The Hingir-Rampur Coal Co., Ltd. and Others

Vs

The State of Orissa and Others

Petition No. 87 of 1959

(P. B. Gajendragadkar, A. K. Sarkar, K. Subha Rao, K. N. Wanchoo, J.R. Mudholkar JJ)

21.11.1960

JUDGMENT

GAJENDRAGADKAR, J. -

This is a petition filed under Art. 32 of the Constitution in which the validity of the Orissa Mining Areas Development Fund Act, 1952 (XXVII of 1952), is challenged. The first petitioner is a public limited company which has its registered office at Bombay. A large majority of its shareholders are citizens of India; some of them are themselves companies incorporated under the Indian Companies Act. Petitioners Nos. 2 to 7 are the Directors of Petitioner No. 1, the second petitioner being the Chairman of its Board of Directors. These petitioners are all citizens of India. At all material times the first petitioner carried on and still carries on the business of producing and selling coal excavated from its collieries at Rampur in the State of Orissa. Two leases have been executed in its favour; the first was executed on October 17, 1941, by the Governor of Orissa whereby all that piece or parcel of land in the registration district of Sambalpur admeasuring about 3341.79 acres has been demised for a period of 30 years commencing from September 1, 1939, in consideration of the rent reserved thereby and subject to the convents and conditions prescribed thereunder; and the second is a surface lease executed in its favour by Mr. Mohan Brijraj Singh Deo on April 19, 1951, in relation to a land admeasuring approximately 211.94 acres for a like period of 30 years commencing from February 4, 1939, in consideration of the rent and subject to the terms and conditions prescribed by it.

Pursuant to section 5 of the Orissa Estates Abolition Act, 1951, all the right, title and interest of the Zamindar of Rampur in the lands demised to the first petitioner under the second lease vested in respondent 1, the State of Orissa. Since then the first petitioner had duly paid the rent reserved by the said lease to the appropriate authorities appointed by respondent 1, and has observed and performed all the conditions and convenants of the said lease. In exercise of its rights under the said two leases the first petitioner entered upon the lands demised and has been carrying on the business of excavating and producing coal at its collieries at Rampur.

In December, 1952, the Legislature of the State of Orissa passed the impugned Act; and it received the assent of the Governor of Orissa on December 10, 1952. It was, however, not reserved for the consideration of the President of India nor has it received his assent. In pursuance of the rule-making power conferred on it by the impugned Act respondent 1 has purported to make rules called the Orissa Mining Areas Development Act Rules, 1955; these rules have been duly notified in the State Gazette on January 25, 1955.

Subsequently, the Administrator, respondent 2, appointed under the impugned Act issued a

notification on June 24, 1958, whereby the first petitioner's of Rampur colliery has been notified for the purpose of liability for the payment of cess under the impugned Act. The area of this colliery has been determined at 3341.79 acres. In its appeal filed under rule 3 before the Director of Mines the first petitioner objected to the issue of the said notification, inter alia, on the ground that the impugned Act and the rules framed under it were ultra vires and invalid; no action has, however, been taken on the said appeal presumably because the authority concerned could not entertain or deal with the objections about the vires of the Act and the rules.

Thereafter on March 26, 1959, the Assistant Administrative Officer, respondent 3, called upon the first petitioner to submit monthly returns for the assessment of the cess. The first petitioner then represented that it had filed an appeal setting forth its objections against the notification, and added that until the said appeal was disposed of no returns would by filed by it. In spite of this representation respondent 3, by his letter of May 6, 1959, called upon the first petitioner to submit monthly returns in the prescribed form and issued the warning that failing compliance the first petitioner would be prosecuted under section 9 of the impugned Act. A similar demand was made and a similar warning issued by respondent 3 by his letter dated June 6, 1959. It is under these circumstances that the present petition has been filed.

The petitioners contend that the impugned Act and the rules made thereunder are ultra wires the powers of the Legislature of the State of Orissa, or in any event they are repugnant to the provisions of an existing law. According to the petition the cess levied under the impugned Act is not a fee but is in reality and in substance a levy in the nature of a duty of excise on the coal produced at the first petitioner's Rampur colliery, and as such is beyond the legislative competence of the Orissa Legislature. Alternatively it is urged that even if the levy imposed by the impugned Act is a fee relatable to Entries 23 and 66 in List II of the Seventh Schedule, it would nevertheless be ultra vires having regard to the provisions of Entry 54 in List I read with Central Act LIII of 1948. The petitioners further allege that even if the said levy is held to be a fee it would be similarly ultra vires having regard to Entry 52 in List I read with Central Act LXV of 1951. According to the petitioners the impugned Act is really relatable to Entry 24 in List III, and since it is repugnant with Central Act XXXII of 1947 relatable to the same Entry and covering the same field the impugned Act is invalid to the extent of the said repugnancy under Art. 254. On these allegations the petitioners have applied for a writ of mandamus or a writ in the nature of the said writ or any other writ, order or direction prohibiting the respondents from enforcing any of the provisions of the impugned Act against the first petition; a similar writ or order is claimed against respondent 3 in respect of the letters addressed by him to the 1st petitioner on March 3, 1959 and June 6, 1959.

This petition is resisted by respondent 1 on several grounds. It is urged on its behalf that the levy imposed by the impugned Act is a fee relatable to Entries 23 and 66 in List II and its validity is not affected either by Entry 54 read with Act LIII of 1948 or by Entry 52 read with Act LXV of 1951. In the alternative it is contended that if the said levy is held to be a tax and not a fee, it would be a tax relatable to Entry 50 in list II, and as such the legislative competence of the State Legislature to impose the same cannot be successfully challenged. Respondent 1 disputes the petitioner's contention that the impugned Act is relatable to Entry 24 in List III; and so, according to it, no question of repugnancy with the Central Act XXXII of 1947 arises.

After this appeal was fully argued before us Mr. Amin suggested - and Mr. Sastri did not object - that we should hear the learned Attorney-General on the question as to whether even if the levy imposed by the impugned Act is a fee relatable to Entries 23 and 66 in List II of the Seventh Schedule, it would nevertheless be ultra vires having regard to the provisions of Entry 54 in List I

read with Central Act LIII of 1948. Accordingly we directed that a notice on this point should be served on the learned Attorney-General and the case should be set down for hearing on that point again. For the learned Attorney-General the learned Additional Solicitor-General appeared before us in response to this notice and we have had the benefit of hearing his arguments on the point in question.

The first question which falls for consideration is whether the levy imposed by the impugned Act amounts to a fee relatable to Entry 23 read with Entry 66 in List II. Before we deal with this question it is necessary to consider the difference between the concept of tax and that of a fee. The neat and terse definition of tax which has been given by Latham, C.J., in Matthews v. Chicory Marketing Board ((1938) 60 C.L.R. 263, 276.) is often cited as a classic on this subject. "A tax", said Latham, C.J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied. There is, however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exempted from the payment of the cess. Though there is an element of quid pro quo between the tax-payer and the public authority there is no option to the tax-payer in the matter of receiving the service determined by public authority. In regard to fees there is, and must always be, co-relation between the fee collected and the service intended to be rendered. Cases may arise where under the guise of leaving a fee Legislature may attempt to impose a tax; and in the case of such a colourable exercise of legislative power courts would have to scrutinies the schemes of the levy very carefully and determine whether in fact there is a co-relation between the service and the levy, or whether the levy is either not co-related with service or is levied to such an excessive extent as to be a pretense of a fee and not a fee in reality. In other words, whether or not a particular cess lived by a statute amounts to a fee or tax would always be a question of fact to be determined in the circumstances of each case. The distinction between a tax and a fee is, however, important, and it is recognised by the Constitution. Several Entries in the Three Lists empower the appropriate Legislatures to levy taxes; but apart from the power to levy taxes thus conferred each List specifically refers to the power to levy fees in respect of any of the matters covered in the said List excluding of course the fees taken in any Court.

The question about the distinction between a tax and a fee has been considered by this Court in three decisions in 1954. In The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt ([1954] S.C.R. 1005.) the vires of the Madras Hindu Religious and Charitable Endowments Act 1951 (Madras Act XIX of 1951), came to be examined Amongst the sections challenged was section 76(1). Under this section every religious institution had to pay

to the Government annual contribution not exceeding 5% of its income for the services rendered to it by the said Government; and the argument was that the contribution thus exacted was not a fee but a tax and such outside the competence of the State Legislature. In dealing with this argument Mukherjee, J., as he then was, cited the definition of tax given by Latham, C.J., in the case of Matthews ((1938) 60 C.L.R. 263.), and has elaborately considered the distinction between a tax and a fee. The learned judge examined the scheme of the Act and observed that "the material fact which negatives the theory of fees in the present case is that the money raised by the levy of the contribution is not earmarked or specified for defraying the expense the Government has to incur in performing the services. All the collections go to the consolidated fund of the State and all the expenses have to be met not out of those collections but out of the general revenues by a proper method of appropriation as is done in the case of other Government expenses". The learned judge no doubt added that the said circumstance was not conclusive and pointed out that in fact there was a total absence of any co-relation between the expenses incurred by the Government and the amount raised by contribution. That is why section 76(1) was struck down as ultra vires.

The same point arose before this Court in respect of the Orissa Hindu Religious Endowments Act, 1939, as amended by amending Act II of 1952 in Mahant Sri Jagannath Ramanuj Das v. The State of Orissa ([1954] S.C.R. 1046.). Mukherjea, J., who again spoke for the Court, upheld the validity of section 49 which imposed the liability to pay the specified contribution on every Mutt or temple having an annual income exceeding Rs. 250 for services rendered by the State Government. The scheme of the impugned Act was examined and it was noticed that the collections made under it are not merged in the general public revenue are not appropriated in the manner laid down for appropriation of expenses for other public purposes. They go to constitute a fund which is contemplated by section 50 of the Act, and this fund to which the Provincial Government contributes both by way of loan and grant is specifically set apart for the rendering of services involved in carrying out the provisions of the Act. The same view was taken by this Court in regard to section 58 of the Bombay Public Trust Act, 1950 (Act XXIX of 1950) which imposed a similar contribution for a similar purpose in Ratilal Panachand Gandhi v. The State of Bombay ([1954] S.C.R. 1055.). It would thus be seen that the tests which have to be applied in determining the character of any impugned levy have been laid down by this Court in these three decisions; and it is in the light of these tests that we have to consider the merits of the rival contentions raised before us in the present petition.

On behalf of the petitioners Mr. Amin has relied on three other decisions which may be briefly considered. In P.P. Kutti Keya v. The State of Madras, (A.I.R. 1954 Mad. 621.), the Madras High Court was called upon to consider, inter alia, the validity of section 11 of the Madras Commercial Crops Markets Act 20 of 1933 and Rules 28(1) and 28(3) framed thereunder. Section 11(1) levied a fee on the sales of commercial crops within the notified area and section 12 provided that the amounts collected by the Market Committee shall be constituted into a Market Fund which would be utilised for acquiring a site for the market, constructing a building, maintaining the market and meeting the expenses of the Market Committee. The argument that these provisions amounted to services rendered to the notified area and thus made the levy a fee and not a tax was not accepted by the Court. Venkatarama Aiyar, J., took the view that the funds raised from the merchants for a construction of a market in substance amounted to an exaction of a tax. Whether or not the construction of a market amounted to a service to the notified area it is unnecessary for us to consider. Beside, as we have already pointed out we have now three decisions of this Court which have authoritatively dealt with this matter, and it is in the light of the said decisions that the present question has to be considered.

In Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Co. ((1950) A.C. 87.), the Privy Council had to deal with the validity of forest protection impost levied by the relevant section of the Forest Act R.S.B.C. 1936. The lands in question were statutorily exempted from taxation, and it was urged against the validity of the impost that the levy of the said impost was not a service charge but a tax; and since it contravened the exemption from taxation granted to the land it was invalid. This plea was upheld by the Privy Council. The Privy Council did consider two circumstances which were relevant; the first that the levy was on a defined class of interested individuals, and the second that the fund raised did not fall into the general mass of the proceeds of taxation but was applicable for a special and limited purpose. It was conceded that these considerations were relevant but the Privy Council thought that the weight to be attached to them should not be exaggerated. In appreciating the weight of the said relevant circumstances the Privy Council was impressed by the fact that the lands in question formed an important part of the national wealth of the Province and their proper administration, including in particular protection against fire, is a matter of high public concern as well as one of particular interest to individuals. In other words, the effect of the impugned provision was that the expenses of what was the public service of the greatest importance for the Province as a whole had been divided between the general body of taxpayers and those individuals who had a special interest in having their property protected. It would thus appear that this decision proceeded on the basis that what was claimed to be a special service to the lands in question was in reality an item in public service itself, and so the element of quid pro quo was absent. It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly from part of services to the public in general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy.

In Parton v. Milk Board (Victoria) ((1949) 80 C.L.R. 229.), the validity of the levy imposed on dairymen and owners of milk depots by section 30 of the Milk Board Act of 1933 as amended by subsequent Acts of 1936-1939 was challenged, and it was held by Dixon, J., that the levy of the said contribution amounted to the imposition of a duty of excise. This decision was substantially based on the ground that the statutory board "performs no particular service for the dairyman or the owner of a milk depot for which his contribution may be considered as a fee or recompense"; that is to say the element of quid pro quo was absent quo the persons on whom the levy had been imposed. Therefore none of the decisions on which Mr. Amin had relied can assist his case.

Let us now examine the scheme of the impugned Act. As the preamble shows it has been passed because it was though expedient to constitute mining areas and Mining Areas Development Fund in the State of Orissa. It consists of 11 sections. Section 3 of the Act provides for the constitution of a mining area whenever it appears to the State Government that it is necessary and expedient to provide amenities like communications, water-supply and electricity for the better development of any area in the State of Orissa wherein any mine is situated, or to provide for the welfare of the residents or to workers in any such areas within which persons employed in a mine or a group of mines reside of work. Under this section the State Government had to define the limits of the area and is given the power to include within such area any local area contiguous to the same or to

exclude from such area any local area comprised therein; that is the effect of section 3(1). Section 3(2) empowers the owner a lessee of a mine or his duly constituted representative in the said area to file objections in respect of any notification issued under section 3(1) within the period specified, and the State Government is required to take the said objection into consideration. After considering objections received the State Government is authorised to issue a notification constituting a mining area under section 3(3). Section 4 deals with the imposition and collection of cess. The rate of the levy authorised shall not exceed 5 per centum of the valuation of the minerals at the pit's mouth. Section 5 provides for the constitution of the Orissa Mining Areas Development Fund. This fund vests in the State Government and has to be administered by such officer or officers as may be appointed by the State Government is that behalf. Section 5(2) requires that there shall be paid to the credit of the said fund the proceeds of the cess recovered under section 4 for each mining area during the quarter after deducting expresses, if any, for collection and recover. Section 5(3) contemplates that to the credit of the said fund shall be placed all collections of cess under section 5(2) as well as amounts from State Government and the local authorities and public subscriptions specifically given for any of the purposes of the fund. Section 5(4) deals with the topic of the application of the said fund. The fund has to be utilised to meet expenditure incurred in connection with such measures which in the opinion of the State Government are necessary or expedient for providing amenities like communications, water supply and electricity, for the better development of the mining areas, and to meet the welfare of the labour and other persons residing or working in the mining areas. Section 5(5) lays down that without prejudice to the generality of the for__egoing provisions the fund may be utilised to defray any of the purposes specified in cls. (a) to (e). Under section 5(6) the State Government is given the power to decide whether any particular expenditure is or is not debitable to the fund and their decision is made final; and section 5(7) imposes on the State Government an obligation to public annually in the gazette a report of the activities financed from the fund together with an estimate of receipts and expenditure of the fund and a statement of account. Section 6 prescribes the mode of constituting an advisory committee. It has to consist of such number of members and chosen in such manner as may be prescribed, provided however that each committee shall include representatives of mine-owners and woren employed in mining industry. The names of the members of the committee are required to be published in the gazette. Section 7 deals with the appointment and functions of the statutory authorities to carry out the purpose of the Act, while section 8 confers on the State Government power to make rules. Section 9 prescribes penalties and provides for prosecutions; and section 10 gives protection to the specified authorities or officers in respect of anything done or intended to be done by them in good faith in pursuance of the Act or any rules or order made thereunder. Section 11, which is the last section, confers on the State Government the power to do anything which may appear to them to be necessary for the purpose of removing difficulties in giving effect to the provisions of the Act.

The scheme of the Act thus clearly shows that it had been passed for the purpose of the development of mining areas in the State. The basis for the operation of the Act is the constitution of a mining area and it is in regard to mining areas thus constituted that the provisions of the Act come into play. It is not difficult to appreciated the intention of the State Legislature evidenced by this Act. Orissa is an underdeveloped State in the Union of India though it has a lot of mineral wealth of great potential value. Unfortunately its mineral wealth is located generally in areas sparsely populated with bad communications Inevitably the exploitation of the minerals is handicapped by lack of communications, and the difficulty experienced in keeping the labour force sufficiently healthy and in congenial surroundings. The mineral development of the State, therefore, requires that provision should be made for improving the communications by constructing good roads and by providing means of transport such as tramways; supply of water and electricity would also help. It would also

be necessary to provide for amenities of sanitation and education to the labour force in order to attract workmen to the area. Before the Act was passed it appears that the mine-owners tried to put up small-length roads and tramways for their own individual purpose, but that obviously could not be as effective as roads constructed by the State and tramway service provided by it. It is on a consideration of these factory that the State Legislature decided to take an active part in unsystematic development of its mineral area which would help the mine-owners in moving their minerals quickly through the shortest route and would attract labour to assist the excavation of the minerals. Thus there can be no doubt that the primary and the principal object of the Act is to develop the mineral areas in the State and to assist more efficient and extended exploitation of its mineral wealth.

The constitution of the advisory committee as prescribed by section 4 emphasises the fact that the policy of the Act would be to carry out with the assistance of the mine-owners and their workmen. Thus after a mining area is notified an advisory committee is constituted in respect of it, and the task of carrying out the objects of the Act is left to the care of the said advisory committee subject to the provisions of the Act. Even before an area is notified the mine-owners are allowed an opportunity to put forward their objections. These features of the Act are also relevant in determining the question as to whether the Act is intended to render service to the specified area and to the class of persons who are subjected to the levy of the cess.

Section 5 shows that the cess levied does not become a part of the consolidated fund and is not subject to an appropriation in that behalf; it goes into the special fund earmarked for carrying out the purpose of the Act, and thus its existence establishes a correlation between the cess and the purpose for which it is levied. It was probably felt that some additions should be made to the special fund, and so s. 5(3) contemplates that grants from the State Government and local authorities and public subscriptions may be collected for enriching the said fund. Every year a report of the activities financed by the fund had to be published together with an estimate of receipt and expenditure and a statement of accounts. It would thus be clear that the administration of the fund would be subject to public scrutiny and persons who are called upon to pay the levy would have an opportunity to see whether the cess collected from them has been properly utilised for the purposes for which it is intended to be used. It is not alleged by the petitioners that the levy imposed is unduly or unreasonably excessive so as to make the imposition a colourable exercise of legislative power. Indeed the fact that the accounts have to be published from year to year affords an indication to the contrary. Thus the scheme of the Act shows that the cess is levied against the cess of persons owning mines in the notified area and it is levied to enable the State Government to render specific services to the said class by developing the notified mineral area. There is an element of quid pro quo in the scheme, the cess collected is constituted into a specific fund and it has not become a part of the consolidated fund, its application is regulated by a statute and is confirmed to its purposes, and there is a definite co-relation between the impost and the purpose of the Act which is to render service to the notified area. These features of the Act impress upon the levy the character of a fee as distinct from a tax.

It is, however, urged that the cess levied by section 4(2) is in substance and reality a duty of excise. As we have already noticed section 4(2) provides that the rate of such levy shall not exceed 5 per centum of the valuation of the minerals at the pit's mouth; in other words it is the value of the minerals produced which is the basis for calculating the cess payable by mine-owners and that precisely is the nature in which duty of excise is levied under Entry 84 in List I. The said Entry empowers Parliament to impose duties of excise inter alia, on goods manufactured or produced in India. When minerals are produced from mines and a duty of excise is intended to be imposed on

them it would be normally imposed at the precisely what the impugned Act purports to do. It is also contended that the rate prescribed by section 4(2) indicates that it operates not as a mere fee but as a duty of excise. This argument must be carefully examined before the character of the cess is finally determined. It is not disputed that under Entry 23 in List II read with Entry 66 in the said List the State Legislature can levy a fee in respect of mines and mineral development. Entry 23 reads thus : "Regulation of Mines and Mineral development subject the provisions of List I with respect to regulation and development under the Control of the Union". We will deal with the condition imposed by the letter part of this Entry later. For the present it is enough to state that regulation of mines and mineral development is within the competence of the State Legislature. Entry 66 provides that fees in respect of any of the matters in the said List can be imposed by the State Legislature subject of course to the exception of fees taken in any Court. The argument is that though the State Legislature is competent to levy a fee in respect of mines and mineral development, if the statute passed by a State Legislature in substance and in effect imposes a duty of excise it is travelling outside its jurisdiction and is trespassing on the legislative powers of Parliament.

This argument is based on two considerations. The first relates to the form in which the levy is imposed, and the second relates to the extent of the levy authorised. The extent of the levy authorised would always depend upon the nature of the services intended to be rendered and the financial obligations incurred thereby. If the services intended to be rendered to the notified mineral areas require that a fairly large cess should be collected and co-relation can be definitely established between the proposed services and the impost levied, then it would be unreasonable to suggest that because the rate of the levy is high it is not a fee but a duty of excise. In the present case, if the development of the mining areas involved considerable expenditure which necessitates the levy of the prescribed rate it only means that the services being rendered to the mining areas are very valuable and the rate-payer in substance is compensating the State for the services rendered by it to him. It is significant that the petitioners do not seriously suggest that the services intended to be rendered are a cloak and not genuine, or that the taxes levied have no relation to the said services, or that they are unreasonable and excessive. Therefore, in our opinion, the extent of the rate allowed to be imposed by section 4(2) cannot by itself alter the character of the levy from a fee into that of a duty of excise. If the co-relation between the levy and the services was not genuine of real, or if the levy was disproportionately higher than the requirements of the services intended to be rendered it would have been another matter.

Then as to the form in which the impost is levied, it is difficult to appreciate how the method adopted by the Legislature in recovering the most can alter its character. The character of the levy must be determined in the light of the test to which we have already referred. The method in which the fee is recovered is a matter of convenience, and by itself it cannot fix upon the levy the character of the duty of excise. This question had often been considered in the part, and it has always been held that though the method in which an impost is levied may be relevant in determining its character its significance and effect cannot be exaggerated. In Ralla Ram v. The Province of East Punjab ((1948) F.C.R. 207.) the Federal Court had to consider the character of the tax levied by section 3 of the Punjab Urban Immovable Property Tax Act XVII of 1940. Section 3 provided as follows : "There shall be charged, levied and paid an annual to tax on building sand lands situated in the rating areas shown in the schedule to this Act at such rate not exceeding twenty per centum of the annual value of such buildings and lands as the Provincial Government may by notification in official gazette direct in respect of each such rating area". The argument urged before the Federal Court was that the tax imposed by the said section was in reality a tax on income within the meaning of Item 54 in List I of the Seventh Schedule to the Constitution Act of 1935, and as such it was not covered by Item 42 in List II of the said Schedule. This argument was rejected on the ground that

the tax levied by the Act was in pith and substance a tax on land and buildings covered by Item 42. It would be noticed that the basis of the tax was the annual value the building which is the basis used in the Indian Income-tax Act for determining income from property and so, the attack against the section was based the ground that it had adopted the same basis for levying the impost as the Income-tax Act and the said basis determined its character whatever may be the appearance in which the impost was purported to be levied. In repelling this argument Fazl Ali, J. observed that the crucial question to the answered was whether merely because the Income-tax Act had adopted the annual value as the standard for determining the income it must necessarily follow that if the same standard is employed as a measure for any other tax that tax becomes a tax on income. The learned judge then proceeded to add that if the answer to this question is to be given in the affirmative then certain taxes which cannot possibly be described as income-tax must be held to be so. In other words, the effect of this decision is that the adoption of the standard used in Income-tax Act for getting at the income by any other act for laving the tax authorised by it would not be enough to convert the said tax into an income-tax. During the course of this judgment Fazl Ali, J. also noticed with approval a similar view taken by the Bombay High Court in Sir Byramjee Jeejeebhoy v. The Province of Bombay (I.L.R. 1940 Bom. 58.).

This decision has been expressly approved by the Privy Council in Governor-General in Council v. Province of Madras ((1945) L.R. 72 I.A. 91.). Consistently with the decision of the Federal Court their Lordships expressed the opinion that "a duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax on goods and not on sales or the proceeds of the sale of goods. The two taxes, the one levied on the manufacturer in respect of his goods and the other on the vendor in respect of his sales may in one sense overlap, but in law there is no overlapping; the taxes are separate and distinct imposts. If in fact they overlap that may be because the taxing authority imposing a duty of excise find it convenient to impose that duty at the moment when the exciseable article leaves the factory or workshop for the first time on the occasion of its sale". In that case the question was whether the tax authorised by the Madras General Sales Tax Act, 1939, was a tax on the sale of goods or was a duty of excise, and the Privy Council held it was the former and not the latter. Therefore, in our opinion, the mere fact that the levy imposed by the impugned Act had adopted the method of determining the rate of the levy by reference to the minerals produced by the mines would not by itself makes levy a duty of excise. The method thus adopted may be relevant in considering the character of the impost but its effect must be weighed along with and in the light of the other relevant circumstances. In this connection it is always necessary to bear in mind that where an impugned statute passed by a State legislature is relatable to an Entry in List II it is not permissible to challenge its vires only on the ground that the method adopted by it for the recovery of the impost can be and is generally adopted in levying a duty of excise. Thus considered the conclusion is inevitable that the cess levied by the impugned Act is neither a tax nor a duty of excise but is a fee.

The next question which arises is, even if the cess is a fee and as such may be relatable to Entries 23 and 66 in List II its validity is still open to challenge because the legislative competence of the State Legislature under Entry 23 is subject to the provisions of List I with respect to regulation and development under the control of the Union; and that takes us to Entry 54 in List I. This Entry reads thus : "Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest". The effect of reading the two Entries together is clear. The jurisdiction of the State Legislature under Entry 23 is subject to the limitation imposed by the latter part of the said Entry. If Parliament by its law had declared that regulation and development of mines should in public interest be under the control of Union, to the extent of such declaration the jurisdiction of the State

Legislature is excluded. In other words, if a Central Act has been passed which contains a declaration by Parliament as required by Entry 54, and if the said declaration covers the field occupied by the impugned Act the impugned Act would be ultra vires, not because of any repugnance between the two statutes but because the State Legislature had no jurisdiction to pass the law. The limitation imposed by the latter part of Entry 23 is a limitation on the legislative competence of the State Legislature itself. This position is not in dispute.

It is urged by Mr. Amin that the field covered by the impugned Act had already been covered by the Mines and Minerals (Regulation and Development) Act, 1948, (LIII of 1948) and he contends that in view of the declaration made by section 2 of this Act the impugned Act is ultra vires. This Central Act was passed to provide for the regulation of mines and oil fields and for the development of minerals. It may be stated at this stage that by Act LXVII of 1957 which had been subsequently passed by Parliament, Act LIII of 1948 has now been limited only to oil fields. We are, however, concerned with the operation of the said Act in 1952, and at that time it applied to mines as well as oil fields. Section 2 of the Act contains a declaration as to the expediency and control by the Central Government. It reads thus : "It is hereby declared that it is expedient in the public interest that the Central Government should take under its control the regulation of mines and oil fields and the development of minerals to the extent hereinafter provided". It is common ground that at the relevant time this Act applied to coal mines. Section 4 of the Act provides that no mining lease shall be granted after the commencement of this Act otherwise than in accordance with the rules made under this Act. Section 5 empowers the Central Government to make rules by notification for regulating the grant of mining leases or for prohibiting the grant of such leases in respect of any mineral or in any area. Sections 4 and 5 thus purport to prescribe necessary conditions in accordance with which mining leases have to be executed. This part of the Act has no relevance to our present purpose. Section 6 of the Act, however, empowers the Central Government to make rules by notification in the official gazette for the conservation and development of minerals. Section 6(2) lays down several matters in respect of which rules can be framed by the Central Government. This power is, however, without prejudice to the generality of powers conferred on the Central Government by section 6(1). Amongst the matters covered by section 6(2) is the levy and collection of royalties, fees or taxes in respect of minerals mined, quarried, excavated or collected. It is true that no rules have in fact been framed by the Central Government in regard to the levy and collection of any fees; but, in our opinion, that would not make any difference. If it is held that this Act contains the declaration referred to in Entry 23 there would be no difficulty in holding that the declaration covers the field of conservation and development of minerals, and the said field is indistinguishable from the field covered by the impugned Act. What Entry 23 provides is that the legislative competence of the State Legislature is subject to the provisions of List I with respect to regulation and development under the control of the Union, and Entry 54 in List I requires a declaration by Parliament by law that regulation and development of mines should be under the control of the Union in public interest. Therefore, if a Central Act has been passed for the purpose of providing for the conservation and development of minerals, and if it contains the requisite declaration, then it would not be competent to the State Legislature to pass an Act in respect of the subject-matter covered by the said declaration. In order that the declaration should be effective it is not necessary that rules should be made or enforced; all that this required is a declaration by Parliament that it is expedient in the public interest to take the regulation and development of mines under the control of the Union. In such a case the test must be whether the legislative declaration covers the field or not. Judged by this test there can be no doubt that the field covered by the impugned Act is covered by the Central Act LIII of 1948.

It still remains to consider whether section 2 of the said Act amounts in law to a declaration by

Parliament as required by Art. 54. When the said Act was passed in 1948 the legislative powers of the Central and the Provincial Legislatures were governed by the relevant Entries in the Seventh Schedule to the Constitution Act of 1935. Entry 36 in List I corresponds to the present Entry 54 in List I. It reads thus : "Regulation of Mines and Oil Fields and mineral development to the extent to which such regulation and development to the extent Dominion control is declared by Dominion law to be expedient in public interest". It would be noticed that the declaration required by Entry 36 is a declaration by Dominion law. Reverting then to section 2 of the said Act it is clear that the declaration contained in the said section is put in the passive voice; but in the context there would be no difficulty in holding that the said declaration by necessary implication has been made by Dominion law. It is a declaration contained in a section passed by the Dominion Legislature, and so it is obvious that it is a declaration by a Dominion law; but the question is; Can this declaration by a Dominion law be regarded constitutionally as declaration by Parliament which is required by Entry 54 in List I.

It has been urged before us by the learned Additional Solicitor-General and Mr. Amin that in dealing with this question we should bear in mind two general considerations. The Central Act has been continued under Art. 372(1) of the Constitution as an existing law, and the effect of the said constitutional provision must be that the continuance of the existing law would be as effective and to the same extent after the Constitution came into force as before. It is urged that after the said Act was passed and before the Constitution came into force no Provincial Legislature could have validly made a law in respect of the field covered by the said Act, and it would be commonsense to assume that the effect of the continuance of the said law under Art. 372(1) cannot be any different. In other words, if no Provincial Legislature could have trespassed on the field covered by the said Act before the Constitution, the position would and must be the same even after the Constitution came into force.

It is also contended that for the purpose of bringing the provision of existing laws into accord with the provisions of the Constitution the President was given power to make by order appropriate adaptations and modifications of such laws, and the object of making such adaptations obviously was to make the continuance of the existing laws fully effective. It is in the light of these two general considerations, so the argument runs, must the point in question be considered.

The relevant clause in the Adaptation of Laws Order, 1950, on which reliance has been placed in support of this argument is cl. 16 in the Supplementary Part of the said Order. This clause provides that subject to the provisions of this Order any reference by whatever form of words in any existing law to any authority competent at the date of the passing of that law to exercise any power or authorities, or to discharge any functions, in any part of India shall, where a corresponding new authority has been constitute by or under the Constitution, have effect until duly repealed or amended as if it were a reference to that new authority. The petitioners contend that as a result of this clause the declaration made by the Dominion Legislature in section 2 of the Central Act must now be held to be the declaration made by Parliament. In this contention justified on a fair and reasonable construction of the clause ? That is the crux of the problem.

In considering this question it would be relevant recall the scheme of the Adaptation of Laws Order, 1950. It consists of Three Parts. Part I deals with the adaptation of Central Laws and indicates the adaptation made therein; Part II deals with the adaptation of Provincial Laws and follows the same pattern; and Part III is a Supplementary Part which contains provisions in the nature of supplementary provisions. A perusal of the clauses contained in Part I would show that though some adaptation was made in Act LIII of 1948 it was not thought necessary to make an adaptation in

section 2 of the said Act whereby the declaration implied in the said section had been expressly adapted into a declaration by Parliament.

Now, the effect of cl. 16 in substance is to equate an authority competent at the date of the passing of the existing law to exercise any powers or authorities, or to discharge any functions with a corresponding new authority which has been constituted by or under the Constitution. Reference to the authority in the context would suggest cases like reference to the Governor-General or nomine, or Central Government which respectively would be equated with the Prima facie the reference or authority would not include reference to a Legislature; in this connection it may be relevant to point out that Art. 372(1) refers to a competent Legislature as distinguished from other competent authorities. That is the first difficulty in holding that cl. 16 refers to the Dominion Legislature and purports to equate it with the Parliament.

It is clear that for the application of this clause it is necessary that a reference should have been made to the authority by some words whatever may be their form. In other words it is only where the existing law refers expressly to some authority that this clause can be invoked. It is difficult to construe the first part of this clause to include authorities to which no reference is made by any words in terms, but to which such reference may be implied; and quite clearly the Dominion Legislature is not expressly referred to in section 2. In constraining the present clause we think it would be straining the language of the clause to hold that an authority to which no reference is made by words in any part of the existing law could claim the benefit of this clause.

Besides, there is no doubt that when the clause refers to any authority competent to exercise any powers or authorities, or to discharge any functions, it refers to the powers, authorities or functions attributable to the existing law itself; that is to say, authorities which are competent to exercise powers or to discharge functions under the existing laws are intended to be equated with corresponding new authorities. It is impossible to hold that the Dominion Legislature is an authority which was competent to exercise any power or to discharge any function under the existing law. Competence to exercise power to discharge functions to which the clause refers must inevitably be related to the existing law and not to the Constitution Act of 1935 which would be necessary if Dominion Legislature was to be included as an authority under this clause. This Constitution Act of 1935 had been repealed by the Constitution and it was not, and could not obviously be, the object of the Adaptation of Laws Order to make any adaptation in regard to the said Act. Therefore, the competence of the Dominion Legislature which flowed from the relevant provisions of the Constitution Act of 1935 is wholly outside this clause. We have carefully considered the arguments urged before us by the learned Additional Solicitor General and Mr. Amin but we are unable to hold that cl. 16 can be pressed into service for the purpose of supporting the conclusion that the declaration by the Dominion Legislature implied in section 2 of Act LIII of 1948 can, by virtue of cl. 16, be held to be a declaration by Parliament within the meaning of the relevant Entries in the Constitution. If that be the true position then the alternative challenge to the vires of the Act based on cl. 16 of the Adaptation of Laws Order must fail.

There is another possible argument which may prima facie lead to the same conclusion. Let us assume that the result of reading Art. 372 and cl. 16 of the Adaptation of Laws Order is that under section 2 of Act LIII of 1948 there is a declaration by Parliament as suggested by the petitioners and the learned Additional Solicitor- General. Would that meet the requirements of Entry 54 in List I of the Seventh Schedule? It is difficult to answer this question in the affirmative because the relevant provisions of the Constitution are prospective and the declaration by Parliament specified by Entry 54 must be declaration made by Parliament subsequent to the date when the Constitution came into

force. Unless a declaration is made by Parliament after the Constitution came into force it will not satisfy the requirements of Entry 54, and that inevitably would mean that the impugned Act is validly enacted under Entry 23 in List II of the Seventh Schedule. If that be the true position then it would follow that even on the assumption that cl. 16 of the Adaptation of Laws Order and Art. 372 can be construed as suggested by the petitioners the impugned Act would be valid.

Faced with this difficulty, both the learned Additional Solicitor- General and Mr. Amin argued that cl. 21 of the said Order may be of some assistance. Clause 21 reads thus : "Any Court, Tribunal, or authority required or empowered to enforce any law in force in the territory of India immediately before the appointed day shall, notwithstanding that this Order makes no provision or insufficient provision for the adaptation of the law for the purpose of bringing it into accord with the provisions of the Constitution, construe the law with all such adaptations as are necessary for the said purpose". Assuming that this clause is valid we do not see how it is relevant in the present case. All that this clause purports to do is to empower the Court to construe the law with such adaptations as may be necessary for the purpose of bringing it in accord with the provisions of the Constitution. There is no occasion to make any adaptation in construing Act LIII of 1948 for bringing it into accord with the provisions of the Constitution at all. The said Act has been continued under Art. 372(1) and there is no constitutional defect in the said Act for the avoidance of which any adaptation is necessary. In fact what the petitioners seek to do is to read in section 2 of the said Act the declaration by Parliament required by Entry 54 so as to make the impugned Act ultra vires. Quite clearly cl. 21 cannot be pressed into service for such a purpose. Therefore, we reach this position that the field covered by Act LIII of 1948 is substantially the same as the field covered by the impugned Act but the declaration made by section 2 of the said Act does not constitutionally amount to the requisite declaration by Parliament, and so the limitation imposed by Entry 54 does not come into operation in the present case. Act LIII of 1948 continues in operation under Art. 372; with this modification that so far as the State of Orissa is concerned it is the impugned Act that governs and not the Central Act. Article 372(1) in fact provides for the continuance of the existing law until it is altered, repealed or amended by a competent Legislature or other competent authority. In the absence of the requisite parliamentary declaration the legislative competence of the Orissa Legislature under Entry 23 read with Entry 66 is not impaired, and so the said Legislature is competent either to repeal, alter or amend the existing law which is the Central Act LIII of 1948; in effect, after the impugned Act was passed, so far as Orissa is concerned the Central Act must be deemed to be repealed. This position is fully consistent with the provisions of Art. 372. The result is that the material words used in cls. 16 and 21 being unambiguous and explicit, it is difficult to give effect to the two general considerations on which reliance has been placed by petitioners. Incidentally the present case discloses that in regard to the requisite parliamentary declaration prescribed by Entry 54 in List I in its application to the pre-Constitution Acts under corresponding Entry 36 in List I of the Constitution Act of 1935, there is a lacuna which has not been covered by any clauses of the Adaptation of Laws Order; that, however, is matter for Parliament to consider.

There is one more point which is yet to be considered. Mr. Amin contends that Entry 23 in List II is subject to the provisions in List I with respect to regulation and development under the control of the Union, and according to him Entry 52 in List I is one of such provisions. In this connection he relies on the said Entry which deals with industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest, and Industries (Development and Regulation) Act, 1951 (LXV of 1951). This Act has been passed to provide for the development and regulation of certain industries one of which undoubtedly is cola mining industry. Section 2 of this Act declares that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule. This declaration is a declaration made by Parliament, and

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

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

The result is the petition fails and is dismissed with costs.

WANCHOO, J. -

I have read the judgment just delivered by my learned brother Gajendragadkar J. and regret that I have not been able to persuade myself that the cess levied in this case on all extracted minerals from any mine in any mining area at a rate not exceeding five per centum of the value of the minerals at the pit's mouth by the Orissa State Legislature under section 4 of the Orissa Mining Areas Development Fund Act, No. XXVII of 1952, (hereinafter called the Act) is a fee properly so called and not a duty of excise. The facts are all set out in the judgment just delivered and I need not repeat them.

The scheme of the Act, as appears from section 3 thereof is to give power to the State Government, whenever it thinks it necessary and expedient to provide amenities, like communications, water-

supply and electricity for the better development of any area in the State wherein any mine is situated or to provide for the welfare of residents or workers in any such area within which persons employed in a mine or a group of mines reside or work, to constitute such an area to be a mining area of the purposes of the Act, to define the limits of the area, to include within such area any local area contiguous to the same and defined in the notification and to exclude from such area any local area comprised therein and defined in the notification. A notification under section 3 is made, after hearing objections from owners or lessees of mines. After such an area is constituted under section 3, a cess is imposed under section 4 on all extracted minerals from any mine in any such area at the rate not exceeding five per centum of the value of the minerals at the pit's mouth. The cess so collected is credited to a fund called the Orissa Mining area Development Fund created under section 5 of the Act, bedsides other amounts with which were are not concerned in this case. The Fund is to be applied to meet expenditure incurred in connection with such measures, which in the opinion of the State Government, are necessary or expedient of providing amenities like communications, water-supply and electricity, for the better development of mining areas and to meet the welfare of labour and other persons residing or working in the mining areas. Then come other provisions or working out the above provisions including section 8, which gives power to the State Government to frame rules to carry into effect the purposes of the Act. The Rules were framed under the Act in January, 1955.

The constitutional competence of the Orissa State Legislature to levy the cess under the Act is attacked on two main grounds. In the first place, it is urged that the cess is in pith and substance a duty of excise under item 84 of List I of the Seventh Schedule and therefore the levy of such a cess is beyond the competence of the Orissa State Legislature. In the second place, it is urged that even if the cess is a fee, in view of the two Acts of the Central Legislature and Parliament, namely, The Mines and Minerals (Regulation and Development) Act, No. LIII of 1948 and The Industries (Development and Regulation) Act, No. LXV of 1951, the Orissa Legislature was not competent to pass the Act.

The petition has been opposed on behalf of the State of Orissa and the main contentions urged on its behalf are that the cess is a fee properly so called and not a duty of excise and therefore the Orissa State Legislature was competent to levy it and the two Central Acts do not affect that competence. In the alternative it has been urged that even if the cess is a tax the State Legislature was competent to levy it under item 50 of List II of the Seventh Schedule.

The first question therefore that falls for consideration is whether the cess in this cases is a tax or a fee. Difference between a tax properly so called and a fee properly so called came up for consideration before at this Court in three cases in 1954 and was considered at length. In the first of them, namely, The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt ([1954] S.C.R. 1005.) it was pointed out that -

> "though levying of fees is only a particular form of the exercise of the taxing power of the State, out Constitution has placed fees under a separate category for purposes of legislation and at the end of each one of the three legislative lists, it has given a power to the particular legislature to legislate on the imposition of fees in respect to every one of the items dealt with in the list itself".

It was also pointed that -

> "the essence of a tax is compulsion, that is to say, it is imposed under statutory power

> without the tax payer's consent and the payment is enforced by law. The second characteristic of a tax is that it is an imposition made for public purpose without reference any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of quid pro quo between the tax-payer and the public authority. Another feature of taxation is that as it is a part of the common burden, quantum of imposition upon the tax-payer depends generally upon his capacity to pay."

As to fees, it was pointed out that -

> "a 'fee' is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay."

Finally, it was pointed out that -

> "the distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is a payment for a special benefit or privilege.... Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives."

The consequence of these principles was that -

> "if, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision be co-related to the expenses incurred by Government in rendering the services.... If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax."

Having laid down these principles, that case then considered the vires of section 76 of the Madras Hindu Religious and Charitable Endowments Act, No. XIX of 1951, and it was pointed out that the material fact which negatived the theory of fees in that case was that the money raised by levy of the contribution was not ear-marked or specified for defraying the expenses that the Government had to incur in performing the services. All the collections went to the consolidated fund of the State and all the expenses had to be met not out of those collections but out of the general revenues by a proper method of appropriation as was done in the case of other government expenses. That in itself might not be conclusive, but in that case there was total absence of any co-relation between the expenses incurred by the Government and the amount raised by contribution under the provision of section 76 and in those circumstances the theory of return or counter-payment or quid pro quo could not have any possibly application to that case. Consequently, the contribution levied under section 76 was held to be a tax and not a fee.

In the second case of Mahant Sri Jagannath Ramanuj Das v. The State of Orissa ([1954] S.C.R. 1046.), a similar imposition by the Orissa Legislature came up for consideration. After referring to the earlier case, it was pointed out that -

> "two elements are thus essential in order that payment may be regarded as a fee. In the first place, it must be levied in consideration of certain of services which the individuals accepted either willingly or unwillingly. But this by itself is not enough to make the imposition a fee, if the payments demanded for rendering of such services are not set apart of specifically appropriated for that purpose but are merged the general revenue of the State to be spent for general public purposes."

The Orissa imposition was held to be a fee because the collections made were not merged in the general public revenue and were meant for the purpose meeting the expenses of the Commissioner and his office which was the machinery set up for due administration of the affairs of the religious institution. They went to constitute a fund which was contemplated by section 50 of the Orissa Act and this fund was specifically set apart for rendering services involved in carrying out the provisions of the Act.

The third case, namely, Ratilal Panachand Gandhi v. The State of Bombay ([1954] S.C.R. 1055.) came from Bombay. Sec. 58 of the Bombay Act, No. XXIX of 1950, provided for an imposition in proportion to the gross annual in come of the trust. This imposition was levied for the purpose of due administration of the trust property and for defraying the expenses incurred in connection with the same. After referring to the two earlier cases, the Court went on to say that -

> "tax is a common burden and the only return which the taxpayer gets is participation in the common benefits of the State. Fees, on the other hand, are payments primarily in the public interest, but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always an element of quid pro quo which is absent in a tax.... But in order that the collections made by the Government can rank as fees, there must be co-relation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services." It was then pointed out that the contributions, which were collected under section 58, were to be credited in the Public Trusts Administration Fund as constituted under section 57. This fund was to be applied exclusively of the payment of charges for expenses incidental to the regulation of public trusts and for carrying into effect the provisions of the Act. The imposition therefore was in that case held to be a fee.

These decisions clearly bring out the difference between a tax and a fee and generally speaking there is always an element of quid pro quo in a fee and the amount raised through a fee is co-related to the expenses necessary for rendering the services which are the basis of quid pro quo. Further, the amount collected as a fee does not go to augment the general revenues of the State and many a time a special fund is created in which fees are credited-though this is not absolutely necessary. But as I read these decisions, they cannot be held to lay down that what is pith and substance a tax can become a fee merely because a fund is created in which collections are credited and some services may be rendered to the persons from when collections are made. If that were so, it will be possible to convert many taxes not otherwise leviable into fees by the device of creating a special fund and attaching some service to be rendered through that fund to the persons from whom collections are made. I am therefore of opinion that one must first look a the pith and substance of the levy, and if

in its pith and substance it is not essentially different from a tax it cannot be converted into a fee by creating a special fund in which the collections are credited and attaching some services to be rendered through that fund.

Let me then look at the pith and substance of the cess, which has been imposed in this case. The cess consists of a levy not exceeding five per centum of the value of the minerals at the pit's mouth on all extracted minerals. Prima facie such a levy is nothing more nor less than a duty of excise. Item 84 of List I gives power to levy duties of excise exclusively to the Union and is in these terms :-

> "Duties of excise on tobacco and other goods manufactured or produced in India except -
>
> (a) alcoholic liquors for human consumption;
>
> (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

This item gives power to Parliament to impose duties of excise on all goods manufactured or produced in India with certain exceptions mentioned therein. Taking this particular case, coal is produced from the mine and would clearly be covered by the words "other goods produced in India" and a duty of excise can be levied on it. What then exactly is meant by a duty of excise ? Reference in this connection may be made to Governor-General in Council v. Province of Madras ((1945) L.R. 72 I.A. 91.). In that case that point arose whether the sales-tax imposed by the Madras Legislature was duty of excise. The Privy Council pointed out that -

> "in a Federal constitution in which there is a division of legislative powers between Central and Provincial legislatures, it appears to be inevitable that controversy should arise whether one or other legislature is not exceeding its own, and encroaching on the other's, constitutional legislative power, and in such a controversy it is a principle, which their Lordships do not hesitate to apply in the present case, that it is not the name of the tax but its real nature, its 'pith and substance' as it has sometimes been said, which must determine into what category it falls".

The Privy Council went on to consider what a duty of excise was and said that -

> "it is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax on goods not on sales or the proceeds of sale of goods. Though sometimes a duty of excise may be imposed on first sales, a duty of excise and a tax on the sale of goods were separate and distinct imposts and in law do not overlap."

The Privy Council approved of the decisions of the Federal Court in re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 ((1939) F.C.R. 18.) and The Province of Madras v. Messrs. Boddu Paidanna and Sons ((1948) F.C.R. 90). It seems to have been urged that because income cases a duty of excise may be levied on the occasion of the first sale and a sales tax may also be levied on the same occasion, there is really no difference between the two. It is however clear that a duty of excise is primarily a tax on goods manufactured or produced; it is not a tax on the sale of goods, though the taxing authority may as a matter of concession to the producer

not charge the tax immediately the goods are produced and may postpone it, to make it easy for the producer to pay the tax, till the first sale is made by him; nevertheless the charge is still on the goods and is therefore a duty of excise. On the other hand, a sales tax can only be levied when a sale is made and there is nothing to prevent its levy on the first sale. The two concepts are however different and, as the Privy Council pointed out, a sales tax and a duty of excise are separate and distinct imposts and in law do not overlap. The pith and substance of a duty of excise is that it is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced.

Let me therefore see what the Orissa Legislature has done in the present case. It has levied a cess at a rate not exceeding five per centum on the value of minerals at the pit's mouth on all extracted minerals. All the extracted minerals are nothing other than goods produced and the cess is levied on the goods produced at a rate not exceeding five per centum of the value at the pit's mouth. The cess therefore in the present case cannot be anything other than a duty of excise. The pith and substance of the cess in this case falls fairly and squarely within entry 84 of List I and is thereof a duty of excise, which cannot be levied by the Orissa State Legislature. I may in this connection refer to the cesses levied by the Central Legislature and Parliament by Act XXXII of 1947 and by the Act No. LXV of 1951. Sec. 3 of Act XXXII OF 1947 lays down that there shall be levied and collected as a cess of the purposes of that Act a duty of excise on all coal and coke despatched from collieries at such rate not less than four annas and not more than eight annas per ton as may from time to time be fixed by the Central Government by notification in the Official Gazette. This is obviously a tax on the goods produced, the basis of the tax being so much per ton. Again sec. 9 of Act LXV of 1951 lays down that there maybe levied and collected as a cess for the purposes of that Act on all goods manufactured or produced in any such scheduled industry as may be specified in this behalf by the Central Government by notified order a duty of excise at a rate not exceeding two annas per centum of the value of the goods. This again is clearly a tax on goods produced or manufactured and is in the nature of a duty of excise, the basis of the tax being so much of the value of the goods. If these two taxes are duties of excise, I fail to see any difference in pith and substance between these two taxes and the cess levied under the Act.

It is however urged that the method employed in the Act for realising the cess is only a method of quantification of the fee and merely because of this quantification, the pith and substance of the impost does not change from a fee to a duty of excise. Reference in this connection was made to three cases of quantification. In Sir Byramjee Jeejeebhoy v. The Province of Bombay (I.L.R. 1940 Bom. 58.), a question arose with respect to a tax imposed on urban immovable property, whether it was a tax on lands and buildings. The challenge to the tax was on the ground that it was tax on income or capital value within items 54 and 55 of List I of the Seventh Schedule of the Government of India Act and could not therefore be imposed by the Bombay Legislature. It was held that the tax was a tax on lands and buildings within the meaning of item 42 of List II of the same Schedule and that the basis of the tax, which was the annual value, would not convert it into a tax on income or capital value. The High Court considered the pith and substance of the said Act and came to the conclusion that every tax on annual value was not necessarily a tax on income and it was held that the mode of assessment of a tax did not determine its character and one has to look to the essential character of the tax to decide whether it was a tax on income or on lands and buildings. Looking to the pith and substance of the tax it was held in that case that it was a tax on lands and buildings. That decision was in the circumstances of that case right because the intention of the legislature was not to tax the income of any one; the essential character of the tax in that case was to tax the lands and buildings and the annual value of the lands and buildings was only taken as a mode of levying the tax. In the present case, however, the very mode of the levy of the cess is nothing other than the

levy of a duty of excise and therefore the principle of quantification for purposes of a fee cannot be extended to such an extent as to convert what is in pith and substance a tax into a fee on that basis.

The next case to which reference was made is Municipal Corporation, Ahmedabad v. Patel Gordhandas Hargovandas (I.L.R. 1954 Bom. 41.). In that case the Ahmedabad Borough Municipality had levied a rate on open lands and the basis of the levy was one per centum of the capital value of the land. It was urged that this amounted to a capital levy within entry 54 of List I; but the court repelled that contention and held that the levy was in pith and substance a tax on lands, which came within entry 42 of List II of the Seventh Schedule to the Government of India Act. A distinction was made between a tax on land which is levied on the basis of its capital value and a tax which is on capital treating it as an asset itself. This decision also, if I may say so with respect, is correct, of the basic idea was to tax lands and some method had to be found for doing so and the method evolved, though it might look like a capital levy, was in pith and substance not so. But the theory of quantification which is the basis of these two cases cannot be stretched so far as to turn levies which are in pith and substance taxes into fees, by the process of attaching certain services and creating a fund.

The third case is Ralla Ram v. The Province of East Punjab ((1948) F.C.R. 207.). That was a case of a tax on lands and buildings and annual value was the basis on which the tax was levied. The Federal Court rightly pointed out that the pith and substance of the levy had to be seen and on that view it was not income-tax but a tax on lands an buildings and the method adopted was merely a method of quantification. The Federal Court also pointed out that "where there is an apparent conflict between an Act of the Federal Legislator and an Act of the provincial Legislature, we must try to ascertain the pith and substance or the true nature and character of the conflicting provisions and the before an Act is declared ultra vires, there should be an attempt to reconcile the two conflicting jurisdictions, and, only if such a reconciliation should prove impossible, the impugned Act should be declared invalid." It may also be pointed out that in all these three cases, one source of income of an individual or one item out of the total capital of an individual was the basis of calculation while income-tax or capital levy is generally on the total income or the total capital of a person. That aspect must have gone into the decision that the method employed was merely a mode for imposing a tax on lands and buildings. In the present case, however, I see no difference between the method of imposing a duty of excise and the method employed in the Act for imposing a cess - a matter which will be clear from the cesses imposed under the two Central Acts already referred to (No. XXXII of 1947 and No. LXV of 1951). It is not as if there could be no method of imposing a fee properly so called in this case except the one employed. Two methods readily suggest themselves. A lump sum annual fee could be levied on each mine even on a graded scale depending on the size of the mine as evidenced by its share capital. Or a similar graded fee could be levied on each mine depending on its size determined by the number of men employed therein. Where therefore the result of quantification is to bring a particular impost entirely within the ambit of a tax it would not be right to say that such an impost is still a fee, because certain services have to be rendered and a fund has been created in which collections of the impost are credited. If this were permissible many taxes not otherwise leviable would be converted into fees by the simple device of creating a special fund and attaching certain services to be rendered from the amount in that fund. That would in my opinion be a colourable exercise of the power of legislation, as explained in K. C. Gajapati Narayan Deo v. The State of Orissa ([1954] S.C.R. 1.).

Let me illustrate how taxes can be turned into fees on the so-called basis of quantification with the help of the device of creating a fund and attaching certain services to be rendered out of monies in the fund. Take the case of income-tax under item 82 of List I of the Seventh Schedule, which is

exclusively reserved for the Union. Suppose that some State Legislature wants to impose a tax on income other than agricultural income in the garb of fees. All that it has to do is then to create a special fund out of the amounts collected and to attach rendering of certain services to the fund. All that would be necessary would be to define the services to be rendered so widely that the amount required for the purpose would be practically limitless. In that case there would be no difficulty in levying any amount of tax on income, for the amount collected would always be insufficient for the large number of services to be rendered. What has to be done is to find out a number of items in Lists II and III of the Seventh Schedule in respect of which fees can be levied by the Estate Legislature. These fees can be levied on a total basis for a large number of services under various entries of Lists II and III. A fund can be created, say, of rendering services of various kinds to residents of own district. In order to meet the expenses of rendering such services, suppose, the legislature imposes a tax on every one in the district at 10 per centum of the net total income (other than agricultural income); the amount so collected is put in a separate fund and ear-marked for such special services to be rendered to the residents of that district. Can it be said that such a levy is a fee justified under various entries of Lists II and III, and not a tax on income, on the ground that this is merely a mode of quantification ? As an instance, take, item 6 of List II, "Public health and sanitation, hospitals and dispensaries", item 9, "Relief of the disabled and unemployable ", item 11, Education; item 12, Libraries, museums and similar institution"; item 13, communications, that is to say, roads, bridges an other means of communications; item 17, "Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power"; and item 25, "Gas and gas-works"; item 23 of List III, "Social security and social insurance, employment and unemployment"; item 24, "Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits", item 25, "Vocational and technical training of labour"; and item 38, "Electricity". Assume that a fund is created for rendering these services to the residents of a district. The State Legislature is entitled to impose fees for rendering these services to the residents of the district; the costs of these services would obviously be limitless and in order to meet these costs, the State legislature levies a consolidated fee for all these purposes at 10 per centum of the total net income on the residents of the district (excluding his agricultural income) as a measure of quantification of the fee. Can it be said in the circumstances the such a levy would not be income-tax, simply because a fund is created to be used in the district where collections are made and these services have to be rendered out of the fund so created to the residents of that district and to no others ? The answer can only be one, viz., that the nature of the impost is to be seen in its pith and substance; and if in pith and substance it is income-tax within time 82 of List 1 of the Seventh Schedule it will still remain income-tax in spite of the creation of a fund and the attaching of certain services to the monies in that fund to be rendered in a particular area. Such an impost can never be justifies a as consolidated fee on the ground that it is merely a method of quantification.

Compare what has been done in this case. Sec. 3 of the Act which refers to the services to be rendered mentions communications, that is, reads, bridges and other means of communication (barring those given in List I), water-supply and electricity, for the better development of the area. These three items themselves would mean expenditure of such large amounts that anything could be charged as a fee to meet the costs, particularly in an undeveloped State like Orissa. Further, the section goes on to mention provision for the welfare of residents or workers in any such area, which would include such things as social security and social insurance, provident-funds, employer's liability, workmen's compensation, invalidity and old age pensions and maternity benefits and may be even employment and unemployment. Again large funds would be required for these purposes. Therefore, the services enumerated in section 3 being so large and requiring such large sums, any

amount can be levied as a fee and in the name of quantification any tax, even though it may be in List I, can be imposed; and that is exactly what has been done, namely, what is really a duty of excise has been imposed as a fee for these purposes which fall under items 13 and 17 of List II and 23, 24 and 38 of List III. There can be no doubt in the circumstances that the levy of a cess as a fee in this case is a colourable piece of legislation. I do not say that the Orissa State Legislature did this deliberately. The motive of the legislature in such cases is irrelevant and it is the effect of the legislation that has to be seen. Looking at that, the cess in this case is in pith and substance nothing other than a duty of excise under item 84 of List I and therefore the State legislature was incompetent to levy it as a fee.

The next contention on behalf of the State of Orissa is that if the cess is not justified as a fee, it is a tax under item 50 of List II of the Seventh Schedule. Item 50 provides for taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development. This raises a question as to what are taxes on mineral rights. Obviously, taxes on mineral rights must be different from taxes on goods produced in the nature of duties of excise. If taxes on mineral rights also include taxes on minerals produced, there would be no difference between taxes on mineral rights and duties of excise under item 84 of List I. A comparison of Lists I and II of the Seventh Schedule shows that the same tax is not put in both the Lists. Therefore, taxes on mineral rights must be different from duties of excise which are taxes on minerals produced. The difference can be understood if one sees that before minerals are extracted and become liable to duties of excise somebody has got to work the mines. The usual method of working them is for the owner of the mine to grant mining leases to those who have got the capital to work the mines. There should therefore be no difficulty in holding that taxes on mineral rights are taxes on the rights are taxes on the right to extract minerals and not taxes on the minerals actually extracted. Thus tax on mineral rights would be confined, for example, to taxes on leases of mineral rights and on premium or royalty for that. Taxes on such premium and royalty would be taxes on mineral rights while taxes on the minerals actually extracted would be duties of excise. It is said that there may be cases where the owner himself extracts minerals and does not give any right of extraction to somebody else and that in such cases in the absence of mining leases or sub-leases there would be no way of levying tax on mineral rights. It is enough to say that these cases also, rare though they are, present no difficulty. Take the case of taxes on annual value of buildings. Where there is a lease of the building, the annual value is determined by the lease-money; but there are many cases where owners themselves live in buildings. In such cases also taxes on buildings are levied on the annual value worked out according to certain rules. There would be no difficulty where an owner himself works the mine to value the mineral rights on the same principle son which leases of mineral rights are made and then to tax the royalty which, for example, the owner might have got if instead of working the mine himself he had leased it out to somebody else. There can be no doubt therefor that taxes on mineral rights are taxes of this nature and not taxes on minerals actually produced. Therefore the present cess is not a tax on mineral rights; it is a tax on the minerals actually produced and can be no different in pith and substance from a tax on goods produced which comes under Item 84 of List I, as duty of excise. The present levy therefore under section 4 of the act cannot be justified as a tax on mineral rights.

In the view I have taken, it is not necessary to consider the other point, raised on behalf of the petitioners, namely, that even if it is a fee, in view of the two Central Acts (mentioned earlier) the Orissa Legislature was not competent to pass the Act. I would therefore allow the petition, and declare that the Orissa Mining Areas Development Fund Act, 1952, is beyond the constitutional competence of the Orissa Legislature to pass it. The whole Act must be struck down because there will be very little left in the Act if section 4 falls as it must. The legislature would never have passed

the Act without section 4.

BY COURT.

In accordance with the majority Judgment of the Court, the Writ Petition is dismissed with costs.

</html