ORISSA HIGH COURT

Laxmi Narayan

Vs

State (Orissa)

Criminal Jurn. Case Nos. 364, 1517 and 1745 of 1978, 829 of 1979, 524, 1708 and 1709 of 1980, 32, 22, 664, 1082 to 1086 and 2437 of 1981

(P.K. Mohanti, B.N. Misra and R.C. Patnaik, JJ.)

07.03.1983

JUDGEMENT

R.C. Patnaik, J.

1. In this batch of writ applications the petitioners challenge the vires of the Orissa Cess Act, 1962 in so far as it purported to levy cess on lands held for carrying on mining operations and seek mandamus for quashing the demands raised against them and the proceedings taken for recovery of the demands.

2. The Orissa Cess Act, 1962 (hereinafter called 'the Cess Act') was enacted by the Orissa State Legislature with a view to consolidating and amending the law relating to cess in the State of Orissa. It got the assent of the Governor on 3-5-1962 and came into force with effect from 1-4-1963. The statement of objects and reasons indicated that the assessment and levy of cess were being made "under the various statutes and also in accordance with various local usages and customs which differ from district to district. This makes their administration difficult and gives cause for complaint by the public due to lack of uniformity. The present Bill is proposed to be enacted with the primary objective of condensing and simplifying the existing laws on the subject by consolidating the different enactments, customs and usages having force of law in the State and also to amend the same in such matters where they are found to be defective and deficient." Its object was to have a uniform rate throughout the State. By Section 2, the enactments which were specified in the first column of the Schedule were repealed to the extent mentioned therein, that is to say, the provisions therein relating to assessment and levy of cess ceased to be in force on and from the date the Cess Act came into force. Section 3 defined certain expressions used in the Cess Act. The expression 'land' was defined as meaning "lands of " whatever description and includes laid which is covered with water, but does not include houses or buildings" Chapter II related to imposition and application of the cess and contained the crucial provisions. Section 4 was the charging section and read as hereunder :-

> "4. All lands to be liable to payment of cess -
> (1) From and after the commencement of this Act all lands shall be liable to the payment

of cess determined and payable as herein provided :
xxx xxx xxx."

Section 5 prescribed the rate of cess and the manner of assessment, fixation of cess year and was as follows :-

"5. Rate of cess, assessment of fixation of cess year - (1) The cess shall be assessed on the annual value of all lands on whatever tenure held calculated in the manner hereinafter appearing.
(2) The rate per year at which such cess shall be levied shall be -
(a) one hundred per centum of the annual value in the case of lands held for carrying on mining operations; and
(b) fifty per centum of the annual value in the case of other lands.
(3) The Board of Revenue, shall by an order published in the Gazette, fix the date from which cess leviable under this Act in any district or part of a district shall take effect and may fix and from time to time alter the date from which the cess year shall run in any district or part thereof."

Section 6 fixed the liability and read :-

"6. Persons by whom cess payable - (1) Notwithstanding anything contained in any other law the cess payable -
(a) by a raiyat for the lands he holds and shall be paid by him to the landlord immediately under whom he holds the land;
(b) by an intermediary in respect of his estate and such cess together with the amount payable to him as cess by intermediaries subordinate to him and the raiyats holding under him shall be paid by him to the intermediary immediately superior to him or to the Government, as the case may be;
(c) by a person for the lands he holds for carrying on mining operations and shall be paid by him to the Government;
Explanation - For the purpose of Clause (a) 'landlord' shall include the Government;
(2) Cess shall be paid on such dates and in such manner as may be prescribed."
Section 7 prescribed as to how the annual value referred to in Section 5 would be calculated. Section 8 authorised the Board of Revenue to revise the amount calculated to be the annual value by the Collector and provided that such revision would take effect from the beginning of such year as would be prescribed by the Board of Revenue. Section 9 authorised the Board of Revenue to direct the Settlement Officer to make valuation for the purpose of assessment of cess while the record-of-rights for any area was being prepared or revised under any law, etc. Section 10 provided that the cess collected would be credited to the Consolidated Fund of the State and would be utilised in the manner stated in Clause(a) and (b) thereof. Section 11 provided that calculation of annual value of land and assessment of cess payable in respect thereof would be in accordance with such

rules as might be prescribed. Section18 contained the provisions for appeals. Section 19 conferred on the Board of Revenue the power of revision. Section 21, authorised the Government to make rules for carrying out all or any of the purposes of the Cess Act and in particular, in regard to matters expressly required or allowed by the Cess Act to be prescribed. In pursuance of the said provision, the Orissa Cess Rules, 1963 were framed. Rule 3 prescribed the date and manner of payment of cess. R.4 laid down the procedure for revision of valuation.

Sections 8, 9, 18 and 19 were amended and a new section - Section 9-A was inserted and Section 11 was omitted by Orissa Act 10 of 1965. The Orissa Cess (Amendment) Act, 1976 (Orissa Act 42 of 1976) was published in the Gazette on 16-10 1976. A new proviso was inserted after the existing proviso to sub-section(1) of Section 4 of the principal Act and was to the following effect:

"Provided further that nothing in the preceding proviso shall apply to lands held for carrying on mining operations. In section 6 of the Cess Act, a new clause was added as clause (c) which read as follows :-

(c) by a person for the lands he holds for carrying on mining operations and shall be paid by him to the Government."

A new sub-section was inserted in Section 7 of the Cess Act and was to the following effect:-

"(3). In the case of lands held for carrying on mining operations, the annual value shall be the royalty or, as the case may be, the dead rent payable by the person carrying on mining operation, to the Government."

A new section was inserted as Section 9-B which read :

"9-B.(1) The cess payable in respect of lands held for carrying on mining operations shall be assessed in the prescribed manner.

(2) Nothing contained in Sections 8, 9 and 9-A shall apply in relation to the assessment of cess in respect of the aforesaid lands."

and Section 10 of the Cess Act providing for application of the proceeds of the cess was substituted. In 1977, Orissa Ordinance 8 of 1977 was promulgated. The first proviso to Section 4, was substituted and the rate of cess contained in Section 5 prescribed as 25 per centum of the annual value of the lands was substituted by 50 per cent. The Orissa Cess (Amendment) Act, 1978 (Orissa Act, 7 of 1978) repealed the Ordinance enacting in toto the provisions contained therein.

3. The petitioners hold mining leases granted by the State of Orissa under the provisions of the Mines and Minerals (Regulation and Development) Act of 1957 (Central Act 67 of 1957) (hereinafter called 'the Central Act of 1957') read with the Mineral Concession Rules, 1960 and are carrying on mining operations.

4. Mr. Govind Das, the learned Counsel who led the arguments on behalf of the petitioners, urged that :-

(a) the Cess Act in so far as it imposed cess on lands held for carrying on mining operations was unconstitutional, the Orissa Legislature lacking legislative competence; the field had been taken over by Parliament by declaration in Section 2 of the Central Act of 1957 enacted in exercise of powers under Entry 54 of List I:
(b) the Cess Act in so far as it purported to levy cess was a piece of colourable legislation in effect, purpose and design; the Legislature purporting to impose royalty under the garb of cess. Alternatively, it was a tax on royalty. The object of the legislation was totally different from what it ostensibly purported to be;
(c) the Cess Act was violative of Article 14 of the Constitution of India in its hostile discrimination, unequal treatment;
(d) it also inhibited or impeded free flow of trade and commerce guaranteed under Article 301. It was confiscatory and extortionate in nature, thereby infringing Article 14 and 19 (1) (f); and
(e) the impost of cess violated the condition contained in the mining leases - statutory lease - prescribed by the Cess Act and the Orissa Cess Rules.

Mr. R.K. Mohapatra appearing for one of the petitioners took a different stand. He urged that the initial object of the Cess Act was to levy a fee. By amendment in 1976, the Legislature purported to impose a tax and the imposition after the amendment of 1976 was, in fact a tax on royalty and he drew attention especially to the statement of objects and reasons of Orissa Act 42 of 1976. In other respects, he adopted the submissions made by Mr. Das. Mr. Ranjit Mohanty, the learned counsel appearing for another set of petitioners urged that the Central Act of 1957 covered the entire field relating to mines and mineral development including the fields of taxation and the State Legislature has been denuded of any power to impose tax in respect of mines.
Mr. S.C. Mohapatra, the learned counsel for the petitioner in O.J.C. No. 829 of 1979, urged that the cess is truly a royalty on minerals and no guidelines having been indicated in Section 9-B the provision was *ultra vires* by reason of abdication of the legislative power.

5. Learned Advocate-General met the challenge contending that the enactment was referable to Entry 49 of the State List in the 7th Schedule to the Constitution of India. There was no encroachment on the legislative fields of the Parliament. The Parliament was not competent to impose tax on lands held for carrying on mining operations. He even went further and urged that the Parliament was not competent to impose tax on mines. He repelled the submissions that the Cess Act infringed Article 14, 19(1)(f) or (g) or Article 301 of the Constitution.

6. To understand fully the contentions raised by the parties, it is necessary to give a brief resume of the legislation relating to mines and minerals. Under the Government of India Act, 1935 the subject of Mines and Minerals was covered by Entry 36 of the Federal Legislative List I and Entry 23 of the provincial Legislative List II of the 7th Schedule. Entry 36 : Regulation of mines and oil fields and mineral development to which such regulation and development under a Federal control is declared by Federal law to be expedient in the public interest. Entry 23 : Regulation of mines and oil fields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control. The Entries have been kept intact in the Constitution and are as follows :- Entry 54 - List-I - "Regulation of mines and minerals development to the extent to which such regulation and development under the control

of the Union is declared by Parliament by law to be expedient in the public interest."

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

The only difference between the Entries of the 1935 Act and the Constitution is in the deletion of 'oilfields' from the Entries and that the declaration must be made by Parliament. In 1948, the Legislative Assembly enacted the Mines and Minerals (Regulation and Development) Act, 1948. The said Act made provisions for regulation of mines and oilfields and for development of mines. In 1957, the Parliament enacted the Central Act of 1957. It came into force on 1-6-1958. It made an amendment in the 1948 Act so as to make the latter relate to oil fields only.
Section 2 contains the declaration :-

> "It is hereby, declared that it is expedient in the public interest that the Union should take under its control the regulation of Mines and the development of minerals to the extent hereinafter provided."

Section 4 of the Central Act of 1957 provides that no mining lease shall be granted after the commencement of the Act otherwise than in accordance with the rules made under the Act. It also provides that no person shall undertake any prospecting, mining operations in an area except under and in accordance with the terms and conditions of a prospecting license or, as the case may be, a mining lease granted under the Act and the rules made thereunder. By the proviso the rights existing prior to the commencement of the Act are not affected. Section 5 of the Central Act of 1957 contains the restrictions on the grant of prospecting licenses or mining leases. Section 6 prescribes the maximum area for which a prospecting license or mining lease may be granted and Section 7 stipulates the period for which prospecting license may be granted or renewed and Section 8 the period for which mining leases may be granted or renewed. Section 9 fixes the royalties in respect of mining leases - the rate being specified in the second schedule in respect of minerals - and confers authority on the Central Government to enhance or reduce the rate at which royalty shall be payable. Section 9-A inserted by the Central Act 56 of 1962 makes the lessee liable to pay dead rent to the State Government at such rate as may be specified in the 3rd. Schedule. Sections 10 to 12 provide the procedure for obtaining prospecting licenses or mining leases in respect of lands in which the minerals vest in the Government. Section 13 confers power in the Central Government to make rules in respect of minerals. Section 14 excludes the application of Sections 4 to 13 to minor minerals. Section 15 confers power on the State Government to make rules in respect of minor minerals. Section 16 gives power to modify mining leases granted before 25th of October, 1959. Section 17 lays down the special powers of the Central Government to undertake prospecting or mining operations in certain lands. Section 18 gives power to the Central Government to take all such steps as may be necessary for the conservation and development of minerals and in that behalf gives additional power to it. Section 19 provides that any prospecting license or mining lease granted, renewed or acquired in contravention of the provisions of the Act or any rules or orders made thereunder, shall be void and of no effect. Section 20 makes the provisions of the Act and the rules applicable to prospecting licenses or mining leases granted before the commencement of the Act. The next important provision is Section 25 which is an enabling provision. It provides that any rent, royalty, tax, fee or other sum due to the Government under the Act or the rules or under the terms and conditions of any prospecting license or mining lease may, on a certificate of such officer as

may be specified by the State Government, be recovered in the same manner as an arrear of land revenue and, such due shall be a first charge on the assets of the holders of the license or mining lease, as the case may be. Rule 31 of the Mineral Concession Rules 1960 lays down that where an order has been made for the grant of a mining lease, the lease deed in the prescribed form (Form K). or in a form as near thereto as circumstances of each case may require, shall be executed within six months of the order or within such further period as the State Government may allow in this behalf. It is not necessary for our purpose to refer to the other provisions of the Central Act of 1957 or Mineral Concession Rules.

7. It was contended by the counsel for the petitioners that having regard to the declaration in Section 2 of the Central Act of 1967 that "it is expedient in the public interest that the Union should take under its control the regulation of Mines and development of minerals", the State Legislature was denuded of the power to make legislation in respect of mines and mineral development. The field of the State Legislature under Entry 23 of List II was taken over by the Parliament and the imposition of cess on lands held for carrying on mining operations was a trespass upon occupied field. It was contended that the State Legislature was no more competent to make law either under Entry 49 or Entry 50 of List II after the Parliament occupied the field by its declaration that it took under its control the regulation of mines and development of minerals. It was argued that the imposition of cess in respect of lands held for carrying on mining operations was a piece of colorable legislation as the State Legislature was indirectly or covertly doing what it could not do overtly or directly. The exercise of power under Entry 49 was a cloak, the real object being framing of law in relation to mines and development of minerals.

8. In a federal Constitution, it is of the essence that there should be a distribution of the legislative powers of the federation between the Centre and the Provinces. A federal system implies a double Government and a division of powers between the two Governments, the Federation and the States. The scheme of distribution has varied with different Constitutions. In Australia, the Commonwealth, Parliament has enumerated or selected its exclusive powers. The enumeration is not double. Only the powers of the Commonwealth Parliament are enumerated. It has both exclusive and concurrent powers, though there is no separate list enumerating the concurrent powers. The Legislative powers of the State are residuary. The State Legislature may legislate on any subject not exclusively assigned to the Commonwealth Parliament. But in case of inconsistency, the law of Commonwealth Parliament is to prevail. The British North America Act, 1867, however, divides the field of legislation between the Dominion Parliament and the Legislatures of the Provinces. The powers are enumerated exhaustively in Sections 91 and 92 of the said Act. Matters of common Canadian concern are assigned to the Dominion Parliament while matters of local concern are assigned to the Provincial Legislatures. In case of overlapping, the benefit goes to the Dominion Parliament. However, the residuary power is vested in the Dominion Parliament. The provisions relating to distribution of powers in our Constitution were adopted from the Government of India Act, 1935. "The British Parliament when enacting the Indian Constitution Act had a long experience of the working of the British North America Act and the Australian Commonwealth Act and must have known that it is not in practice possible to ensure that the powers entrusted to the several Legislatures will never overlap." *(Lord Porterprafulla Kumar v. Bank of Commerce*[1]*,).* It gave an exhaustive enumeration of powers and distributed them in three Legislative lists - List 1 being Federal, List II being provincial and List III being Concurrent Legislative List. Section 100(1) of the Government of India Act, 1935, gave the Federal Legislature exclusive power to legislate with respect to matters in List I, Section

100(2) gave the Federal Legislature and, subject to Section 100 (1), also to the provincial Legislature, power to legislate in respect of matters in List III; and Section 100(3) gave the Provincial Legislature, subject to Sections 100(1) and (2), exclusive power to legislate in respect of matters in List II. Such enumeration of powers was made with a view to reducing litigation arising from overlapping powers. The Lists were, in fact supremely well drawn and disputes of substance have presented no insuperable problems. The 1935 Act was an innovation over the earlier Acts enacted by the British Parliament. The innovations *inter alia* were in the fields of exercise of concurrent legislative powers and in the distribution of powers of taxation.

9. The Lists contained in the 7th Schedule to the 1935 Act provided for distinct and separate fields of taxation. The Concurrent List contained no entry relating to taxation but provided only for fees in respect of matters contained in the List but not including fees taken in any Court. Lists I and II of the 7th Schedule, however, avoided overlapping powers of taxation. Under our constitutional scheme, the entire legislative power is distributed between the Parliament and the State Legislatures; the framers of the Constitution divided all conceivable topics or subjects, being 209 in number, in three legislative lists, the division between Parliament and State Legislatures depending broadly on their national and local importance, with the third list containing subjects of common interest. Today, List I, Union List-comprises 96 heads or subjects; List II being the State List comprises 62 heads or subjects while List III comprises 52 heads or subjects, and ordinarily all the Entries in the three Lists in between them exhaust all conceivable subjects of legislation. By way of abundant caution, residuary power in regard to unforeseen topics or subjects is vested in the Parliament under residuary Entry 97 in List I. The Lists merely contain enumeration of subjects while the actual distribution of legislative powers has been made by Articles 245 and 246 and under the scheme of these two articles, the position becomes clear that Parliament as well as State Legislatures are sovereign legislative bodies possessing plenary legislative powers within the ambit of Entries assigned to them, subject to primary (sic) being given to the laws made by Parliament over the State Laws with respect to any of the matters enumerated in the Concurrent List. Article 248 confers exclusive residuary powers of legislation upon Parliament to make any law with respect to any matter not enumerated in the Concurrent List or State List and this Article has to be read with Entry 97 of the Union List. In connection with the aforesaid scheme pertaining to distribution of legislative powers, two things appear to be well settled. Firstly, every effort having been made to make the three lists as comprehensive and exhaustive as possible, the specific Entries in the three Lists in between them must be held to exhaust all conceivable topics or subjects of legislation and, therefore, whenever any matter is dealt with by any particular Act, an attempt will have to be made to allocate such matter to one or the other of the Entries in these Lists and secondly, it is only when such attempt fails that the Court can fall back upon the residuary Entry 97 of List I, for, resort to residual powers should be the last refuge. See *J.C. Waghmare v. State of Maharashtra*[2], The problem of construction of the Entries has engaged the minds of Judges. In the case of *United Provinces v. Mt. Atiqua Begum*[3], Maurice Gwyer, C.J., observed :

> "The subjects dealt with in the three legislative lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the Provincial List in such a way as to make it exclusive of every other item in that list, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import.....I think,

however, that none of the items in the lists is to be read in a narrow or restricted sense, and that each general words should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it."

In *Asstt. Commr. of Urban Land Tax, Madras v. Buckingham and Carnatic Co. Ltd.*[4], Ramaswami, J. said (at p. 175) :

> ".....The legislative entries must be given a large and liberal interpretation, the reason being that the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simple enumeration of broad categories....."

In *Raja Jagannath Baksh Singh v. State at U.P*[5]. Gajendragadkar, J. observed (at p. 1568):

> ".....It is necessary to bear in mind that we are interpreting the words used in the Constitution and it is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative powers must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. It would be out of place to put a narrow or restricted construction on words of wide amplitude in a Constitution....."

Venkatarama Ayyar, J. summarized the position thus :-

> ".....When a law is impugned on the ground that it is *ultra vires* the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach to the
> question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are *intra vires,* and what are not....."
> ".....Notwithstanding that the lists were framed so as to be fairly full and comprehensive, it was not long before it was found that the topics enumerated in the two sections overlapped, and the Privy Council had time and again to pass on the constitutionality of laws made by the Dominion and Provincial legislatures. It was in this situation that the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was *intra vires,* regard must be had to its pith and substance. That is to say, if a statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be *intra vires,* even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its

competence may be an element in determining whether the legislation is colourable, that is, whether in the guise of making a law on a matter within its competence, the legislature is, in truth, making a law on a subject beyond its competence. But where that is not the position, then the fact of encroachment does not affect the vires of the law even as regards the area of encroachment....."

(A.S. Krishna v. Madras State[6],) In *Subrahmanayan Chettiar v. Muttuswami Goundan[7],* Gwyer, C.J., observed :

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different, provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the judicial committee whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or in that....."

In Prafulla Kumar's case (AIR 1947 PC 60) (supra), Lord Porter approving the aforesaid observations of Gwyer, C.J. observed :

"Their Lordships agree that this passage correctly describes the grounds upon which the rule is founded, and that it applies to Indian as well as to Dominian legislation. No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provisions should be
attributed and those which are merely incidental. But the overlapping of
subject-matters is not avoided by substituting three lists for two or even by arranging for a hierarchy of jurisdictions.
Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with."

In *Gallagher v. Lynn[8],* the principle was stated thus :

"It is well established that you are to look at the true nature and character of the legislation, the pith and substance of the legislation. If on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is

not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object e.g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e.g., direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed in respect of the forbidden subject."

In *K.C. Gajapati Narayan Deo v. State of Orissa*[9], B.K. Mukherjea, J., observed (at p. 379):-

"It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'bonafides" or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power.....A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetency, and a legislature which enjoys only a limited or a qualified jurisdiction.

If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As was said by Duff., J. in Attorney-General for *Ontario v. Reciprocal Insurers*[10],:

"Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must

always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority - 'vide (1924) AC 328 at p. 337 (B)'. For the purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design - Vide *Attorney-General for Alberta v. Attorney-General for Canada*[11], But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers.

xxx xxx xxx

.....It may appear on scrutiny that the real purpose of a legislation is different from that appears on the face of it, but it would be a colourable legislation only if it is shown that the real object is not attainable to it by reason of any constitutional limitation or that it lies within the exclusive field of another legislature....."

In *R.S. Joshi v. Ajit Mills Ltd*[12]*.,* Krishna Iyer, J. observed (at p. 2286) :

"..... In the jurisprudence of power, colorable exercise of or fraud on legislative lower or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law although the label of competency is stuck on it, and then it is colorable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. To put it more relevantly to the case on hand, if a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another

legislature, it can be struck down as colorable even if the motive were most commendable. In other words, the letter of the law notwithstanding, what is the pith and substance of the Act? Does it fall within any Entry assigned to that legislature in pith and substance, or as covered by the ancillary power implied in that Entry? Can the legislation be read down reasonably to bring it within the legislature's constitutional powers? If these questions can be answered affirmatively, the law is valid. Malice or motive is beside the point, and it is not permissible to suggest Parliamentary incompetence in the score of mala fides."

It is not possible to make so dead a cut between the powers of the various legislatures: they are bound to overlap from time to time.

10. The impact of Central Act of 1957 now be considered. The question came up for consideration first in the case of *Hingir-Rampur Coal Co. Ltd. v. State of Orissa*[13]*,* In that case the vires of the Orissa Mining Areas Development Fund Act (27 of 1952) was challenged on the ground that the Orissa State Legislature had no power to make the said law, in view of the provisions contained in the Mines and Minerals (Regulation and Development) Act of 1948

passed by the Central Legislature. When the case was heard by the Supreme Court, the Central Act of 1957 had come on the Statute Book. The Supreme Court observed (at pp. 469-70) :-

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

The vires of the Orissa Mines Areas Development Fund Act was again questioned in *State of Orissa v. M.A. Tulloch and Co*[14]*.,* when the State of Orissa levied demand of
lax thereunder. The views expressed in Hingir Rampur's case (AIR 1961 SC 459) (supra) were reiterated and it was observed by Ayyangar, J.,(at p. 1287)

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

In *H.R.S. Murthy v. Collector of Chittoor*[15]*,* land cess was imposed under the Madras District Boards Act of 1920. It was contended that in view of the Central Act of 1957, land cess under Section 78 of the Madras Act could not be levied in regard to mining leases. The Supreme Court observed that the Orissa Act, which was the subject- matter for consideration in Hingir-Rampur's case and Tulloch's case, had been passed for the purpose of development of mining areas and the Central enactment covered the same fields as the Orissa Act. Having regard to the

comprehensive provisions contained in the several sections of the Central Act, the extent provided included those which fell within the scope of the State Act, which was for the regulation and development of mining areas within the State. The decisions in Hingir-Rampur's case (AIR 1961 SC 459) and Tulloch's case (AIR 1964 SC 1284) were distinguished on the ground that the provisions of the Madras Act had nothing to do and were not concerned with the development of mines and minerals or their regulations. The proceeds of the land cess were credited to the District Fund which were to be utilised, "for everything necessary for or conducive to the safety, health, convenience or education of the inhabitants or the amenities of the local area concerned and everything incidental to the administration." The land cess is in truth a 'tax on lands' within Entry 49 of the State List." Their Lordships observed :

> ".....When a question arises as to the precise head of legislative power under which a taxing statute has been passed, the subject for enquiry is what in truth and substance is the nature of the tax. No doubt, in a sense, but in a very remote sense it has relationship to mining as also to the mineral won from the mine under a contract by which royalty is payable on the quantity of mineral extracted. But that, does not stamp it as a tax on either the extraction of the mineral or on the mineral right....."

Their Lordships held that the Central Act of 1957 did not denude the State Legislature of its power to impose cess. In *Western Coalfields Ltd. v. Special Area Development Authority, Korba*[16]*,* the controversy was whether property tax could be imposed on the lands and buildings which were used for the purpose of mining operations and were covered by coal mines. It was urged therein that when by virtue of the declaration in Section 2 of the Central Act of 1957 the legislative field covered by
Entry 23 of List II passed on to the Parliament under Entry 54 of List I, property tax could not be imposed under M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 (as amended in 1976). Their Lordships observed that in H.R.S. Murthy"s case (AIR 1965 SC 177) (supra) it had been held that the tax had nothing to do with the development of mines or minerals or their regulation. The law providing for levy was not in conflict with the powers conferred on the Union Government to regulate and develop the coal mines. Their Lordships observed (at P. 708) :

> ".....The paramount purpose behind the declaration contained in Section 2 of the Mines and Minerals (Regulation and Development) Act, 1957 is not in any manner defeated by the legitimate exercise of taxing power under Section 69(d) of the Act of 1973."

Their Lordships distinguished the decision in *Baijnath Kedia v. State of Bihar*[17] on the ground that the Bihar Government had no legislative competence to demand dead rent, royalty and surface rent contrary to the terms of the lease. After referring to the case of *State of Haryana v. Chanan Mal*[18]*,* their Lordships observed that the declaration under Section 2 of the Central Act of 1957 did not result in invalidation of every State legislation relating to mines and minerals. The rule laid down in *Ishwari Khetan Sugar Mills v. State of U.P*[19]*.,* was followed. In that case the Government of Uttar Pradesh by an Ordinance acquired 12 sugar undertakings. It was contended that the State Legislature had no competence to pass the Ordinance in view of the fact that sugar was a declared industry under the Industries (Development and Regulation) Act, 1951. It was held by Desai, J., that the field occupied by the Central Legislature was the measure of the

erosion of the legislative competence of the State Legislature. Since the Central Act was primarily concerned with the development and regulation of declared industries and not with ownership of industrial undertakings, the State Legislature had the competence to enact the impugned law. Summing up, their Lordships said in Western Coalfield's case (AIR 1982 SC 697) that the functions, powers and duties of Municipalities did not become an occupied field by reason of the declaration contained in Section 2 Of the Central Act of 1957.

> "..... Though, therefore, on account of that declaration the legislative field covered by Entry 23, List II may pass on to the Parliament by virtue of Entry 54 List I, the competence of the State Government to enact laws for municipal administration will remain unaffected by that declaration."

11. The various provisions contained in the Central Act of 1957 also indicate that the Parliament while making the declaration in Section 2 has not taken under its control the field of taxation. No provision of the Act or the Rules has been brought to our notice which provides for levy of cess or tax. Learned Counsel for the petitioners strongly relied on section 25 and contended trial it contained the provisions regarding taxation. In our view, section 25 is an enabling and not a substantive provision. It says that any rent, royalty, tax or other sum due to the Government under the Act or the Rules or under the terms and conditions of the prospecting license or mining lease may, on a certificate of the prescribed authority, be recovered in the same manner as an arrear of land revenue. The section pre-supposes liability to tax under some other provision and declares that if any such liability has been incurred realization can be made by following the mode prescribed for recovery of arrears of land revenue. It was also contended that Rule 27(1)(d) authorized imposition of cess on land over which mining operations were carried on. We quote Rule 27(1)(d) :-

> "(d) the lessee shall also pay, for the surface area used by him for the purposes of mining operations, surface rent and water rate at such rate not exceeding the land revenue, water and cesses assessable on the land as may be specified by the State Government in the lease;"

Rule 27 enumerates the conditions the mining lease shall contain. It enjoins that surface rent and water rate shall be specified by the Govt. in the lease. The rate of such surface rent and water rate shall not exceed the land revenue, water rate and cess (otherwise) assessable on the land. The lessee shall be liable to pay the surface rent and water rate so specified in the lease. The meaning would be abundantly clear if we read the clause as under :

> "(d). The lessee shall also pay, for the surface are used by him for the purpose of mining operation of surface rent and water rate at such rate (not exceeding the land revenue, water and cesses assessable on the land), as may be specified by the State Government in the lease;"

12. It was contended that royalty was tax and the Parliament having taken over control by declaration in Section 2 of the Central Act of 1957 to levy royalty in the field of mining and mineral development, the power, of the State Legislature to impose tax was over-borne. In this

connection, we were referred to two decisions. In the case of *Laddu Mal v. State of Bihar*[20], it was held that the word royalty, had been used in secondary sense to signify that part of the reddendum which was variable and depended upon the quantity of mineral taken out. Royalty was a payment made to the land-owner by the lessee of the mine, in return of the privilege of working it. It differed from rent. It was a kind of levy in proportion to the minerals worked. It was an impost by the Govt. though its origin was riveted in the concept of royal prerogative. It was a compulsory exaction and recoverable in the event of non-payment as arrear of land revenue. All collections made on account of royalty on mines and minerals became part of the consolidated fund. It was not a payment for service rendered. "royalty on mines and minerals cannot be a fee but a levy of the nature of a tax." In the case of *M/s. Laxminarayana Mining Co., Banglore v. Taluk Development Board*[21] the Taluk Development Board exercising the powers under Sections 143 and 144 of the Mysore village Panchayats and Local Boards Act of 1959, levied license fee on the mining of manganese or iron ore, etc. When challenged, the levy was sought to be sustained as tax. It was observed that by enacting the Central Act of 1957:

> "the Parliament intended that the power to legislate with regard to taxation on mineral rights also should be assumed by it to the exclusion of the State
> Legislatures. The expression 'royalty' is used differently in different contexts.
> sometimes it is used as equivalent to a tax also and in some other cases it is used as representing the amount payable by a lessee in respect of minerals removed by the lessee even though the lessor is not the sovereign Government. We are of the opinion that the expression 'royalty' in Section 9 which requires payment of royalty to the State Government as prescribed in the II Schedule connotes the levy of a tax. Vide *Laddu Mal v. State of Bihar*[22], It is a levy falling outside the scope of Entry 84 in List I which provides for levy of excise duty by Parliament, but within the scope of the expression 'tax on mineral rights' within the meaning of that expression in Entry 50 of List II. To us it appears the expression 'tax on mineral rights' includes within its scope the royalty payable on minerals extracted. Mineral rights and mining activity carried on in exercise of those mineral rights appears to us to be indistinguishable in the above context. That appears to be the intendment of the declaration contained in Section 2 of the Central Act and, that is so enacted in order to see that throughout the Indian Union, the rents, royalties and other taxes payable in respect of mining and minerals are uniform....."

It may be observed that the license the levied on mining activities was attempted to be sustained as tax by recourse to Entry 50 of List II. With respect, we are unable to accept the ratio of the decisions in the cases of Laddu Mal and Laxminarayana (supra) that royalty is tax. In the case of H.R.S. Murthy (AIR 1965 SC 177) (supra), royalty was held to connote the payment made for the materials or minerals won from the lands. In the case of *Saurashtra Cement and Chemical Industries Ltd. v. Union of India*[23], it was held that the expression 'royalty' used in Section 9 was the share which the lessor claimed in the mineral which had been won from the soil by the lessee and which otherwise belonged to the lessor. It was "not a tax in the form of compulsory exaction". It was the price paid for the privilege of exercising the right to explore the minerals. Their Lordships further observed, (para 7):

> ".....since royalty is not a tax, the subject-matter of Section 9 (of Central Act of 1957) is not covered by Entry 50 in the State List. It falls squarely under Entry 54 of the Union List because a lessee who is authorised to operate mine and win minerals therefrom, pays price of that property, as prescribed by Parliament, to the lessor or the owner of the minerals the Union of India....."

In *Dr. Shanti Saroop Sharma v. State of Punjab*[24], it was held that royalty was neither a tax nor a fee but was more akin to rent. In our view royalty is the payment made for the minerals extracted. It is not tax. The question can also be considered from another angle. The taxing powers of the Parliament and the State Legislatures have been enumerated in List II. In List I, Entries 1 to 81 mention the several matters over which the Parliament has authority to legislate, Entries 82 to 92 enumerate the taxes which can be imposed by a law enacted by the Parliament. "An examination of these two groups of Entries shows that while the main subject of legislation figures in the first group, a tax in relation thereto is separately mentioned in the second." In List II, Entries 1 to 44 form one group enumerating the subjects on which the State Legislature may make laws. Entries 45 to 63 form another group and deal with taxes. Construing the constitutional scheme, the Supreme Court in the case of *M.P.V. Sundararaminer and Co. v. State of A.P*[25]., observed (at p. 494) :-

> ".....taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Article 248, Clause(1) and (2) and of Entry 97 in List I of the Constitution ....."
> "The taxes are separate and distinct impost",

(Per Lord Simonds) in our constitutional scheme. Entry 54 of List I does not authorise the Parliament to levy a tax on mines or minerals. If we accept the contention of the petitioners that royalty is tax and Section 9 and 9-A contains provisions for levy of tax (royalty), the said sections would be *ultra vires* for want of legislative competence of Parliament. Keeping in mind the elementary principle that an interpretation which makes a law invalid should, if possible, be avoided, we are loath to hold that royalty is tax and Section 9 and 9-A deprived the State Legislature of its authority.

13. The petitioners contained that the State Legislature by the Cess Act has sought to impose royalty on the mines by way of cess or "to reach at the royalty" for the purpose of levying cess. Section 5 of the Cess Act provides that the cess is to be assessed on the annual value and annual value in case of lands held for carrying on mining operations is defined as the royalty or as the case may be, the dead rent payable by the person carrying on mining operations. 'Royalty' is defined as meaning the royalty payable under the Central Act of 1957 and included any payments made or likely to be made to the Government for the right of raising minerals from the land which shall be calculated on every tonne of such minerals dispatched from the lands at the same rate as prescribed under the said Act or such other rate as may be fixed by the Government but not exceeding the amount which would have otherwise been payable as royalty under the said Act. It was contended that assessment of cess with reference to royalty or payments made

for the right of raising minerals was tantamount to levying royalty and so, the Cess Act was beyond the legislative competence of the State Legislature. We were referred to *(Baijnath Kedia v. State of Bihar[26]).* In that case the Bihar Government demanded dead rent, royalty and surface rent from the lessee, contrary to the terms of the lease, by virtue of Section 10(2) of the Bihar Land Reforms Act, 1950 and the Rules framed thereunder. It was held (at p. 1443) :-

> ".....Entry 54 of the Union List speaks both of Regulation of Mines and Minerals Development, and Entry 23 is subject to Entry 54. It is open to Parliament to declare that it is expedient in the public interest that the control should rest in Central Government. To what extent such a declaration can go is
> for Parliament to determine and this must he commensurate with public
> interest. Once this declaration is made and the extent laid down, the subject of
> legislation to the extent laid down becomes an exclusive subject for legislation by Parliament.
> Any legislation by the State after such declaration and trenching upon the field disclosed in the declaration must necessarily be unconstitutional because that field is abstracted from the legislative competence of the State Legislature....."

The Supreme Court observed that the pith and substance of the provision in the Bihar Act fell within Entry 23 of List II although it incidentally touched land, and the field having already been occupied by the Central legislation under Entry 54 of List I, the State Legislature had no legislative competence. In our opinion, Entry 54, List I and Entry 49 of List II operate in different fields and enumerate distinct heads of power. Lord Thankerton observed in (1936) AC 352, In re Section 3, Finance Act, (Northern Ireland), 1934 :-

> "It is the essential character of the particular tax charged that is to be regarded, and the nature of the machinery, often complicated, by which the tax is to be assessed is not of assistance except in so far as it may throw light on the general character of the tax."

In the case of *Byramjee Jeejeebhoy v. Province of Bombay[27],* the question was whether the urban immovable property tax levied by Section 22 of the Amended Bombay Finance Act, 1932 was beyond the powers of the Bombay Legislature, on the ground that it was essentially a tax on income, Broomfield, J. observed :-

> ".....The main ground on which it is sought to be shown that the impugned tax is a tax on income is that it is assessed on the same basis as income tax, that is on annual value or the amount at which the property may reasonably be expected to let. But the mode of assessment does not determine the character of a tax.....
> We have to discover what is the 'essential character' of the lax, what it is 'in pith and substance', apart from the mere machinery by which it is assessed, and we are to look mainly at the charging sections of the Act for this purpose. But neither in the charging sections nor in any other part can I find any clear evidence that is intended to be, or is in effect, a tax upon income....."

Kania, J. (as his Lordship then was) in the said decision referred to AIR 1939 FC 1 (In re C.P. Motor Spirit Act) and said :

> ".....the provisions of an Act like the Government of India Act, 1935 should not be cut down by a narrow and technical construction, but considering the magnitude of the subjects with which it purports to deal in a very few words, it should be given a large and liberal interpretation so that the Central Government to a great extent but within certain fixed limits may be mistress in her own house, as the provinces, to a great extent but again within theirs. In an enquiry, whether an enactment is *ultra vires* , the Court must ascertain the true nature and character of the challenged enactment its pith and substance, and not the form alone which it may have assumed under the hand of the draftsman. When there is an absolute jurisdiction vested in a legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character obviously, it may be necessary to examine, with some strictness, the substance of the legislation, for the purpose of determinating what it is that the legislature is really doing. It is the duty of the courts, however, difficult it may be, to ascertain in what degree, and to what extent authority to deal with matters falling within these classes of subjects (mentioned in the Central and Provincial Lists) exists in each Legislature and to define, in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result the two sections must be read together, and the language of one interpreted and where necessary modified by that of the other.....In the interpretation of a completely self-governing constitution founded upon a written organic instrument (such as the Government of India Act of 1935) if the text is explicit, the text is conclusive, alike in what it directs and what it forbits. When the text is ambiguous, as for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and the scheme of the Act....."

In the case of *Ralla Ram v. Province of East Punjab*[28], Fazl Ali, J. said :-

> ".....If a tax is to be levied on property, it will not be irrational to correlate it to the value of the property and to make some kind of annual value the basis of the tax, without intending to tax income....."

In the case of *State of Haryana v. Chanan Mal*[29], the controversy was if the Haryana Minerals (Vesting of Rights) Act of 1973 was beyond the legislative competence of the State Legislature. The Supreme Court repelling the contention that acquisition was only a means of conservation or development of mineral resources and the field stood excluded by the declaration of Section 2 and the other provisions of the Central Act, 1957 observed (at page 1666) :

> ".....It seems difficult to sustain the case that the provisions of the Central Act would

be really unworkable by mere change of ownership of land in which mineral deposits are found. We have to judge the character of the Haryana Act by the substance and effect of its provisions and not merely by the purpose given in the statement of reasons and objects behind it, such statements of reasons are relevant when the object or purpose of an enactment is in dispute or uncertain. .... It is not disputed here that the object and effect of the Haryana Act was to acquire proprietary rights to mineral deposits in land. Its provisions, however, do not mention leasehold or licensee rights. Obviously, this is so because these rights are governed by the Central Act 67

of 1957."

In the case of *Sudhir Chandra Nawn v. Wealth-tax Officer, Calcutta*[30], the question was if the Wealth-tax Act enacted by the Parliament in exercise of the power contained in Entry 86 of List I was *ultra vires* , because it trenched upon the field covered by Entry 49 of List II. In that context, it was said :

".....By Legislation in exercise of power under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not, in our judgment, make the fields of legislation under the two entries overlapping."

In the case of Asst. Commr. of *Urban Land Tax, Madras v. Buckingham and Carnatic Co. Ltd. (AIR 1970 SC 169)* (supra) the vires of the Madras Urban Land Tax Act of 1966 which imposed a tax on urban land at a percentage of the market value was questioned. It was contended that the State Legislature had trespassed upon the field of legislation covered by Entry 86, List I by adopting the annual or the capital value of lands and buildings as the measure. It was held (para 5) :-

".....Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it..... But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two entries overlapping....."

In *Ramchand Maroti Mandwale v. Malkapur Municipal Council, Malkapur*[31], the Maharashtra Legislature enacted the Maharashtra Education (Cess) Act of 1962 which created a fund for the promotion of education in the State of Maharashtra and for connected matters by levy of tax on lands and buildings at the rate of 2 per cent of the annual letting value of the lands and buildings. Vires being challenged, it was held (at p. 158):-

".....It is true that the education tax is levied on a percentage basis on the annual letting value of the lands and buildings, but that is a mode of determining the quantum of tax

imposed on the person who owns lands and buildings. Nonetheless, it is a tax on lands and buildings and not on the income, as contended by the petitioner or exclusively reserved for local bodies....."

In *Second G.T. Officer, Mangalore v. D.H. Hazareth*[32], the Supreme Court held that in pith and substance the Gift Tax Act placed a tax on the gift of property which include lands and buildings. It was not a tax imposed directly upon lands and buildings, but was tax upon the value of the total gifts made
in a year above the exempted limit. The tax was not upon lands and buildings as the object of taxation; the value of the lands and buildings was ascertained as a measure of taxation. The words in the Entries conferring legislative Power should receive the mast liberal construction and if the word used is of wide amplitude, no restricted meaning should be given. What is the meaning of the word 'land' in Entry 49 of List II ?

".....Entry 49 of List II contemplates a levy of tax on lands and buildings or both as units. Such tax is directly imposed on lands and buildings and bears a definite relation to it. .....The word 'land' includes not only the face of the earth, but everything under or over it, and has in its legal signification an indefinite extent upward and downward, giving rise to the maxim. Cujus est solum ejus est usque and coelum (see pp. 162.73 Corpus Juris Secondum). According to Broom's Legal Maxims, 10th Edn., p. 259, not only has land in its legal signification an indefinite extent upwards, but in law it extends also downwards, so that whatever is in a direct line between the surface and the centre of the earth by the common law belongs to the owner of the surface (not merely the surface, but all the land down to the centre of the earth and up to the heavens) and hence the word 'land' which is nomen generalissimum, includes, not only the face of the earth, but everything under it or over it".

(Anant Mills Co. Ltd. v. State of Gujarat[33]*).* In the case of *City of Westminster v. Southern Rly. Co*[34]*.,* Lord Russel of Killowen observed :-

"Subject to special enactments, people are rated as occupiers of land, land being understood as including not only the surface of the earth but all strata above or below."

In the case of *Electric Telegraph Co. v. Salford Overseers, Pollock*[35]*,* C.B. said :-

"There is no distinction between the occupying land, by passing through a fixed point of space in the air to another fixed point, or by passing in the same manner through land or water. Land extends upwards as well as downward ....."

It is stated in Ryde on Rating, 11th Edn., at page 14 :-

"By far the largest number of persons rated are as 'occupiers of land or houses'. The word 'land' as used in the statute, must be understood in the widest possible sense: it includes

not only the surface of the earth, but everything under it, or over it".

Under the Cess Act, the object or subject-matter of taxation is land. In a remote way, it may relate to mining operations carried on lands. Mines and minerals are not the object of taxation. Cess is not imposed directly on the extraction of minerals but upon the lands. No doubt, cess is assessed on the basis of royalty paid or payable but that is
only a mode or machinery for assessment. It is a measure of the tax. To gather the object of taxation, the primary guide is what is known as the charging section. The identification of the subject-matter of a tax is only to be found in the charging section. That is the section which creates the liability to pay the tax as distinct from the mode of assessment or the machinery by which it is assessed. (See *Ralla Ram v. province of East Punjab (AIR 1949 FC 81)* (supra) Provincial Treasurer of *Alberta v. C. Keer, (1933) AC 710, Sri Byramjeejeebhoy v. Province of Bombay (AIR 1940 Bombay 65) (FB)* (supra): and, *State of Bom. v. R.M.D. Chamarbaugwala*[36], The intrinsic character of tax is not to be determined by the mode of measurement or standard of calculation prescribed for assessing the amount of tax.

> "For the determination of the amounts of taxes to be assessed upon individual persons, corporations or pieces of property, any reasonable standard of measurement may be selected, and the intrinsic character of the tax is not determined by the mode of measurement thus selected."

(See Willoughby, constitutional law, Vol. 2 page 669). In Ralla Ram's case (supra), Fazl Ali, J., observed :-

> ".....It is true that the annual value was used as the basis, but it was very different from the annual value which may be used for getting at the true profits or income. It is only a standard used in the Income-tax Act for getting at income, but that is not enough to bar the use of the same standard for assessing provincial tax. If a tax is to be levied on property, it will not be irrational to correlate it to the annual value the basis of the tax, without intending to tax income....."

Shri D. Basu in his Commentary on the Constitution of India has succinctly summarized the law thus:

> In order to determine whether a tax falls under one or other of the taxing powers conferred by the Various Entries in the List, it is necessary to examine the charging section of the taxing statute as distinguished from the means or machinery or basis of taxation. In other words, the mode of assessment does not determine the character of tax."

The tax is charged under Section 4 of the Cess Act. The provisions in Sections 5, 6 and 7 contain the mode, the manner or the machinery of taxation. It is therefore, difficult to accept the contention of the counsel for the petitioners that as the annual value of lands held for carrying on mining operations is calculated with reference to royalty or other payments paid or payable for the right of raising minerals, the cess levied under the Cess Act is not on lands but is royalty or a levy on royalty.

14. It was next contended that the Cess Act infringed Article, 14 of the Constitution by singling out lands held for carrying on mining operations and for hostile and unequal treatment. The Cess Act does not apply to houses or buildings. The First proviso to Section 4 excludes certain types of lands enumerated therein from the
application of the Act. Whereas the rate of cess per year leviable on all lands except lands held for carrying on mining operations is 50 per cent of the annual value, in case of lands held for carrying on mining operations, the rate of cess is 100 per cent of the annual value. It was submitted that discrimination was evident ex fade. There was no reasonable basis for the differential treatment. In *Budhan Choudhry v. State of Bihar*[37] it was observed (at p. 193):-

> ".....Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration....."
>
> ".....In permissible classification mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstances arising out of peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. Taxation law is not an exception to this doctrine. But, in the application of the principles, the Courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the legislature in the matter of classification so long as it adheres to the fundamental principles underlying the said doctrine. The power of the legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways.....
>
> (See *Anant Mills Co. Ltd. v. State of Gujarat*[38]*)*
>
> ".....the Court applies a spectrum of standards in reviewing discrimination violative of Article 14, that spectrum comprehends variation in the degree of care with which the Court will scrutinise particular classification and, that in the context of economic and tax matters, a classification made by the legislature is almost always sustained because the Court lacks both the expertise and the familiarity with the local problem so necessary for making a wise decision, with respect to raising and disposing public revenues ...."
>
> (See *State of Karnataka v. D.P. Sharma*[39].
>
> "It is well recognized that a Legislature does not have to tax everything in order to tax something. It can pick and choose districts, objects, persons, methods and even rates of taxation as long as it does so reasonably (Wills Constitutional law of the United States

587).

A taxing statute is not invalid on the ground of discrimination merely because other objects could have been but are not taxed by the Legislature. (*V. Venugopala Ravi Varma v. Union of India*[40]*,).* When a statute divides the objects of tax into groups or categories, (so) long as there is equality and uniformity within each group, the tax cannot be attacked on the ground of its being discriminatory although due to fortuitous circumstances or a particular situation some included in a class or group may get some advantage over others, provided of course they are not sought out for special treatment (AIR 1963 SC 591). Likewise, the mere fact that a tax falls more heavily on some in the same group or category is by itself not a ground for its invalidity, for then hardly any tax, for instance, sales tax and excise tax, can escape such a charge (AIR 1970 SC 1133). The Cess Act excludes houses and buildings from its purview because the houses and buildings are assessable to tax in the State either under the Municipal Act or the Gram Panchayat Act. Similarly, land assessed to tax or part of a holding under the Orissa Municipal Act are outside the charging section. Lands which are assessable to cess have been classified into two categories; namely, lands held for carrying on mining operations and other lands. The rate of cess in respect of the first category is 100 per cent of the annual value; it is 50 per cent in case of second category. The Act does not discriminate within the category of person who hold lands for carrying on mining operations. There is equality and uniformity within this group. Merely because the tax falls more heavily on lands held for carrying on mining operations, it cannot be said that the Act violates the guarantee enshrined in Article 14. It was open to the legislature to pick and choose. Equality in taxation matters does not mean that every person should be taxed, equally. It does not mean that if property of the same character has to be taxed, the taxation must be by the same standard, so that the burden of taxation may fall equally on all persons holding that kind and extent of property. If the taxation, generally speaking, imposes a similar burden on every one with reference to that particular kind and extent of property on the same basis of taxation, the law shall not be open to attack on the ground of inequality, even though the result of the taxation may be that the total burden on different persons may be unequal. Hence, if the legislature has classified persons or properties into different categories, which are subjected to different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal. Similarly, different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification, Article 14 will not stand in the way or such a classification resulting in unequal burdens on different classes of properties. But if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property see Moopil Nair's case, AIR 1961 Supreme Court 552. The State has a wide discretion in selecting the persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of Article 14, (See AIR 1962 Supreme Court 1733). We are satisfied that there is an intelligible differentia distinguishing lands held for carrying on mining operations from other lands and the differentia has a rational relation to the objects sought to be achieved. The challenge to the Act on the ground that it was violative of Article 14, therefore,
fails. The challenge fails also on another ground. There is a presumption of constitutional validity

of a statutory provision. Whoever assails the validity of any provision on the ground that it is violative of Article 14 of the Constitution takes the burden of pleading by necessary averments and establishing that the classification is violative of Article 14.

> "...Under the law it is for person who assails a legislation as discriminatory to establish that it is not based on a valid classification and it is well settled that this burden is all the heavier when the legislation under attack is a taxing statute.....".

(East India Tobacco Co. v. State of A.P[41]). Except making a bald assertion that the Act was violative of Article 14, the petitioners have not made the necessary averments to sustain their plea; much less have they established it.

15. The next ground of attack was that the Act was confiscatory in character and was violative of Article 19 (1)(f) of the Constitution. The petitioners referred us to Moopil Nair's case (AIR 1961 SC 552) (supra). The learned Advocate-General vehemently objected to our entertaining the plea. He contended that a bald assertion that the Act was confiscatory in character or violative of Article 19(1) (f) was not enough. The petitioners should have made necessary averments and furnished adequate facts and particulars to establish their plea. With a view to wriggling out of the situation, one of the petitioners, i.e. petitioner in O.J.C. No. 1517 of 1978, filed certain documents and affidavits in course of the hearing of the matters. But no step was taken to incorporate the necessary averments by way of amendment. We agree with the learned Advocate-General that without the necessary averments in support of the plea, the plea ought not to be entertained and the materials placed in course of the hearing should not be looked into. No step was taken to incorporate necessary averments by way of amendment of the writ petition. Assuming that there are the necessary averments we are of the view that the affidavits and the documents filed by one of the petitioners, i.e., petitioners in O.J.C. No. 1517 of 1978, do not establish that the cess is confiscatory in character or violative of Article 19 (1)(f) of the Constitution. In applying the test of reasonableness, it is essential to notice that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of taxation are regarded not as grant of power but as limitation upon the power which would otherwise be practically without limit. But where the statute is plainly discriminatory or confiscatory or unconstitutional in nature, the tax can be struck down as unreasonable and violative of Article 19 (1)(f).

In Moopil Nair's case (AIR 1961 SC 552) (supra), the vires of Travancore-Cochin Land Tax Act, 1955, as amended by Travancore-Cochin Land Tax (Amendment) Act of 1967, was impugned. It was alleged that under the Act the land tax at a flat rate of Rs. 2/- per acre had been imposed. One of the petitioners therein made a grievance that though he had 25,000 acres of forest land, he was making an income of Rs. 3,100/- only per year out of the forest. Under the amended law, he was required to pay Rs. 50,000/- a year, besides a sum of Rs. 4,000/- as tax on the surveyed portion of the said forest. Hence, his total liability in respect of the forest amounted to Rs. 54,000/- whereas his annual income was Rs. 3,100/-, without making any deduction
towards expenses of management. It was contended that such would also be his liability year after year. In the premises, the Supreme Court held that the Act was "clearly confiscatory in character and effect." Moopil Nair's case (AIR 1961 SC 552) was considered by the Supreme Court in the case of *Raja Jagannath Baksh Singh v. State of Uttar Pradesh (AIR 1962 SC 1563)* (supra). Their Lordships observed that a careful examination of the material facts in Moopil

Nair's case would indicate that the Act had levied an impost which was confiscatory in character and so, was a piece of colorable legislation. But their Lordships cautioned (at p. 1572) :

> ".....The conclusion that a taxing statute is colourable would not and cannot normally be raised merely on the finding that the tax imposed by it is unreasonably high or heavy, because the reasonableness of the extent of the levy is always a matter within the competence of the Legislature. Such a conclusion can be reached where in passing the Act the Legislature has merely adopted a device and a cloak to confiscate the property of the citizen taxed. If, however, such a conclusion is reached on the consideration of all relevant facts that is a separate and, independent ground for striking down the Act....."

(emphasis*supplied) * Emphasis not given in original-Ed.

16. The next ground of attack was with reference to Article 301 of the Constitution. It was contended that the levy impeded or inhibited free flow of trade and commerce guaranteed by Article 301. In Atiabari's case (AIR 1961 SC 232), it was held that restrictions which directly (and) immediately restrict or impede the free flow or movement of trade came within the mischief of Article 301. Though the taxation amounted to restrictions, it was only such taxes as directly and immediately restricted trade that would fall within the purview of Article 301. In view of the great impact of the judgment, a larger Bench was constituted to reconsider the same and in *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*[42], the aforesaid principle was upheld; but it was clarified that regulatory measure or measures imposing compensatory tax did not come within the purview of the restrictions contemplated under Article 301. An impost may have some effect on trade and commerce. What Article 301, however, prohibits is an impost which would restrict or impede directly and immediately free flow of trade and commerce. In our opinion, the land cess does not come within the mischief of Article 301.

17. It was also contended that the impost was violative of the terms and conditions contained in the lease deeds, viz., mining leases. We have already held that the Central Act is referable to Entry 54 of List I, whereas the Cess Act has been enacted under the powers conferred on the State Legislature by Entry 49 of List II. If the State Legislature has the legislative competence, the petitioners cannot make a grievance that in addition to the amounts stipulated under the lease deed, they will be obliged to pay the cess in respect of the lands held by them for mining operations. We have also shown that the Parliament has not the legislative competence to enact a provision for levy of tax on land over which mining operation is carried. Entry 54 is not an entry authorizing imposition of tax. In fact, there is no provision in the Central Act or the Mineral Concession Rules which authorizes imposition of tax. So, this ground also
fails.

18. Mr. R.K. Mohapatra appearing for Dr. Sarojini Pradhan contended that the parent Act sought to impose a fee; but by the amending Act of 1976, the Legislature had attempted to levy tax. The distinction between fee and tax is now well settled in law. It is unnecessary to consider the said aspect. If the levy is considered as a fee, the Act would be stifled at birth, for, there is no indication of any quid pro quo. Section 10 would not save it from the vice. It is not the case of the State that the cess is in the nature of a fee. Its stand is a forthright one. The cess is a tax a compulsory exaction for the general revenue of the State and for public purposes.

19. It was urged by the counsel that the provisions of the Act gave rise to strange and anomalous situations. By way of illustration it was stated that where a piece of land was used for carrying on mining operations and agricultural purposes, the land would be liable to two sets of taxes. In respect of some land, there might be as many leases as types of ores found, granted to one person or more. Under the scheme of the Act more than one set of tax would be levied. Such a scheme was unreasonable according to the petitioners. In the sphere of taxation this is not a strange phenomenon. Such a situation also arises where multiple taxation is resorted to, e.g. (a) general tax, (b) water tax, (c) drainage tax and (d) conservancy tax in relation to a holding. In *Avinder Singh v. State of Punjab*[43], it was observed (at p. 324) :

> "There is nothing in Article 265 from which one can spin out the constitutional vice called double taxation ..... If on the same subject-matter the Legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure save where other prohibitions exist....."

In *Mathra Prashad and Sons v. State of Punjab*[44], on the sale and manufacture of tobacco one set of tax was levied under the East Punjab General Sales Tax Act and under the Punjab Tobacco Vend Fees Act. The provision was upheld. In *Kendriya Nagrik Samiti, Kanpur v. Jal Sansthan*[45], imposition of sewerage tax and water tax was upheld. Cess is assessed at a certain percentage of the annual value. Annual value is determined with reference to royalty or dead rent, as the case may be, paid or payable for lands held for carrying on mining operation. Whether royalty is paid or payable for one type of ore or more and by one person or more are ancillary matters which do not impinge on the taxing power of the State. The contention is, therefore, devoid of substance.

20. It was urged that the Act was also violative of Article 14 by its denial for a fair hearing in course of assessment. It was submitted that whereas in cases of assessments made under Sections 9 and, 9-A remedy by way of appeal has been granted to the aggrieved party, such a remedy has been withheld in case of assessment under Section 9B of cess on lands held for carrying on mining operations. Repelling the attack the learned Advocate-General submitted that the assessment of cess was linked with and dependent upon the assessment of royalty. Determination of cess is not by way of an independent assessment but is only an arithmetical calculation basing upon the assessment of royalty. He further submitted that having regard to the scheme and the provisions of the Act and the Rules, provision containing a right of appeal was unnecessary and its absence did not prejudice the petitioners at all. Further the Act conferred revisional powers on the Board of Revenue to revise any order passed under the Act. In *Fatechand Himmatlal v. State of Maharashtra*[46], the Supreme Court observed (at page 1843) :

> "It is true that in several cases this court has held that a right of appeal is a gesture of statutory fairness in the disposal of cases. Our attention was drawn to the rulings reported as Jyoti Pershad, (1962) 2 SCR 125 : (AIR 1961 SC 1602) and Mangalore Ganesh Beedi Works (1974) 3 SCR 221 : (AIR 1974 SC 1832) and other cases bearing on the necessity of right of appeal, as an incident of fair hearing. We cannot dogmatise, generalize or pontificate on questions of law whose application depends sensitively on the nature of the subject-matter, the total circumstances, the urgency of the relief and what not....."

In *Organo Chemical Industries v. Union of India*[47], it was contended that without a right of appeal the assessment of damages under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, was unreasonable and arbitrary. The Supreme Court negatived the said contention observing (at p. 1806) :

> ".....An appeal is a desirable corrective but not an indispensable imperative and while its presence is an extra check on wayward orders its absence is not a sure index of arbitrary potential. It depends on the nature of the subject-matter, other available correctives, possible harm flowing from wrong orders and a wealth of other factors."

That the writ jurisdiction of the High Court was available to the aggrieved party was also taken into account in negativing the contention. In *Ahmedabad Manufacturing and Calico Printing Co. Ltd. v. State of Gujarat*[48], the Gujarat Education Cess Act not providing its own procedure of assessment and in not giving the tax-payers an opportunity for putting forward their objections by way of representation, appeal or otherwise, before the tax is finally fixed, offended the principles of natural justice. In that connection, their Lordships observed (at p. 1920) :-

> ".....The cess is nothing more than an addition to existing taxes. As it is a percentage of another tax, the determination of the cess is not by an independent assessment. It is an arithmetical calculation based on the result of assessment under other Act or Acts....."

In the case of *Ramchand Maroti v. Malkapur Municipal Council*[49], it was urged that no machinery had been provided for the manner of levying and calculating the Maharashtra Education Cess Act, 1962. The plea was negatived by holding that since the levy was a percentage of the annual letting value of the lands and buildings which was determined by separate proceedings, it was not necessary to evolve an independent method for the purpose of assessment and levy of tax under the Cess Act. In our opinion, the aforesaid authorities squarely meet the challenge. The assessment of cess is not an independent exercise. Cess is quantified with reference to the royalty or dead rent, as the case may be. Once there is a determination of royalty or dead rent, quantification of the cess is an automatic process. Moreover, as was pointed out by the Supreme Court in Organo Chemical's case (AIR 1979 SC 1803) (supra), remedy nevertheless is available to the aggrieved person. The Board of Revenue under Section 19 has wide powers to revise any orders passed under the Act or the Rules.

21. Shri R.K. Mohapatra referred to the statement of objects and reasons of Act 42 of 1976, and contended that the provision was a mere device and the real object was to impose royalty. We have already indicated that the language of the provisions is clear. It is unnecessary to refer to the statement of objects and reasons. The law is to be adjudged by its substance and its effect and not by the purpose given in the statement of objects and reasons. Resort to the statement of objects and reasons is permissible when there is ambiguity in the provision or the meaning is not clear. Our attention was also drawn to the definition of 'royalty' - to its wide and expensive character to show that the object of the Legislature was *mala fide* and the legislation was a mere device or pretence. In our view, the wide and expansive nature of the definition is with a view to bringing within its fold all types of fact-situations we may here refer to what O. Connor, J. said in *Baxter*

v. An. Way[50]:-

> "The claim of all legislatures is to project their minds as far as possible into the future and to provide in terms as general as possible for all contingencies likely to arise in the application of the law....."

22. This Full Bench was constituted to consider the correctness of the decision rendered by a Division Bench of this Court (the leading judgment wherein was delivered by one of us) in *Tata Iron and Steel Co. Ltd. v. State of Orissa*[51] We have come to the same conclusions as the Divisional Bench on the points raised before it.

22A. All the contentions raised on behalf of the petitioners having failed, the writ petitions have no merit and are accordingly dismissed. On the facts and circumstances of the cases, there would be no order as to costs.

P.K. Mohanti, J.

23. I agree.

DR. B.N. Misra, J

24. I agree.

Petitions dismissed.

Cases Referred.

[1] AIR 1947 PC 60
[2] AIR 1978 Bom 119 (FB)
[3] AIR 1941 FC 16
[4] AIR 1970 SC 169
[5] AIR 1962 SC 1563
[6] AIR 1957 SC 297
[7] AIR 1941 FC 47
[8](1937) AC 863
[9] AIR 1953 SC 375
[10](1924) AC 328 at p. 337 (B)
[11](1939) AC 117 at p. 130
[12] AIR 1977 SC 2279
[13] AIR 1961 SC 459
[14] AIR 1964 SC 1284
[15] AIR 1965 SC 177
[16] AIR 1982 SC 697
[17] AIR 1970 SC 1436
[18] AIR 1976 SC 1654
[19] AIR 1980 SC 1955
[20] AIR 1965 Pat 491
[21] AIR 1972 Mys 299
[22] AIR 1965 Pat 491

[23] AIR 1979 Guj 180
[24]AIR 1969 Pun and Har 79
[25] AIR 1958 SC 468
[26] AIR 1970 SC 1436
[27] AIR 1940 Bom 65 (FB)
[28] AIR 1949 FC 81
[29] AIR 1976 SC 1654
[30] AIR 1969 SC 59
[31] AIR 1970 Bom 154
[32] AIR 1970 SC 999
[33] AIR 1975 SC 1234
[34](1936) A. C. 511
[35](1855) 11 Ex. 181
[36] AIR 1956 Bom 1
[37] AIR 1955 SC 191
[38] AIR 1975 SC 1234 (at p. 1244)
[39] AIR 1975 SC 594
[40] AIR 1969 SC 1094
[41] AIR 1962 SC 1733
[42] AIR 1962 SC 1406
[43] AIR 1979 SC 321
[44] AIR 1962 SC 745
[45] AIR 1982 All 406
[46] AIR 1977 SC 1825
[47] AIR 1979 SC 1803
[48] AIR 1967 SC 1916
[49] AIR 1970 Bom 154
[50](1909) 8 CLR 626
[51](1980) 50 Cut LT 34 : (1980 Tax LR NOC 140).