides the third item?

9

10 **RAKESH DWIVEDI:** ... In the same second, in continuation. Does Section 9 or any other
11 provision of MMDR Act, contain any limitation, with respect to the field in Entry 50 List II ?
12 The third is, My Lord... so this is all about... Entry 50, third - whether the expression "subject
13 to any limitations imposed by Parliament by law, relating to mineral development," "the
14 subject to, till development" can be put in quotes, "subject to any limitations imposed by
15 Parliament, by law relating to mineral development", in Entry 50, List II, *pro tanto* subjects,
16 the entry... *pro tanto* subjects, the said entry, to Entry 54, List I, which is a non-taxing general
17 entry, and consequently there is any departure from the general scheme of distribution of
18 legislative power, as inundated in *M.P.V. Sundararamier's Case (1958) SCR 1422.*
19 *(1958) SCR 1422.*

20

21 **CJI DY CHANDRACHUD:** Just one second.

22

23 **RAKESH DWIVEDI:** May I repeat, My Lord?

24

25 **CJI DY CHANDRACHUD:** Yes. What is the citation of..? Can you do just repeat this?
26 Consequently, is there a departure from the general scheme....

27

28 **RAKESH DWIVEDI:** From the general scheme of distribution of legislative power...

29

30 **CJI DY CHANDRACHUD:** As stated in *M.P.V. Sundararamier's.*

31

32 **RAKESH DWIVEDI:** *(1958) SCR 1422.* And the 4th question is what is the scope, what is
33 the scope of Entry 49, List II, and whether it envisages a tax, which involves a measure based
34 on the value of produce of land?

35

36 **CJI DY CHANDRACHUD:** Measure on the value of the produce?

37

1 **RAKESH DWIVEDI:** Of land and in continuation, would the constitutional position be any
2 different, where mining land on account of Entry 50, List II, read with Entry 54, List I? The
3 5th question is, whether Entry 50, List II, is a specific Entry in relation to Entry 49, List II and
4 would consequently, abstract mining land, from the scope of Entry 49, List II. Abstract, Your
5 Lordship may say /or exclude.

6
7 **CJI DY CHANDRACHUD:** Yes.

8
9 **RAKESH DWIVEDI:** And the 6th question is, whether that... of course there is a conflict My
10 Lord. So, this question whether there is a conflict between *India Cement*, the conflict is
11 there. Incidentally a question could have arisen whether five judges could have held that
12 certain observations is in...

13
14 **CJI DY CHANDRACHUD:** According to you *Kesoram* is in conflict with *India Cement*?

15
16 **RAKESH DWIVEDI:** Yes that's right.

17
18 **CJI DY CHANDRACHUD:** .But that's not something they accept as such.

19
20 **SPEAKER:** Doesn't matter..

21
22 **CJI DY CHANDRACHUD:** It doesn't really, we are a bench of nine so....

23
24 **RAKESH DWIVEDI:** ... what I am [INAUDIBLE].

25
26 **CJI DY CHANDRACHUD:** We are looking at the entirety of the matter, at first impression.

27
28 **RAKESH DWIVEDI:** This issue of *per incuriam*, something...

29
30 **CJI DY CHANDRACHUD:** The 6th question do we formulated or no, not necessary really?

31
32 **RAKESH DWIVEDI:** In my view My Lord, it's not necessary.

33
34 **A. K. GANGULY:** We are all addressing Your Lordship on the first [UNCLEAR].

35
36 **CJI DY CHANDRACHUD:** Right. Because we are a bench of nine anyway.

37

1 **JUSTICE B. V. NAGARATHNA:** How to reconcile the two decisions?

2

3 **A. K. GANGULY:** Well, as Your Lordships have been pleased to observe, while that, Your
4 Lordship, is made an observation with regard to fifth question, that will arise at all or not. It is
5 true, that this is line of Your Lordship deciding the issue afresh. There would still be, My Lord,
6 an aspect which this bench may like to say, for the purpose of My Lord, a discipline, which the
7 court normally follows.

8

9 **CJI DY CHANDRACHUD:** That the laws have been laid down in the *Dawoodi Bohra*
10 recently, so I don't think we need to really look at the issue. It would be more academic than
11 anything else.

12

13 **HARISH SALVE:** Maybe in some other case.

14

15 **CJI DY CHANDRACHUD:** Maybe in some other case. Now, it's too important to us to say
16 that the reference it's not correctly made.

17

18 **A. K. GANGULY:** I thought, since the question is arisen squarely here, Your Lordship may
19 [UNCLEAR].

20

21 **RAKESH DWIVEDI:** Let me just take minute or two to say how..

22

23 **CJI DY CHANDRACHUD:** The sixth point is, do we formulate or just leave it?

24

25 **RAKESH DWIVEDI:** I think this is covered. Any other issues they want, I think this...

26

27 **HARISH SALVE:** 49, 50 [INAUDIBLE].

28

29 **CJI DY CHANDRACHUD:** That is the heart of the matter.

30

31 **HARISH SALVE:** [INAUDIBLE] What is the context of 'royalty'? [INAUDIBLE] Your
32 Lordship will say 'yes' or Your Lordship will say 'no'... Does it really matter what *India*
33 *Cement* said or what so and so said. Now you are, nine of Your Lordships...

34

35 **CJI DY CHANDRACHUD:** What Mr. Dwivedi said at the beginning that, there are five
36 questions. We'll keep it down to five.

37

1 **HARISH SALVE:** Absolutely.

2

3 **VIJAY HANSARIA:** One more question may arise here, [UNCLEAR] 25 of List II, which is
4 your public... local government, which has been dealt with by the *Kesoram*, My Lord, saying
5 that the Act under which challenge, comes when the Entries, My Lord.

6

7 **CJI DY CHANDRACHUD:** When your turn comes, you can just... we can see what...

8

9 **HARISH SALVE:** Speaking for ourselves, I've discussed and what I've seen...

10

11 **RAKESH DWIVEDI:** Entry 5 may have some incident...

12

13 **CJI DY CHANDRACHUD:** For us in the Constitution Bench, there's a live transcript of the
14 proceedings which are being argued here. So at the end of the day, all of you, particularly the
15 lawyers who are in session at that point, get the transcript. Any corrections can be indicated
16 to our IT team. But before we upload it, we have your certification on what has been...

17

18 **A. K. GANGULY:** It's very helpful, My Lord.

19

20 **CJI DY CHANDRACHUD:** We have a complete transcript at the end of the proceeding of,
21 in fact, by the day we have a transcript to the proceeding.

22

23 **HARISH SALVE:** Dealing with the taxing entries Your Lordship, will have enough for the
24 day. We can go to other entries.

25

26 **RAKESH DWIVEDI:** And we are very grateful for constituting this nine judges bench,
27 coming up after 20 years, My Lord. So, whereas the state is suffering from the loss of tax, the
28 other side will be burdened with heavy taxation. So that will be another issue, My Lord. In case
29 the states win, then how to balance My Lord. Maybe running in to thousands of crores, My
30 Lord.

31

32 **CJI DY CHANDRACHUD:** Yes.

33

34 **RAKESH DWIVEDI:** So we are very grateful, My Lord for this. The conflict not, if I may just
35 state in a minute, My Lord, how this issue had arisen because...

36

1 **HARISH SALVE:** One thing which we may be able to do based on the transcript in the
2 evening, I've got a list of seven my friend says, five, we have taken down everything you said.
3 In the evening, we can just go over between ourselves. We give Your Lordship, piece of paper
4 saying...

5

6 **CJI DY CHANDRACHUD:** Absolutely.

7

8 **TUSHAR MEHTA:** These are the agreed questions, My Lord.

9

10 **CJI DY CHANDRACHUD:** Agreed questions. Reducing the number as much as...

11

12 **TUSHAR MEHTA:** The number as much as...

13

14 **RAKESH DWIVEDI:** So in *India Cement*, My Lord, there was a cess on royalty imposed
15 by the state. So the issue was never, that royalty is a tax. Validity of cess, which was imposed
16 on royalty, was an issue. And perhaps that case could have been disposed of, as Mr. Sirohi has
17 said in his book, that royalty is an income, My Lord, which the state derives from, as a part of
18 the sale, profits which the lessee gets from the sale of minerals. So it would have been invalid
19 on that ground. But then the court went on, and at one place in para 34, it's said royalty is
20 taxed in the first sentence, instead of cess on royalty is a tax. Because issue was, what is this
21 cess? There was no issue at all, whether royalty is taxed or not. Issue was only cess and there
22 was no argument also. But yet in the first sentence of para 34, though it noted that, four High
23 Courts have held royalties not taxed and one Mysore High Court has held that royalty is taxed.
24 But it doesn't dwell on that, doesn't consider, My Lord, which is right, which is wrong. No
25 observations. Para first sentence, it says that royalty is taxed. In the last sentence, it says that
26 royalty is a return for the use of... So, there was a contradiction. So when we were arguing,
27 before the five judges bench in *Kesoram*, and in fact, in two earlier occasions before two-
28 three judges bench, this issue arose that there is no discussion in this... and erroneous and this
29 is contradictory and seems to be a mistake... So first bench, My Lord, in *Orissa Cement*,
30 bypassed it...didn't answer. In the second bench, My Lord, in *Mahalakshmi Fabrics*, they
31 said, "No. There is enough material to show that royalty is taxed in that judgement". So, in
32 *Kesoram's* case, they discussed the whole concept of 'royalty', which was also not discussed
33 in *India Cements*. So, having discussed the entire concept and all the judgements, including
34 of High Courts, that royalty - what is the nature of royalty? And then, they concluded that it's
35 a return, and it's not a tax. In the process, they went into this question, how to deal with para
36 34, though they said... they summoned the original file and original judgement, which was
37 earlier also summoned, in the earlier cases. So, this was a very live question bothering the

1 Court, My Lord, continuously. So, they said that the word 'cess on' is missing in the first
2 sentence. If that word is inserted, then it becomes a consistent judgement. Or whether five
3 judges should have done it. I did request, it should go to a larger bench, but then, that's how it
4 is.

5

6 **JUSTICE HRISHIKESH ROY:** But the sentence is really tricky, as you have rightly pointed
7 out in paragraph 34.

8

9 **RAKESH DWIVEDI:** Yes. Right.

10

11 **JUSTICE HRISHIKESH ROY:** The first sentence says that ' We are in the opinion that
12 royalty is a tax'?

13

14 **RAKESH DWIVEDI:** That's right.

15

16 **JUSTICE HRISHIKESH ROY:** And then, the last sentence of the same paragraph says that,
17 royalty is not a tax.

18

19 **RAKESH DWIVEDI:** ... 'Not a tax on land but a payment on the user of the land'. And all
20 other earlier paragraphs also, where they consistently say 'it's a user'... 'return on the user of
21 the land'. But then, that's how, My Lord, this one sentence completely derailed the whole thing.
22 Thousand... so many other judgements came, which followed **India Cements** and based on
23 'royalty is tax', the laws was struck down. Now... So that's how the mistake arose. And when
24 we were arguing this matter, although in my case, in **Jharkhand**, royalty really doesn't come
25 in. But High Court relied upon **India Cements** and the other cases based on that. So
26 therefore, this issue came up again, and Justice... Chief Justice Kapadia felt that how can five
27 judges say that it's a mistake and correct it... 'should have gone to seven judges. That's how we
28 are before Your Lordships. So now that we have before Your Lordship... unnecessary, My Lord,
29 to decide, whether they can or no. I don't mind how Your Lordships can observe. I think it
30 would be clearly permissible for a subsequent bench, if it notices a clear contradiction. It tries
31 to harmonize the first and last sentence and says that - 'If you just says add cess on royalty, it
32 becomes consistent with the whole.' That's how...

33

34 **JUSTICE B.V. NAGARATHNA:** Actually, in what context royalty was held to be tax in the
35 **Mysore High Court** judgement, will be clear if it is seen, that in that in judgement was for
36 what was actually imposed was a license fee.

37

1 **RAKESH DWIVEDI:** License fee.

2

3 **JUSTICE B.V. NAGARATHNA:** So there was a discussion of the facts of the *Mysore*
4 *High Court* judgement, then paragraph 34 probably may have been different.

5

6 **RAKESH DWIVEDI:** Absolutely. There, the issue was whether that license fee would be tax
7 or not. In fact...

8

9 **JUSTICE B.V. NAGARATHNA:** Yes. It was held that the license fee is a royalty, in the
10 *Mysore High Court* judgment

11

12 **RAKESH DWIVEDI:** So, however, since we are before the Lordship, that...Now, may I just
13 show, if your Lordship has my written note, where I have extracted the sections involved,
14 because in my case, My Lord, *Jharkhand*, though I will be defending *Kesoram*, but...

15

16 **CJI DY CHANDRACHUD:** Volume I?

17

18 **RAKESH DWIVEDI:** Volume I, Page 6, I(a). Yes. Volume I(a), I stand corrected. Actually,
19 *India Cement* My Lord, sent all the states' scurrying to find alternatives to recoup the loss
20 of revenue. Finally, at paragraph 4, at page 6, the old section, I have mentioned - 'Levy and
21 assessment of cess - subject to the provisions of this Act and the rules framed under it, the
22 authority shall, by notification published..' I'm sorry. Yes, old Section 18, 'Subject to the
23 provisions of this Act and the rules framed under it...'

24

25 **CJI DY CHANDRACHUD:** Just one second, Mr...

26

27 **RAKESH DWIVEDI:** All of Your Lordships have got this? I'm in the same position as Justice
28 Bhuyan, My Lords. This computer....

29

30 **CJI DY CHANDRACHUD:** Look at this... I mean... Probably a year ago, this would have
31 been unimaginable that everybody is on their laptops and iPads. If you have a record like 30 -
32 40,000 pages, it would have been impossible.

33

34 **HARISH SALVE:** Using laptops [INAUDIBLE].

35

36 **CJI DY CHANDRACHUD:** Books all gone from the court... not that they are not used, but
37 they are used in the digitized form.

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JUSTICE HRISHIKESH ROY: I don't think that there are no pretenders in the court.

RAKESH DWIVEDI: I am one of pretenders, so I have two assistants who will help me out. Some of us has an added problem of getting headaches by looking at the computer for too long. So may I place the old section, this is not under challenge, just for historical purposes. 'Subject to the provisions of this Act and the rules framed under it, the authority shall by notification published in the official gazette, levy a tonnage cess. I'm reading para 4.

CJI DY CHANDRACHUD: Yes.

RAKESH DWIVEDI: 'Tonnage cess, assessed on the annual dispatches of coal and coke from each mine at the rates to be prescribed by the authority with the prior approval of the state government, provided that the rate of such cess shall not exceed Rs. 6 per ton without the prior approval of Central Government. Provided further, that the tonnage cess shall only be leviable until provision to the contrary is made by the Parliament.' Then there was a royalty cess also. 'An addition cess at the rate of 5% shall be levied and realized on the amount of royalty to be received by the state government. Additional cess realized under sub-clause 1, shall be transferred to the authority for the fulfilment of its object.' Then this was amended with effect from, in 1992, 'Levy...' and this one is an issue. 'Levy of tax on use of land for other than agriculture, agricultural and residential purposes. One, the authority shall subject to the provisions of this Act and rules framed there under, levy tax, by notification published in the official gazette on land being used by any person, group of persons, company, the Central Government or the state government, local or corporate body for mining, commercial or industrial purposes, with the prior approval of state government, provided that the tax so levied shall not exceed rupees 1.50/m² annually, for any such land. But such tax shall not be levied on land which is subject to holding tax.' So holding tax is identical tax paid on land by the agriculturalists. That's why the agriculturalist has been excluded. Two, 'the state government shall, out of the tax so levied and collected, determine the amount to be deposited into the consolidated fund of the state government from time to time.' So, in my case, the tax is not imposed on royalty nor it is reckoning royalty, nor it is on the annual produce. It is directly and squarely on land and how land is bought and sold per square metre.

CJI DY CHANDRACHUD: It's qualified by the use of the land, it's on land which is used for commercial, industrial or mining purposes.

1 **RAKESH DWIVEDI:** That's right. So, that is to exclude the holding tax, which is already on
2 agriculturalists. We don't want to burden the agriculturalists, and therefore, that's excluded.
3 Now, that was one issue, which is not referred to Your Lordships, which will be decided by a
4 smaller bench when it goes back, namely whether it is a used tax. That was one finding which
5 went against, which Your Lordships need not decide. But as far as royalty, etc. is concerned,
6 this tax has nothing to do with royalty, nor its measure is based on royalty. It's a plain and
7 simple, not exceeding 1.50/m². *India Cement* was there, so it was referred.

8
9 **HARISH SALVE:** No. Who is challenging this law. I've been trying to fight.

10
11 **RAKESH DWIVEDI:** [INAUDIBLE] industries. Now, in para 6, I've mentioned the
12 notification which was issued on 11th of February 1993, pursuant to the amended Section 89.
13 The dates were as follows: for industrial purpose, it was Rs. 1 /m², for commercial purpose Rs.
14 1.25 and all other non-agriculture, non-residential purposes, other than...

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16 **CJI DY CHANDRACHUD:** What is that? "other than"?

17
18 **RAKESH DWIVEDI:** Other than 'i' and 'ii'.

19
20 **CJI DY CHANDRACHUD:** One... 'i' and 'ii'.

21
22 **RAKESH DWIVEDI:** 'i' is... other than i and ii. 150.

23
24 **CJI DY CHANDRACHUD:** Yes.

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26 **RAKESH DWIVEDI:** In brief, at page 8, I have mentioned the findings of the High Court in
27 my case, but I'll not read it out. It's not necessary for the present purposes, but only thing is
28 that, they relied upon *India Cement, State of Bihar. India Aluminium Company* and
29 all those cases, *Orissa Cement*. Now, this having been done, Your Lordships may kindly
30 have the Constitution itself..

31
32 **HARISH SALVE:** I was just wondering because, this has been... Lordship sees my learned
33 friend's note, just a matter of housekeeping, one of the things which the High Court said was,
34 "This is the use tax on..."

35
36 **RAKESH DWIVEDI:** I think I told the Court.

37

1 **HARISH SALVE:** That is not a question referred to Your Lordships.

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3 **CJI DY CHANDRACHUD:** That has to be decided by a smaller bench.

4

5 **RAKESH DWIVEDI:** That's what I said. I'll take Your Lordship through first, to the some
6 of the entries, which have... directly a relationship with the issue. The first of them, My Lord,
7 is Entry 23, List II. So, to start with, under the scheme of distribution of legislative power,
8 regulation of mines and mineral development is in the fold of the state legislature by virtue of
9 Entry 23, List II, which says... which reads thus, "Regulation of Mines and Mineral
10 Development, subject to the provisions of List I, with respect to regulation and development
11 under the control of the Union". To correlate it with List I, as the Lordships are aware, the
12 entry pertinent, would be Entry 54. "Regulation of Mines and Mineral Development to the
13 extent to which such regulation and development under the control of the Union, is declared
14 by Parliament, by law to be experienced in public interest." So, the 'Parliament must make a
15 law.' That is the first prerequisite. And 'that law must contain a declaration'. That it is
16 necessary, that Union controls in public interest. So first, law. Second is, declaration, and the
17 third is, which obviously it can't be a simple declaration and you can't take it out. It must lay
18 down, the same law must lay down the extent to which, the Parliament desires to control. In
19 short, My Lord, this entry is an abstracting entry. It takes out from the fold of the state
20 completely. So to the extent, My Lord, the prescription is there under Entry 54, the field of the
21 state under Entry 23, gets denuded. So, it's a *pro tanto* denudation. There's a cognate entry
22 which is Entry 53, which does not share the same interrelationship. It does not share the same
23 interrelationship. Entry 53 reads, 'Regulation and development of oil fields and mineral oil
24 resources: Petroleum and petroleum products, other liquids and substances declared by
25 Parliament, by law, to be dangerously inflammable'. So, this is an independent entry. Before
26 the Constitution's advent of the Constitution My Lords, they were smudged into one, under
27 the 1948 Act, which I'll show to Your Lordships. But while the Constitution was approved, then
28 they were segregated, and this was completely within the fold of the Parliament. Now yet
29 another, My Lord, is, which has a similarity, will be Entry 24, of List II, with which deals with
30 other industries. Entry 24, List II, which reads, 'Industries subject to the provisions of Entry 7
31 and 52 of List I'. Now 7, is 'Industries declared by Parliament'. I'm reading Entry 7, List I,
32 'Industries declared by Parliament, by law, to be necessary for the purposes of defence or for
33 the prosecution of war'. And 52 is, 'Industries, the control of which, by the Union, is declared
34 by Parliament, by law, to be expedient in public interest'. So, that has some similarity with 54.

35

36 **CJI DY CHANDRACHUD:** So, both 7 and 52 require a declaration by law?

37

1 **RAKESH DWIVEDI:** Both required by law. Both required declaration and...

2

3 **CJI DY CHANDRACHUD:** And public interest.

4

5 **RAKESH DWIVEDI:** Now 52 doesn't use the word, 'to the extent to which', but in *Ishwari*
6 *Khetan* case, and very rightly, they said that that is implicit. Entry 52 also, when you are
7 making a law and you are extracting, then how much you have extracted has to be specified in
8 the law. So, that was held to be implicit. Now Entry 56 also carries a similarity, but not
9 pertinent. Now, we come to My Lord, the taxing entries, which are being relied upon by the
10 state. Your Lordship, turns to Entry 50, Entry 49 and 50. Entry 49 is, 'Tax on Lands and
11 Buildings'. Now, it is with respect to this Entry 49, that observations have come that tax on
12 lands and buildings should be directly on land as a unit. This expression as a unit My Lord,
13 occurred on account of the fact that in List 1, Entry 86, taxes on the capital value of the assets,
14 exclusive of agricultural land of individuals and companies, taxes on the capital of companies.
15 So, this expression, taxes on the capital value of the assets in land, is also one of the assets so
16 the issue, there were two competing entries in certain cases. Consequently, the court said that
17 'no', even if land is being included in Entry 86, it is along with all the other assets, so therefore
18 it is a composite tax. Whereas tax on land and building in Entry 49, is as a unit. Means, as the
19 unit therefore only connotes that individually on land and building, not along with other assets
20 which a party may be owning. So, in contrast to a composite tax under 86, it was a tax on the
21 unit of land. In my respectful submission, this word 'as a unit' doesn't indicate anything else.
22 Then we have Entry 50. Taxes on mineral rights. Subject... May I place Entry 51?

23

24 **CJI DY CHANDRACHUD:** Yes.

25

26 **RAKESH DWIVEDI:** Taxes on mineral rights subject to any limitations, imposed by
27 Parliament by law relating to mineral development. So, based on this My Lord, two questions
28 would be arising. What is this mineral rights? Would it comprehend within its ambit, the
29 leased area in which the mining is to be done, or which is peripheral. Because in every leased
30 area, there is an area which contains minerals, but in order to excavate and carry it away, win
31 it and then dispatch it, you need some other areas, contiguous area, which is actually not
32 containing minerals to facilitate the activity of mining. So, whether it will include that mining
33 land and the peripheral area. If I may use this expression 'peripheral contiguous area'. The
34 other question is, how do we understand this expression, 'limitations?' Does this expression
35 'limitation' enable Parliament to usurp the taxing power? Or is it merely imposing some kind
36 of a cap? Maybe denial, don't impose or can it usurp the power itself, while making a law
37 relating to mineral development, under Entry 54? This obviously alludes to, though not

1 expressly mentioned, the last phrase 'by law relating to mineral development' will mean 'a law
2 made under Entry 54'. Which is not a taxing provision, but a general entry. And that's how the
3 other side raises this question, that there is a departure from **Sundararamier's** doctrine,
4 which has been consistently followed and upheld and recently brought My Lord, Justice
5 Nagarathna has also delivered a judgment, that is in **State of Karnataka versus**
6 **Meghalaya**, and in the 9-judges judgment in **Jindal Steels**. So, doctrine of
7 **Sundararamier's** is well entrenched, not departed from, descended from, by any learned
8 judge in any case.

9

10 **CJI DY CHANDRACHUD:** Which really postulates that the taxing entries are separately
11 delineating [INAUDIBLE].

12

13 **RAKEASH DWIVEDI:** That's correct. There is no overlap. One, that the taxing entries and
14 general entries are separate. Two, that the taxing entries, as between the two Lists I and II,
15 they do not overlap. And the third, is that the general entry does not contain a source of tax.
16 Now depositing this, would it be permissible, therefore, to say that this limitation, which will
17 necessarily be imposed under Entry 54, because if it involves usurpation of taxing power, then
18 Entry 54 becomes an entry, which is, as the other side says, *sui generis*, so, this stands apart
19 from the general structure and division of power.

20

21 **JUSTICE B.V. NAGARATHNA:** The question is, whether a taxing power can be read into
22 a general entry?

23

24 **RAKESH DWIVEDI:** That's right.

25

26 **JUSTICE B.V. NAGARATHNA:** Impliedly.

27

28 **RAKESH DWIVEDI:** That's right. Impliedly, by extending something from the taxing entry
29 in List II, we make the List I entry, a taxing entry, which is actually a general entry.

30

31 **CJI DY CHANDRACHUD:** The consistent position in law is that, the power to tax is
32 identified separately in the list, and therefore, a general entry in the list will not include within
33 it, a power to tax.

34

35 **RAKESH DWIVEDI:** Yes. So, therefore, this limitation can only mean putting a limit.
36 Because minerals are very important, no dispute will not between the parties here. They will
37 also emphasize. I'm also conceding. Minerals are very important, My Lord, right from defence

1 down to so many other things. The infrastructure industry, every industry needs steel and iron
2 and so. Ingots and.... So, therefore minerals rights are certainly very important. And in this
3 respect, I will be showing to Your Lordships, an important aspect from the Constituent
4 Assembly debates. For the present, Your Lordships, may just make a note of that. And that is,
5 that there was a motion moved by one of the members, that Entry 50 should be deleted from
6 List II and kept in List I, but Dr. Ambedkar rejected it. So, if the framers had wanted that, there
7 should be a taxing power, on mineral rights with the Parliament, the easiest thing was to accept
8 that and move it from there to there. Not to move that means that, 'no', state will continue to
9 have the power, but since it is of national importance, minerals, therefore Parliament has a
10 reserved power, to say, to cap it. So that, the states don't go berserk My Lord, and they start
11 competing and raising taxes beyond limits and extraordinary limits. So, this 'limitation' word
12 is grammatically understood, will not indicate usurpation, arrogation by Parliament.
13 Contextually also, it will not indicate that. And if we keep in mind, the Constituent Assembly
14 debates, it will not mean that. So, whereas now, there is a fourth doctrine that all the entries
15 must be liberally construed, but that will not mean that the 'limitation' which is imposed, has
16 also to be so liberally construed as to completely denude the main part of it. Just as in the case
17 of provisos, we say that proviso cannot heat up. The ear cannot rise higher than the head. So,
18 the entry has to be liberally construed, but the 'limitation' or 'restriction' has to be construed
19 naturally by natural words, whatever they mean. I'm not saying that you squeeze the scope of
20 limitation'. Whatever it may naturally mean, grammatically mean, should be attributed to it.
21 So, there is a balance. In that sense My Lord, one may say it's a unique entry, though I don't
22 see. I'll show some more entries of similar kind. So, there's nothing unique. This distribution
23 of legislative power involves balancing. Something is put there, something is here. The tilt is
24 in favour of Parliament, both here in the distribution as well as in 246. That if ultimately, as
25 My Lord, Justice Nagarathna said in that judgement, that there is a clash and conflict which
26 cannot be resolved, cannot be harmonized, then state has to exceed to the... scope of
27 Parliament's power. But when we construe the entry, My Lord, then it cannot have... the
28 limitation or restriction cannot be expanded so as to eat up the legislative field itself to render
29 the entry. Yet another aspect is, My Lord, should not this limitation, should not this limitation
30 in the law made by Parliament, be expressed specific and concrete? Not by inferences that
31 Parliament has MMDR Act, we read and we say that even though there is no provision which
32 is restricting Entry 50, by imposing a tax on mineral rights or a limitation on tax on mineral
33 rights, yet we say that somewhere we find 'royalty' so therefore this is out. So, the limitation
34 Parliament must apply its mind, consciously, impose specific and express provisions in its law,
35 in order to limit it. It should not be difficult for Parliament to say that tax imposed under Entry
36 50 List II, will not go beyond this. So, the submission will be that please understand 'limitation'
37 as something which is an express, concrete, specific provision.

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JUSTICE ABHAY S. OKA: But this limitation will be only in terms of quantum? Quantum of tax?

RAKESH DWIVEDI: It could be anything. I'm not saying squeeze it, but it should be something which is limiting. It can be in the form of principles that this formula will be applied. It could be just anything without meaning to be exhaustive about it. It could be anything which tells the state, do it in this way, don't do that. So, do and don't, both can come in.

JUSTICE B.V. NAGARATHNA: It should be in the context of mineral development.

RAKESH DWIVEDI: Mineral.

JUSTICE B.V. NAGARATHNA: To encourage certain minerals to be extracted.

RAKESH DWIVEDI: Yes.

JUSTICE B.V. NAGARATHNA: For initially, years of a lease, there could be a tax holiday.

RAKESH DWIVEDI: Could be. They can say that for five years, you will not impose a tax.

JUSTICE B.V. NAGARATHNA: Yes.

RAKESH DWIVEDI: They may even say that, let's say some war is going on, for this interregnum period, you will not have it. So I don't mean to be exhaustive. All I mean to say is, in the negative sense that you can't expand limitations, so as to say, that not the state, Parliament will do. That's my limited purpose of it.

JUSTICE HRISHIKESH ROY: But your first principle remains.

RAKESH DWIVEDI: Yes.

JUSTICE HRISHIKESH ROY: You have to enact a law, and only by enacting the law, you can limit.

RAKESH DWIVEDI: Limit.

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JUSTICE HRISHIKESH ROY: It can't be a matter of inference.

RAKESH DWIVEDI: No. It has to be specific express. We will not derive it from the nooks and corners of MMDR Act, that there is a limitation on this.

CJI DY CHANDRACHUD: The limitation which Parliament can impose is a limitation in the interests of mineral development.

RAKESH DWIVEDI: Yes.

CJI DY CHANDRACHUD: It's not expressly a limitation on the taxing power only, but Parliament may well come to the conclusion that a limit on the taxing power of the states is necessary to ensure...

RAKESH DWIVEDI: For general development. I understand that.

CJI DY CHANDRACHUD: So, it's not in that sense, the taxing power of the state which is restricted by taxing power of the Union. It's a taxing power of the state, which is restricted by the general regulatory power of the Union in that area.

RAKESH DWIVEDI: And this Entry itself says, 'by law relating to mineral development'. So, in other words..

CJI DY CHANDRACHUD: Government is in interest of mineral development.

RAKESH DWIVEDI: Correct.

CJI DY CHANDRACHUD: And that imposes a restriction on the taxing powers of the state.

RAKESH DWIVEDI: Correct. Now if... I agree with that. Now, Parliament need not expressly say that it's doing so in the interest of mineral development because it is making a law which is in the interest of mineral development, but it must have a provision which is clear, specific and express and intention is clearly flowing that it intends to limit this taxing power of the state. And the bottom line is...

1 **JUSTICE ABHAY S. OKA:** What is the concept of mineral development? What is the
2 concept of mineral development?

3

4 **RAKESH DWIVEDI:** Like mineral development will also involve conservation of minerals,
5 how much mineral is to be extracted. It will also involve in what manner the minerals are to
6 be used, because now there is a generational, intergenerational right concept introduced by
7 this Court, internationally accepted. So...

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9 **CJI DY CHANDRACHUD:** The quantum of mining which can be carried out.

10

11 **RAKESH DWIVEDI:** Yes, quantum of mining. That's why it requires a mining plan. Then
12 ecological impact of it, what is happening. So that's why we require a certification from the
13 Environment Ministry. If there are forest that has to be... So, all this balancing will be part of
14 mineral development.

15

16 **JUSTICE B.V. NAGARATHNA:** Could be a restriction on export of certain minerals.

17

18 **RAKESH DWIVEDI:** Export of minerals. Export of...

19

20 **JUSTICE B.V. NAGARATHNA:** Its expected only for domestic consumption.

21

22 **RAKESH DWIVEDI:** Yes, for domestic consumption. So, that may be the width. But what I
23 understand from My Lord, Justice Oka's question was that independently what we understand
24 by mineral development. So, for example when we extract iron ore, then there are blue fines,
25 as we call it, the dusty. Then all that is, there are lumps also. So then you have to bring it to
26 particular sizes. So, beneficiation. So, there are specific provisions in the MMDR Act in this
27 respect, 'how to?' And they are, again, as I said, it's for Parliament and for the experts to decide,
28 to what extent. It can't be... We can't define this word in a manner which makes it rigid. We
29 have to leave it to the times as economics develops, as the industry develops and as the needs
30 arise. But ultimately, the law which is made limiting is... the limitation itself has to be in the
31 interest of mineral development. And as I respectfully submit, the bottom line is, 'whatever
32 your limitations, you wish, temporary, permanent, long term, short term... you can't usurp.'
33 You can't say, 'I will be imposing the tax.' You may go to the extent of 'don't impose'. In the
34 interest of mineral development, maybe a price factor, because the international prices are
35 going up. So national prices, you have to do all sorts of balancing in economics. So, you may
36 say, 'Stop. Don't do it. Don't impose, temporarily or permanently, whatever.' But you can't say,
37 'I will impose.'

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CJI DY CHANDRACHUD: Because, taxes on mineral rights are not assigned to... It's not a subject which is given to Parliament. It is exclusively within the Constituent Assemblies of the States.

RAKESH DWIVEDI: So in that sense, the Entry seems to be... One may say that, is different from the other plain, simple Entries like tax on land and buildings, but the power is exclusively within. Now read this with 246(3). 'Any idea of usurpation goes against the grain of 246. 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 the matters enumerated in List II.' So any idea of usurpation, My Lord, goes against the grain of this exclusivity.

JUSTICE B.V. NAGARATHNA: At the same time, you have to see, what in pith and substance is the imposition?

RAKESH DWIVEDI: That can always be seen. Because labels will not decide the substance... Pith and Substance Doctrine will have its play. But at the moment, I'm only trying to question this possible submission which is being made and earlier made in cases, that because of MMDR Act and because there is Section 9 royalty, therefore, this is denuded. Or the other submission that, once in a complete code is there under Entry 54, therefore, 50 is ousted. That cannot happen. And Entry 50 cannot go into Entry 54. Parliament cannot itself impose the tax under Entry 54. So, that's one, that's not a taxing Entry. Second, Constituent Assembly rejected the shifting of Entry 50 to List I.

CJI DY CHANDRACHUD: Just one second. Entry 54 of List I is not a taxing entry.

RAKESH DWIVEDI: Non-taxing entry. And secondly, the Constituent Assembly rejected the shifting of Entry 50 to List I. And thirdly, Entry 50 is exclusive power of state. And fourthly, 'limitation' word by its very nature considered naturally and grammatically, cannot result in abstraction of taxes on mineral rights into the fold of Parliament.

JUSTICE HRISHIKESH ROY: Interestingly in 54, as the Chief Justice just now was commenting, regulation of mines and mineral development is there in 54?

RAKESH DWIVEDI: Yes.

JUSTICE HRISHIKESH ROY: ...and in 50 also.

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RAKESH DWIVEDI: Yes.

JUSTICE HRISHIKESH ROY: Parliament by law relating to mineral development. So, this expression is used twice.

RAKESH DWIVEDI: That's right.

JUSTICE HRISHIKESH ROY: In both List I and List III.

RAKESH DWIVEDI: This indicates that, that limitation must come under Entry 54. It is the same kind of law which is contemplated. Whatever law Parliament will make, it will make either with respect to List I or List III. So, this word of 'limitation' is not... independent empowerment of Parliament to make a law but is an allusion to the law which the Parliament can make by virtue of the entries in List I or List III. Otherwise, we will...

CJI DY CHANDRACHUD: Parliament can really, in that sense, impose a restriction on the taxing power of the state but the taxing power still continues to vest with the state.

RAKESH DWIVEDI: That's the humble submission.

CJI DY CHANDRACHUD: Always.

JUSTICE B.V. NAGARATHNA: Entry 23 of List II is also subject to Entry 54 of List I, because they are the same with regard to mines and mineral development. But...

RAKESH DWIVEDI: I am obliged.

JUSTICE B.V. NAGARATHNA: It is subject to...

RAKESH DWIVEDI: Subject matter is identical.

JUSTICE B.V. NAGARATHNA: Identical. But subject to List I Entry 54.

RAKESH DWIVEDI: That's right. So, law will be under List I. The only difference with, if we compare 23 with 50, is that 23 does not use the expression, 'subject to any limitations imposed there'. The entire entry is subjected.

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JUSTICE B.V. NAGARATHNA: It is subject to the provisions.

EKLAVYA DWIVEDI: Yes.

RAKESH DWIVEDI: Whereas, here it says, 'subject to any limitations imposed'. That's a contrast between the two. I'm grateful My Lords. Now this Entry My Lord, in no way, Entry 50 List II, is not in any sense unique. Kindly have 57. 'Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tram cars, subject to the provisions of Entry 35 List III'. So, here again we find a taxing entry in the state list which alludes to, or which is subjected to List III, which apart from fee, doesn't contain a taxing power. Kindly see Entry 35 List III. 'Mechanically propelled vehicles, including the principles on which taxes on such vehicles are to be levied'. So, although both state and Parliament, state legislature and Parliament can make law with respect to List III, but Parliament has an overriding power, but while making a law, Parliament with respect to Entry 35 can only lay down principles.

CJI DY CHANDRACHUD: Principles, yes. Entry 63 of List II.

RAKESH DWIVEDI: 63 of List II.

CJI DY CHANDRACHUD: Weights of stamp duty.

RAKESH DWIVEDI: Stamp duty in respect of documents other than those specified in provisions of List I with regard to rates of stamp duty.

CJI DY CHANDRACHUD: Entry 91 of List I.

RAKESH DWIVEDI: Entry 91 of List I. 'The rates of stamp duty in respect of bills of exchange, checks so and so'. But in case of this 91 and 63, once these documents are actually out of the fold, only Parliament can impose tax. Whereas, so far as 50 and 57 are concerned, the power of Parliament is limited. In one case, 'limitation' word is there, another case 'general principles'. Yet...

CJI DY CHANDRACHUD: But interestingly on stamp duty, the main provision is in the Concurrent List. Entry 44 of List III. 'Stamp duties, other than duties of fees collected by means of judicial stamp, but not including rates of stamp duties'. And why is rates taken out of Entry 44? Because the rates in respect of some documents are introduced in the Union List.

1 Rates in the respect of all other documents are introduced in the State List. But the power is a
2 Concurrent Power.

3

4 **RAKESH DWIVEDI:** Yes. So that if the states have imposed some rates, Parliament can
5 override that.

6

7 **CJI DY CHANDRACHUD:** In respect of?

8

9 **RAKESH DWIVEDI:** Rates.

10

11 **CJI DY CHANDRACHUD:** Right. No, but Parliament can't override the rates at all. The
12 power to impose rates is exclusively assigned to the state except in respect of the excluded
13 Entry.

14

15 **RAKESH DWIVEDI:** Not including the rates of state.

16

17 **CJI DY CHANDRACHUD:** But the power to levy a stamp duty is given both to Parliament
18 and the states.

19

20 **RAKESH DWIVEDI:** Now kindly also, there's another interesting Entry in List I, which is
21 32. Though it's a general Entry, 'property of the Union and the revenue therefrom...', Lordships
22 have this Entry 32?

23

24 **CJI DY CHANDRACHUD:** Yes.

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26 **RAKESH DWIVEDI:** '...and the revenue therefrom. But as regards property situated in a
27 state, subject to legislation by the state, save in so far as Parliament may by law otherwise
28 provide.'

29

30 **JUSTICE B.V. NAGARATHNA:** It's an exception to an exception.

31

32 **RAKESH DWIVEDI:** Yes. So, ordinarily it's the states, but if the Parliament does not want
33 the states to do that, then it provide otherwise. Now, all this provision otherwise, and the
34 reason for alluding to this is that Parliament by law, otherwise provides... again these have to
35 be specific, concrete, express. They can't be by inferences, by mere implications. At best, there
36 should be a strong implication.

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1 **CJI DY CHANDRACHUD:** One other interesting aspect which would support your
2 submissions, Entry 97 of the residuary Entry...

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4 **RAKESH DWIVEDI:** Yes.

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6 **CJI DY CHANDRACHUD:** ...of List I, which says, "any other matter not enumerated in List
7 II or List III including any tax not mentioned in any of the list'. So, if a tax is mentioned in any
8 other list, then Parliament can't exercise the residual power of legislation to enact that act.

9

10 **RAKESH DWIVEDI:** Even under 97, it cannot. And this has to be read with Article 248.
11 248 is pertaining to the residuary powers. 248 reads this, 'subject to Article 246(a), Parliament
12 has exclusive power to make laws with respect to any matter not enumerated in the Concurrent
13 or State List.' So, 246(3), exclusivity. 248(3), they are all consistent. 97.

14

15 **JUSTICE B.V. NAGARATHNA:** Section 2 of the Article 248 is more pertinent.

16

17 **RAKESH DWIVEDI:** 'Such power shall include the power of making any law imposing a tax
18 not mentioned in either of...' I'm grateful. 'Either of those lists.' So, not only the field of
19 legislation, but which has to be read with the power under 248, read along with that, is
20 indicative of the fact that, 'there is no arrogation of taxing power reserved for the state
21 contemplated.' So, the scheme of *Sundaramier*, as endorsed by subsequent judgments
22 stands reinforced rather than diluted by Entry 50. And all these expressions of, 'subject to', et
23 cetera, not 'including this', 'excluding that', these are meant to balance and distribute the
24 powers in the larger national interest and state interest. And to complete this chain of thoughts
25 with regard to Entries, there is a doctrine developed by this Court note, and that is with respect
26 to 'federalism being a basic feature of the Constitution' and that is a doctrine which applies in
27 a limited way. Because ultimately, federalism has two parts, both the Centre and the State. But
28 what this doctrine evolved by this Court says is, that, 'don't expand the phraseology so as to
29 deprive the state of its taxing power for any other field of legislation. If the subjection to the
30 Parliamentary domain, Parliamentary legislative power is clearly and specifically flowing, it
31 has to be honoured'. But that is the scheme of the Constitution. But if there is that doubts or
32 ambiguity et cetera, then the efforts should be to preserve the state's power rather than rule in
33 favour of its denudation, which I will show, My Lords, the judgments. So, that completes the
34 Entry and the...

35

36 **CJI DY CHANDRACHUD:** Also, Mr. Dwivedi, the Doctrine of Occupied Field does not
37 really apply in a conflict or where the subjects are in List I and List II. The Doctrine of Occupied

1 Field, where the mere enactment of a law or the failure of Parliament to enact a law, has no
2 bearing on whether the state should or should not legislate. If it's an occupied field, then by
3 virtue of the fact that it is occupied by a law made by Parliament, the states are completely
4 denuded. But that's only in respect of List III.

5

6 **JUSTICE B.V. NAGARATHNA:** Yes.

7

8 **RAKESH DWIVEDI:** Yes. This expression, 'occupied field', My Lord, Your Lordships have
9 deployed in two senses. One is List III, where Your Lordship says that if the Parliament has
10 exhaustively covered the entire field with regard to a subject matter, then states cannot trench
11 upon that field, and if the states have already made a law in that, then it will survive only to
12 the extent it is not repugnant and Article 254 becomes the key to resolve. The other is My Lord,
13 this expression has been used in the context of Entry 23 and 54 and 24 and 52, where Your
14 Lordships, have said that if Parliament has made a law with regard to mines and mineral
15 development, and that My Lord, covers the whole field, then the states cannot. So much so
16 that, if regarding minor minerals, Parliament doesn't itself, but it contains Section 15, which
17 says the states will make rule on these, these subjects regarding minor minerals. So, the states
18 must act as a delegate under Section 15. It cannot make its own law. So, it's in that sense, that
19 this expression has also occurred and repeatedly deployed. All that Your Lordships have
20 warned is that, we must clearly demarcate whether the field is covered or not. So, whenever
21 somebody says that this field is completely covered by MMDR Act or any other Oil Off Shore
22 Mining Act then one has to read that act to see what the state has done. Is it occupied there?
23 If it's not occupied, then state's law is good.

24

25 **JUSTICE B.V. NAGARATHNA:** That is why it says, 'to the extent to which'.

26

27 **RAKESH DWIVEDI:** 'To the extent to which'. I'm grateful. I am sorry My Lord, one more
28 provision I need to show. Article 286. I'm more concerned with 286(3) but I'll read the whole
29 of it so that the context is clear. 286(1), 'no law of a state shall impose or authorize the
30 imposition of attacks on the supply of goods or of services or both where such supply takes
31 place, a) outside the state or b) in the course of import of the goods or services or both into, or
32 export of the goods or services or both out of the territory of India.' Then 2), 'Parliament by
33 law formulate principles for determining when a supply of goods or services are both in any of
34 the ways mentioned in Clause 1.' Now, 3), has been deleted subsequently in 2016, but if Your
35 Lordships, will look at the Footnote 4. I hope My Lord, it's there?

36

37 **CJI DY CHANDRACHUD:** Yes, Mr. Dwivedi it's there.

1
2 **RAKESH DWIVEDI:** 'Clause 3 omitted by the Constitution, 101st Amendment 2016, with
3 effect from 16th September 2016, was substituted by so and so.' 3), 'any law of a state shall in
4 so far as it imposes or authorizes the imposition of a) a tax on the sale or purchase of goods
5 declared by Parliament by law to be of special importance in interstate trade or commerce or
6 b) a tax on the sale or purchase of goods being taxed of the nature referred to in Sub-Clause
7 (b), (c), (d) of Clause 29(a) of Article 366 be subject to such restrictions and conditions in
8 regard to the system of levy, rates and other incidents of the tax as Parliament may by law
9 specify'. So Entry 54, if it is a good... particular good is declared to be of special importance,
10 then it will be subject to restrictions and conditions which My Lord, that issue did arise in this
11 Court and Lordships said the restrictions and conditions must be specific, expressed in
12 concrete. Otherwise...

13
14 **CJI DY CHANDRACHUD:** It... I mean it has no bearing on what your argument. Look at
15 Clause 2 of 286. It doesn't make sense now.

16
17 **RAKESH DWIVEDI:** Yes.

18
19 **CJI DY CHANDRACHUD:** Just see, it says, 'Parliament may by law...'

20
21 **RAKESH DWIVEDI:** '...formulate principles for determining when a supply of goods or
22 services or both, in any of the ways mentioned in Clause I.'

23
24 **CJI DY CHANDRACHUD:** So, you know what happened was... Now see Footnote 33.

25
26 **RAKESH DWIVEDI:** Yes.

27
28 **CJI DY CHANDRACHUD:** The original word was, 'sale or purchase of goods takes place',
29 while making the amendment after the JFC legislation was enacted, they deleted the words,
30 'takes place'. The words 'takes place' should have been retained in Clause II. Otherwise, Clause
31 II has no meaning now. As Mr. Salve says, it's a fossil. But they by mistake, the drafts person,
32 took away the words 'takes place' also from 286(2).

33
34 **RAKESH DWIVEDI:** But maybe by formulating principles, it can be brought back.

35

1 **CJI DY CHANDRACHUD:** Formulate principles for determining when. They said, now
2 supply, because GST legislation is not sale or budget, it's supply. But you had to put the words
3 'takes place'. 'Takes place' is just taken away. Anyway you referred to 286(3), right?

4

5 **RAKESH DWIVEDI:** Yes. I referred to it because I'll be relying upon the case which is
6 directly on this to say that they should be specific and...

7

8 **CJI DY CHANDRACHUD:** What next, Mr.?

9

10 **RAKESH DWIVEDI:** Now, I would like to place the Mines and Minerals Development Act,
11 because that's a law made by Parliament, which is immediately an issue.

12

13 **CJI DY CHANDRACHUD:** Is it already in a digitised form?

14

15 **HARISH SALVE:** I don't think there's anything he has said which is controversial from what
16 I have heard. In some jurisdictions, they say in a case like these, 'please lead Counsels, sit down
17 together and formulate a list of propositions or laws to which you all agree'. So then, one of
18 them reads it, and that's it. And then focus your submissions on what you don't agree on.

19

20 **CJI DY CHANDRACHUD:** So, I think we can do that. That, you know, we've also taken
21 down what Mr. Dwivedi has said.

22

23 **HARISH SALVE:** No, no. Like my friend was arguing, we could all say we agree to all these.
24 You don't need to go over a lot of...

25

26 **CJI DY CHANDRACHUD:** Perhaps on your side, you could tell us tomorrow, at least we
27 can implement it in part. So that would have now anyway, we have taken an hour plus, on what
28 are those propositions about which there is no real dispute over here on this side completely.

29

30 **RAKESH DWIVEDI:** Or maybe after I finish, they may not dispute anything.

31

32 **HARISH SALVE:** Which makes that quite possible because we are actually running on
33 parallel tracks. [INAUDIBLE] We are all appearing in cases where there is a tax on royalty.
34 Here's a case that there's no tax on royalty. [INAUDIBLE]

35

36 **RAKESH DWIVEDI:** I have *Kesoram* to defend.

37

1 **CJI DY CHANDRACHUD:** Yes. Is the MMDR Act in the digitised form also or...?

2

3 **RAKESH DWIVEDI:** Volume IV, page 910.

4

5 **CJI DY CHANDRACHUD:** It has all the statutes as well.

6

7 **RAKESH DWIVEDI:** Kindly first have page 891. There was a predecessor act which will
8 have some relevance.

9

10 **JUSTICE J.B. PARDIWALA:** You are showing 48, right?

11

12 **RAKESH DWIVEDI:** 48.

13

14 **JUSTICE J.B. PARDIWALA:** 891 is the Volume... PDF.

15

16 **RAKESH DWIVEDI:** Now, this was a law made by the Constituent Assembly itself acting as
17 the Parliament under the India Independence Act 1947 and it was exercising all the powers
18 which was earlier being exercised by the Governor-General in Council, because the
19 Government of India Act 1935, to the extent of federation, never came into existence. So the
20 Government of India Act 1919 continued and the powers of the Governor-General in Council
21 were the same there. All those powers vested and read with India adaptations under the India
22 Independence Act, this law was made. Received the assent of the government, it's a short law,
23 received the assent of the Government General on the 8th September '48 and is published in
24 the Gazette of India Extraordinary, dated 8th September 1948. An act to provide for the
25 regulation of mines and oil fields and for the development of minerals, whereas it is expedient
26 in the public interest to provide for the regulation of mines and oil fields and for the
27 development of minerals to the extent here and after specified. It is hereby enacted, this act
28 may be called the Mines and Minerals so and so... It extends to all the provinces of India, and
29 also to any acceding states for which the Central Legislature has, for the time being, the power
30 to make a law, 'Development of Minerals.' Now, Your Lordships will see that, both oil fields
31 and that... they are covered by this, same. They were not separately dealt with. Section 2
32 contains a declaration, but it could not be a declaration under 54 because Constitution was not
33 there. That was one of the problems in... I am so sorry. Your Lordship will notice, historically
34 significant something that it says that, 'Provinces of India and to acceding states. By this time,
35 the issue of accession had not been finally settled.' It's September. And this Hyderabad and
36 Junagarh and Kashmir issues were still alive.

37

1 **JUSTICE ABHAY S. OKA:** Very interesting, actually.

2

3 **RAKESH DWIVEDI:** Yes. So, they say, acceding states. And they also say, "Has for the time
4 being, the power." Because some states, which had acceded, they had acceded only on 3
5 subjects and some had already stated that they accept the Constitution which is coming. So,
6 this variations are taking care of.

7

8 **JUSTICE B.V. NAGARATHNA:** In 1950, January 26.

9

10 **RAKESH DWIVEDI:** Yes. In fact, Goa came much later. Goa was...

11

12 **JUSTICE ABHAY S. OKA:** Goa, Dadra and Nagar Haveli.

13

14 **RAKESH DWIVEDI:** Dadra and Nagar Haveli and all that. Three is the definition and Your
15 Lordships will see, C) minerals include natural gas and petroleum. But now under the MMDR,
16 they've excluded it, and separated it. Oil field is in (E). Then 4 or 5, we can leave. Kindly have
17 6. Or both 5 and 6. 'The Central Government may, by notification in the official gadget, make
18 rules...' I'm reading Section 5. 'for regulating the grant of mining leases or for prohibiting the
19 grant of such leases, in respect of any mineral or in any area.' My Lords, that was those times,
20 the idea was that, investments were not there in the private sectors, so state had to do it. So,
21 they could prohibit also. Even today, the States and Central Government can reserve. 'In
22 particular, without prejudice to generality of foregoing power, such rules may provide for all
23 or any of the following matters. (A) Manner in which the mineral or areas in respect of which
24 by whom, applications for mining leases may be made. (B) The authority by which, the terms
25 on which, and the conditions subject to which, mining leases may be granted. (C) The
26 maximum or minimum area and the period for which a mining lease may be granted. And
27 terms on which lease will be granted, with respect to contiguous area may be amalgamated.
28 Fixing of the maximum minimum rent payable by lessee whether the mine is worked or not.'
29 Then 6, 'Central Government may by notification in the official gadget make rules for the
30 conservation'. And now kindly have (i), Section 6(i). 'The levy in...', Your Lordship has? Section
31 6(i).

32

33 **CJI DY CHANDRACHUD:** Section 6(i).

34

35 **RAKESH DWIVEDI:** 'The levy and collection of royalties, fees for taxes in respect of
36 minerals mined, quarried, excavated or collected.' Now, this is significant because both powers
37 were with the Central Government. By exercising a rule making power, it could fix both

1 royalties, fees and taxes in respect of minerals. Section 7 pertains to modification of the
2 existing leases. Under Section 10, it had to be laid, the rules had to be laid before the
3 legislature, Central Legislature. It's a matter of some interest, Section 13, that even the Crown
4 was found because at that time, we were Dominion.

5

6 **CJI DY CHANDRACHUD:** Right.

7

8 **RAKESH DWIVEDI:** Not yet declared to be a Republic. So, the Crown was also...

9

10 **JUSTICE ABHAY S. OKA:** This is a typo. There are two typos in fact. After or, also.

11

12 **RAKESH DWIVEDI:** So, Section 6(i) is that royalty and tax are both mentioned and has
13 powers to be exercised by Central Government.

14

15 **CJI DY CHANDRACHUD:** Yes.

16

17 **RAKESH DWIVEDI:** This significance will arise when we deal, when Your Lordships, sees
18 Section 25, of the present act, which talks of recovery of taxes, because one of the questions
19 was that Section 25 is talking of recovery of taxes, but there is no provision imposing tax. So,
20 unless you treat royalty as a tax, the connection snaps. So the reason for mentioning will be
21 evident when one side pleads. This explains why Section 25, has the word, 'tax'. Now kindly
22 have the main act, which is still operating, that is MMDR Act 1957, Volume IV, page 910. If
23 Your Lordship has the bare act, that will... can be containing other rules also. Kindly see, I'll
24 only point out the relevant provision. Section 3(a)(c) is the 'leased area'. The declaration is
25 contained in Section 2. Now, this declaration will be under Entry 54. (a)(c), is the 'leased area'
26 means the, 'area specified in the mining lease within which the mining operations can be
27 undertaken and includes the non-mineralized area required and approved for the activities
28 falling under the definition of mine as referred to in Clause (i). Now (a)(e), is mineral
29 concession, which is very widely worded, includes mining lease, reconnaissance permits,
30 prospecting license, composite license and all this. (c), is mining lease means, a lease granted
31 for the purpose of undertaking mining operations include sub-lease. (d), is mining operations.
32 Means any operation, undertaken for purpose of winning any mineral. And (f)(a), is
33 production, or any derivative word of the word production means the winning or raising of
34 mineral within the leased area for the purpose of processing or dispatch. We can leave out for
35 a definition of prospecting, et cetera. By virtue of Section 4 My Lord, all mining has to be done
36 under the licenses, permits and lease. Section 6 is maximum area. 7 is periods. 7 and 8. Now
37 8, is a new provision rule which now requires that initial leases will be of 50 years, rest all by

1 auction. Kindly come straight to Section 9. 'The holder of mining lease granted before the
2 commencement of this act shall notwithstanding, anything contained in the instrument of
3 lease or in any law enforce at such commencement, pay royalty in respect of any mineral
4 removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee
5 from the leased area after such commencement, at the rate for the time being specified in the
6 2nd Schedule in respect of that mineral. 2) the holder of a mining lease granted on or after the
7 commencement of this act, shall pay royalty in respect of any mineral removed or consumed
8 by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at
9 the rate for the time being specified in the 2nd schedule in respect of that mineral.' So both old
10 leases and the new leases will be subjected to charge of royalty. The only exception with regard
11 to coal is 2(a), that to the extent the workmen consume coal for their own purposes, subject to
12 limitation, royalty will not be charged. And 3, Subsection 3 says, 'the Central Government may
13 by notification in the gazette amend the 2nd Schedule so as to enhance or reduce the rate at
14 which royalty shall be payable in respect of any mineral, with effect from such date as may be
15 specified in the notification provided that the Central Government shall not enhance the rate
16 of royalty in respect of any mineral more than once, during any period of three years.' So that
17 then is the provision of royalty and...

18

19 **JUSTICE HRISHIKESH ROY:** But 'royalty' is not defined under that?

20

21 **RAKESH DWIVEDI:** No.

22

23 **JUSTICE HRISHIKESH ROY:** Not defined?

24

25 **RAKESH DWIVEDI:** No. All that it says, is that 'royalty' is in respect of minerals which are
26 removed or consumed from the leased area. And if Your Lordships looks at the 2nd Schedule,
27 Your Lordship will find various... just a glance, we are not referring to any particular mineral
28 here. But the 2nd Schedule has a detailed list of different minerals, different rates, *ad valorem*.
29 So question, one of the question is whether this royalty which is levied under Section 9 is in
30 the nature of tax either on a plain reading or by bringing in Article 366, 28 of the Constitution,
31 which says... which can be seen at this stage.

32

33 **JUSTICE ABHAY S. OKA:** That's the main question here. Everything revolves on the
34 nature of the royalty.

35

36 **DINESH DWIVEDI:** That's right. Tax were 'imposed', is the word used there. So how do we
37 understand this word, 'imposed'? Kindly have a look at Section 366.

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CJI DY CHANDRACHUD: Section 366?

RAKESH DWIVEDI: Article 366, 28. 'Taxation includes the imposition of any tax were imposed, whether general, or local, or special, and tax shall be construed accordingly'. So one question is, how do we look at this word 'imposed' as something completely different from the word, along with which it occurs? Namely, that it should be in the nature of a tax. And the other would be, that irrespective of the label or the nomenclature which is used, because this issue has arisen several times, whether it's a cess, which is... is it a fee or is it tax? Is the fee in the nature of tax or tax in the nature of fee? So...

JUSTICE B.V. NAGARATHNA: What is the implication of holding it one way or the other?

DINESH DWIVEDI: If Your Lordships hold that royalty in Section 9 is a tax, then the next step, which the Respondents take is that, royalty is with respect to minerals removed or dispatched, so, it has connection with the minerals. Or the mineral rights. And consequently, it will be a provision, which is a limitation within Entry 50. That will be one inference with regard to royalty. So therefore, the question arises if we treat this as a tax, then it becomes a case on a plain reading of 9, 1, 2, and 3, where Parliament has abrogated to itself the power to impose tax. It's not imposing any limitations. "You will not do it, I will do it." That's the consequence of considering it a tax. 3 says, 'only Central Government, by notification can amend the schedule so as to enhance or reduce.' So, the Parliament then will not be limiting the state's power, but will be assuming the power to itself to fix, to enhance, to reduce and that's how the word 'limitations', the ambit of the word, 'limitation' itself becomes an issue.

CJI DY CHANDRACHUD: Yes.

RAKESH DWIVEDI: And this is quite apart from the fact that the expression 'royalty' has been used even in the '48 Act, when the Parliament was mentioning both royalty and tax side by side.

CJI DY CHANDRACHUD: Right.

RAKESH DWIVEDI: But now Your Lordship will not find any provision which imposes a tax. It does not use, except in the case of recovery, that is Section 25. It was necessary to have the word 'tax' in Section 25 in a Recovery Provision alone because 1948 Act had empowered the Parliament to... Central Government to impose tax also. And it was possible that this due

1 when this new Act comes into force. So, the recoveries would still have to be made up with
2 respect to those tax dues and consequently only tax is there.

3

4 **CJI DY CHANDRACHUD:** Which is the next provision you want us to see?

5

6 **JUSTICE ABHAY S. OKA:** Only one thing. Section 20... 25 says, "Tax fee or other sums
7 due to the government under this act.' You can't go to the old acts then.

8

9 **RAKESH DWIVEDI:** Sub-section 2?

10

11 **JUSTICE ABHAY S. OKA:** No. Sub-section 1 of Section 25 says that, "Tax fee or other sums
12 due to the government under this act."

13

14 **RAKESH DWIVEDI:** Yes.

15

16 **JUSTICE ABHAY S. OKA:** Not under the old act. This will not empower the recovery of
17 outstanding tax under the old act.

18

19 **RAKESH DWIVEDI:** So I'll just show to Your Lordships... straight away, kindly see Section
20 29.

21

22 **JUSTICE B.V. NAGARATHNA:** Yes, existing rules...

23

24 **RAKESH DWIVEDI:** Section 29 continues the existing rules as if they are made under. As
25 if this act has been in force on that date. 'All rules made or purporting to have been made under
26 the Mines and Mineral Regulation and Development Act 1948 shall, insofar as, they relate to
27 matters for which provision is made in this Act and are not inconsistent, therewith be deemed
28 to have been made under this act, as if, this act has been enforced on the date on which such
29 rules were made and shall continue in force unless and until they are superseded by any rules
30 made under this act.' So, the rules under the '48 Act, were made in 1949. So, they were
31 continued. This Act itself came in 1957, after the first elections.

32

33 **JUSTICE ABHAY S. OKA:** Yes.

34

35 **RAKESH DWIVEDI:** And the rules, as Your Lordships are aware, were made in 1960.
36 Mineral Concession Rules, 1960, which repealed the old rules. That appears to be the only
37 intent of 25, otherwise, it's a Recovery Provision as Your Lordships, you will see on a plain

1 reading it says, 'any rent, royalty, tax fee, other sum due to the Government, under this act, all
2 the rules made there, under or under the terms and conditions of Mineral Concession, may
3 own a certificate of such officer, may be specified. b) They covered in the same manner as an
4 area'. So, it's not a provision. 25 doesn't impose a tax.

5

6 **CJI DY CHANDRACHUD:** It's a Recovery Provision.

7

8 **RAKESH DWIVEDI:** Recovery. And it's an Omnibus Provision. So, whether it doesn't take
9 care of what is due or not due, it lumps together everything and gives a wide power for
10 recovery. But the tax imposition has to come by some specific provision. And royalty is
11 something, there's one concept My Lord, which in *Gannon Dunkerley* which Your
12 Lordships deployed, namely My Lord, If a particular expression like, 'sale' was being
13 commonly used and understood in a particular manner in the sense of Sale of Goods Act. So
14 therefore, wherever this Entry 54, the word, 'sale' was understood in that sense. Likewise,
15 royalty, was not something unknown. This was being recovered. In fact, one finds mention of
16 this in even Kautilya's *Arth Shastra*. The Iron Age My Lord, came much before so, mining is
17 not that was unknown to India, only after the Britishers came. So, with respect to... one clearly
18 understands this, state is the owner of the minerals. There's no dispute again. I hope so. Unless
19 and until My Lord, land, et cetera, is acquired specifically by Parliament under some law.

20

21 **JUSTICE ABHAY S. OKA:** No, there may be a dispute where the land is a *patta* land. Again
22 is a controversy.

23

24 **RAKESH DWIVEDI:** Then there is a private person who will be owning. And that is a very
25 important aspect, which I am relying upon. If royalty is a tax and if state is mining on a private
26 person's land, then it has to pay royalty to that private person. So, is the state or the Central
27 Government My Lord, paying royal... tax to the private person? Royalty, therefore, is
28 consistently used in the sense, prevailing sense, namely, that it is a return for parting with my
29 ownership right to the lessee. The state and the government can itself mine, extract minerals
30 and fill it. Instead of doing itself, it grants a lease. And under the lease, the lessee then assumes
31 that right and a lease is nothing but a contract.

32

33 **JUSTICE B.V. NAGARATHNA:** What happens if the owner of the land himself mines?

34

35 **RAKESH DWIVEDI:** Then no royalty will be due.

36

37 **JUSTICE B.V. NAGARATHNA:** No royalty is due?

1

2 **RAKESH DWIVEDI:** Yes. But if it transfers that right, then it says, all right, you will be
3 selling. You'll be earning profits. So, I must get it. It's just like My Lord, if I author a book, and
4 I give it to a publisher, I transfer my copyright to the publisher and the publisher earns profit
5 on that by publishing n number of copies. So, I say that I must get as an owner. So, it's no
6 different and that's how it is used. Now, (c) also 9(a), which is dead rent. 9(a), dead rent. It is
7 intricately connected with royalty, because if somebody doesn't mine, even then, he has to pay
8 dead rent. 'The holder of a mining lease, whether granted before or after the commencement
9 of the Mines and Minerals Regulation and Development Amendment Act, 1972 shall,
10 notwithstanding anything contained in the instrument of lease or in any other law for the time
11 being enforce, pay to the state government every year dead rent at such rate, as may be
12 specified for the time being in the 3rd Schedule for all the areas included in the Instrument of
13 Lease.'

14

15 **CJI DY CHANDRACHUD:** Yes.

16

17 **RAKESH DWIVEDI:** Then proviso is important. 'Provided that where the holder of such
18 mining lease becomes liable under Section 9 to pay royalty for any mineral removed or
19 consumed by him or by his agent, manager, employee, contractor, or sub-lessee from the
20 leased area, he shall be liable to pay either such royalty or the dead rent in respect of that area,
21 whichever is greater.' So if the mineral dispatched result in a royalty which is lesser than the
22 dead rent, then you have to pay dead rent. If you don't mine at all, you still have to pay dead
23 rent. So that's the price which I am asking for myself, for namely the state, because the land
24 has mineral and has been given to you for purposes of certain activity. The dead rent assures
25 a minimum return and royalty may be a higher return or a lesser return. But only one of the
26 two is payable, whichever is greater. Just to note, kindly just note Section 13, which is a rule
27 making power of the Central Government. 13(2)(i). 'Empowers rules, making of rules for
28 regulating the grant of mineral concession'. And then 2(i), some specific illustrations. One is,
29 (i), is the fixing and collection of fee for mineral concession, surface rent, security deposit fines
30 or other fees or charges and the time within which, and the manner in which the dead rent or
31 royalty shall be payable. To the manner... the rate is, etc. fixed under 9, dead rent under 9(a)
32 and the manner of payment. Now Section 15(1)(a), small (g) is for minor minerals, and the
33 state has power to make rules. Then kindly have Section 17. As the caption of above Section 17
34 shows, it's a special powers of Central Government to undertake prospecting or mining
35 operations in certain cases. Sub-Section 1 of Section 17 says, 'provisions of this section shall
36 apply in respect of land in which the minerals vest in the government of a state or any other
37 person.' Then kindly have 3, 'where in exercise of the powers conferred by sub-Section 2, the

1 Central Government...', I'm sorry, 'where in exercise of the powers conferred by Sub-Section
2 (2), the Central Government undertakes reconnaissance prospecting or mining operations in
3 any area. The Central Government shall be liable to pay reconnaissance permit fee or
4 prospecting fee, royalty, surface rent or dead rent, as the case may be at the same rate at which
5 it would have been payable under this act, if such reconnaissance prospecting or mining
6 operations had been undertaken by private persons under a mineral concession'. Now, if we
7 treat royalty as a tax, then this will be a stretch case of the government paying tax to the private
8 persons. Therefore, royalty under this act cannot be understood as tax. It has to be understood
9 as a return. Because the land belongs to and mineral belong to the private person, to the private
10 person you have to recompense him by paying a return which you are yourself charging. The
11 only difference will be that, royalty is not being fixed by the private person. But under Section
12 9... but that's a matter of regulation. Now 17(A), 'Reservation of area for purposes of
13 conservation. The Central Government with a view to conserving any minerals and after
14 consultation with the said State Government, may reserve any area not already held under any
15 prospecting license or mining lease and where it proposes to do so, it shall by notification in
16 the official gadget specify the boundaries of such area and the mineral or minerals in respect
17 of which, such area will be reserved. 1(a), the Central Government may in consultation with
18 the State Government, reserve any area not already held under prospecting license or mining
19 lease for undertaking prospecting or mining operations through a government company or
20 corporation owned or controlled by it, and where it proposes to do so, it shall, by notification
21 in the official gadget specify the boundaries of such area and the mineral or minerals, in
22 respect of which, such area will be reserved'. Now, with this, if Your Lordships sees 2(a), where,
23 'in exercise of the powers conferred by Sub-Section 1(a) or Sub-Section 2, the Central
24 Government or the State Government, as the case may be, reserves any area for undertaking
25 prospecting or mining operations or prospecting operations, followed by mining operations,
26 the State Government shall grant prospecting license, mining lease or composite license as the
27 case may be in respect of such area to such government company or corporation within the
28 period specified in the section'. Now, having got this, kindly turn to... advert to Section, Sub-
29 Section 3.

30

31 **JUSTICE HRISHIKESH ROY:** That's important.

32

33 **RAKESH DWIVEDI:** Although 2(c), also envisages some payment, My Lord, on account of
34 this, but pertinent is 3, Sub-Section 3, wherein 'exercise of the powers conferred by Sub-
35 Section 1(a) or Sub-Section 2, the Central Government or the State Government, as the case
36 may be, undertakes prospecting or mining operations in any area in which the minerals vest
37 in a private person, it shall be liable to pay prospecting fee, royalty, surface rent, or dead rent

1 as the case may be from time to time at same rate at which it would have been payable under
2 this act, if such prospecting or mining operations had been undertaken by a private person
3 under a prospecting license'. So, where the minerals are vesting in the private person. So, it
4 makes sense that, if it is a return for the parting of the ownership right to extract minerals and
5 sell them, then it's a consideration virtually. As in the case of Excise Act, My Lord, they say
6 that it was a privilege's part or in the case of spectrum My Lord, which is owned in trust by the
7 Central Government, so they can charge, call it license fee, royalty, et cetera. They are all
8 considered to be... consideration or a share. I would put it as a share in the mineral value. My
9 Lord Justice Oka was asking about mineral development. There's something in Section 18.
10 Whole chapter begins with this, 'development of minerals.' Opening of new mines, excavation,
11 collection of minerals taken by owners of mines for purpose of beneficiation, new boring shaft
12 sinkings. So, it's understood in a slightly wider sense. Kindly have Section 21. Of course, its
13 penalty but if somebody unlawfully mines under Sub-Section 5, he has to, he will still be
14 subjected to payment of rent, royalty or tax, as the case may be. Now this again, My Lords, is
15 one, a Recovery Provision and here after the word, 'tax', Your Lordships will find, 'as the case
16 may be'.

17

18 **CJI DY CHANDRACHUD:** Where Mr. Dwivedi, 21 ?

19

20 **RAKESH DWIVEDI:** 21(5). 'Whenever, any person raises, without any lawful authority,
21 any mineral from any land, the State Government may recover from such person the minerals
22 so raised, or where such mineral has already been disposed of, the price thereof and may also
23 recover from such person rent, royalty or tax as the case may be'. Then is Section 25, which is
24 one of the provisions relied upon by the Respondents. Some of them are Appellants but I'm
25 using this expression generically on the other side, 'Any rent, royalty, tax fee or other sum due
26 to the government under this act or the rules made there under or under terms and conditions
27 of mineral concessions, may own a certificate of such officer or, of as, may be specified by the
28 government in this behalf by general or special order we recover'. So, just like that other
29 provision this is also in 1972, this Sub-Section 2, was substituted. 'Any rent, royalty, tax fee or
30 other sum due to the government either under this act or any rule made there under or under
31 the terms and conditions of any mineral concession may on a certificate of such officer.' So
32 again, a Recovery Provision after 72, but it continues to use the word, 'tax'. The nature is
33 recovery. 29, I have already read. And 33 may be seen, which is also the last section of this act.
34 'All acts of executive authority done, proceedings taken, sentences passed under the Mines and
35 Minerals Act 1948, with respect to regulation of mines and development of minerals during
36 the period 26 January '50 and ending the date of the commencement of this act, the
37 government or by officer of the government or by authority in belief or purported belief that

1 the acts, proceeding or sentences were being taken or passed under the said act shall be valid
2 and operative as if, they had been done, taken or passed in accordance with law'. So even if,
3 there was some irregularity or something, they are still... Now, apart from this My Lord, there
4 is no other provision which levies specifically any tax. And Your Lordships, has seen that
5 royalty is payable, even by the government to the private person. Which is something which
6 India Cement did not note at all. Now, just one rule, Mineral Concession Rules which Your
7 Lordships, will find... at page 897.

8

9 **CJI DY CHANDRACHUD:** Volume?

10

11 **RAKESH DWIVEDI:** Volume IV. 1586.

12

13 **JUSTICE HRISHIKESH ROY:** In the same Volume, I think.

14

15 **RAKESH DWIVEDI:** I'm sorry. Page 1586. Volume IV. Kindly have Rule 64(A) which is
16 only... [INAUDIBLE] authority is the Central Government. Kindly see Chapter 4 of the Mineral
17 Concession Rules 1960 at page 1595. Please see the caption, 'Grant of mining leases in respect
18 of land in which the minerals vest in the government.' Then please advert to Rule 27(c), (1)(c),
19 27(1)(c). The proviso... the proviso says, 'provided that the lessee shall be liable to pay the dead
20 rent or royalty in respect of each mineral, whichever be higher in amount but not both.'

21

22 **CJI DY CHANDRACHUD:** 27, is it?

23

24 **RAKESH DWIVEDI:** Yes.

25

26 **CJI DY CHANDRACHUD:** 27 is the proviso... 1601.

27

28 **RAKESH DWIVEDI:** Yes. 1601. May I continue after lunch, please?

29

30 **CJI DY CHANDRACHUD:** We'll continue after lunch.

31

32

33 **CJI DY CHANDRACHUD:** Yes, Mr. Dwivedi.

34

35 **RAKESH DWIVEDI:** During the course of the lunch, first session, I've gained a case.

36

37 **CJI DY CHANDRACHUD:** Sorry?

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RAKESH DWIVEDI: I have gained a case. I will also be appearing in 901.

CJI DY CHANDRACHUD: 901?

RAKESH DWIVEDI: 901.44, State of Odisha.

CJI DY CHANDRACHUD: C.A. 901 of?

RAKESH DWIVEDI: 901.44 C.A. No. 1883 of 2006.

CJI DY CHANDRACHUD: Yes.

RAKESH DWIVEDI: I had shown Chapter IV of the Mineral Concession Rules, 1960, My Lord.

CJI DY CHANDRACHUD: Yes.

RAKESH DWIVEDI: Now if Your Lordships turns to Chapter V at page 1608 Volume IV. The heading shows My Lord, the procedure for obtaining a prospecting licence or mining lease in respect of land in which minerals vest in a person other than the government. And 41 elaborates that. Minerals vest exclusively in a person other than the government. And Rule 45(i) the provisions of Clause B and so and so of Rule 1 of Rule 27, all those relating to royalty, etc., will apply.

CJI DY CHANDRACHUD: Yes. The important part, which you want to stress, is, of course, the fact that the minerals in that case vest in a person other than the government.

RAKESH DWIVEDI: That's right. So, it can't be, taxed My Lord. It'll be very... to say the least inconsistent My Lord to the constitutional scheme that the state is paying a tax... and the other thing is, it is the Central Government which is making the rules, and Central Government is conscious of the framework of the MMDR Act. And please see sub-rule (iv), 45(iv) If the lessee makes any default in payment of royalty as required by Section 9 or commits a breach of any of the conditions of the lease, the lesser shall give notice to the lessee requiring him to pay the royalty. So, the person will give a notice to the state government... or remedy the breach, as the case may be, within 60 days of the date of receipt of the notice and if the royalty is not paid or the breach is not remedied within such period, the lesser without prejudice to

1 any proceeding that may be taken against the lessee determine the lease. Then please see
2 Chapter VI, now there it envisages some land where some leased area where partly it is owned
3 by them, and partly by the private person. Grant of prospecting licences and mining leases in
4 respect of land in which minerals vest partly in the government and partly in private persons.
5 Then, Rule 53 says Chapter III and IV to apply to prospecting licences and mining leases in
6 respect of minerals which vest partly in government and partly in private persons. The
7 provisions of Chapter III and IV shall apply in relation to grant of prospecting licences and
8 mining leases in respect to minerals which vest partly in the government and partly in private
9 person, as they apply in relation to the grant of prospecting licence and mining leases in
10 respect of minerals which vest exclusively in the government. Provided that the dead rent and
11 royalty payable in respect of minerals, which partly vest in the government and partly in
12 private persons shall be shared by the government and by that person in proportion to the
13 shares they have in the minerals. So, now this can't be a sharing of tax between government
14 and private person. So, royalty will have to be understood in the normal sense, namely that
15 since it's a joint ownership and both are together parting with their right under the lease,
16 therefore, it will be shared.

17

18 Now I will not read it, but Your Lordship may just note 64 D. Inserted in the year 2009, with
19 effect from 10th December 2009, where for different... they have prescribed formulas. Your
20 Lordship may just glance through this. Every mine owner, his agent, manager, employee,
21 contractor or sub-lessee shall compute the amount of royalty on minerals where such royalty
22 is charged on *ad valorem* basis as follows. (i) For all non-atomic and non-fuel minerals sold
23 in the domestic market or consumed in captive plants or exported by the mine owners other
24 than bauxite and laterite dispatched...

25

26 **JUSTICE J.B. PARDIWALA:** You may skip that. Come to page 1614. There is something,
27 "Royalty = Sale price X rate of royalty in percentage."

28

29 **RAKESH DWIVEDI:** Equal to total quantity of mineral produced / dispatched. So that's the
30 formula prescribed for that particular mineral.

31

32 **JUSTICE J.B. PARDIWALA:** So has this royalty something to do with fixation of the price
33 of the mineral?

34

35 **RAKESH DWIVEDI:** No. Whatever be the price the lessee is selling in the market that will
36 be taken and in certain cases, the royalty.... Next proviso may be seen, My Lords.

37

1 **JUSTICE J.B. PARDIWALA:** Difference between fixation of the price of a particular
2 mineral with the fixation of royalty, anything of that sort?

3

4 **RAKESH DWIVEDI:** Yes, it will depend upon that. The formula is casted in a manner that
5 the price becomes a relevant factor and the prices are fixed by IBM.

6

7 **JUSTICE J.B. PARDIWALA:** Those prices should be uniform, perhaps.

8

9 **RAKESH DWIVEDI:** Now, kindly see, the proviso. Provided that if for a particular mineral,
10 the information for a State for a particular month is not published by the Indian Bureau of
11 Mines, the latest information available for that mineral in the State shall be referred, failing
12 which the latest information for All India for the mineral shall be referred. Then (ii) also refers
13 to the sale price published by the IBM, shall be used as a benchmark. The last three lines of
14 (iii) also for primary gold, silver, copper, nickel.

15

16 **CJI DY CHANDRACHUD:** What is the next provision you want us to see?

17

18 **RAKESH DWIVEDI:** And 64A contemplates interest, 24% if there is delay in payment of
19 royalty. The very fact that Section 9 gives power to the Central Government to fix, the idea
20 seems to be therefore, that as far as royalty is concerned, the considerations which are charged
21 by the various State Governments should be on a broadly uniform basis. And Rule 68 now
22 repeals the 49 Rules.

23

24 **CJI DY CHANDRACHUD:** Right.

25

26 **RAKESH DWIVEDI:** And 72 is surface rent. Now, kindly see the Form K in which the lease
27 is granted at page 1644. Turn to Part V of this Form K, which will be at page 1648. Now Part V
28 and VI, they talk of both rent and royalty. Part VII, the covenants of the lessee and lessees. 1.
29 The lessee/lessees shall pay the rent, water rate and royalties reserved by this lease at such
30 times and in the manner provided in Parts V and VI of these presents and shall also pay and
31 discharge all taxes, rates, assessments and impositions whatsoever being in the nature of
32 public demands which shall from time to time be charged, assessed or imposed by the
33 authority of the Central and State Governments upon or in respect of the premises and works
34 of the lessee/lessees in common with other premises and works of a like nature except
35 demands for land revenues.

36

1 **CJI DY CHANDRACHUD:** Royalty is a payment made for any mineral removed or
2 consumed by the lessee. That is evident from Part V, Rule 1 or Clause 1. Provided that where
3 the holder of such mine lease becomes liable under Section 9 to pay royalty for any mineral
4 removed or consumed by him. That's what Section 9 says. That's why if you don't remove
5 mineral then you pay dead rent.

6

7 **RAKESH DWIVEDI:** Dead rent. Or even when you have... Now VII 1., shows, see the
8 structure of VII 1., Part VII, the covenants. The lessee shall pay the rent, water rate and
9 royalties reserved...

10

11 **JUSTICE HRISHIKESH ROY:** Computation of Royalty is given Part VI, para 2. You may
12 like to read that.

13

14 **JUSTICE J.B. PARDIWALA:** It says minerals produced and dispatched.

15

16 **RAKESH DWIVEDI:** My Lords are referring to which Clause?

17

18 **JUSTICE J.B. PARDIWALA:** Part VI, Clause 2. 1649.

19

20 **RAKESH DWIVEDI:** That's for keeping account of what is produced and dispatched.
21 Ultimately, the point of time when the royalty is to be paid is when it is dispatched. It leaves
22 the leased area. What I was pointing out to my Lords in Part VII, condition 1 is the structure,
23 My Lord that rent, water rate and royalties reserved by this lease at such times, in such manner
24 provided in Part V and VI of these presents, and shall also pay and discharge all taxes, rates
25 assessment and imposition whatsoever.

26

27 **CJI DY CHANDRACHUD:** So taxes are used in...

28

29 **RAKESH DWIVEDI:** In the nature of public demand.

30

31 **CJI DY CHANDRACHUD:** Yes. So taxes are not... royalties are not subsumed in tax.

32

33 **RAKESH DWIVEDI:** No. Even Section 25 uses royalty and tax, both separately.

34

35 **CJI DY CHANDRACHUD:** No, that we saw.

36

1 **RAKESH DWIVEDI:** And one explanation I gave, My Lord, about why only a recovery of
2 tax provision is there referring to the previous Act and the rules. The other is My Lord, that
3 subsequent to this Act, the States are still competent under Entry 50 List II to impose tax on
4 mineral rights. So therefore... and the provisions say, either under this Act or this rule or the
5 terms and conditions of the lease. So, the lease condition expressly talks of royalty and tax
6 also, because States, some State can other States may not so, as the case may be, that's the
7 expression, concerned. Now, there are other Acts, My Lord, which also like Coal Bearing Areas,
8 (Acquisition and Development) Act, 1957 where Central Government in certain States has
9 acquired the land and then it has power to vest it in some Central Government Company also.
10 That also contemplates the payment of royalty though, it says that you will pay a sum which is
11 equivalent to royalty, under this Act, Mines and Minerals Act. So I'm not referring Your
12 Lordships, to all those Acts, because there are number of Acts where... This is Section 18A of
13 Coal Bearing Areas (Acquisition and Development) Act 1957, page 1396 at 1404. Under Section
14 10 of this Act the Central Government can acquire either the land itself or the rights in the
15 land. Section 9 allow me to place 2 or 3 sections, My Lords.

16

17 **CJI DY CHANDRACHUD:** Coal Bearing Areas Act?

18

19 **RAKESH DWIVEDI:** Yes, Coal Bearing Areas (Acquisition and Development) Act.

20

21 **CJI DY CHANDRACHUD:** Where do we get it?

22

23 **RAKESH DWIVEDI:** Page 1399 Volume IV. Section 9 is declaration of acquisition where
24 the Central Government is satisfied after considering report, if any made under Section 8, that
25 any land or any rights in or over such land should be acquired, a declaration shall be made by
26 it to that effect, and different declarations may be made from time to time in respect of
27 different parcels of land or of rights in or over such land covered by the same notification under
28 sub-section (1) of Section 7, irrespective of whether one report or different reports has or has
29 been made. Provided that no declaration in respect... something like Section 6 of the Land
30 Acquisition Act. But the importance of this section is that it is... the Parliament is visualizing
31 the land itself and the rights in or over such land differently and separately. They are distinct
32 rights. Even under the MMDR Act, when the lease is granted so the right to the leased area in
33 the form of lease is by virtue of the grant of lease. But the right to extract the mineral and
34 dispatch it is by virtue of the conditions of the lease. So, either of the two can be acquired or
35 both. Then 10 says vesting of land or rights in Central Government. On the publication in the
36 Official Gazette of the declaration under Section 9, the land or the rights in or over the land,
37 as the case may be, shall vest absolutely in the Central Government, free from all

1 encumbrances. Where the rights under any mining lease granted or deemed to have been
2 granted by a State Government to any person are acquired under this Act, the Central
3 Government shall, on and from the date of such vesting, be deemed to have become the lessee
4 of the State Government as if a mining lease under the Mineral Concession Rules had been
5 granted by the State Government to the Central Government, the period thereof being the
6 entire period for which such a lease could have been granted by the State Government under
7 those rules. So, if you acquire only, then you become a lessee of the State Government. Then
8 11, power of Central Government to direct vesting of land or rights in a government company.
9 Notwithstanding anything contained in Section 10, the Central Government may, if it is
10 satisfied that a Government company is willing to comply, or has complied, with such terms
11 and conditions as the Central Government may think fit to impose, direct, by order in writing,
12 that the land or the rights in or over the land, as the case may be, shall, instead of vesting in
13 the Central Government under section 10 or continuing to so vest, vest in the Government
14 company either on the date of publication of the declaration or on such other date as may be
15 specified in the direction. And then 12 is taking of possession. Now kindly see 18A. Payment
16 to State Government in lieu of royalty. Notwithstanding anything contained in this Act, where
17 any land or any rights in or over land belonging to a State Government (other than the rights
18 under a mining lease granted or deemed to have been granted by the State Government to any
19 person) vest in the Central Government under Section 10 or in a Government Company under
20 Section 11, the Central Government or the Company, as the case may be, may pay to the State
21 Government such sum of money as would have been payable as royalty by a lessee had such
22 land or rights been under a mining lease granted by the State Government. So, if the Central
23 Government does not transfer it to the company and keeps it to itself and does mining, then it
24 will pay a sum which is equivalent to royalty. One more Act, My Lord, then I'm done with this.
25 This is IV(b). The The Offshore Areas Mineral (Development and Regulation) Act, 2002.
26 Volume IV(b), page 6. Kindly see Section 16 at page 13. Your Lordships have Section 16? Lessee
27 shall pay royalty to the Central Government in respect of any mineral removed or consumed
28 from the area covered under this production lease at the rate for the time being specified in
29 the First Schedule in respect of that mineral. Again, it is in respect of any mineral removed or
30 consumed.

31

32 **CJI DY CHANDRACHUD:** Right.

33

34 **RAKESH DWIVEDI:** So, the question now My Lord is, having seen the scheme of royalty,
35 the fact that a private person pays royalty to the Government and the Government pays to the
36 private person if the Government is mining in an area where the minerals are owned by a
37 private person, I submit that that fact alone is enough to conclude that royalty under the

1 MMDR Act or the other cognate Acts is not a tax. Because a tax, as enunciated by this Court is
2 a sovereign imposition in public interest to meet the needs of the Government. And this has
3 been so held by all the Hon'ble Judges, unanimously in **Jindal Steel**. I'll show those
4 paragraphs. Here on a holistic reason of the Act, quite apart from the normal concept of
5 royalty, as we understand is that, royalty is being paid to the owner of the minerals, be it
6 Government or a private person. Logically therefore, since the owner is parting with his right
7 to extract and sell the minerals in the market in favour of a lessee or a deemed lessee under
8 law, therefore, the lessee is required to pay a particular share. The other thing is that for good
9 reasons, the framers of the Constitution have placed Entry 54 in List I because minerals are of
10 considerable importance to the whole country, and therefore to an extent, as far as royalty is
11 concerned, comes broad uniformity and that's the idea of regulation. That's the Entry says
12 regulate mines and mineral development. Before Independence, many Provinces were
13 passing, making their own rules and own royalties were being fixed in the way they wanted.
14 So therefore, in the interest of the country, the fact that there is a uniformity envisaged as
15 regards royalty would not mean that it's a taxation. The fee can be uniform, the prices can be
16 uniform, so various charges, levies, impositions they can all be uniform or differentiated. Even
17 the Parliament, while fixing royalty as Your Lordships have seen in the rules they can fix
18 different royalty for different minerals and Parliament is also competent to fix a different rate
19 of royalty for different states if it can classify it appropriately. So, that idea of classification
20 remains with the Central Government, and it can do that. So whether it wants a complete
21 uniformity or broad uniformity or differentiated rate of... it's up to the Central Government.
22 But that does not make it a tax because one of the assertions from the other side is that since
23 it's a uniform imposition by the Parliament under this, so therefore, it's in the nature of tax
24 and for that they draw sustenance from the word 'imposed' in Article 366(28). Now, kindly see
25 how **India Cement** dealt with this. Just one more thing Your Lordships may note Schedule
26 6, the only place where... Kindly have, My Lord, before the case, Schedule 6, the only place
27 where Constitution uses the expression 'royalty' is in Schedule 6. Kindly have Clause 8 of
28 Schedule 6. Now, this Sixth Schedule refers to Article 244(2) and 275(1). Please see Clause 8.
29 The Regional Council for an autonomous region in respect of all lands within such region and
30 the District Council for an autonomous district in respect of all lands within the district except
31 those which are in the areas under the authority of Regional Councils, if any, within the
32 district, shall have the power to assess and collect revenue in respect of such lands in
33 accordance with the principles for the time being followed by the Government of the State in
34 assessing lands for the purpose of land revenue in the State generally. (2) The Regional Council
35 for an autonomous region in respect of areas within such region and the District Council for
36 an autonomous district in respect of all areas in the district except those which are under the
37 authority of Regional Councils, if any, within the district, shall have power to levy and collect

1 taxes on lands and buildings, and tolls on persons resident within such areas, which is Entry
2 49, List II, and tolls on persons resident within such areas. The District Council for an
3 autonomous district shall have the power to levy and collect all or any of the following taxes
4 within such district, that is to say— (a) taxes on professions, trades, callings and employments;
5 (b) taxes on animals, vehicles and boats; (c) taxes on the entry of goods into a market for sale
6 therein, and tolls on passengers and goods carried in ferries; and (d) taxes for the maintenance
7 of schools, dispensaries or roads and taxes on entertainment and amusements. So, a set of
8 taxes in 8. A Regional Council or District Council, as the case may be, may make regulations
9 to provide for the levy and collection of any of the taxes specified in sub-paragraphs (2) and
10 (3) of this paragraph 2 and every such regulation shall be submitted forthwith to the Governor
11 and, until assented to by him, shall have no effect. 9, licences or leases for the purpose of
12 prospecting for, or extraction of, minerals.—(1) Such share of the royalties accruing each year
13 from licences or leases for the purpose of prospecting for, or the extraction of, minerals
14 granted by the Government of the State in respect of any area within an autonomous district
15 as may be agreed upon between the Government of the State and the District Court of such
16 district shall be made over to that District Council. It's interesting that the District Court is
17 brought in. Should be District Council. Should be council. If any dispute arises, shall be
18 referred to the Governor for the determination.

19

20 **JUSTICE HRISHIKESH ROY:** You see, these areas are autonomous areas, particularly
21 from Assam. So, there needs to be district courts. We do not know. We can't be very sure that
22 it's typo or...

23

24 **RAKESH DWIVEDI:** That's why I am asking whether all books have it.

25

26 **JUSTICE HRISHIKESH ROY:** No, it is District Council otherwise, because councils are
27 there. So just cross check whether it is a typo or... It should be council, District Councils are
28 there. They are elected bodies. District Councils are elected bodies. So far as those areas are
29 concerned.

30

31 **RAKESH DWIVEDI:** Now, what I'm trying to point out is that taxing power has been
32 separately mentioned in 8 and royalty is for the extraction of minerals is separately placed in
33 9. *India Cement*...

34

35 **CJI DY CHANDRACHUD:** *India Cement*, now?

36

1 **RAKESH DWIVEDI:** Yes. Having placed how the courts have dealt with this issue, just four
2 of five cases and then I'll advert to 366(28). And kindly allow me to read **India Cement** and
3 **Kesoram** in some detail because the conflict is between those two.

4

5 **CJI DY CHANDRACHUD:** In any case that will also cover, they would have otherwise.

6

7 **RAKESH DWIVEDI:** Kindly come to page 1155 of Volume V. From the very beginning I'm
8 placing, My Lord, the question involved in these... May I place it? I think Justice Bhuyan has
9 some problem.

10

11 **JUSTICE UJJAL BHUYAN:** It's fine.

12

13 **RAKESH DWIVEDI:** The question involved in these appeals, especially petitions and writ
14 petitions is, whether levy of cess on royalty is within the competence of the State Legislature.
15 In order to appreciate the question, it is necessary to refer to certain facts civil appeals, so and
16 so is an appeal by special leave from the judgment and order of the High Court of Madras,
17 dated 13th October '69 in writ appeal number 46467. The appellant is a Public Limited
18 Company, incorporated under the Indian Companies Act 1913. The company at all relevant
19 times used to manufacture cement in factory at Thalaiyuthu in Tirunelveli district and at
20 Sankari Durg in Salem district of Tamil Nadu. By G.O. dated 19th July '63 the Government of
21 Tamil Nadu sanctioned the grant to the appellant mining lease for limestone and *kankar* for
22 a period 20 years over an extent of 133.91 acres of land in the village of Chinnagoundanur
23 Taluk, Salem district out of the extent of 133.91 acres comprised in the mining lease an extent
24 of 126 acres was *patta* land and only the balance of 7.7 acres was Government land. This lease
25 was in accordance with Mineral Concession Rules, 1960. So, My Lord, part of the land was
26 *patta* land and part was Government land.

27

28 **CJI DY CHANDRACHUD:** We have a little bit of connect from this side also.

29

30 **JUSTICE ABHAY S. OKA:** That's right. I was about to say that.

31

32 **HARISH SALVE:** Ultimately it comes down to this. Do we accept the Mysore *patta* view?
33 Do we accept the Rajasthan view? And the most pleasant surprise on our side was when Mr.
34 Parasaran got up and supported the petition. This time also the Union has filed an affidavit.

35

36 **RAKESH DWIVEDI:** The rates of royalty, dead rent and surface rent were as follows.
37 Royalty, limestone... all the rates are given. Then the appellants started mining operations...

1 I'm reading para 2... soon after the execution of the lease deed and has ever since been paying
2 the royalties, dead rents and other amounts payable under the Deed. Under Section 115 of the
3 Madras Panchayats Act, as amended by Madras Act XVIII of 1964, the appellant was required
4 to pay local cess at 45 paise per rupee. It may be mentioned that the said imposition was with
5 retrospective effect along with the local cess charge under Section 116. The contention of the
6 appellant is and was at all the relevant times that cess on royalty cannot be levied. This may
7 be marked, My Lords. The issue is only whether cess on royalty. This is the common question
8 which falls for consideration and requires determination in these appeals and petitions. To
9 complete the narration of events, however, it has to be noted that the Collector sent a
10 communication on 10th April, 1965, demanding cess or royalty payable under the Act on
11 minerals carried on during the period 1st July, 1961 to 31st December, 1964, and the petitioner
12 was threatened of serious consequences in case of default of payment on receipt of that
13 communication. Thereafter, writ petition No. 1864/65 was filed in the High Court of Madras.
14 By the judgment delivered by order so and so, learned single Judge of the Madras High Court,
15 Justice Kailasam dismissed the writ petition holding that the cess levied under Section 115 of
16 the Act is a tax on land and, as such, falls under Entry 49 of the State List of the Seventh
17 Schedule of the Constitution, and was within the competence of the State legislature. Reliance
18 was placed by the learned single Judge on the decision of this Court in ***H.R.S. Murthy v.***
19 ***Collector of Chittoor & Anr.***, another Constitution bench judgment of Hon'ble five Judges.
20 He held that cess levied under Section 15 was a tax on land though fixed with a reference to
21 the land revenue in regard to Section 116 of the Act. The learned single Judge held that the
22 maximum limit had been described by the government by rules, and therefore, there was no
23 arbitrariness about the levy. Sub-section 1 of Section 115 enjoins there shall be levied in every
24 Panchayat development block a local cess at the rate of 45 paise on every rupee of land revenue
25 payable to the government in respect of any land for every Fasli. An explanation to the said
26 Section was added and deemed always to have been incorporated by the Tamil Nadu
27 Panchayat Amendments and Miscellaneous Provisions Act 1964 being Tamil Nadu Act XVIII
28 of 1964, which provided as follows: Explanation- In this Section and in Section 116, land
29 revenue means public revenue due on land and includes water cess payable to the government
30 for water supplied or used for irrigation of land, royalty lease amount for other sum payable
31 to the government in respect of land held directly from the government on lease or license,
32 but does not include any other cess or the surcharge payable under Section 116 provided that
33 land revenue remitted shall not be deemed to be land revenue payable for the purpose of this
34 Section. Sub-section 2 of Section 115 provides that the local cess shall be deemed to be public
35 revenue due on all the lands. In respect of which a person is liable to pay local cess and all the
36 said lands, the buildings upon the said lands and their products should be regarded as the
37 security for the local cess. Subsection so and so of Section 115 of the said Act deal with the

1 application of the cess so collected for various purposes mentioned therein. In the controversy
2 before us the said provisions need not be considered. Section 116 of the Act is as follows: Every
3 Panchayat Union Council may levy on a every person liable to pay land revenue to the
4 Government in respect of any land in the Panchayat Union, a local cess surcharge at such rate
5 as may be considered suitable as an addition to the local cess levied in the Panchayat
6 Development block under Section 115 provided that the rate of local cess surcharge so levied
7 shall not exceed two rupees and fifty paise on every rupee of land revenue payable in respect
8 of such land. The words 'shall not exceed two rupees and fifty paise on every rupee' was
9 substituted for the words 'shall be subject to such maximum' as may be prescribed by Section
10 3 of the Tamil Nadu Panchayat Act, 1970. And these words were substituted for the words
11 'shall not exceed one rupee and fifty paise on every rupee of land revenue' by Section 2, the
12 Amendment Act, 1972. So that's how, My Lord, the matter came up. Now, what is to be noted
13 is, My Lord, that here the cess which has been imposed is with respect to land revenue and
14 royalty is one element. If we come back to the explanation in Section 5 the cess was...
15 paragraph 5 the explanation to Section 115 shows that, the cess was on land revenue and
16 royalty was one element amongst others for evaluating the total quantum with respect to which
17 the cess will be calculated. It was not a simpliciter cess on royalty.

18
19 Then, paragraph 10 at page 1158. The appellant is bound to pay royalty to the Government
20 according to the rates provided in the Second Schedule to the said Act of 1957 Clause 1 of Part
21 VII of the lease document provides as follows: The lessee/lessees shall pay the rent, water rate
22 and royalties reserved by this lease at such times and in the manner provided in Part V and
23 VI... I have placed this provision already. Then 11. As mentioned herein before, there is an
24 obligation of the lessee to pay rent and other charges mentioned in the said clause and all other
25 Central and State Government dues except demands for land revenue. The question therefore
26 which arises is, is cess on royalty a demand of land revenue or additional royalty? One can
27 understand this question as posed, because if conclusion is that the cess on... in as so far as
28 royalty is there, the element of royalty goes up. So therefore it's clashing with Section 9. One
29 can comprehend that part of it. But as I submitted that in this case, the cess was not on royalty,
30 but cess on land revenue and royalty was one factor. Then kindly come to para 14.

31

32 **JUSTICE J.B. PARDIWALA:** Paragraph 12.

33

34 **RAKESH DWIVEDI:** 12 is the mention of counsels.

35

36 **JUSTICE J.B. PARDIWALA:** Give us some more clarity. Last six lines.

37

1 **RAKESH DWIVEDI:** For the appellants and/or petitioners we have heard Mr. Nariman,
2 Mr. Chitale and Mr. Salve, and for the interveners, Mr. K.D. Prasad, Mr. Choudhary and Ms.
3 Seita Vaidialingam have made their submissions. For the State of Tamil Nadu, Mr.
4 Krishnamurthy Iyer and Mr. V. Krishnamurthy have made their submissions. We have had
5 the advantage of the submissions made by learned Attorney General on behalf of Union of
6 India. The issues are common in the writ petitions as well as in the appeal The question
7 involved in the appeals and the writ petition is about the constitutional validity of Section
8 115(1) of the Act, in so far as it sought to levy as local cess 45 naya paise on every rupee of the
9 land revenue payable to the Government, the meaning of land revenue being artificially
10 expanded by the explanation so as to include royalty payable under the mining lease. In this
11 connection, it may be appropriate to refer to the Statement of Objects and Reasons for the
12 amendment which stated, *inter alia*, as follows: Under the explanation to Section 115 of the
13 Act "land revenue" means public revenue due on land and includes water cess payable to the
14 Government for water supplied or used for the irrigation of land but does not include any other
15 cess or surcharge payable under Section 16. The explanation does not cover royalties, lease
16 amount or other sum payable to the government in respect of land held direct from the
17 government on lease or licence, which were included in the definition of land revenue under
18 the Madras District Boards Act. As under the Madras District Boards Act, 1920 certain
19 Panchayat Union Councils continued to levy the cess and surcharge under the Madras
20 Panchayat Act, 1958 also. It is considered that the levy should be on the same basis as under
21 the Madras District Boards Act, 1920. It is therefore proposed to include royalty, lease amount
22 and other sums payable to the Government in the definition of land revenue. In the
23 explanation to the Section 115 of the Act and also to validate the levy and collection of the cess
24 and surcharge made hitherto on the said basis. It is obvious that the said amendment was
25 intended to bring royalty within the explanation and definition of land revenue in Section 115
26 as well as 116 and was affected by Gazette Notification 1964 by Act No. 18 of 1964. In order to
27 appreciate the controversy, it has to be understood that in this case, royalty was payable by the
28 appellant, which was prescribed under the lease deed, the terms whereof have been noted
29 herein before.

30

31 The royalty had been fixed under the statutory rules and protected under those rules. The
32 royalty was fixed under the Mines and Minerals Regulation and Development Act 1957, which
33 is Central Act by which the control of mines and minerals had been taken over by the Central
34 Government. It was an act for the regulation of mines and development of minerals under the
35 control of Union of India. That Act was to provide for the regulation of mines and development
36 of minerals under the control of the Union of India. Section 2 of the Act declares that it is
37 expedient in public interest that Union of India should take under its control the regulation of

1 mines and mineral development to the extent provided in the Act, Section 9 is then quoted.
2 Then para 15, the Act was passed by virtue of powers of Parliament under Entry 54 of the
3 Seventh Schedule, since the control of the mines and development of minerals were taken over
4 by the Parliament. The question that arises is whether the levy or the imposed by the State
5 Legislature imposed in this case can be justified or sustained either under 49, Entry 49, 50 or
6 45 of List 2 of the 7th Schedule. Courts of law are enjoined to gather the meaning of the
7 Constitution from the language used. And although one should interpret the words of the
8 Constitution on the same principles of interpretation as one applies to an ordinary law. But
9 these very principles of interpretation compel one, to take into account, the nature and scope
10 of the Act, which requires interpretation. It has to be remembered that it is Constitution that
11 requires interpretation. Constitution is the mechanism under which the laws are made and
12 not merely an Act which declares what the law is to be. See the observations of Justice Higgins
13 an Attorney General of State, New South Wales. ***In Re: CP and Berar Sales of Motor***
14 ***Spirit***, Chief Justice Gwyer of the Federal Court of India relied on the observations of Lord
15 Wright in ***James versus Commonwealth*** and observed that a Constitution must not be
16 construed in any narrow or pedantic sense, and that construction most beneficial to the widest
17 possible amplitude of its powers must be adopted. The learned Chief Justice emphasized that
18 a broad and liberal spirit should inspire those whose duty it is to interpret the Constitution,
19 but they are not free to stretch or pervert the language of the enactment in the interest of any
20 legal or constitutional theory or even for the purposes of supplying omissions or correcting
21 supposed errors. A Federal Court will not strengthen, but only derogate from its position if it
22 seeks to do anything but declare the law. But it may rightly reflect that a Constitution of our
23 country is a living and organic thing which of all instrument has the greatest claim to be
24 construed. *Ut res magis valeat quam pereat.* 'It is better that it should live than that it should
25 perish.' Certain rules have been evolved in this regard, and it is well settled that the various
26 entries in the three Lists are not powers but fields of legislation. The power to legislate is given
27 by Article 246 and other Articles of the Constitution. See the observations of this court in
28 ***Calcutta Gas Company.*** The entries in the three lists of Seven Schedules of the
29 Constitution are legislative heads of fields of legislation. These demarcate the area over which
30 appropriate legislature can operate. It is well settled that the widest amplitude should be given
31 to the language of these entries but some of these entries in different lists or in the same list
32 may overlap and sometimes may also appear to be in direct conflict with each other. Then it is
33 the duty of the court to find out its true intent and purpose to examine a particular legislation
34 in its pith and substance to determine whether it fits in one or the other of the list. See the
35 observations of this court in ***H.R. Bhanthia*** and ***H.S. Dhillon.*** This list, the lists are
36 designed to define and delimit the respective areas of respective competence of the Union and
37 the States. These neither impose any implied restriction on the legislative power conferred by

1 Article 246 of the Constitution, nor prescribe any duty to exercise the legislative power in any
2 particular manner. Once the language of the entry should be given widest scope to find out
3 which of the meaning is fairly capable of because these setup machinery of the Government,
4 each general word should be held to extend to all ancillary and subsidiary matters which can
5 fairly and reasonably be comprehended. In interpreting an entry, it should not be reasonable
6 to import any limitation by comparing or contrasting that entry with any other one in the same
7 list. It is in this background that one has to examine the present controversy. Here, we are
8 concerned with cess on royalty. One can have an idea as to what cess is?
9

10 From the observations of Justice Hidayatullah, as the learned Chief Justice then was in **Guru**
11 **Swami and Company vs State of Mysore**, we're at page 571, the learned Judge observed
12 the word cess is used in Ireland and is still used in India, although the word rate has replaced
13 it in England. It means a tax and is generally used when the levy is for some special
14 administrative expense which the name health cess, education cess or road cess, et cetera,
15 indicates. When levy does an increment to an existing tax, the same matters not for the validity
16 of the cess must be judged of in the same way as the validity of the tax to which it is an
17 increment. The said observations were made in the dissenting judgment, but there was no
18 dissent on this aspect of the matter. Relying on the aforesaid observations, Mr. Nariman
19 appearing for the Appellant and the Petitioner suggested that the impugned levy in this case
20 is nothing but a tax on royalty, and is therefore *ultra vires* of the state legislature. Mr. Krishna
21 Murthy, appearing for the State of Tamil Nadu submitted that the cess in question in the
22 instant case is a levy in respect of land for every [UNCLEAR]. He hears that the words a local
23 says at the rate of 45 paise on every rupee of land revenue payable qualify the words 'land
24 revenue'. These words are only intended, according to Mr. Krishna Murthy, to mean cess
25 payable. It is, however, not possible to accept this submission in view of the obligation
26 indicated by the language of the provision. Cess is not on land, but on royalty, which is included
27 in the definition of land revenue. None of the three lists of the Schedule of the Constitution
28 permits or authorises the state to impose a tax on royalty. This levy has been sought to be
29 justified under Entry 45, List II of the Seventh Schedule. Entry 45 deals with land revenue,
30 which is well known concept and has existed in India before the Constitution came into force.
31 In **NR Reddy**, Justice Jagan Mohan Reddy as the learned judge then was of Andhra Pradesh
32 High Court while sitting in division bench observed that no Land Revenue Act existed in the
33 composite state of Madras nor had the Ryotwari System ever been established by legislative
34 enactment. Learned judge at page 306 of the report observed that in earlier days, sovereigns
35 had in exercise of their prerogative right claimed a share of the produce of all cultivated land
36 known known as *rajabhagam* or by any of the various other names and had fixed their share
37 or it's cumulative money value from time to time according to their will and pleasure. The

1 learned judge noted that, as long as the share of the sovereign was being paid, the sovereign
2 had no right to the possession of the land and the proprietorship of these land was vested in
3 the occupier who could not be removed because another offered more. The right of sovereign
4 to share in the produce, as observed by the government of Madras is not rent which consists
5 of all surplus produce after paying the cost of cultivation and the profits of agricultural stock,
6 but land revenue only, which ought, if possible, to be so lightly assessed as to leave a surplus
7 or rent to the occupier, when he in fact lets the land to others or retains it in his own hands. It
8 was noted that the amount of tax that was levied before the Mohammedan rule, amounting to
9 1/8th, 1/16th, 1/12th according to Manu, depending on the differences in the soil and the
10 labour necessary to cultivate it. And it even went up to 1/4th in times of urgent necessity, as of
11 war and invasion. The later commentators, *Jajjanavaka Apastambha*, Gautam Baudhayan
12 and Narada have all asserted not only the right but the extent of share. When the British came
13 to India, they followed not only the precedent of the previous Mohammedan rulers who also
14 claimed enormous land revenue with this difference that the Mohammedan rulers claimed
15 they could never fully realise. But what the British rulers claimed therein lies with vigour. It is
16 not necessary to refer in detail how land revenue developed in India after the advent of the
17 British rules. There was an appeal from the said decision of the High Court, and this court
18 dismissed the appeal in ***State of AP versus NR Reddy***. It is, however, clear that over a
19 period of centuries, land revenue in India has acquired a connotative meaning of share in the
20 produce of land, to which the king or the government is entitled to receive. It was contended
21 on behalf of the Appellants, that the impugned measure being a tax, not on the share of the
22 produce of land but on royalty, royalty being the return received from the produce of the land.

23
24 So, so far, there is no argument that royalty is taxed versus the share in the produce of land.
25 The argument of the petitioners themselves. Revenue was payable for winning materials from
26 the land. In the premises it was contended that it cannot be attributable to Entry 45 list II of
27 the Seventh Schedule being not a land revenue. It has, however, to be borne in mind that
28 explanation to Section 115(1) was added and there was an amendment as we have noted before.
29 That very explanation makes a distinction between land revenue as such and royalty which by
30 amendment is deemed to be land revenue. It is therefore recognized by the very force of that
31 explanation, and the amendment thereto, that the expression royalty in Section 115/16 cannot
32 mean land revenue, properly called or conventionally known which is separate and distinct. It
33 was also contended on behalf of the Respondent State of Tamil Nadu, Mr. Krishnamurthy Iyer
34 that it could also be justified under Entry 49, list II of Seventh Schedule as taxes on lands and
35 buildings. This, however, cannot be accepted. In this connection, reference may be made to
36 the decision of this court in ***Raja Jagannath Baksh Singh***, where at page 229, it was
37 indicated that the expression land in Entry 49 is wide enough to include agricultural land as

1 well as non-agricultural land. Justice Gajendragadkar, as the learned Chief Justice then was
2 observed that the cardinal rule of interpreting the words used by the constitution in conferring
3 legislative power was that these must receive the most liberal construction. And if they are
4 words of wide amplitude, the construction must accord with it. If general word was used, it
5 must be so construed so as to extend to all ancillary or subsidiary matters that can reasonably
6 be included in it. So construed there could be no doubt that the word land in Entry 49, List II
7 includes all lands, whether agricultural or non-agricultural. Hence, since the impugned act
8 imposed tax on lands and buildings which was within the competence of state legislature and
9 its validity was beyond challenge. But the court observed that there was Entry 46 in List II,
10 which refers to tax on agricultural income. It is clear that agricultural income is not included
11 in 49. If the state legislature purports to impose a tax on agricultural income, it would be
12 referable to Entry 49. Mr. Krishnamurthy Iyer relied on the said principle, but in the instant
13 case, royalty being that which is payable on the extraction from the land and cess being an
14 additional charge on royalty cannot by the parity of the same reasoning be considered to be
15 a tax on land. But since it was not a tax on land, and there is no Entry like 46 in the instant
16 situation like the position before this court in the aforesaid decision enabling the state to
17 impose tax on royalty, in the instant situation, the state was incompetent to impose a tax.
18 There is a clear distinction between tax directly on land and tax on income arising out of the
19 land. It is here that Mr. Seervai says that this was enough to strike it down because it's a tax
20 on income and it is state's own income which it is taxing. But this judgment does support, so
21 far as Entry 49, List II is concerned, that it is to be very widely construed and includes all types
22 of land. The aforesaid decision confirmed the above position in ***New Maneck Chowk***
23 ***Spinning and Weaving Mills*** this court after referring to the several decisions observed
24 that Entry 49 or List II of the Seventh Schedule only permitted levy of tax on land and building.
25 It did not permit the levy of tax on machinery contents in or situated on the building even
26 though the machinery was there for the use of the building for a particular purpose. Rule 72 of
27 the Bombay Municipal Corporation rules was also held to be accordingly *ultra vires* in the said
28 case. In ***SC Non***, this court had occasion to consider this and upheld the validity of Wealth
29 Tax Act on the ground

30 that it fell within Entry 86 and not Entry 49 of List II. Construing the said entry this court
31 observed that Entry 49 contemplated a levy on land as a unit, and the levy must directly be
32 imposed on land and must bear a definite relation to it. So this is the case which drew the
33 distinction between a composite tax under 86 List I and land as a unit, which means it should
34 be only on land, not on all other assets. In ***Assistant Commissioner of Urban Land Tax***
35 ***versus Buckingham & Garnatic Company*** this got reiterated the principles laid down
36 in ***SC Non's*** case and held that Entry 49 of List II was confined to tax that was directly on
37 land as a unit. In ***Second Gift Tax Officer versus Nazareth***, it was held that tax on the

1 gift of land is not a tax imposed directly on land, but only on the particular user, namely the
2 transfer of land by way of gift. In **Union of India versus Dhillon**, this Court approved the
3 principal laid down in **Non** as well as **Nazareth**. In **Bhagwan Das Jain** this Court made a
4 distinction between levy on income from house property, which would be referable to Entry
5 49, List II. It is therefore, not possible to accept Mr. Krishnamurthy's submission that the cess
6 on royalty cannot possibly be said to be a tax or imposed on land. Mr. Nariman is right that
7 royalty which is indirectly connected with land, cannot be said to be taxed directly on land as
8 a unit. In this connection a reference may be made to the differentiation made to the different
9 type of taxes. For instances, one being professional tax and entertainment tax. **In Western**
10 **India Theatres**, it was held that the entertainment tax is dependent upon whether they
11 would or would not be a show in cinema halls. If there is no show, there is no tax. It cannot be
12 a tax on profession of calling. Professional tax does not depend upon the exercise of one's
13 profession, but only concerns itself with the right to practice. It appears that in the instant case
14 also, no tax can be levied or is leviable under the impugned Act if no mining activities are
15 carried on. Hence, it is manifest that it is not related to land as a unit, which is the only method
16 of valuation of land under Entry 49 of List II but is relatable to minerals extracted. Royalty is
17 payable on a proportion of the minerals extracted. It may be mentioned that the Act does not
18 use dead rent as a basis on which land is to be valued. Hence, there cannot be any doubt that
19 the impugned legislation in its pith and substance is a tax on royalty and not on land. In my
20 humble submission, My Lord, this is completely erroneous. Because Your Lordships saw in
21 9(a) that dead rent or royalty in the alternative, whichever is higher. The court seems to be
22 saying had it been dead rent instead of royalty, it would have been all right, but since royalty
23 has been brought there, therefore it is... And the other aspect is that since it is dependent upon
24 use, now, the fact that land is being used or not used can be a classification method because
25 Government will not like to tax the land My Lord where for some good reason, mining is not
26 being done. So, it's not always that once the aspect of user comes in, therefore it automatically
27 becomes, goes out of the fold of Entry 49 List II. Then, kindly come to 24 at page 116. On behalf
28 of the State of Tamil Nadu learned counsel, Mr. Krishnamurthy Iyer sought to urge that it can
29 also be sustained under Entry 50, List II. Entry 50 of List II of the Seventh Schedule deals with
30 taxes on mineral rights subject to limitation imposed by Parliament relating to mineral
31 development. Entry 23 of List II deals with regulation of mines and mineral development,
32 subject to the provisions of List I, with respect to regulation and development under control
33 of the Union and Entry 54 in List I deals with regulation of mines and minerals under the
34 control of the Union, declared by Parliament, by law, to be expedient in public interest. Even
35 though minerals are part of the State List, they are treated separately and therefore, the
36 principle that the specific excludes the general, must be applied. See the observations of
37 **Waverly Jute Mills**, where it was held at land in Entry 49 cannot possibly include minerals.

1 Please mark this sentence My Lords. It will not include minerals. Not that it will not include
2 the land itself.

3

4 In this connection, learned Attorney General appearing for the Union of India submitted
5 before us, that in order to sustain the levy, the power of the state legislature has to be found
6 within one or more of the entries of List II of the Seventh Schedule. The levy in question has
7 to be either a tax or a fee or an imposed. If it is neither a tax nor a fee, then it should be under
8 one of the general entries under List II. The expression land, according to its legal significance,
9 has an indefinite extent both upwards and downwards, the surface of the soil and would
10 include not only the face of the earth, but everything under it, or over it. Now, this is in support
11 of the states it doesn't go against. See the observations in *Anant Mills*. The minerals which
12 are under the earth can in certain circumstances fall under the expression of land. But as tax
13 on mineral rights is expressly covered by Entry 50 List II, if it is brought under the head taxes
14 under Entry 49 of List II, it would render Entry 50 of List II redundant. Learned Attorney
15 General is right in contending that the entries should not be so construed as to make one entry
16 redundant. It was further argued that even in pith and substance, the tax fell to Entry list 50
17 List II. It would be controlled by a legislation under Entry 54 List I. Now, there's only one
18 problem with these observations that Mr. Krishnamurthy wanted to justify the tax in the
19 alternative under Entry 50 List II, saying, therefore, that it can be, cess on royalty can be
20 understood since royalty is relatable to extracted mineral and dispatch mineral. Therefore, it
21 is very proximate in nexus with Entry 50 List II. Now, what the court is saying that the minerals
22 which are under the earth can, in certain circumstances, fall under the expression land. So if
23 it's falling, either falls under land or it falls as a mineral right. So either it goes under 49 List
24 II or it comes within the fold of Entry 50. If it comes under 50 then the state is competent,
25 subject to the limitations. On the other hand, learned Attorney General submitted that if it be
26 held to be a fee, then the source of power of the State Legislature under Entry 66 read with
27 Entry 23, List II here also, the extent to which regulation of mines and mineral under the
28 control of the Union is declared by Parliament, by law, to be expedient in public interest to the
29 extent such legislation makes provision will denude state legislature of the power to override
30 the provision of Entry 50 List II. Now, this again, in my humble submission is completely
31 erroneous. 54 will not denude, it will not enable Parliament to arrogate to itself any power of
32 tax. In view of the Parliamentary Legislation under Entry 54, declaration made under Section
33 2 and provision of Section 9 of the Act, the state legislation would be overridden to that extent.
34 This is completely erroneous in my respectful submission, because it assumes that Section 9
35 is a tax and tax pertaining to Entry 50 List II and it is a limitation on that and therefore,
36 denudation happens. Then they refer to *Hingir-Rampur* and also the observations *State*
37 *of Odissa versus Tulloch*. Our attention was drawn to the decision of the division bench

1 judgment of the High Court of Mysore in **Lakshminarayana Mining Company**. There
2 speaking for the court one of us, Justice Venkataramiah of the Mysore High Court as the
3 learned Chief Justice then was, observed that a combined reading of Entry 23 and 50 of List
4 II and Entry 54 establishes that as long as the Parliament does not make any law in exercise
5 of its power under Entry 54, the powers of the state legislature in Entry 23 and 50 would be
6 exercisable by the state legislature. But once the Parliament makes a declaration by law, that
7 it is expedient in the public interest to make a regulation of mines and minerals development
8 under the control of the Union to the extent to which such regulation and development is
9 undertaken by the law made by Parliament, the power of the state legislature under 2023 and
10 50 List II are denuded. 23 is understandable. But Entry 50, unless one finds a specific express
11 limitation in MMDR Act made under Entry 54, will not be either denuded or abstracted for
12 me. Abstraction is absolutely not possible. Limitation is possible.

13

14 **JUSTICE B.V. NAGARATHNA:** But this has to be read in the context of the facts of that
15 case. There it was a license fee, a license fee was held to be royalty. But here the interpretation
16 of that judgment is very wide.

17

18 **RAKESH DWIVEDI:** Yes and that has led to the errors in this case. I'll place that case also
19 before Your Lordships. To the similar effects of the observations of the High Court of Patna.
20 That High Court of Patna this para My Lord I am not reading, because Patna has been followed
21 in the Karnataka case. And when I place that Mysore case...Then in para 29 **HRS Murthy** is
22 referred and this was overruled in this by this seven judges judgment. So let me place this
23 extracted part of **HRS Murthy**. When a question arises as to the precise head of legislative
24 power under which a taxing statute has been passed, the subject for inquiry is, what in truth
25 and substance is the nature of the tax. No doubt, in a sense, but in a very remote sense. It has
26 a relationship to the mining as also to the mineral one from the mine under a contract by which
27 royalty is payable on the quantity of mineral extracted, but that does not stamp it as a tax on
28 either the extraction of the mineral or on mineral right. It is unnecessary for the purpose of
29 this case to examine the question as to what exactly is a tax on mineral rights, seeing that such
30 a tax is not leviable by Parliament, but only by the state. And the sole limitation on the state's
31 power to levy the tax is that it must not interfere with a law made by Parliament as regards
32 mineral development. Our attention was not invited to the provisions of any such law created
33 by Parliament. In the context of Section 78, 79 and the scheme of those provisions, it is clear
34 that the land cess is in truth a tax on land with an Entry 49. So **HRS Murthy** did not see
35 Section 9 as a tax or a limitation on Entry 50. It seems, therefore, that the attention of the
36 court was not invited to the provisions of the Mines and Mineral Development and Regulation
37 Act and Section 9 thereof. Section 9(3) of the act in term states that royalty is payable under

1 the Second Schedule of the act shall not be enhanced more than once during the period of four
2 years. It is therefore a clear bar on the state legislature taxing royalty so as to, in effect, amend
3 Second Schedule of the Central Act. In the provision it cannot be right to say that tax on royalty
4 can be a tax on land. And even if it is a tax, if it falls within Entry 50, will be *ultra vires* the
5 state's legislative power in view of Section 9(3). In *Hingir-Rampur versus State of*
6 *Orissa*, Justice Wanchoo in his dissenting judgment has stated that a tax on mineral rights
7 being different from duty of excise pertains only to a tax that is leviable for the grant of right
8 to extract minerals and is not a tax on minerals as well. On that basis, a tax on royalty would
9 not be a tax on mineral rights and would therefore, in any event be outside the competence of
10 the state legislature.

11

12 **CJI DY CHANDRACHUD:** Yes.

13

14 **RAKESH DWIVEDI:** The Rajasthan, Punjab, Gujarat and Orissa High Courts have held that
15 royalty is not a tax. See so and so, so and so and so and so. It was contended, now, there's no
16 discussion of these judgments at all, as to what they have held, what is their logic and where,
17 what is the fallacy in those judgments. In fact, in *Dr. SH Sharma's* case, which I'll be placing,
18 the validity of Section 9 had been questioned that this is a tax and it's a usurpation of power
19 under 50. So the court said it's not a tax and therefore there's no question of usurpation. That's
20 how it was saved. Then 32, it was contended by Mr. Krishnamurthy that the state has a right
21 to tax minerals. It was further contended that if a tax is levied, it will not be irrational to
22 correlate it to the value of the property and to make some kind of annual value basis of tax
23 without intending to tax the income. In view of the provisions of the Act as noted herein before
24 this commission cannot be accepted. Krishnamurthy also further sought to urge that in Entry
25 50 there is no limitation to the taxing power of the State. In view of the principles mentioned
26 herein before, and express provision of Section 9(2) of MMRDA Act, this submission cannot
27 be accepted. The field is fully covered by the Central Legislation. In any event, royalty is
28 directly relatable only to minerals extracted and on the principle that the general provision is
29 excluded by the special one, royalty would be relatable to Entry 23 and 50, List II, and not
30 Entry 49, List II. But as the fee is covered by the Central....

31

32 **CJI DY CHANDRACHUD:** Is it the field? I think. But as the field is covered.

33

34 **RAKESH DWIVEDI:** Fee is covered by the Central.

35

36 **CJI DY CHANDRACHUD:** Field.

37

1 **RAKESH DWIVEDI:** Fee.

2

3 **CJI DY CHANDRACHUD:** Field. It is a typo.

4

5 **JUSTICE B.V. NAGARATHNA:** Here it is a typo.

6

7 **RAKESH DWIVEDI:** That also is.

8

9 **CJI DY CHANDRACHUD:** As the field is covered....

10

11 **RAKESH DWIVEDI:** As the field is covered by the central power under Entry 23 or Entry
12 50 of List II, the impugned legislation cannot be upheld. Our attention was drawn to a
13 judgment of the High Court of Madhya Pradesh, **Hiralal Rameshwar Prasad** which was
14 delivered by Division Bench, Justice JS Verma, acting Chief Justice as the Lordship then was,
15 held at the development cess by so and so is *ultra vires*. It is not necessary to, in the view taken
16 by us further. So just pausing My Lord, up till Para 33, there is no discussion, no debate, no
17 issue raised by any side that royalty is a tax or not. Just the Mysore High Court judgment is
18 referred and then the four High Courts holding otherwise is referred. Neither of them are
19 discussed because if there are two sets of reasoning, it would be expected if a Bench of seven
20 judges to discuss and debate on which one is the right one, and why Mysore should be adopted
21 instead of the other four. In fact, the seven judges bench has avoided the question which of
22 them is right. My learned friend is not quite right in saying that while getting up, the judge
23 said and obviously, that is not on record, that it is this or it is that. At least I was not there. I
24 will go by the record. Now, kindly see the abrupt conclusion.

25

26 **JUSTICE ABHAY S. OKA:** Most crucial paragraph...

27

28 **RAKESH DWIVEDI:** 34.

29

30 **JUSTICE ABHAY S. OKA:** 34 is the most crucial paragraph.

31

32 **RAKESH DWIVEDI:** In the aforesaid view of the matter, we are of the opinion that royalty
33 is taxed, as such cess on royalty being a tax on royalty is beyond. One can understand cess on
34 royalty being a tax on royalty is beyond the competence. One can understand that part. But
35 there was no issue. Issue was whether cess on royalty is good or bad. And the Court is saying
36 in view, in the aforesaid view of the matter. So, there is no view of the aforesaid matter in the
37 previous paragraphs, not a single sentence, not a whisper. And that's why **Kesoram** said that

1 if you say that, this word is missing in the aforesaid view of the matter, we are of the opinion
2 that cess on royalty is a tax.

3

4 **CJI DY CHANDRACHUD:** Correct.

5

6 **RAKESH DWIVEDI:** So that's how My Lord this clarified this apparent error. There was no
7 issue. No issue has been framed in any paragraph that whether royalty is a tax or not. There's
8 no debate, no consideration of the general concept of royalty.

9

10 **CJI DY CHANDRACHUD:** Read it like that. See it's so obvious, in the aforesaid view of the
11 matter, we are of the opinion that royalty is a tax. Now we'll just leave that aside, because those
12 are the disputed words.

13

14 **RAKESH DWIVEDI:** Yes.

15

16 **CJI DY CHANDRACHUD:** Now see what follows,

17

18 **RAKESH DWIVEDI:** As such cess on royalty...

19

20 **CJI DY CHANDRACHUD:** As such cess on royalty being a tax on royalty. So the next phase
21 makes it very clear that what they were saying was....

22

23 **RAKESH DWIVEDI:** That's right, that was the issue

24

25 **CJI DY CHANDRACHUD:** That cess on royalty is tax.

26

27 **RAKESH DWIVEDI:** That's all that which *Kesoram* has tried to make it straight,
28 consistent and this sentence My Lord, the first part of the sentence has been picked up in a
29 number of cases down the line, and they all went astray.

30

31 **JUSTICE ABHAY S. OKA:** Sentence clarifies it actually.

32

33 **RAKESH DWIVEDI:** Now see the second and third sentence. In any event we are...

34

35 **CJI DY CHANDRACHUD:** On royalty.so they try to repeat what they had said earlier in
36 the second part of the same sentence. In order to draw the conclusion is beyond the
37 competence of their state...

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RAKESH DWIVEDI: In any event, we are of the opinion that cess on royalty, they come back to cess on royalty, cannot be sustained under Entry 49 List II as being tax on land. Royalty on mineral rights is not a tax on land, but a payment for the user of land. This is what we are saying that the last sentence is supporting, which I have been submitting since morning, that royalty is for not merely user. I would say even this is not fully correct My Lord, because the royalty is for transfer of the owner's right to extract the mineral and sell it. So the mineral value has to be shared by the owner and the lessee. One is...the lessor is the dominant owner in the lessee is the subservient owner.

CJI DY CHANDRACHUD: Yes.

RAKESH DWIVEDI: Having an interest in land because of the lease. So therefore, My Lord it's logical that the mineral value which is, state is owning must be shared with the.... only the sharing mode is prescribed by Section 9. So I am not defending, standing up to defend a cess on royalty simpliciter though, in this case it was a cess on land revenue. By virtue of explanation royalty was one additional factor. Even otherwise, with utmost deference to the learned Judges I submit that even if royalty there was a problem then that word could be struck down, though not the whole section My Lord which said cess land revenue, including water charges and so on and so forth. Especially...

HARISH SALVE: [UNCLEAR] on royalty. [UNCLEAR] even more. Orissa for example, is straight on. That's all right.

RAKESH DWIVEDI: We'll come to Orissa, don't worry. Right now we are on Jharkhand My Lords. So in this case, the cess was not on royalty directly but a cess on land revenue. Normally something like surcharge, it takes the same character.

JUSTICE HRISHIKESH ROY: In this paragraph 34, it reads somewhat abruptly?

RAKESH DWIVEDI: That's right.

JUSTICE HRISHIKESH ROY: Because we are not able to sort of connect with the previous paragraphs.

RAKESH DWIVEDI: Yes.

1 **JUSTICE HRISHIKESH ROY:** The logic or the reasoning. Anyway, I'm sure....

2

3 **RAKESH DWIVEDI:** It's an abrupt conclusion without any issue being there, without any
4 contention being there, and without any debate or consideration of the concept of royalty as it
5 exists. One may arrive at a conclusion that in other matters, royalty may be a consideration or
6 a return to the owner, but in the context of mining it is not so. But there is no debate. No
7 consideration of that at all.

8

9 **CJI DY CHANDRACHUD:** Justice Oza says, whether royalty is a tax or not, is not very
10 material for the purpose of determination of this.

11

12 **JUSTICE HRISHIKESH ROY:** What about the the conclusion that the court reads.

13

14 **RAKESH DWIVEDI:** Justice Oza's judgment goes further down the street. If we accept
15 Justice Oza, then every tax has got some land. Every business has got land, every business is
16 based on capital, every business is based on labour. So this formula that a tax is on land plus
17 capital plus labour. So every tax which is being imposed on capital assets or whatever, the sale
18 tax and so on, the excise duty, on manufactures...So no manufacturing can happen unless there
19 is a capital, unless there is labour and the factory is standing on some land and based on raw
20 material.

21

22 **JUSTICE B.V. NAGARATHNA:** On cess there is a dissenting opinion of Justice Wanchoo
23 in *Hingir-Rampur*.

24

25 **RAKESH DWIVEDI:** *Hingir-Rampur*. Your Lords are right.

26

27 **JUSTICE B.V. NAGARATHNA:** Just because you make a fund for certain infrastructure
28 development and you call it a cess, it doesn't mean that it is different from royalty. That is what
29 he says.

30

31 **RAKESH DWIVEDI:** So I'll place *Hingir-Rampur* also. Your Lordships are right.

32

33 **HARISH SALVE:** Called it excise duty.

34

35 **JUSTICE B.V. NAGARATHNA:** On manufacture or extraction of minerals and
36 manufacture. Entry 86.

37

1 **RAKESH DWIVEDI:** 84.

2

3 **JUSTICE B.V. NAGARATHNA:** 84. List I.

4

5 **RAKESH DWIVEDI:** Excise duty.

6

7 **HARISH SALVE:** The problem is in the next sentence, where he says if you levy it with
8 reference to royalty. Royalty is real if you levy it with reference to production, it's an excise
9 duty. Majority says that's a measure given by that subject. He says, no, this is an excise duty.
10 And then he says, royalty is a tax on mineral rights, but royalty is also charged with reference
11 to production. That is why *India Cement* at one place says when dealing with Wanchoo's
12 judgement, then royalty is also not a tax. It will be excise duty. Because if anything is collected
13 on the basis of actual production, it becomes manufacture according to Justice Wanchoo's
14 logic. That is why we are... best nine of Your Lordships hear these without being...

15

16 **CJI DY CHANDRACHUD:** Yes.

17

18 **RAKESH DWIVEDI:** Just see para 40 of Justice Oza's judgment concurring. Whether
19 royalty is a tax or not is not very material for the purpose of the determination of this question
20 in this case. It is admitted that royalties are charged on the basis of per unit of minerals
21 extracted. It is no doubt true that mineral is extracted from the land and is available, but it
22 could only be extracted if there are three things. Land, capital, labour. It is therefore clear, that
23 unit of charge of royalty is not the land, but land, labour, capital. It is therefore clear that if
24 royalty is a tax or an imposition or in levy, it is not on land alone, but it is a levy or a tax on
25 mineral, labour, capital employed in extraction of the mineral. So, even if we take this sentence
26 as it is, My Lord, it will be both land and mineral. So, both Entry 49 and Entry 50 will be
27 attracted. It therefore is clear that royalty, if it is imposed by Parliament, it would only be a tax
28 not only on land, but on these three things stated above. Now, this is based on 'if', 'if royalty'.
29 Royalty, if it is imposed by Parliament as a tax. It is not in dispute that the cess which the
30 Madras Village Panchayat proposes to levy is nothing but an additional tax and originally it
31 was levied only on land revenue. Apparently land revenue would fall within the scope of Entry
32 49. This is erroneous. It will be Entry 45, land revenue. But it could not be doubted that royalty,
33 which is a levy or tax on the extracted mineral is not a tax or a levy on land alone, and if cess
34 is charged on the royalty it would not be said to be a levy or tax on land, and therefore, it could
35 not be upheld as imposed in excise of jurisdiction under Entry 49. Thus, it is clear that by
36 introducing this explanation to Section, widening the meaning of the word 'land revenue' for
37 the purpose of Section 115 and 116. When the Legislature included royalty, it went beyond its

1 jurisdiction under Entry 49, List II, and therefore clearly is without the authority of law. But
 2 this also may lead to an interesting situation, the cess levied under so and so was intended to
 3 be levied on all lands falling within the area. But as this cess on royalty is without the authority,
 4 the result will be that the cess is levied so far as lands other than land are situated are
 5 concerned, but lands where mines are situated, this levy of cess is not in accordance with that
 6 law. This anomaly could have been averted if the legislature in this expedition had used the
 7 word "surface rent" in place of royalty. Even if the lands were mines were situated and which
 8 are subject to license and mining leases, even for those lands, there is a charge on the basis of
 9 surface of the land, which is sometimes described as surface rent or sometimes also dead rent.
 10 Although the two are different concepts - Dead rent and surface rent. It could not be doubted
 11 that if such a surface rent or dead rent is charged or an imposition on the land only, and
 12 therefore, will clearly fall within the purview of 49, List II and if a cess is levied on that, it will
 13 also be justified as tax on land. So, had it been surface rent and dead rent, then it is justified
 14 under 49, but not all.

15

16 **CJI DY CHANDRACHUD:** What next Mr Dwivedi?

17

18 **RAKESH DWIVEDI:** Now, there are two cases in between. One is **Orissa Cement**. Same
 19 volume, page 1329. Now, paragraph 3 suggests this is also a case of cess on royalty. Para 8,
 20 Your Lordships refer to the dissenting judgment of Justice Wanchoo in **Hingir-Rampur**.
 21 That's referred to in para 8. Kindly come to page 1350 where the section under challenge is
 22 quoted, Section 5 and then Section 7. At the bottom of the page 1350. The rate per year at
 23 which such cess shall be levied. If I may read the top My Lord, 'the rate of cess.' (ii), the rate of
 24 test assessment and fixation of cess here are dealt with by Section 5 which reads, 'the cess shall
 25 be assessed on the annual value of all lands on whatever tenure held, calculated in the manner
 26 herein after appearing. The rate per year at which cess shall believe will be 25% of the annual
 27 value of the land'. Now at page 1351, towards the bottom, Section 7 defines annual value. The
 28 annual value of lands held by raiyats shall be the then payable by such raiyat to the landlord.
 29 (2) In the case of land held as an estate, the annual value shall be the aggregate of the amount
 30 which the intermediary is entitled to receive on account of revenue or rent less the amount
 31 payable by an intermediary as revenue to the intermediary immediately superior to him or to
 32 the government, as the case may be. (B) the rent, if any, payable under the land or in the *khas*
 33 possession. (3) In the case of lands held for carrying on mining operations the annual value
 34 shall be royalty or as the case may be, the dead rent payable by the person carrying on mining
 35 operations to the government. And then Section 9(b) in between Placitum D, 7(3) is there. In
 36 the case of land held for carrying on mining operations annual value shall be the land, as the
 37 case may be the dead rent payable by the person carrying on mining operations to the

1 government or the pit-mouth value, wherever it has been determined. Please come to page
2 1370. In the previous paragraph there are discussions or references to **India Cement**. I'm
3 leaving that because I've placed the judgment. There has been considerable discussion before
4 us as to whether royalty itself is a tax or not. The controversy before us centres around the
5 discussion contained in paragraph 31 to 34 of **India Cement** judgment. Counsel for the
6 assessee Respondents invite attention to the opening sentence of paragraph 34, which runs -
7 in their aforesaid view of the matter, we are of the opinion that royalty is tax, and argue that
8 this clinches the issue. On the other hand, Sri Iyer submits that this purported conclusion does
9 not follow from the earlier discussion and is also inconsistent with what follows. He points out
10 that though there is reference in paragraph 27 to the conclusion of Justice Venkataramiah in
11 a judgment of the Mysore High Court, that royalty under Section 9, is really a tax and a
12 reference in paragraph 31 to Rajasthan, Punjab, Gujarat, that to the effect that royalty is not a
13 tax. There is no discussion, criticism or approval of any of the decisions on this point. And then
14 therefore, the first sentence of para. 34 is non sequitur. He submits that perhaps there is
15 typographical error in the first sentence of para 34, and the sentence should really read thus.
16 So here the sentence is completely suggested in a different form. He also points out that the
17 last sentence of para 34 reads royalty on mineral rights is not a tax on land, but a payment for
18 the user of land. He submits therefore, that this issue has not been decided in **India Cement**.
19 He submits that before we express any opinion on this issue, we should consider the matter
20 afresh and places before us extracts from various lexicons and dictionaries to show that royalty
21 is nothing more than the rent or a lease amount payable to the lessor in consideration for the
22 grant of lease to exploit minerals. Reference may also be made to DK Trivedi, para 35 so and
23 so. It is therefore neither a fee nor a tax, but merely a price paid for the use of mineral bearing
24 land. We do not think it is necessary for us to express an opinion either way on this controversy
25 for it seems to us, it is immaterial for the purpose of the present case. If royalty itself were to
26 be regarded as a tax it can perhaps be described properly as a tax on mineral rights, and has
27 to conform to the requirements of Entry 50 which are discussed later. We are, however, here
28 concerned with the validity of the levy of not royalty but of cess. If the cess is taken as tax, then
29 unless it can be described as land revenue or a tax on land or a tax on mining rights, it cannot
30 be upheld under Entry 45, 49, or 50. On the contrary, if it is treated as a fee, the state's
31 competence to levy the same has to be traced to Entry 23, a proposition the effect of which will
32 be considered later. The question whether royalty is a tax or not does not assist us much in
33 furnishing an answer to the two questions posed in the present case and set out earlier. We
34 shall therefore leave this question to rest here. So it's not that for the first time suddenly My
35 Lord, subsequent benches also this issue, and the learned judges obviously did not deal with
36 that issue in this.

37

1 **CJI DY CHANDRACHUD:** How long now, Mr. Dwivedi? Any reassessment of the time that
2 you are likely to take?

3

4 **RAKESH DWIVEDI:** We will finish tomorrow.

5

6 **CJI DY CHANDRACHUD:** Sorry?

7

8 **RAKESH DWIVEDI:** I'd like to finish tomorrow. I will try to finish tomorrow.

9

10 **CJI DY CHANDRACHUD:** Maybe everyone can now make a reassessment of the time they
11 are going to take and then give us a fresh assessment. Would about lunch be all right for you
12 tomorrow, Mr. Dwivedi?

13

14 **RAKESH DWIVEDI:** By lunch will not be possible.

15

16 **HARISH SALVE:** If their side finishes tomorrow, then our side can start on Thursday.

17

18 **SANSKRITI PATHAK:** No, no, that's not possible. That's not possible.

19

20 **RAKESH DWIVEDI:** Day after, lunch time.

21

22 **SANSKRITI PATHAK:** This week, let it be. This week this side.

23

24 **CJI DY CHANDRACHUD:** No, no. This week will be too long for this side. I think now Mr.
25 Dwivedi has covered a very large part of his submissions.

26

27 **VIJAY HANSARIA:** So some part which is not covered by Mr. Dwivedi only can be
28 supplemented.

29

30 **CJI DY CHANDRACHUD:** We were thinking tomorrow this side can conclude. At the most,
31 maybe 1 hour, day after tomorrow, and then the other side can start. We can give you time
32 until 11:30 on Thursday. So, by 11:30 on Thursday, I think this side can conclude. So please
33 ration out the time between yourselves, so that by 11:30 the baton passes on to this side.
34 Everybody, between you, 11:30 on Thursday. By 11:30 we'll start with this side.

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END OF DAY'S PROCEEDINGS