

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.670 OF 2010

M/s. Sociedade de Fomento
Industrial Pvt. Ltd. a Company
incorporated under Companies Act
1956 with its registered Office at
Villa Flores da Silva, Erasmo Carvalho
Street, Post Box No.31, Margao, Goa
represented in this Act by its Director
Francisco Lume Pereira.

..... Petitioner.

Versus

1. State of Goa
through its Secretary of Finance,
having its Office at Secretariat,
Alto-Porvorim, Bardez, Goa.

2. Director of Transport of
Government of Goa, with its
Office at Junta House, Panaji, Goa.

..... Respondents.

Mr. Darius Khambata, Senior Advocate with Mr. Parag Rao and Ms.
Swati Kamat, Advocates for the Petitioners.

Mr. Prasad Dhakephalkar, Senior Advocate with Mr. Pravin
Faldessai, Additional Government Advocate for the Respondents.

***Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.***

Reserved on : 18 June 2018.

Pronounced on : 26 September 2018.

JUDGMENT: (Per N.M. Jamdar, J.)

The Petitioner has challenged the constitutional validity of the Goa Rural Improvement and Welfare Cess Act, 2000 and the Goa Rural Improvement and Welfare Cess Rules, 2006. The Petitioner has also challenged the demand notices issued under the impugned enactments and the notification issued on 8 October 2010.

2. The Petitioner, a Company registered under the Companies Act 1956, carries on the business of production of mining of the iron ore and its extraction, processing, transport and export in the State of Goa.

3. The Goa State Legislative Assembly passed the Goa Rural Improvement and Welfare Cess Act, 2000, the Goa Cess Act, to which the Governor of Goa gave assent on 28 September 2000. The Act was published in the Official Gazette of Government of Goa on 16 October 2000.

4. The State of Goa, in the exercise of powers under Sections 4, 5 and 8 of the Goa Cess Act, framed the Goa Rural Improvement and Welfare Cess Rules, 2006, the Goa Cess Rules. The Goa Cess Rules were notified on 23 January 2006 and

published in the Official Gazette on 24 January 2006. A Corrigendum was published in the Official Gazette on 27 January 2006. In exercise of powers under Section 1(3) and 3(1) of the said Act, the State Government issued a Notification on 8 October 2010 and Rule 3(1) was substituted. Under the exercise of powers under Section 3(2) of the Goa Cess Act, the State Government revised the extent of the rate of cess on certain materials which were specified in Schedule I appended to the Goa Cess Act.

5. A notice dated 31 August 2010 was served on the Petitioner, calling upon the Petitioner to deposit an amount of ₹ 1088000/- as cess under the provisions the Goa Cess Act for the period from April 2010 to June 2010. The Petitioner, by this Petition, has challenged the action initiated by the State of Goa under the Goa Cess Act and the Rules. The Petitioner has prayed for a declaration that the Goa Cess Act and the Goa Cess Rules framed there under are ultra vires the Constitution of India, illegal, null and void. The Petitioner has also sought a declaration that the notification dated 13 May 2008, issued by the State, be held as arbitrary, illegal and unconstitutional and, therefore, null and void.

6. Rule was issued in the Petition. During the pendency of the Petition, further demand notices were issued to the Petitioner; those by amendment are also challenged. The Petitioner deposited

the cess under protest and without prejudice to the contentions raised in the Petition.

7. Rule was issued by this Court in several other writ petitions raising similar challenge, and this Writ Petition was directed to be heard along with the group. Levy of the cess under the Goa Cess Act and the Goa Cess Rules was made subject to the outcome of the Petitions. It was directed that if the Petitioners succeeded, then the State would have to refund the amounts without the Petitioners taking out separate proceedings for recovery of the cess paid. By Notification dated 6 April 2016, Schedule I to the Goa Cess Act was amended to make the cess "*Nil*" in respect of the royalty paid items.

8. When this Petition along with the group of Writ Petitions came up for hearing, the Counsel in other petitions requested that the two arguments raised in this Petition, that is the legislative competence of the State and retrospective application, are common in almost all matters and they requested to be heard in support when this Petition is heard. The Counsel requested that after the decision is rendered in this petition, the other petition be taken up for consideration on other individual grounds. Given this request by the Counsel, the other grounds of challenge than the two argued before us in this petition, are not be construed as

foreclosed by this decision. The arguments on behalf of the Petitioner were led by Mr. D. J. Khambata, Senior Advocate. Mr. Prasad Dhakephalkar, Senior Advocate with Mr. Pravin Faldessai, Additional Govt. Advocate for the Respondent-State supported the levy. Mr. S. Lotlikar, Mr. V. Dhond, ~~and Mr. S. Katak~~ Senior Advocates, Mr. P. Rao, and Mr. D. Pangam, learned advocates appearing in other petitions supported the submissions of Mr. Khambata by adding their inputs.

Correction carried out
as per order dated
28/09/18
Sd/-

9. In the first part of the judgment, we will deal with the challenge on the ground of constitutional validity of the Act and the Rules. In the second part, we deal with the arguments on the retrospective operation. There was a considerable overlap in the arguments advanced by the Counsel for the Petitioner, and we have taken the arguments together for consideration.

10. On the legislative competence of the State, the challenge in brief is as follows: Article 265 mandates that no tax shall be levied or collected, except by the authority of law. Articles 246 and 248 of the Constitution of India gives primacy to the Parliament to enact laws. The power of the State Legislature under List II is made subject to the power of legislation in respect of List I and List III of the Seventh Schedule. Entry 54 of List I, relates to

regulation of mines and mineral development to the extent to which Parliament declares such regulation and development under the control of the Union by law. This has to be read with the power of the State legislature in Entry 23 of List II, which is subject to the power of the Parliament. Once the Parliament has legislated under Entry 54, the legislative power of the State to enact laws stands denuded. The Parliament has enacted the Mines and Minerals (Regulation and Development) Act (1957), the MMDR Act, to provide for development and regulations of mines and the necessary declaration under Entry 54 is made by the Parliament under Section 2 of the MMDR Act and, thus, the entire field pertaining to the minerals stands occupied. The issue as to the scope of the MMDR Act occupying the entire subject matter relating to the mines and mineral development covered by the MMDR Act, is settled. Apart from this position, the examination of the MMDR Act and the various provisions there under would show that the entire field of mines and mineral development, including that of taxation, is occupied by the MMDR Act. Even though the actual enactment of the Rules may not have been framed under the MMDR Act, it is sufficient that the Parliament has the power to legislate upon a particular area in terms of the MMDR Act. The amendments to the MMDR Act, inserting Section 9-B and 9-C will also show that the field in respect of providing amenities and welfare measures is also

covered under the MMDR Act. The Central Government always has the powers under Section 13 of the MMDR Act to take welfare measures for the mining affected persons and the enactments have only reiterated the said power. The Parliament has also framed the Mineral Conservation & Development Rules and in terms of Section 18 of the MMDR Act. Chapter V of the MMDR Act is entirely devoted to the aspect of the environment. The MMDR Act covers all the subjects; from the commencement of mining operations to the transportation of minerals, storage of minerals, taxation, pollution, lease conditions, royalty, contribution to Mineral Foundations, cognizance of offenses, and revisional jurisdiction, and such like. The Goa Cess Act is clearly an enactment taxing mineral as cess is fixed on the basis of tonnage of the ore. There is no power with the State Legislature to enact the impugned law since the MMDR Act entirely occupies the subject matter. Nothing is left to be legislated upon by the State Legislature. Once the field is occupied and requisite declaration is made, the State is denuded of its legislative power. Various Constitution Benches of the Supreme Court have analysed and interpreted the provisions of the MMDR Act in the context of the State Legislation, and it has been consistently held that the field of mines and mineral, including taxation, is occupied by the MMDR Act. The decisions are, *The*

Hingir-Rampur Coal Co. Ltd. & ors. vs. The State of Orissa & ors.,¹; *State of Orissa & Anr. vs. M/s. M.A. Tulloch & Co. & Anr.*²; *Baijnath Kadio vs. State of Bihar & ors.*³; *India Cement Ltd. vs. State of Tamil Nadu & Ors.*⁴; *Synthetics and Chemicals Ltd. & Ors. vs. State of U.P. & ors.*⁵; and *The Quarry Owners Association vs. State of Bihar & Ors.*⁶. The decision of the Constitution Bench of five judges in *State of W.B. Vs Kesoram Industries Ltd. & Ors.*,⁷ is contrary to the decisions to the above decisions and of the benches of the seven learned judges in *India Cement Ltd., and Ors., Vs State of Tamil Nadu and Ors.*⁸ and *State of U. P. and Anr., Vs Synthetics and Chemicals Ltd., and Anr.*,⁹. Since the decision in *Kesoram Industries* does not interpret or clarify the decisions in *India Cement* or *Synthetics and Chemicals*, the High Court is bound to follow the opinion of the larger bench of the Supreme Court. Even assuming the decision in *Kesoram Industries* is followed, the State does not have any power under Entries 6 and 13 of List II. Entries 6 and 13 only relate to general entries and tax cannot be levied under a general entry. As regards Entry 50, consequent upon the

¹ AIR 1961 SC 459

² AIR 1964 SC 1284

³ 1969 (3) SCC 838

⁴ 1990 (1) SCC 12

⁵ 1990 (1) SCC 109

⁶ AIR 2000 SC 2870

⁷ (2004) 10 SCC 201

⁸ AIR 1990 SC 85

⁹ (1991) 4 SCC 139

declaration under Section 2 of the MMDR Act, the State has no power. Neither Entry 56, nor Entry 66 can be relied upon. Section 4 of the Goa Cess Act provides that the proceeds of the Cess will be applied to promote the welfare of the people affected by the movements of carriers transporting the material and the Petitioner is not given any special benefit and the Government incurs no expenses for outlay of facilities in respect of the trade of the Petitioner. The Supreme Court in *Jindal Stainless Ltd. & Anr. vs. State of Haryana & Ors.*¹⁰ has held that the doctrine of the direct and immediate effect of the impugned law as propounded in the in *Atiabari Tea Co. Ltd. vs. State of Assam*,¹¹ will continue to apply. The contention based on the competence of the State in the context of the Goa Cess Act imposing a compensatory tax has been given up in view of the decision of the Constitution Bench in *Jindal Stainless Limited and Anr., Vs State of Haryana and Ors.*,¹². However, the arguments in respect of the legislative competence, including that of a fee, are maintained. The Petitioners thus refer to and rely upon the following decisions: *P. Kannadasan and Ors. vs. State of T.N. and Ors.*¹³; *Saurashtra Cement and Chemical Industries and Anr. vs.*

¹⁰ (2006) 7 SCC 241

¹¹ AIR 1962 SC 1406

¹² (2017) 12 SCC 1

¹³(1996) 5 SCC 670

*Union of India and Ors.*¹⁴ ; *Synthetics and Chemicals Ltd. and Ors. vs. State of U.P. and Ors.*,¹⁵; *State of West Bengal. vs. Kesoram Industries Ltd. and Ors.*,¹⁶; *Mineral Area Development Authority and Ors. vs. Steel Authority of India and Ors.*,¹⁷ ; *Union of India and Anr. vs. K. S. Subramanian*¹⁸; *G.K. Krishnan and Ors. vs. State of Tamil Nadu and Ors.*,¹⁹ ; *M/s. International Tourist Corporation and Ors. vs. State of Haryana and Ors.*,²⁰; *Jindal Stainless Ltd. (2) and Anr. vs. State of Haryana and Ors.*²¹ ;

11. The response of the State on the legislative competence, in brief, is as follows: Entry 54 of List I refer only to the '*regulation of mines and mineral development to the extent to which such regulation and development are declared by Parliament by law*' meaning not the entire field of mines and mineral development. The Union has taken it under its control, only to the extent what is provided under the MMDR Act and not the entire field of regulation of mines and mineral development. The MMDR Act is

¹⁴ (2001)1 SCC 91

¹⁵(1990) 1 SCC 109

¹⁶(2004) 10 SCC 201

¹⁷(2011) 4 SCC 450

¹⁸(1976) 3 SCC 677

¹⁹(1975) 1 SCC 375

²⁰(1981) 2 SCC 318

²¹(2006) 7 SCC 241

not a complete Code. Various aspects which are incorporated in the Goa Cess Act are not covered in the MMDR Act. The preamble of the Goa Cess Act shows that it is to provide additional revenue for infrastructure and to promote the welfare of the people in the rural areas. There is no conflict or overlapping between the MMDR Act and the Goa Cess Act. The measures employed in assessing the tax is distinct than the nature of the tax. There is a distinction between the subject matter of tax and the standard by which the amount of tax is measured. There is a distinction between the general subjects of legislation and the field of taxation. Merely because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. Denial to the State is only to the extent of the declaration made by the Parliament and power to tax the mineral is with the State. So long as a tax or fee on mineral rights remains in pith and substance in augmenting the revenue of the State or a fee for rendering services by the State, it does not impinge upon the regulation of mines and regulation development or upon control of the Central Government. The decision of the Supreme Court in *Kesoram Industries* is followed by Rajasthan High Court in *Madhyabharat Phosphate vs. State of Rajasthan*²² upholding the legislative competence of the relevant provisions of the Rajasthan

²² 2012 (1) ILR (Raj) 355

Finance Act and Rajasthan Environment and Health Cess Rules. The Supreme Court in *Kesoram Industries* interpreted all earlier Judgments and that being the latest decision of the Supreme Court, the same is binding. The directive principles of State Policy contained in Articles 38, 47 and 48 of the Constitution require the State to promote the welfare of people by securing a just and equitable social order and also to improve the environment and the public health. The cess imposed is referable to Entry 56 of List II of VIIth Schedule to improve the welfare of the people residing in rural areas, and if the improvement of the road clearly benefits a class of transporters who use the road for carrying their goods, even if it is to be held as 'fee', then it is referable to Articles 6, 13, read with 23 and 66 of List II of VIIth Schedule. The Goa Cess Act is not directed at the minerals, but it is in reference to the transportation. The Goa Cess Act seeks to levy a cess on the carriers which transport certain items, which are mentioned in Schedule I. In Schedule, I not only the ore has been mentioned, but there are other items too. The levy is upon the carriers who transport certain items mentioned in Schedule I as cess on infrastructure, as transportation affects the health of the people residing in the rural areas in the State of Goa and to promote the welfare of the people and their health which is affected by transportation. The levy is imposed to augment revenue to provide for infrastructure. The

statement of objects of the Goa Cess Act states that it is to provide additional resources for the improvement of the infrastructure and the health, to promote the welfare of the people residing in the rural areas affected by the use of plastics, dumping of garbage and spillage of materials. Massive dumps of garbage, dirt, and plastics are common problems caused by transportation of the material under the Schedule, affecting the health of people in the rural areas. In pith and substance, the Goa Cess Act falls under Entry in respect of transportation and public health and assuming that there is an encroachment in respect of the minerals, it is incidental. The collection from the Goa Cess Act is used in respect of the areas affected by plastics, spillage of material, by providing medicines to the Health Centers and other development works. Even assuming the impost is a tax on mineral it is within the legislative competence of the State under Entry 50 of List II of VIIth Schedule as held in *Kesoram's* case. The State referred to and relied on the following decisions. *R.K. Garg and ors. vs. Union of India (UOI) and ors.*²³; *Sainik Motors, Jodhpur & ors. vs. The State of Rajasthan*²⁴; *Saurashtra Cement and Chemical Industries and anr. vs. Union of India and ors.*²⁵; *M.P.V. Sundararamier & Co. vs. The State of*

²³(1981) 4 SCC 675

²⁴AIR 1961 SC 1480

²⁵(2001) 1 SCC 91

*Andhra Pradesh and Anr.*²⁶; *State of Orissa and Another vs M/s. M.A. Tulloch and Co.*,²⁷; *State of U.P. and anr. vs. Synthetics and Chemicals Ltd. and anr.*²⁸; *Bajjnath Kadia vs. State of Bihar and ors.*,²⁹; *Western Coalfields Limited vs. Special Area Development Authority, Korba and anr.*,³⁰; *M.S. Sandhu and anr. etc. vs. State of Punjab and ors.*,³¹; *Madhyabharat Phosphate Pvt. Ltd. (M/s.) vs. State of Rajasthan*³²; *State of West Bengal. vs. Kesoram Industries Ltd. and ors.*³³

12. First, we will advert to the principles governing the legislative competence of the State. Then we will refer to the judicial pronouncements in respect of mineral rights and power of the State legislature. In this context, we will extensively refer to the decision of the Constitution Bench in *Kesoram Industries* and arguments of the petitioner on the binding effect of *Kesoram Industries*. Then we will refer to the Goa Cess Act and MMDR Act and the rules and analyse the same. We will also refer to the purpose and impact of the

²⁶AIR 1958 SC 468

²⁷AIR 1964 SC 1284

²⁸(1991) 4 SCC 139

²⁹(1969) 3 SCC 838

³⁰(1982) 1 SCC 125

³¹(2014) 6 SCC 514

³² 2012 (1) ILR (Raj) 355

³³(2004) 10 SCC 201.

Goa Cess Act and the Rules.

13. The basic principles governing the legislative power in the context of the present case can be culled out from the dicta of the Supreme court in *Hoechst Pharmaceuticals Ltd. Vs State of Bihar*³⁴ and in the decision of the Constitution bench in *Kesoram industries*. These principles are as follows. The main Article in the Constitution dealing with of legislative power is the Article 245. Article 246 of the Constitution separates the legislative fields between the Parliament and the Legislature of any State. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I, Union List, in Seventh Schedule. The Legislature of any State has the power to make laws with respect to any of the matters enumerated in List III, the Concurrent List, subject to the power of the Parliament. Subject to the above, the Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, the State List. The power to make a law imposing a tax not mentioned in the Concurrent List or State List, vests in Parliament. The various entries in the three Lists are not 'powers' of legislation but 'fields' of legislation. There is no overlapping anywhere in the taxing power, and the Constitution gives independent sources of taxation to the

³⁴ (1983) 4 SCC 45

Union and the States. Repugnancy between the law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and a direct conflict arises. If there is a repugnancy due to overlapping, the State law will be ultra vires and shall have to give way to the Union law. Taxation is a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The power to tax cannot be deduced from a general legislative entry as an ancillary power. The entries in the List must receive a liberal construction and not in a narrow pedantic sense. A power to legislate as to the principal matter specifically mentioned in the entry shall also include the legislation touching incidental and ancillary matters. Where three Lists are containing a large number of entries, there is bound to be some overlap. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relates. Once it is so determined, any incidental trenching on the field reserved to the other Legislature is of no consequence. The Court has to look at the substance of the legislation. Regard must be had to the enactment as a whole, its main objects, to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded. The predominance of the Union List would not

prevent the State Legislature from dealing with any matter within List II, though it may incidentally affect any item in List I. The precedence of List I do not necessarily mean that the State is precluded from dealing with any matter in List II though it may incidentally entrench any items in List I. The legislation in the field of taxation and economic activities need special consideration and are to be viewed with more flexibility in approach. Greater latitude is to be allowed to the Legislature in such matters because it has to be dealt with complex problems. In the matters of utilities, tax and economic regulation the legislature has the affirmative responsibility and further given the complexity of economic regulation, self-limitation on the part of the Court in testing the constitutional validity of such Legislature should be observed and the Courts ought to adopt a pragmatic approach. The measure employed for assessing a tax must not be confused with the nature of the tax. Even crudities and inequities have to be accommodated in taxation and economic legislation. The Legislation should therefore, receive an interpretation as far as possible to make the enactment operative unless an entire and unequivocal position has travelled beyond the bounds set out in the Constitution, the statute should not be declared as ultra vires. A heavy burden lies on those who challenge the constitutional validity of a statute, and the Court must presume constitutionality. These are some of the basic principles we have to

keep in mind while proceeding to address the challenge.

14. Entry 54 in the list I, the Union List, of the Seventh Schedule to the Constitution, deals with the regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union are declared by Parliament by law to be expedient in the public interest. Entry 23 in the List II, the State list, deals with 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.

15. The position of law concerning the minerals in the context of legislative powers has arisen for consideration in the Supreme Court right from the year 1961. There have been decisions of the five learned Judges and seven learned Judges of the Supreme Court on the topic. The debate before us is primarily focused on the decisions of the constitution benches in *Hingir Rampur Coal Co. Ltd., and Ors. Vs The State of Orissa and Ors.*³⁵; *State of Orissa Vs M.A. Tulloch and Co.*,³⁶ , *India Cement Ltd. and Ors., V/s State of Tamil Nadu and Ors.*,³⁷ and *the State of West Bengal Vs Kesoram Industries Ltd. and Ors*³⁸. For the sake of brevity, we will refer to

³⁵ AIR 1961 SC 459

³⁶ AIR 1964 SC 1284

³⁷ AIR 1990 SC 85

³⁸ (2004) 10 SCC 201

the decisions of the Constitution Benches as *Hingir Rampur*, *Tulloch*, *India Cement*, and *Kesoram* respectively. An extensive review of the entire law on the subject is taken in *Kesoram*. Almost all the decisions on the subject till then, also the ones the petitioners have relied upon, are discussed in *Kesoram*. As many as one hundred and fifty five decisions were cited and discussed in *Kesoram*.

16. The decision in the case of *Kesoram* was rendered by the Constitution Bench of five learned Judges. The majority decision was rendered by Justice R.C Lahoti J (*as his lordship then was*) on behalf of V.N. Khare, C.J., B.N. Agrawal, J. Dr. A.R. Lakshmanan, J., and himself. S.B. Sinha, J. delivered a dissenting judgment. A batch of matters, appeals and writ petitions, was filed in the Apex Court raising question concerning the Entries 52, 54 and 97 in List I and Entries 23, 49, 50 and 66 in List II of the Seventh Schedule. *Kesoarm* dealt with earlier constitution Bench decisions, distinguished them and by a majority decision dated 15 January 2004 laid down various propositions of law, which have a direct bearing on the case at hand.

17. Petitioner contends that *Kesoram* should not be relied upon because it is contrary to *Hingir Rampur*, *Tulloch*, *India Cement*, and *Synthetic & Chemicals*. It is contended that *India*

Cements and Synthetic & Chemicals are decisions of the bench of seven learned Judges, while the bench of five learned Judges have rendered the decision in *Kesoram*. It is contended that *Kesoram* does not interpret or clarify *India Cement* or *Synthetic & Chemicals* but it is in conflict, and if there is a conflict between two Benches of the Supreme Court, the decision of the larger Bench will prevail. The Petitioner has taken us through the earlier decisions in detail to demonstrate before us why *Kesoram* should not be followed. The Petitioners have relied upon the decisions in the case of *Union of India & anr. vs. K.S. Subramanian*³⁹, *Central Board of Dawoodi Bohra Community and anr. vs. State of Maharashtra and anr.*⁴⁰ and *Official Liquidator vs. Dayanand and ors.*⁴¹ in furtherance of the arguments on the law of precedents.

18. The decision in *Kesoram* is a decision of the Constitution Bench specifically formed to answer a question, which has a direct bearing on the case before us. This decision has considered all the earlier decisions. In the case of *Mehtab Liaq Ahmed Shaikh and another Vs State of Maharashtra and others*⁴², the Full Bench of this Court had an occasion to consider the

³⁹ (1976) 3 SCC 677

⁴⁰ (2005) 2 SCC 673

⁴¹ 2008 (10) SCC 1

⁴² 2018(1) ALL MR 1 (F.B.)

binding dicta of the Constitution Bench and its distinct status. The concept of Constitution Bench is traceable to Article 145 of the Constitution of India. The purpose of referring a question to the Constitution Bench is to give a quietus to the legal controversies and bring about certainty in the law. The decision in *Kesoram* is far from being in ignorance of the earlier decisions. It is therefore not permissible for us to simply keep aside the decision in *Kesoram* as the petitioners want us to do. We will, therefore, proceed to analyse *Kesoram* in detail and then come back to this aspect of the matter.

19. *Kesoram* arose out of a reference made to the Constitution Bench by the Bench of three learned judges on 12 October 1999 as a question arose on the constitutional significance centering around Entry 54 of List I. The bench passed the following order:

25..... “Great emphasis has been placed by learned counsel for the State of West Bengal upon the judgment of a Bench of three learned Judges in Goodricke Group Ltd. v. State of W.B.⁵ Quite apart from the fact that there are pending proceedings in this Court seeking to reconcile the judgment in Goodricke⁵ with that in State of Orissa v. Mahanadi Coalfields Ltd.⁶ we find some difficulty in accepting as correct the view taken by Goodricke⁵ particularly having regard to the earlier decision (of a Bench of two learned Judges) in Buxa Dooars Tea Co. Ltd. v. State of W.B.⁴ We think, therefore, that these matters should be heard by a Constitution Bench. The papers and proceedings may,

accordingly, be placed before the Hon'ble the Chief Justice for appropriate directions."

Accordingly, several petitions and appeals were placed before the Constitution Bench. The issue centered around Entries 52, 54 and 97 in List I and Entries 23, 49, 50 and 60 in List II of the Seventh Schedule to the Constitution so also the residuary power of legislation vested in the Union.

20. The matters were grouped into four groups. Coal matters, Tea matters, Brick earth matters, and Minor mineral matters. The basic constitutional question in all the groups was the same, and they were heard together. In the Coal matters, the Calcutta High Court had struck down a levy by way of cess on coal, for want of legislative competence. The State Act had levied education cess and rural employment cess. The High Court had struck down the levy relying on *India Cement*. The High Court had held that levy beyond the power of the state legislature and the levy was similar to ones held ultra vires the legislative competence of the State twice by the Supreme Court. Therefore, this issue based on *India Cement* had directly arisen for consideration in *Kesoram*. In Tea matters, cess was sought to be levied by the State on certain lands and building for raising funds to provide primary education throughout the State. Some petitioners had filed petitions under

Article 32 of the Constitution of India. Similar matters were withdrawn from the High Court to be heard together. A Bench of three learned Judges considered the decision in the case of *India Cement* and other decisions and delivered a decision on 25 November 1994 referred as *Goodricke Group Ltd. vs. State of West Bengal*⁴³. The decision in *India Cement* was distinguished in the decision of *Goodricke*, and the constitutional validity of the impugned enactments therein was upheld. In the Tea matters, it was argued that the decision in *Goodricke* runs counter to the decision in *India Cement*. Therefore, even in this group, *Kesoram* was considering the correctness of a decision distinguishing *India Cement*.

21. In Brick Earth group matters, the challenge was on the ground that since the brick earth is a minor mineral, the entire field relating to minor mineral is covered by the MMDR Act and the State legislature is not competent to levy the impugned cess. Identical challenge raised before us. In *Kesoram*, the concerned State had argued that the cess sought to be levied for rendering different services to the society and public benefits and its securing welfare to the people. In Minor Mineral matters, the challenge was to the decision of the Allahabad High Court, upholding the

⁴³ 1995 Suppl. (1) SCC 707

constitutional validity of a cess on mineral rights levied under Section 35 of the U.P. Special Area Development Authorities Act, 1986. The decision of the Allahabad High Court was challenged and the argument before the Constitution Bench in *Kesoram* was that the MMDR Act having been enacted containing a declaration under Section 2 as contemplated by Entry 54 of List I, the State was denuded of its power to enact the impugned law and levy the impugned cess. Again this is Similar to the challenge raised before us.

22. *Kesoram* referred to and restated the law regarding ambit of Article 245 of the Constitution. After an elaborate discussion on this aspect, which we have already referred to. To repeat, *Kesoram* stressed that since there are various entries in the three Lists, there is bound to be some overlap and in such a situation the doctrine of pith and substance has to be applied. It held that the Court should ascertain the real character of the legislation in question. *Kesoram* also underscored the need to consider the legislation in the field of taxation and economic activities as deserving special consideration. *Kesoram* reiterated the settled principle that the measure employed for assessing tax is not to be confused with the nature of the tax. The amount may be measured in many ways, but there is a distinction between the subject matter

of a tax and the standard by which the amount of tax is measured. It referred to the settled principle, that every effort must be made as far as possible to reconcile the seeming conflict between the State legislation and the Parliamentary legislation.

23. *Kesoram* extensively dealt with the concept of regulation and control and whether it includes the power of taxation. A review of its earlier decisions was taken. *Hingir Rampur* was considered *in extensio*. *Hingir Rampur* had laid down features which would distinguish excise from a tax or fee and also features which would distinguish a tax from a fee. There is no general difference between tax and fee, both being the compulsory extraction of money by public authorities. *Hingir Rampur* was considering Orissa enactment which levied a cess, a fee for development of mining areas in the State. The principal object of the Orissa enactment was to develop mineral areas and to assist more efficient and extended exploitation of its mineral wealth. The amount so collected went to the special fund carrying out the purpose of the Act and established a correlation between the cess and the purpose for which it was levied. *Hingir Rampur* held that the Orissa Act was in pith and substance concerned with the development of mining areas, while the Central Act dealt with control of all industries, including the industry of coal. *Hingir*

Rampur, thus applying the doctrine of pith and substance did not annul levy of cess under the Orissa Act. *Kesoram* noticed the distinguishing features in *Hingir Rampur*. *Kesoram* found that the power to levy and collect fees and taxes in respect of minerals mined, quarried, excavated or collected was expressly conferred on the Central Act of 1948. *Kesoram* noted that the MMDR Act did not contain any provision similar to the Central Act of 1948 or the Act of 1951. *Kesoram* then considered *Tulloch* in detail and held that the decision has to be read in its entirety. *Kesoram* held that if the decision in *Tulloch* is read out of context, it may give an impression that the power to levy fee has been appropriated by the MMDR Act to the Central Government and the cess levied by the State would stand obliterated. *Kesoram* categorically held that this is not the ratio in essence in *Hingir Rampur* and in fact *Hingir Rampur* had held to the contrary and *Tulloch* had followed the decision in *Hingir Rampur*. *Kesoram* then analysed the effect of Section 2 of the MMDR Act and noted the preamble to the Act. Then *Kesoram* extensively discussed the distinguishing features of *Tulloch*. It noted firstly that the provisions of MMDR Act did not directly come up for scrutiny in *Tulloch* was only adjudicating upon the issue whether the liability to pay cess under the provisions of the Act would be enforced under the MMDR Act. Secondly, the question whether the Central Act excluded the power to legislate by the States

was not a question dealt with in-depth as it was done in *Hingir Rampur*. Thirdly, it held that *Tulloch* needs to be read in its entirety, otherwise extracting sentences from here and there conveys an incorrect impression

24. *Kesoram* specifically dealt with Section 13, 18 and 25 MMDR Act and held that power of taxation could not be inferred by implication and there must be a charging section specifically empowering to levy the tax. *Kesoram* held that in fact, the view taken by it does not run counter to the principle of law laid down in *Tulloch*. It observed that in *Hingir Rampur* and *Tulloch*, the levy was being collected for development of mining areas in the State and the power to regulate and develop, would not include the power to levy tax and fee, which power shall have to be traced to some other entry in List I. *Kesoram* referring to Article 265 held that power to tax is not a residuary power and there is nothing like implied power to tax, although the legislative power includes incidental or ancillary power to tax stands on a different footing. *Kesoram* noted and expounded the difference between the power to regulate and power to tax. Referring to a commentary of a learned Author, it was observed that the Government has general authority to raise revenue and to choose the methods of doing so. It also has general authority over the regulation of relative rights, privileges, and duties and if

revenue is a primary purpose, the imposition is a tax. *Kesoram* specifically dealt with the decision of Seven Judge Bench in *Synthetics and Chemicals Ltd.* The contention of the Petitioner that *Kesoram* does not deal with *Synthetics and Chemicals Ltd.*, thus is incorrect. The decision in *Synthetics and Chemicals Ltd.* is discussed in detail in *Kesoram*. The Constitution Bench in *Kesoram* held that power to levy or tax for augmenting revenue shall continue to be exercised by the legislature in whom it vests, that is, the State Legislature even though regulation or control is assumed by the Union.

25. *Kesoram* then squarely dealt with *India Cement*. It will be necessary to reproduce Paragraphs 52, 53 and 54 of the report, which read thus:

“52. In *India Cement Ltd. and Ors. v. State of Tamil Nadu and Ors.* what was impugned was a levy of cess on royalty and the question was, whether such cess on royalty is within the competence of the State Legislature. The appellant was required to pay, by the Madras Panchayats Act, 1958, local cess at the rate of 45 paise per rupee of the royalty already being paid. The question formulated by the Court, as arising for decision was : is cess on royalty a demand of land revenue or additional royalty? The Court found that the royalty was payable by the appellant as prescribed under the lease deed. The rates of the royalty were fixed under the Mines and Minerals (Development and Regulation) Act, 1957, which is a Central Act, passed

under Entry 54 in List I, by which the control of mines and minerals has been taken over by the Central Government. The State Legislature sought to justify and sustain the levy by reference to Entry 49, 50 or 45 in List II, Cess is a tax and is generally used when the levy is for some special administrative expense, suggested by the name of the cess, such as health cess, education cess, road cess etc. This is a well-settled position of law. The levy was sought to be justified under Entry 45 in List II by including it within the meaning of land revenue, and in the alternative under Entry 49 in List II as tax on lands. The challenge to the constitutional validity of the levy was upheld. We would briefly state the reasoning which prevailed with the learned Judges.

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

List II, it would be controlled by a legislation under Entry 54 in List I.

54. A Division Bench decision of Mysore High Court in Laxminarayana Mining Co., Bangalore and Anr. v. Taluk Development Board and Anr. - AIR 1972 Mysore 299 was cited with approval in India Cement . The Mysore High Court struck down as violative of MMDR Act, 1957 a licence fee on mining manganese or iron ore etc. imposed by a State Legislation. A perusal of the judgment of the Mysore High Court shows that the impost was by way of licence fee on the mining of certain minerals. Regulation and development of mines and minerals was undertaken by the Central Legislation and therefore the power of the State Legislature under Entries 23 and 52 in List-II got denuded in the field of regulation and development covered by the Central Legislation. The Division Bench vide para 6 held "it is therefore clear that to the extent the Central Act makes provision regarding the regulation and development of minerals, the powers of the States Legislatures under Entry 23 of List 11 stand curtailed ". The State Government had sought to defend the licence fee on the ground that it was in the nature of a tax and not a licence fee. This plea has been specifically noted by the High Court and dealt with. However, what is significant to note is the revelation, made by careful reading of the Judgment, that provision for licence fee was made in the Central Legislation and licence fee was sought to be imposed by the State too. In fact, the licence fee was a step trenching upon the field of regulation and therefore was liable to be struck down on this ground alone. Yet, another reasoning which prevailed with the High Court was that Section 143 of the State Act, which was

not inconsistent with the Central Act, was relied on by the State Government as conferring power on it to levy the impugned licence fee. On that plea the High Court formed an opinion that on the framing of Section 143 of the State Act it did not in express terms authorize a levy of fee or tax. The High Court observed - "It (Section 143) cannot also be construed as conferring such a power on the respondents to levy a tax or fee on mining, in view of the well-settled and statutory construction that a Court construing a provision of law must presume that the intention of the authority in making it was not to exceed its power but to enact it validly". The ratio of the decision of the Mysore High Court is that provision for licenses and license fees, operating in the field of regulation of mines and minerals is not available to be made by State legislation - in view of the declaration in terms of Entry 54 in List I."

Thereafter, after considering the issue whether the royalty is a tax *Kesoram* discussed the regulation and control and whether the general power which includes the power of taxation. In this context also, *Kesoram* dealt with the decisions in *Hingir Rampur Coal Co. Ltd.*, and *M. A. Tulloch and Co.*, in detail. *Kesoram* categorically held that the whole field of regulation under the provisions of the MMDR Act could not be said to be reserved for the Parliament.

26. When *Kesoram* evaluated *India Cement*, it is elementary that it was fully conscious that it was dealing with a

decision of seven learned Judges. *Kesoram* was considering three questions. Firstly, whether royalty on mineral could be considered as a tax; secondly, whether Entry 54 in List I and the consequential declaration under Section 2 of the MMDR Act will completely denude the State to do anything at all even remotely connected with mineral and, thirdly, whether the State could levy cess in the nature of fee or tax in respect of the mineral. *Kesoram* analysed *India Cement* in detail. It found that in *India Cement* reliance was placed on the decision of the Mysore High Court. The Mysore High Court had struck down an impost levied by the State on mining of certain minerals. In *India Cement* what was impugned was a levy of cess on royalty. The concerned State legislature had sought to justify and sustain the levy with reference to Entries 49, 50 and 45 of List II. *Kesoram* held that the decision of the Mysore High Court could not be read widely so as to lay down an absolute proposition that the power of the Union to regulate and control results in depriving the States of their power to levy a tax or a fee within their legislative competence without trenching upon the fields of regulation and control as power of regulation is different from the power to tax. *Kesoram* then addressed, which according to the learned Judges, was an anomaly by way of an error that had crept up in *India Cement*. After detailed analysis, they found that *India Cement* never meant to lay down that royalty is a tax, which they discerned from the

reading of *India Cement* and also in series of earlier decisions. *Kesoram* held that prior to this statement appearing in *India Cement* nobody had doubted that royalty is not a tax.

27. *Kesoram* observed that the exercise was consciously being undertaken so that the error which had crept up in *India Cement* should not be a cause for any further harm to the trend of jurisprudential thought. *Kesoram* specifically held that the royalty is not a tax. *Kesoram* held that all that *India Cement* was called upon to consider whether royalty is income and whether the State Legislatures are competent to tax an income. *Kesoram* noted that on this ground alone, the levy of cess impugned in *India Cement* could have been struck down and nothing more was needed. *Kesoram* expressly dissented from the decision in the *State of M.P. vs Mahalaxmi Fabric Mills Ltd.*,⁴⁴ wherein the Court had held that there was no typographical error in *India Cement*.

28. After having discussed and distinguished the decision of *India Cement*, the *Kesoram* proceeded to examine the decisions post *India Cement*. The decisions in the *State of Orissa vs. Mahanadi Coalfield Ltd.*⁴⁵ and *Buxa Dooars Tea Co. Ltd. vs. State*

⁴⁴1995 Supp. (1) SCC 642

⁴⁵ 1995 Supp (2) 686

of *West Bengal*⁴⁶ were also distinguished. *Kesoram*, after distinguishing these two decisions and other decisions, did an analysis of *Goodricke Group Ltd.* *Kesoram*, thus after having made an independent review of several decisions and several legal principles, held that *Goodricke Group Ltd.*'s case was correctly decided and law laid down therein is correct, and the decision in *India Cement* was thus distinguished.

29. *Kesoram* ruled that its conclusion was in line with the decision of *Synthetics & Chemicals Ltd.* that in the field occupied by the Union for regulation and control, the power to levy tax is available to the State so long as it does not interfere with the regulation, which is the power occupied by the Union. Thus to repeat, the contention of the Petitioner that *Kesoram* does not distinguish *Synthetics & Chemicals Ltd* and is contrary to, it is incorrect by the position declared by *Kesoram* itself. *Kesoram* also referred to *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*⁴⁷, which is another decision of seven learned Judges of the Supreme Court. *Kesoram* also noted that the freedom guaranteed under Article 301 does not mean freedom from taxation.

30. Thus, *Kesoram*, after an extensive review, laid down a

⁴⁶ (1989) 3 SCC 211

⁴⁷ AIR 1962 SC 1406

position of law. All the earlier decisions including that of *India Cement* were discussed in detail and distinguished or followed as the case may be.

31. Post *Kesoram*, an issue identical at hand, arose for consideration of the Division Bench of Rajasthan High Court in the case of *Madhyabharat Phosphate*. A bunch of petitions challenging the validity of Chapter VII of the Rajasthan Finance Act providing for levy of cess on mineral rights, were filed in the Rajasthan High Court. The petitioners therein were holders of mining leases granted for extraction of major minerals. They were called upon to pay the environment and health cess imposed under Section 16 of the Rajasthan Finance Act. The State of Rajasthan had framed the rules called 'Rajasthan Environment and Health Cess Rules, 2008'. The petitioners had contended that the provisions of the MMDR Act occupied the field as the declaration was also made under Section 2 of the Act. Thus same contention was raised that in view of the declaration under Section 2, the entire field in respect of mines and mineral development was occupied, and the very same decisions were referred to. It was also contended that the Mineral Conservation and Development Rules, 1988 under MMDR Act also take care of the environment and environmental pollution. It was contended that the State had no competence to enact the

impugned provisions and since the Parliament, in exercise of the powers conferred by Entries 54 and 55 enacted the MMDR Act and the State is denuded of this power to impose any cess and even if the cess considered as 'fee' or 'tax', no power vested in the State. The petitioners had relied upon the decision in the case of *India Cement*. On behalf of the State, it was contended that under Entry No.50 of List II, the State was competent to levy environment and health cess on mineral rights and there is no repugnancy and for the environmental upgradation and restoration of ecology in mining areas the State has legislative competence to enact the law. The Division Bench took a review of the State legislation and its aim and objectives. It then referred to the various entries in different lists and Schedule VII. The Division Bench held that *Kesoram* could not be held to be *per incuriam*. The Division Bench held that the power under Entry 50 of List II of Seventh Schedule is not affected by Section 15 or Section 13 of the MMDR Act. The Division Bench held that the State of Rajasthan was competent to levy environment and health cess on mineral rights under Entry 50 of List II of the Constitution of India. The Division Bench relied upon the decision in *Kesoram*, more particularly the observations therein that the doctrine of occupied field applies when there is a clash between the Union and the State Lists within an area common to both and incidental and superfluous encroachments are to be

disregarded. The Division Bench in *Madhyabharat Phosphate* observed thus:

“41. Merely by the fact that certain provisions have been made with respect to protection of environment and health of the workers and a reclamation of the area in the Act of 1957 and which have been pressed into service by Mr. M.S. Singhvi, learned Sr. Counsel, it cannot be said that the State is denuded of its power to enact the provisions contained in Chapter VII of the Finance Act, 2008. Considering the provisions of List II of Seventh Schedule & Art.265 of the Constitution, the Apex Court in Kesoram (supra) has laid down that the legislative power to tax by reference to Entries in List II is plenary unless the entry itself makes the field 'subject to' any other entry or abstracts the field by any limitations imposable and permissible. A tax or fee levied by State with the object of augmenting its finances and in reasonable limits does not ipso facto trench upon regulation, development or control of the subject, the power to legislate whereof has been conferred on the parliament. It is different, if the tax or fee sought to be levied, by State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental. Thus, in our opinion, the State could not be denied its plenary power to tax mineral rights when it wants to augment its finances in reasonable limits. Thus, levy of cess on environment and health purpose does not trench upon regulation, development or control of the subject, under MMDR Act, 1957 enacted by the Parliament. In case, the Parliament has chosen not to legislate and failed to say something explicit, it is not for the court

to venture into an enquiry to find and hold that what tax would hamper mineral development. It has been held in Kesoram (supra) that Entries 52, 53 and 54 in List I are not heads of taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of the Union having enacted laws by reference to Entries 52, 53, 54 in List I. It has been further laid down that it is for the Parliament to legislate and impose limitations on the State's otherwise plenary power to levy taxes on mineral rights or taxes on lands (including mineral bearing lands) by reference to Entries 50 and 49 in List II and lay down the limitations on the State's power, if it chooses to do so, and also to define the extent and sweep of such limitations. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Union, it is not unconstitutional. Thus, the regulation of mines and minerals vesting in the Union Govt. in MMDR Act, 1957 & the Act of 1952 and Rules of 1955 and Rules of 1988 relied upon by Mr. M.S. Singhvi, learned Senior Counsel, appearing on behalf of the petitioners, could not have come in the way of the State to enact the impugned provision in question, as it does not either impinge upon regulation of mines and mineral development or upon control of industry by the Union. The State is augmenting its revenue resources for the purpose of environment and health. The power to tax the mineral rights is with the State. The power to curtail the exercise of such power is with

the Union. This is the result achieved by homogeneous reading of Entry 50 in List II and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional.”

The Division Bench, repelling an identical challenge raised in the present Petition, concluded by upholding the validity of the Rajasthan Act which authorized the State to levy and collect environment and health cess.

32. Before we refer to the conclusions in *Kesoram*, we revert to the contention of the petitioners on the binding dicta of *Kesoram*. Petitioner contends that *Kesoram* does not interpret *India Cement* and is in direct conflict with it and that being so *India Cement* and the earlier Constitution Benches are binding. In short, the Petitioner calling upon this court to ignore *Kesoram*. It is not possible for us to do so. *Kesoram* has held that the MMDR Act does not take away the power of the State Legislature under Entry 50 of List II. In *Kesoram* the declaration made by the Parliament in Section 2 of the MMDR Act was also considered. It has been held in the case of *Kesoram* that Entry 54 in List I do not limit the power

of the State Government to tax on mineral rights. It is also observed that it is open to the state to augment its revenue and real character of levy must be seen by applying pith and substance. *Kesoram* has not merely bypassed the earlier decisions. These decisions have been directly considered in *Kesoram*. In fact, in paragraph 95 of the majority decision of the Constitution Bench in *Kesoram*, indicates that decision in *Tulloch* itself has not correctly followed the ratio laid down in *Hingir Rampur*. In *Kesoram* a cautionary note was sounded not to read the observations made in *Tulloch* out of context. *Kesoram* observed that the view taken by it was in tune with the correct ratio in *Tulloch*. The decision of *India Cement* which laid down that the royalty is a tax was held to be an inadvertent error. *Kesoram* is a decision of the constitution bench formed specifically to answer and settle a question of law. A decision of the Constitution Bench stands on a different footing.

33. A group of matters was placed before the Bench of three learned Judges of the Supreme Court in the case of *Mineral Area Development Authority and others Vs Steel Authority of India and others*⁴⁸ wherein the issue arose in respect of the decisions in *Kesoram* and *India Cement*. The Court directed that the matters be placed on the administrative side for reference to a larger Bench.

⁴⁸ (2011) 4 SCC 450

One of the questions of law framed was whether the majority decision in *Kesoram* could be read as departing from the law laid down in *India Cement*. Thus, the decisions of both *Kesoram* and *India Cement* were before the Bench of three learned Judges of the Apex Court. As the order shows, the matter was heard for a considerable length of time and thereafter the reference was made. Petitioner sought to make capital of the fact that the Bench *prima facie* observed that there might be a conflict. The Bench, in *Mineral area Development Authority*, did not straightaway conclude that *Kesoram* was *per incuriam* and that *India Cement* being of the Larger Bench it will have to be followed. Thus the legal position is far from obvious as the Petitioner makes out to be. Even the Division Bench of the Rajasthan High Court has held that the decision in the case of *Kesoram* cannot be held to be *per incuriam* of *India Cement*. The decision of the Division Bench was sought to be distinguished by the Petitioners contending that the Division Bench has not considered the various aspects of the case more particularly, the binding effect of *India Cement*. This is not correct. The decision of *India Cement* was referred to by the Division Bench. No decision of any court taking a view that the decision of constitution bench in *Kesoram* is not a good law, is shown to us. When the Petitioner insists that we must adjudicate its challenge, we have to keep in mind that we are considering a challenge to the Constitutional

validity of an enactment, and to the principle of presumption of validity. *Kesoram* is the last Constitution Bench on the subject which directly governs the issue at hand after considering all the other decisions.

34. The relevant principles that are to be derived from the majority of the decision of *Kesoram* are as follows. There is a clear distinction between the general subjects of legislation and heads of taxation in the scheme of the Lists in the Seventh Schedule. Power of 'regulation and control' is separate and distinct from the power of taxation. Taxation may be capable of being comprised in the main subject of the general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There could be overlapping in fact, but there would be not be overlapping in law. Merely because the mechanism for assessment and quantification is similar, the two taxes cannot be said to be overlapping because there is a distinction between the subject of a tax and measure of a tax. The mechanism for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for determining the general character of the tax. Entries 52, 53 and 54 in List I are not

heads of taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures despite Union having enacted laws by reference to Entries 52, 53, 54 in List I. It is for the Union to legislate and impose limitations on the otherwise plenary power of the State to levy taxes on mineral rights. The Entries in the Lists must be so construed as to avoid any conflict. In case any conflict is apparent, an attempt must be made to reconcile the conflict, also an inquiry must be carried out as to which Entry the impugned legislation falls, by finding out the pith and substance of the legislation. An incidental trenching upon another field of legislation is to be ignored. The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of State Legislature cannot be annulled as unconstitutional merely because it may affect the price of the commodity.

35. *Kesoram* further goes on to hold as follows. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said

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

incidental. Power to tax mineral rights is with the States and the power to lay down limitations on the exercise of such power, in the interest of regulation, development or control, as the case may be, is with the Union. This is the result achieved by homogeneous reading of Entry 50 in List II and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development.

36. Keeping in mind the position of law as above, we turn to the analysis of the relevant Entries and the enactments.

37. The State has relied upon the Entries 6, 13, 23, 50, 56 and 66 of the List II of the Seventh Schedule of the Constitution. These Entries, for the sake of convenience, are reproduced hereinbelow.

6. Public health and sanitation; hospitals and dispensaries.

13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

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

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

56 Taxes on goods and passengers carried by road or on inland waterways.

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

Entry 6 relates to Public health and sanitation; hospitals and dispensaries, Entry 13 relates to communications, that is, roads, bridges, ferries, and other means of communication not specified in List I, municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles. Entry 23 is regulation of mines and mineral development, subject to the provisions of List I concerning regulation and development under the control of the Union. Entry 50 is taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development. Entry 56 is taxes on goods and passengers carried by road or on inland waterways. Entry 66 deals with fees in respect of any of the matters in this List, but not including fees

taken in any court.

38. The Directive Principles of State policy in Part IV of the Constitution of India provide guidance while framing the legislations. Article 38 expects the State to promote the welfare of the people by securing and protecting as adequately as it may a social order in which social, economic, political and justice can be achieved. Under Article 47, the State is expected to have regard to the standard of living of its people and the improvement of public health as among its primary duties. Article 48A expects the State to endeavor to improve the environment.

39. In view of the challenge to the validity, it will be useful to reproduce the text of the Goa Cess Act for ready reference. The Act reads thus :

*“The Goa Rural Improvement and Welfare Cess Act,
2000 (Goa Act 29 of 2000) [28-9-2000]*

AN

ACT

to provide additional resources for improvement of infrastructure and health with a view to promote the welfare of people residing in the rural areas affected by the use of plastics, dumping of garbage and spillage of materials.

Whereas it is expedient to provide additional resources for improvement of infrastructure and health with a view to promote the welfare of people residing in

the rural areas affected by the use of plastics, dumping of garbage and spillage of materials.

Be it enacted by the Legislative Assembly of Goa in the Fifty-first Year of the Republic of India as follows:—

1. Short title, extent and commencement.— (1) This Act may be called the Goa Rural Improvement and Welfare Cess Act, 2000.

(2) It shall extend to the whole of the State of Goa.

(3) It shall come into force on such date as the Government may, by notification in the Official Gazette, appoint.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) “carrier” means any mode or conveyance of facility by which material is transported from one place to another by mechanical device;

(b) “Government” means the Government of Goa;

(c) “inspecting authority” means an officer appointed by the Government under section 6 of this Act;

(d) “material” means the material specified in Schedule I;

(e) “owner” means any person who is the immediate proprietor of items enlisted in Schedule I;

(f) “Plastic” means compounds of hydrocarbons that are non-biodegradable and includes Polypropylene, Polyvinylchloride, Polyethylene, Nylon and other plastic goods, such as, P.V.C., Polystyrene which are not capable of being destroyed by action of living beings;

(g) “prescribed” means prescribed by rules made under this Act;

(h) “Schedule I” means Schedule I appended to this Act;

(i) “Welfare Administrator” means an officer appointed by the Government under section 6 of this Act.

3. *Levy and collection of cess.*— (1) With effect from such date as the Government may, by notification in the Official Gazette, appoint, there shall be levied and collected from the owner a cess on all carrier transporting material and at such rates as specified in

(2) The Government may, from time to time, by notification in the Official Gazette, revise the items and the rates of cess by amending Schedule I.

4. *Application of proceeds of cess.*— An amount equivalent to the proceeds of cess levied under this Act, reduced by the cost of collection as determined by the Government in the prescribed manner together with any income from investment of the said amount and any other moneys received by the Government for the purposes of this Act shall, after due appropriation made by the State Legislature by law, be utilized by the Government to meet the expenditure incurred in connection with measures which, in the opinion of the Government, are necessary or expedient to promote the welfare of the people residing in the rural areas affected by the movement of carriers transporting material on public roads or dumping of garbage or use of plastics and in particular:—

(a) to defray the cost of measures taken for the benefit of the villagers affected by the transportation of material on public roads, as well as, dumping of

garbage, material and plastics;

(b) for improvement of public health, the prevention of disease and the provision for improvement of medical facilities;

(c) for provision and improvement of water supply;

(d) for improvement of public roads and the erection of tree barriers for arresting the dust levels;

(e) to meet the allowances, if any, of the members of the Advisory Committee constituted under section 5 of this Act and the salaries and allowances, if any, of the officers appointed under section 6.

5. Advisory Committee.— (1) The Government may constitute an Advisory Committee as it thinks fit to advise the Government on such matters arising out of the administration of this Act as may be referred to it by the Government including matters relating to the amount of cess referred to in section 3.

(2) The Advisory Committee shall consist of such number of persons and chosen in such manner as may be prescribed:

Provided that the Advisory Committee shall include an equal number of members representing the Government, the owner of carrier and representatives of Zilla Panchayat.

(3) The Government shall appoint the Chairman of the Advisory Committee.

(4) The term of office of the members of the Advisory Committee, the allowances, if any payable to them, and the manner in which the Advisory Committee shall conduct its business shall be such as may be prescribed.

(5) The Government shall publish in the Official

Gazette the names of all members of the Advisory Committee.

6. Appointment of Inspecting Authority, Welfare Administrator and their powers.— (1) The Government may appoint Inspecting Authority, Welfare Administrator and such other officers and staff as it thinks necessary for the purposes of this Act.

(2) Every person so appointed shall be deemed to be a public servant, within the meaning of section 21 of the Indian Penal Code, 1860 (Act 45 of 1860).

(3) Any Inspecting Authority or Welfare Administrator may—

(a) with such assistance, if any, as it thinks fit enter at any reasonable time, any place which he considers it necessary for carrying out the purposes of this Act; and

(b) do within such place anything necessary for the proper discharge of his duties.

7. Publication of annual report of activities financed under the Act.— The Government shall, as soon as may be, after the end of each financial year, cause to be published in the Official Gazette a report giving an account of the activities financed under this Act during the previous financial year, together with a statement of accounts.

8. Power to make rules.— (1) The Government may, by notification in the Official Gazette and subject to the condition of previous publication, make rules for carrying into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for:—

(a) the assessment and collection of cess levied under

this Act;

(b) the period within which the cess shall be payable to the Government;

(c) the determination of the cost of collection of the cess;

(d) the manner in which the amount of cess and other moneys, if any, may be applied on the measures specified in section 4;

(e) the composition of the Advisory Committee constituted under section 5, the manner in which the members thereof shall be chosen, the term of office of such members, the allowances, if any, payable to them and the manner in which the Advisory Committee shall conduct its business;

(f) the furnishing by the owner of the carrier of statistical and other information.

9. Penalties.— Whoever fails to pay the cess levied under the provisions of section 3 within the prescribed period shall be punished with imprisonment for a term which may extend to two years or with fine, which may extend to twenty five thousand rupees or with both. Manual of Goa Laws (Vol. IV) —165 — Rural Improvement and Welfare Cess Act

10. Cognizance of offences.— No Court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Government.

11. Offences by Companies.— (1) If the person committing an offence under this Act or any rules made thereunder is a company, every person who, at the time the offence was committed, was in charge of, and was

responsible to the company for the conduct of the business of the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this subsection shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in subsection (1), where an offence under this Act has been committed with the consent or connivance or any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation:— For the purposes of this section,—

(a) “company” means any body corporate and includes a firm or other association of individuals;

(b) “director” in relation to a firm means a partner in the firm.

12. Compounding of offences.— (1) Any offence punishable under this Act or any rule made thereunder may, either before or after the institution of the prosecution, be compounded by the person authorised under section 10 to make a complaint to the court with respect to that offence, on payment to that person, for credit to the Government of such sum as that person may specify not exceeding rupees twenty thousand.

(2) Where an offence is compounded under sub-

section (1), no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded.

13 Recovery of certain sums as arrears of land revenue.— Any sum due to the Government under this Act or the rules made thereunder may, on a certificate of such officer as may be specified by the Government in this behalf by general or special order, be recovered in the same manner as an arrear of land revenue.

14. Rules and notifications to be laid before State Legislature.— Every rule made and every notification issued by the Government under this Act shall be laid, as soon as may be after it is made or issued, as the case may be, before the State Legislature.

15. Power to revise.— The Government may, of its own motion or on application made within the prescribed time by an aggrieved party, revise any order made by the Welfare Administrator or other authority/officer in exercise of the powers conferred on it under this Act.

16. Power to remove difficulties.— If any difficulty arises in giving effect to the provisions of this Act, the Government may, by notification published in the Official Gazette, as occasion requires, do anything, which appears to it to be necessary for removing the difficulty.

SCHEDULE - I

(See section 3)

<i>Material</i>	<i>Rate</i>
<i>1. Iron ore where royalty is paid to Government</i>	<i>Rs. 2/- per metric ton</i>

2. Manganese ore where royalty is paid to Government	Rs. 2/- per metric ton
3. Bauxite ore where royalty is paid to Government	Rs. 2/- per metric ton
4. Iron ore where royalty is not paid to Government	Rs. 5/- per metric ton
5. Manganese ore where royalty is not paid to Government	Rs. 5/- per metric ton
6. Bauxite ore where royalty is not paid to Government	Rs. 5/- per metric ton
7. Coal	Rs. 5/- per metric ton
8. Coke	Rs. 5/- per metric ton
9. Sand	Rs. 2/- per cubic meter
10. Murrum	Rs. 2/- per cubic meter
11. Debris other than local self Government Authority debris	Rs. 2/- per cubic meter
12. Garbage other than local self Government Authority Garbage	Rs. 2/- per cubic meter
13. Packaged water supplied in plastic bottles or sachet made up of plastic, sold for human consumption	Rs. 0.50 per bottle/packet
1[13A. Inflammable and hazardous materials other than those listed hereinunder:—	Rs. 250/- per metric ton
(i) Petrol, diesel and Light Diesel Oil.	
(ii) Aviation Turbine Fuel (ATF).	
(iii) Nafta and Furnace Oil.	
(iv) Kerosene sold through PDS.	

*(v) Liquefied Petroleum Gas (LPG)
for domestic and commercial use.*

*(vi) Waste and Pollutant gases
including Argon gas.*

*(vii) Ammonia, Phosphoric Acid
and Sulphuric Acid and other raw
material used in the manufacture of
Chemical Fertilizers.*

*(viii) MS Scrap, MS Ingots, Sponge
and Pig Iron.*

*(ix) Mineral ore used in the
manufacture of Sponge Iron and Pig
Iron and MS Ingots*

*14. Any other items as notified by
Government from time to time.*

*Rs. 2/- per
ton/cubic meter/per
package, as specified
by the
Government.”*

40. From the text of the Goa Cess Act reproduced above, broadly the scheme of the Act is as follows. The Statement of Objects of the Goa Cess Act shows that it was enacted to provide an additional resource for the improvement of infrastructures and health intending to promote the welfare of people residing in the rural area affected by the use of plastics, dumping of garbage and spillage of materials. Section 2 of the Act contains the definitions. Carrier is a mode or conveyance or facility by which the material is transported from one place to another by a mechanical device. Material is defined as one specified in Schedule I appended to the

Act. Owner is defined as any person who is the immediate proprietor. Plastic is defined which includes the other plastics such as P.V.C., polystyrene. Section 3 enables the State vide notification in the Official Gazette to levy and collect a cess from the owner on all the carriers transporting material as per the rates specified. Section 4 lays down the application of proceed of the cess and states that proceeds of cess levied under the Act reduced by the cost of collection together with the income from the investment shall be utilized to meet the expenses incurred in connection with the measures taken to promote the welfare of the people residing in the rural area affected by the movement of carriers transporting material on public roads or dumping of garbage or use of plastics. The cess is to be used to defray the cost of measures taken for the benefit of the villagers affected by the transportation of material on public roads as well as dumping of garbage, material, and plastics. It is also to be used for the improvement of the public health, the prevention of disease and the provision for improvement of medical facilities. The cess is also to be used for provision and improvement of water supply, improvement of public roads, erection of tree barriers for arresting the dust levels. The cess can also be used to meet the allowances, if any, of the members of the Advisory Committee. Section 5 constitutes an Advisory Committee to advise the State on the matters arising from the administration of the Act.

The appointment of Inspecting Authority, Welfare Administrator and their powers is dealt with under Section 6 of the Act. Section 7 contemplates the publication of an annual report of activities and the powers to frame the rules is referred to under Section 8. Sections 9 to 12 deal with the penalties and offenses. The recovery of sums due to the Government under the Act can be recovered as arrears of land revenue. The Schedule I lists the material, they are iron ore, manganese ore, bauxite ore, coal, coke, sand, murrum, debris other than the local self-Government Authority debris, garbage other than local self-Government Authority garbage, packaged water, and any other items as notified by the Government from time to time. Schedule I lays down the rates of cess which is per metric ton for ore, coal, coke, debris, sand, murrum. For plastic bottles and plastic packets, it is as per bottle and packet.

41. The background of the Goa Cess Act, and the factual position as it exists in the State of Goa is placed on record by the State in the reply affidavits. The Supreme Court, in the case of *Municipal Committee, Patiala vs. Model Town Residents Assn. and ors.*⁴⁹, has held that in order to sustain the presumption of constitutionality, the Court can take matters of common knowledge into consideration. We will now refer to both. There are certain

⁴⁹ (2007) 8 SCC 669

features unique to Goa. Goa is the smallest State in the Country in terms of land mass. It has two Districts. Mining is one of the major industries in the State of Goa. The ore extracted is exported. In addition to the ore extracted from Goa, the ore from outside Goa is also exported via Goa. The State charges royalty on the ore which is extracted in Goa. The royalty on this is fixed by the Central Government. The Government of Goa does not charge royalty on the ore coming from outside Goa. The process of transportation has created severe dust pollution in various parts of the State. There is a heavy load on the infrastructure such as road, water supply, and environment. Heavy traffic has led to dust pollution and traffic congestion. The transportation of the material in the Schedule of the impugned Act results in pollution to the natural water resource, dumping of garbage, spillage of materials, use of plastic. The transportation of materials under the Schedule affects the health of people. Massive dumps of garbage and pollution to rivers, water bodies, and wells, air pollution, spillage, dust, and plastic are some of the common problems. Law and order situations have arisen.

42. The Statement and object of the Goa Cess Act and the material placed on record show that the State was concerned with the ill-effects of transportation in the State. Because of the peculiar situation in the State of Goa, the State was of the opinion that there

was significant impact of transportation on the people. It is placed on record that the State Government is in the process of constructing special by-pass roads for diverting the traffic and also increasing the width of the existing roads also to accommodate the mining traffic, and the estimated costs of the construction of the bye-pass and acquisition of land are very high. The scheme of Goa Cess Act indicates that the focus was primarily on the transportation and its ill-effects and need to augment raise additional resources for the improvement of infrastructures and health affected by the transportation. It is true that the majority of the items listed in the Schedule I are minerals. However, Schedule I does not contain only minerals but it also contains debris, garbage, and plastic waste. The Petitioner contends that the impugned Act is mineral centric and not transportation-centric and it targets the mineral and not the transportation. This contention is not correct. Schedule I lists various items, some of them are minerals. The Petitioner entirely ignores that plastic, garbage, debris are also included in the Schedule. Merely because most of the goods transported are minerals, does not mean that the minerals are targets of the levy. The argument advanced by the Petitioner is that the inclusion of debris, garbage, packaged water is ornamental. There is no substance in this contention. If the State wanted to deal with the problems and transportation and its ill-effect and augment its revenue, it would

have to deal with the transportation which occurs in its common form. It may be that the majority of the transportation that takes place in the State of Goa is of Minerals but that is only a consequence and cannot be considered as a target. The Petitioner is not dealing with debris, garbage or plastic bottles. The cess is equally applicable on transportation of debris, garbage, plastic, and this cannot be kept aside merely on the argument of the Petitioners that it is an ornamental. Levy is decided in terms of weight of the items which will put stress on the infrastructure while being transported.

43. The Goa Cess Act makes it amply clear that the State wanted to augment revenue for infrastructures and health facilities to the people who had suffered the ill consequence of transportation. Therefore, in substance, the Goa Cess Act is not targeted at the mineral regulation, and it is directed at transportation of certain material within the State and to provide infrastructures and health facilities. It is a settled law, as has been pointed out in the decision of *Kesoram* that measure of a levy is not suggestive. Therefore, merely because some of the material transported happens to be minerals does not mean that the State Legislation intends to regulate the mines and mineral development. If the transportation of ore is more in the State of Goa than the other goods, that will not *ipso facto* change the nature of the levy to

be a tax on the mineral. The argument that the levy would increase the cost of mineral has been negated in *Kesoram*. Also, the argument that cess is levied the moment mineral is extracted is academic, as it is a matter of common knowledge that the mineral extracted is to be sent for consumption elsewhere. The argument that Entry 56 is not relating to tax on goods carried on roads, or on inland waters, is equally of no substance.

44. The Goa Rural Improvement and Welfare Cess Rules, 2001 were notified for objections on 5 March 2001. Thereafter, under the exercise of the powers under Sections 4, 5 and 8 of the Act of 2000, the Goa Rural Improvement and Welfare Rules, 2001 were enacted. Rules carry definitions identical to the Act. Rule 3 provides for assessment and conclusion of cess. The cess payable under the Act is to be assessed and collected at the entry point in the State or any other entry points as may be specified by the State in respect of scheduled items. The methodology for recovery and payment of cess is laid down in Rules 3, 4, and 5. Rest of the Rules deal with the composition and functioning of the Advisory Committee. The Schedule to the Rules contains receipts and forms specified. By the notification dated 13 May 2008, the charges levied on the scheduled items were revised.

45. Now turning to the Union legislation. The MMDR Act contains seven Chapters. The Act is to provide for the development and regulation of the mines and minerals under the control of the Union. First Chapter deals with the short title, declaration, and definition. Section 2 contains a declaration as to the expediency of Union control. Section 2 declares that it is expedient in the public interest that the Union should take its control of regulation of mines and the development of minerals. Section 2 specifies that the declaration is to the extent hereinafter provided in the Act. Section 3 *inter alia* provides for the definitions. Leased area is defined as an area within which mining operations can be undertaken. Minerals have been defined as all minerals except mineral oils which means natural gas and petroleum. Mining lease has been defined and so also the mining operations. Chapter II places general restrictions on undertaking prospecting and mining operations. Section 5 provides for restrictions on the grant of prospecting licenses or mining leases. Section 6 provides for the maximum area for which a prospecting license or mining lease may be granted. The periods of prospecting licenses and leases are provided under Sections 7 and 8. Section 9 provides for royalties in respect of mining lease to be paid by the holder of a mining lease. Section 9A relates to dead rent to be paid by the lessee. The District Mineral Foundation and National Mineral Exploration Trust are established under Section 9B and 9C

of the Act. Section 13(1) deals with the power of Central Government to make Rules in respect of minerals regulating the grant of reconnaissance permits, prospecting licenses and mining leases in respect of minerals and for connected purposes. Section 13(2)(i) provides for fixing and collection of fees for reconnaissance permits, prospecting licenses or mining leases, surface rent, security deposit, fines, other fees. It also provides for the time within which and the manner in which the dead rent or royalty will be payable. Section 13(qq) also deals with the manner in which rehabilitation of flora and other vegetation such as trees, shrubs and the like destroyed because of any prospecting or mining operations. The rehabilitation to be done in the same area or in any other area selected by the Central Government, whether by way of reimbursement of the cost of rehabilitation.

46. It will be convenient, for ready reference, to reproduce the Section 13 of the MMDR Act which is as under :

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

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

any of the following matters, namely:—

(a) the person by whom, and the manner in which, applications for [reconnaissance permits, prospecting licences or mining leases] in respect of land in which the minerals vest in the Government may be made and the fees to be paid therefor;

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

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

[(d) the terms and conditions of auction by competitive bidding, the details of mines and their location, the minimum size of such mines and such other conditions which may be necessary for the purpose of coal mining operations including mining for sale by a company under sub-section (1) and sub-section (2) of section 11A;]

(e) the authority by which [reconnaissance permits, prospecting licences or mining leases] in respect of land in which the minerals vest in the Government may be granted;

(f) the procedure for obtaining [a reconnaissance permit, a prospecting licence or a mining lease] in respect of any land in which the minerals vest in a person other than the Government and the terms on which, and the conditions subject to which, such [a permit, licence or lease] may be granted or renewed;

(g) the terms on which, and the conditions subject to which, may other [reconnaissance permit, prospecting licence or mining lease] may be granted or renewed;

(h) the facilities to be afforded by holders of mining leases to persons deputed by the Government for the purpose of undertaking research or training in matters

relating to mining operations;

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

(j) the manner in which rights of third parties may be protected (whether by payment of compensation or otherwise) in cases where any such party may be prejudicially affected by reason of any [reconnaissance, prospecting or mining operations];

[(jj) parameters of existence of mineral contents under clause (a) of sub-section (2) of section 5;]

(k) the grouping of associated minerals for the purposes of section 6;

5. the manner in which, and the conditions subject to which, [a reconnaissance, permit, a prospecting licence or a mining lease] may be transferred;

(m) the construction, maintenance and use of roads, power transmission lines, tramways, railways, aerial ropeways, pipelines and the making of passages for water for mining purposes on any land comprised in a mining lease;

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

(p) the reports and statements to be submitted by holders of [reconnaissance permits or prospecting licences] or owners of mines and the authority to which such reports and statements shall be submitted;

(q) the period within which applications for revision of any order passed by a State Government or other authority in exercise of any power conferred by or under this Act, may be made [the fees to be paid therefor and the documents which shall accompany such applications]

and the manner in which such applications shall be disposed of;

[(qq) the manner in which rehabilitation of flora and other vegetation, such as trees, shrubs and the like destroyed by reason of any prospecting or mining operations shall be made in the same area or in any other area selected by the Central Government (whether by way of reimbursement of the cost of rehabilitation or otherwise) by the person holding the prospecting licence or mining lease;]

[(qqa) the amount of payment to be made to the District Mineral Foundation under sub-sections (5) and (6) of section 9B;

(qqb) the manner of usage of funds accrued to the National Mineral Exploration Trust under sub-section (2) of section 9C;

(qqc) the composition and functions of the National Mineral Exploration Trust under sub-section (3) of section 9C;

(qqd) the manner of payment of amount to the National Mineral Exploration Trust under sub-section (4) of section 9C;

(qqe) the terms and conditions subject to which mining leases shall be granted under sub-section (3) of section 10B;

(qqf) the terms and conditions, and procedure, subject to which the auction shall be conducted including the bidding parameters for the selection under sub-section (5) of section 10B;

(qqg) the time limits for various stages in processing applications for grant of mining lease or prospecting licence-cum-mining lease under sections 10B, 11, 11A, 11B, and section 17A, and their renewals;

(qqh) the terms and conditions for grant of non-exclusive

reconnaissance permits under sub-section (1) of section 10C;

(qqi) the terms and conditions for grant of prospecting licence-cum-mining leases under sub-section (6) of section 11;

(qqj) the terms and conditions, and procedure, including the bidding parameters for the selection under sub-section (6) of section 11;

1[(qqja) the terms and conditions and amount or transfer charges under the proviso to sub-section (6) of section 12A;]

(qqk) the amount to be payable by a Government company or corporation, or a joint venture for grant of mining lease under sub-section (2C) of section 17A; and]

(r) any other matter which is to be, or may be, prescribed under this Act.

Section 13(2)(i) relates to fixing and collection of fees, surface rent, security deposit, fines. Section 13(2)(qq) relates only to the response of the holders of the prospecting licences or mining lease in respect of rehabilitation of flora by way of reimbursement of the cost of rehabilitation or otherwise.

47. Section 15 of the MMDR Act is regarding the powers of the State Government to make Rules for regulating the grant of quarry leases, mining leases, and other mineral concessions. Section 15(1A) empowers the State to make Rules. Section 15(1A) reads thus :

“15(1A) In particular and without prejudice to the

generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the person by whom and the manner in which, applications for quarry leases, mining leases or other mineral concessions may be made and the fees to be paid therefor;

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

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

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

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

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

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

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

(i) the manner in which rehabilitation of flora and other vegetation such as trees, shrubs and the like

destroyed by reason of any quarrying or mining operations shall be made in the same area or in any other area selected by the State Government (whether by way of reimbursement of the cost of rehabilitation or otherwise) by the person holding the quarrying or mining lease;

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

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

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

(m) the reports and statements to be submitted by holders of quarry or mining leases or other mineral concessions and the authority to which such reports and statements shall be submitted;

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

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

Therefore, the State is entitled to make the Rules in respect of quarries, time frame for applications and terms and conditions for renewal of grant. The facilities to be provided to the research staff, fixing and collection of rent, royalty etc. The rights of the third

parties affected by quarrying or mining operations, rehabilitation of flora and other vegetation to be made in the same area, construction of roads, transmission lines, tramways, railways for the mining purposes etc.

48. The Goa (Prevention of Illegal Mining, Storage and Transportation of Minerals) Rules, 2013 are framed by exercising the powers conferred under Section 23C of the MMDR Act. Section 23C empowers the State Government to make rules in respect of illegal mining, transportation, and storage of minerals. From the heading of this section itself it is clear that the powers were conferred to prevent illegal transportation and storage of minerals. It is in furtherance of this object the Rules of 2013 are framed. These Rules define a Carrier means any mode of conveyance or facility by which the mineral is transported from one place to another including the barges. Mineral is as any mineral other than the minor mineral. Various other definitions have been laid down in Chapter I of the Rules of 2013. The Chapter II of the Rules of 2013 deals with the "Prevention of Illegal Mining". Rule 3 places restriction on carrying out the business of buying, storing, selling, supplying, transporting, distributing or delivering of minerals except under and in accordance with law and registration. Rule 4 deals with the commencement of the mining operation. Rule 6 deals with

registration of the transport contractors. Rule 7 deals with the bar on contracts for sharing of mineral or long-term sale agreements. Chapter III deals with sale, export, import and transit of ore. Rule 11 lays down specification in respect of sale/export of mineral. Rule 12 deals with import of mineral. Rule 13 deals with transit of mineral and states that transport of mineral or waste outside the leasehold area for any purpose other than for sale or export shall be regulated by issuance of transit permits. The transit of waste only be allowed in case of dump yard/stockyard is shown in the mining plan of the respective leaseholds after the payment of processing fee. Chapter IV deals with storage of mineral. Chapter V deals with the transportation and winning of mineral. Rule 17 deals with regulation of transport and extraction and mandates for carriers used for transportation of the minerals shall be registered. Registration fee is contemplated under Rule 20. The procedure for registration of carriers is specified under Rule 47. All carriers are mandated to install tracking devices. Chapter VI deals with establishment of check post, barrier and weighbridge and inspection of mineral in transit. The Scheme of Rules of 2013 indicates the purpose for which they were enacted. These Rules framed under Section 23C of the Act of 1957 address the concern of illegal sale and transportation of mineral to third party for carrying out mining and transportation activities. These Rules thus are framed to keep a check on the illegal

mining activities and illegal transportation. These Rules have nothing to do with the effect of transportation in the State on the general public. Rules of 2013 thus are for regulating the illegal activities of the leaseholders and transporters.

49. Petitioner referred to Section 9B(2) of the MMDR Act and the Goa District Mineral Foundation Rules 2016 framed by the State Government and the establishment of the District Mineral Foundation, to contend that the field occupied by Goa Cess Act is already covered. Section 9B(2) relates to areas affected by mining-related operations. The welfare scheme such as Pradhan Mantri Khanij Kshetra Kalyan Yojana and establishment of the District Mineral Foundation are for ones who are directly affected by the mining-related operations. They cover the villages within which the mines are situated and are operational, an area within such radius from a mine or cluster of mines as may be specified by the State Government, Villages in which families are displaced by mines, village that significantly depend on the mining areas for meeting their economic needs and have traditional rights over the project areas, such as grazing, collection of minor forest produce etc. Indirectly affected areas are one where local population is adversely affected on account of economic, social and environmental consequences due to mining-related operations. Section 9B,

therefore, operates in a different sphere and is in respect of the areas in proximity to the mining areas and directly affected by it. Even assuming there is some overlap between the areas referred to under Section 9B of the MMDR Act and the Goa Cess Act and the Rules, it does not mean that the Goa Cess Act and the rules be held unconstitutional. The argument of the Petitioner that even after the Rules are not framed everything in respect of the minerals is covered in view of the declaration under Section 2 of the MMDR Act, is already dealt with and negated in *Kesoram*. *Kesoram* lays down that MMDR Act is not like a magic touch that everything and anything stands obliterated from the legislative competence of the State. As pointed out in pith and substance, the Goa Cess Act is an enactment to provide additional resources for improvement of infrastructure and health with a view to promote the welfare of people residing in the rural areas affected by the use of plastics, dumping of garbage and spillage of materials.

50. In the case of *Madhyabharat Phosphate*, the Division Bench discussed the power of the State to augment the revenue, and the doctrine of pith and substance. It was held at paragraph 38 as under :

"38. We find no repugnancy in the provisions of the Finance Act, 2008 and the rules framed thereunder with the aforesaid legislation, as the Apex Court has laid

down that despite the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and if a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law. Where there are three Lists containing a large number of entries, there is bound to be some overlapping among them but the Entries In List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non-obstante clause "subject to" as enumerated in Article 245(1) of the Constitution does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step, (i) Whether it is still possible to effect a reconciliation between two Entries so as to avoid conflict and overlapping? (ii) In which Entry, the impugned legislation falls? The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the Legislature to the legislation is immaterial. Regard must be had to the enactment as a whole to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded. That interpretation would be preferred which would avoid conflict between two legislations. The Court shall have regard to the object and the scheme of the tax law under consideration and the purpose for which the cess is levied, collected and intended to be used. The Courts shall make endeavour

to search where the impact of the cess falls. The subject matter of levy is not to be confused with the method and manner of assessment or realisation and (iii) Having determined the field of legislation wherein the impugned legislation falls by applying doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored? Once it is so determined that the impugned legislation substantially falls within the power expressly conferred upon the Legislature which enacted it, an incidental encroaching in the field assigned to another Legislature is to be ignored. While laying down so, the Apex Court has relied upon the decisions in Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45, M.P.V. Sundararamier & Co. v. State of A.P., AIR 1958 SC 468, Governor General in Council v. Province of Madras, AIR 1945 PC 98, and Province of Madras v. Bodder Paidanna & Sons, AIR 1942 FC 33."

51. Thus the analysis of both, the Union and State enactments show that they operate in different fields and overlap if any is merely incidental. The MMDR Act is for development and regulation of mines and minerals to the extent provided. The Goa Cess Act on the other hand is enacted to provide additional resources for promoting the welfare of the people residing in rural areas which are facing problems by use of plastics, dumping of garbage and spillage of materials. The cess under the Goa Cess Act and the Rules would be spent to meet the expenditure incurred in connection with the measures to promote the welfare of the people

residing in the rural areas affected by the movements of carriers. The levy under the State Legislation is thus meant for the welfare of the villagers, and improving their health, as also water supply, and public roads. The State Legislation does not seek to regulate or control mines and mineral development.

52. This issue, dealing with the similar enactment, is dealt with in the following passage in *Kesoram* where it deals with *Hingir Rampur*, as under.

“145. The following observations of the Constitution Bench in Hingir Rampur Coal Co. [AIR 1961 SC 459 : (1961) 2 SCR 537] squarely apply to the SADA Act and the SADA Rules for upholding their constitutional validity: (AIR p. 473, paras 35-36)

“[I]n pith and substance the impugned Act is concerned with the development of the mining areas notified under it. The Central Act, on the other hand, deals more directly with the control of all industries including of course the industry of coal. ... The functions of the Development Councils constituted under this Act prescribed by Section 6(4) bring out the real purpose and object of the Act. It is to increase the efficiency or productivity in the scheduled industry or group of scheduled industries, to improve or develop the service that such industry or group of industries renders or could render to the community, or to enable such industry or group of industries to render such service more economically. ... the object of the (Central) Act is to regulate the scheduled industries with a view to

improvement and development of the service that they may render to the society, and thus assist the solution of the larger problem of national economy. It is difficult to hold that the field covered by the declaration made by Section 2 of this Act, considered in the light of its several provisions, is the same as the field covered by the impugned Act. That being so, it cannot be said that as a result of Entry 52 read with Act 65 of 1951 the vires of the impugned Act can be successfully challenged.

Our conclusion, therefore, is that the impugned Act is relatable to Entries 23 and 66 in List II of the Seventh Schedule, and its validity is not impaired or affected by Entries 52 and 54 in List I read with Act 65 of 1951 and Act 53 of 1948 respectively.”

Thus, considering substance and object of the Goa Cess Act and Rules vis-a-vis the MMDR Act and the Rules framed there under, we find that there is no irrevocable conflict between the concerned Union Legislation and the State Legislations. The Goa Cess Act and Rules are targeted for augmentation of revenue to provide infrastructures in the State without impinging on the mineral regulation. The Act is traceable to the entries relied upon by the State.

53. The next contention of the Petitioner is that the State cannot levy any fee under Entries 6, 13 and 50 as it is required to provide some special service to the Petitioner, and no such service, much less special service, is provided to the Petitioner. It is,

therefore, contended that the entire endeavour is to raise revenue for building infrastructure. It is contended that the imposts can be by way of tax or fee, but not both. On the contention based on Entry 66, List II of the Petitioner pertaining power to charge fee, the Petitioners have relied on the decision in *Tulloch* to contend that upon enactment of the MMDR Act, no matter would be left in the State List for the State Legislature to levy fees.

54. The decision in *Tulloch* has been directly considered in *Kesoram*, and it has been held that the State is not denuded of its power. *Kesoram* has observed thus :

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

The Petitioner's contention that there must be a direct nexus between the fee levied and the benefits rendered, is not correct. Such exact proportion and direct links are not necessary. Services rendered is not a condition precedent, nor it is confined to the contributors alone. A broad co-relationship is all that is necessary. It is also not necessary that services nor the incidence of the fee has to be uniform. The element of *quid pro quo* is not always possible, nor necessary, to be established by direct evidence. Thus, the traditional view of strict *quid pro quo* has undergone a substantial change. The State does not have to show with a mathematical exactitude that the fee charged corresponds to the service provided, but some link is required to be established between the fees collected and the benefit conferred. It is good enough to establish that a link exists but it need not be direct.

55. To understand the nature of levy and the benefit seeks to provide, it is not impermissible to consider the matters of common knowledge as held by the Supreme Court in the case of *Municipal Committee, Patiala*. The topography and population statistics in Goa are of common knowledge. As compared to other States in the Country, Goa is a small State of only two Districts. The small land mass of Goa makes the effect of transportation activity more acute, and the benefit of improved roads conditions cascade to the travelers and consequent to the mining leaseholders.

It cannot be denied that the workforce employed by the entities such as the Petitioner may also be from the local area, and the health and welfare of its workforce will benefit even those who employ them. Those who use the improved road will be benefited from the reduced air pollution and ease and economics of better roads.

56. The State has placed on record the data of the expenditure from the Cess on the infrastructure in furtherance of the object of the Act. The State has also produced the data showing item-wise expenditure on a yearly basis in areas affected by use of plastic, dumping of garbage and spillage of materials. The data of expenditure on supply of medicines, equipment of health centers within the affected areas is also placed on record.

57. The State has demonstrated the co-relationship through its affidavits. The co-relationship is also discernible from the provisions of the Goa Cess Act itself. The necessary parameters are present. Even assuming that the services rendered benefits others and the State as a whole or indirectly benefits, would not make the levy unconstitutional. In the Schedule annexed to the Goa Cess Act, there is a varying degree of the imposition of cess. The varying degree also has a nexus to the different impositions. It is not that the levy is extracted compulsorily from all in the State to pay for the services rendered.

58. Sufficient evidence placed on record of spending the money, both on road infrastructure and welfare activities. It cannot be said that the Petitioners do not benefit at all from the services rendered and that there is not even a remote connection. The Goa Cess Act and the Rules are a device for the State to augment its resources. The services rendered by the collection of the levy benefits the Petitioner as well, and there exists a co-relationship. Therefore, the Goa Cess Act and the Rules, whether it imposes a tax or fee, cannot be said to be unconstitutional. *Kesoram* holds that it is immaterial if the nature of the impost is fee or tax, if both could be justified and it is not necessary that one of the pleas must be given up. It is not necessary to direct the State to choose whether the levy is a fee or tax. This distinguishing is only academic as far as legislative competence of the Goa Cess Act is concerned. It needs to be noted that by Notification dated 6 April 2016 the levy where royalty is paid to the Government has been reduced to 'nil'.

59. Thus, we conclude that the challenge of the Petitioner on the constitutional validity of the Goa cess Act and the Rules on the ground of legislative competence must fail.

60. Now we turn to the second part of the challenge that is the Retrospective levy of the Cess.

61. The Goa Cess Act was notified on 16 October 2000 in the official gazette. The Rules under the Goa Cess Act were notified on 12 January 2006. On 23 January 2006, a notification was publishing stating the appointed date as 1 February 2006. A further notification was issued on 8 October 2010, bringing into effect Section 3(1) of the Goa Cess Act.

62. Based on this position, it is contended by the Petitioner that though a statute can be retrospective in its operation, delegated legislation such as the notification, cannot be retrospectively made applicable. No provision of the Goa Cess Act permits the notification to be made retrospective. It is contended that no cess would have been levied from 23 January 2006 to 7 October 2010, as there was no notification authorizing the levy and collect the cess in terms of Section 3(1) of the Goa Cess Act. Section 3(1) of the Goa Cess Act has been brought into force on 7 October 2010. The Petitioner has relied upon a decision in the case of *Commissioner of Income Tax vs. Vatika Township Pvt. Ltd.*⁵⁰ and *Jayam and Co. vs. Asst. Commissioner & anr.*⁵¹. It is sought to be contended that under Section 3 of the impugned Act, the Government cannot fix a back date as an appointed date and can only fix a prospective date

⁵⁰ (2015) 1 SCC 1

⁵¹ (2016) 15 SCC 125

since the notification under Section 3(1) is a delegated legislation. It is contended that unless a contrary intention appears, a Legislation is presumed not to be intended to have a retrospective operation. It is contended that the law confers a benefit that the citizen should be treated as retrospective but when it imposes a liability, the law expresses that it is presumed to be prospective. It is contended that since there is no notification during the above period, no tax could be levied and retrospective effect could not have been given. The State has justified the levy and has contended that there is no retrospective effect given to the Goa Cess Act.

63. The power of the State Legislature is traceable to Articles 245, 446 and 248 of the Constitution of India. There is no embargo in these Articles *per se* to bring in legislation with retrospective effect. In *National Agricultural Coop. Marketing Federation of India Ltd. v. Union of India*⁵² the Supreme Court has held that there is no fixed formula for the expression of legislative intent to give retrospectively to an enactment. It observed that sometimes this is done by providing for jurisdiction where jurisdiction had not been appropriately invested before. Sometimes this is done by re-enacting a valid and legal taxing provision retrospectively and then by fiction making the tax already collected

⁵²(2003) 5 SCC 23

to stand under the re-enacted law.

64. Section 3 of the Goa Cess Act provides that with effect from such date as the Government may by notification in official Gazette appoint there shall be levied and collected from the owner, cess on all carriers transporting minerals and, on such rates, as specified in Schedule I. On plain reading there is thus no embargo under Section 3 to levy cess from an anterior date. Section 3(1) provides that with effect from such date as the Government may by notification in the official gazette appoint, there shall be levied and collected from owners, a cess. The State has argued that when the notification dated 23 January 2006 was published, it was clear that 1 February 2006 would be the appointed date on which the Act would come into force, as well as the same would be the date on which the levy would be made applicable and collected, and it was only a typographical error that Section 3(1) was not mentioned. A corrigendum to that effect was issued. Perusal of the said notification shows that it a corrigendum to the original Notification dated 23 January 2006, by which it was clarified that under Section 1(3) and 3(1), the Goa Cess Act notified the appointed date as 1 February 2006 for the purpose of Section 1(3) and for the purpose of Section 3(1). Therefore, it cannot be held that the power to levy cess was available only after 8 October 2010.

65. In *Vatika Township*, the Supreme Court has observed that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. However, in the facts of the present case, the Goa Cess Act was notified on 16 October 2000, and by virtue of Section 1(3) and Section 3(1), the Government had the power to notify and appoint any date for bringing the Act in force. From 16 October 2000 onwards itself, the State had such power to bring the Act in force and levy cess. There is therefore no retrospective effect given to the Act. The Act has already been published in the year 2000 which confers power on the Government to levy cess from any date thereafter. Had it been levied with effect from before 16 October 2000, it could be said that there is a retrospective effect. Once this power exists in the State, the argument that Notification dated 8 October 2010 being subordinate legislation, being retrospective, will not survive. In the case of *Jayam and Co.*, an amendment to a section was given a retrospective effect, which is entirely different.

66. The argument of the Petitioner that even penalty is liable to be imposed retrospectively which may extend up to two years or fine or both, has no substance. The aspect of imposition of penalty is entirely different. It is not necessary that a fine or

imprisonment is automatically imposed or directed, after the relevant notification has been issued. Demand would be raised and upon failure specified demand that the further proceedings will ensue.

67. In conclusion, the impugned enactments cannot be struck down on the basis of the challenge levied by the Petitioner. The impugned Notification is valid and lawfully issued and the demands made under the impugned Act, Rule and Notification are valid and legal. This being the position, there is no question of refund of the cess collected. The Petitioner is not entitled to any relief in this Petition.

68. The Writ Petition is dismissed. Rule is discharged. No Costs.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.

69. The learned Counsel for the Petitioner, at this stage, seeks continuation of the statement made on behalf of the State that the State would not initiate criminal proceedings in terms of the provisions of the Act for non-payment of the amount due in terms of the demand for the period upto 6 October 2010. The statement

made on behalf of the State and accepted by this Court, is extended for a period of two months from today.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.