

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 4086 OF 2011

BILT Graphic Paper Products Limited,
 A Company incorporated under the
 Companies Act, 1956, having its
 Registered Office at P. O. Ballarpur Paper Mills,
 District Chandrapur (Maharashtra) 442 901,
 through its Manager (Legal).

..... **PETITIONER**

...V E R S U S...

1. The State of Maharashtra through Secretary,
 Department of Revenue, Mantralaya,
 Madam Cama Road, Mumbai-400 032.
2. The Collector, Chandrapur, having his
 Office at Collectorate, Chandrapur.
3. Sub Divisional Officer, Chandrapur.
4. Tahsildar, Ballarpur, District Chandrapur.

..... **RESPONDENTS**

 Shri Sunil Manohar, Senior Advocate with Shri Akshay Naik, Advocate for
 petitioner.

Ms N. P. Mehta, Assistant Government Pleader for respondents.

CORAM :- A.S.CHANDURKAR AND URMILA JOSHI-PHALKE, JJ.

ARGUMENTS WERE HEARD ON :10.06.2022

JUDGMENT IS PRONOUNCED ON :29.08.2022

JUDGMENT (Per A.S.Chandurkar, J.)

The challenge raised in this writ petition filed under Article 226 of
 the Constitution of India is to the Government Resolution dated 27.02.2009
 prescribing payment of fees while granting permission to mortgage Occupancy-

Class II lands as being unconstitutional, without authority of law and violative of Article 14 of the Constitution of India. Condition No.5 of the order dated 09.05.2011 passed by the Sub-Divisional Officer, Chandrapur thereby directing compliance of the terms and conditions stipulated in Government Resolution dated 27.02.2009 while granting permission to the petitioner to mortgage the lands acquired for it is also under challenge.

2. The facts relevant for considering the aforesaid challenges are that the petitioner is a Company incorporated under the provisions of the Companies Act, 1956. It is in the business of manufacturing paper. The manufacturing unit of the Company was to be located at Ballarpur, District Chandrapur and for that purpose an agreement dated 31.07.1947 was entered into between the then Governor of Central Provinces and Berar and the Company agreeing to invest money in the purchase of shares of the Company as well as to acquire land for the Company to set up its paper factory. The State of Madhya Pradesh thereafter initiated proceedings for acquisition of land under the provisions of the Land Acquisition Act, 1894 (for short, the Act of 1894). After acquiring such land, the same was transferred to the Company on 21.01.1950 under the provisions of Madhya Pradesh Land Revenue Code, 1954 (for short, the Code of 1954). After the States Re-organisation Act, 1960 came into force, Chandrapur District which was earlier part of the Central

Provinces and Berar was included in the State of Maharashtra. Pursuant to the initial grant of aforesaid land, the Collector, Chandrapur on 18.01.1968 executed a Deed of recognition of title - *Sanad* in favour of the Company under the provisions of the Maharashtra Land Revenue Code, 1966 (for short, the Code of 1966). In the said *Sanad* it was stated that the Government of Madhya Pradesh at the request of the Company had acquired various lands at Ballarpur and the Company had paid the costs of acquisition to the then Government of Madhya Pradesh. In the *Sanad* certain terms and conditions were incorporated. As per Condition No.7 it was not permissible for the Company to alienate the said lands or any portion thereof by way of sale, mortgage, gift, lease, exchange or otherwise except with the previous permission in writing of the Government. It is stated that the Company continues to enjoy the said land for the purpose for which it was acquired and transferred to it. On 18.05.1972 another agreement was executed with the Company by which land admeasuring 162.30 acres from Survey No.31/1 was allotted to it for the construction of its residential colony.

3 The Company intended to mortgage the aforesaid land with a view to raise finance to facilitate its activities. Accordingly, on 05.01.2009 the Sub-Divisional Officer granted permission to the Company under Section 36 (4) of the Code of 1966 to mortgage part of its land on certain terms and conditions.

It was stated that if the Company failed to repay the loan obtained by it and the mortgaged land was required to be sold, 50% of the amount equivalent of the market value would have to be deposited with the State Government and from the balance amount the loan could be recovered. Thereafter on 04.02.2011 the Company made another application to the Sub-Divisional Officer seeking grant of general permission to create mortgage with regard to the lands mentioned in the schedule thereto. The Office of the Sub-Divisional Officer on 28.03.2011 pointed out certain deficiencies to the Company and also required payment of 0.50% mortgage fees as per Government Resolution dated 27.02.2009. The Company removed the deficiencies and paid an amount of Rs.3,26,25,000/- towards 0.50% mortgage fees as per Government Resolution dated 27.02.2009 however by reserving the right of the Company to challenge the aforesaid Government Resolution. Permission was accordingly granted by the Sub-Divisional Officer on 09.05.2011. In the said order, the conditions existing in the Government Resolution dated 27.02.2009 were imposed and being aggrieved by the imposition of the condition to pay 0.50% mortgage fees, the petitioner has challenged the same in this writ petition.

4. Shri Sunil Manohar, learned Senior Advocate for the petitioners raised the following challenges in support of the prayers made in the writ petition:

(a) The land in question had been acquired by the State of Madhya Pradesh to facilitate setting up of the petitioner's paper manufacturing unit. The entire cost of acquisition was paid to the State of Madhya Pradesh pursuant to which the land was allotted to the Company on 21.01.1950. The initial grant of that land was under the Code of 1954. Condition No.7 in the grant dated 18.01.1968 requiring the Company to obtain the previous permission of the Government before alienating the same by way of mortgage would not entitle the Government to seek recovery of mortgage fees from the Company while granting such permission. Inviting attention to Article 265 and Article 366 (28) of the Constitution of India, it was submitted that for levy or collection of any tax there ought to be an authority of law to do so. The expression "taxation" includes the imposition of any tax or impost whether general or local or special and tax was required to be construed accordingly. The expression "fee" was also comprehended in the expression "tax" for the purpose of Article 265 of the Constitution of India and hence even for collection of "fee", authority of law was necessary. Thus, for any impost or tax to be levied, it was necessary for the State to point out the authority in law which empowered it to recover its demand. It was submitted that in the reply filed on behalf of the State Government a specific stand was taken that the Government Resolution dated 27.02.2009 was based on the provisions of Section 31 of the Code of 1966 as well as the provisions of the Maharashtra

Land Revenue (Disposal of Government Lands) Rules, 1971 (for short, the Rules of 1971). It was submitted that the provisions of Section 31 of the Code of 1966 would not be attracted in the present case since the land in question was granted to the Company in the year 1950 and the Company had paid the price of acquiring the said land to the State of Madhya Pradesh. Under Section 31 of the Code of 1966 payment of the price for unalienated land was required to be made before the land was entered upon under Section 30 of the Code of 1966. Similarly, the provisions of Section 30 of the Code of 1966 were also not attracted in the facts of the present case. While it was open for the State Government to require the Company to obtain its previous permission in writing before alienating the land in question, the same could not be made subject to payment of any mortgage fee. Levy of 0.50% mortgage fees therefore did not have any statutory or legal support for it to be sustainable in law. On this ground, it was urged that the demand of 0.50% mortgage charges was without the authority of law in terms of Article 265 of the Constitution of India. In this regard, reliance was placed on the decision in *Commissioner of Customs (Import) Mumbai vs. Dilip Kumar and Company and others [(2018) 9 SCC 1]*.

(b) In the absence of any charging provision in the Code of 1966 or the Rules framed thereunder, it was not permissible for the State Government

to demand mortgage fees by issuing executive instructions in the form of Government Resolution dated 27.02.2009. Neither Section 30 nor Section 31 of the Code of 1966 empowered the State Government to demand mortgage fees while granting permission to mortgage the lands. While the Legislature was empowered to enact a charging provision, its legislative power could not be taken by the executive for such purpose. Reliance in that regard was placed on the decision in *Tata Iron and Steel Company and another vs. State of Bihar and others* [(2018) 12 SCC 107]. Though Government Resolution dated 27.02.2009 was under challenge, such challenge was restricted to clause (b) thereof prescribing payment of 0.50% of the loan amount as mortgage fees while granting permission to obtain loan from a financial institution.

(c) It was not permissible for the State Government to demand 0.50% mortgage fees which was in the nature of unearned income being demanded by the State. Inviting attention to the judgment of the Division Bench in *Smt. Jaikumari Amarbahadursingh and others vs. State of Maharashtra, through the Secretary, Revenue and Forest Department and another* [2009 (1) All M R 343] it was submitted that it was held by this Court in clear terms that the revenue authorities could not demand any amount towards “unearned income” for legitimising the proposed transfer of any land with a view to raise revenue. The Division Bench after examining the Code of 1966 had held in clear terms

that the State had no the authority in law to make such demand of unearned income. Moreover, it was held that in the absence of any specific law on the said subject, the State Government or its officers could not usurp to themselves the power to levy such fees on the basis of any Government Resolution. The Government Resolution dated 19.06.2007 was held to be unsustainable with the scheme of the Code of 1966 and the Rules framed thereunder. Though the aforesaid judgment considered the grant of such land for purposes other than commercial or industrial purpose, the ratio therein dis-entitled the State Government to make a demand in the nature of unearned income even in the present case.

(d) Without prejudice to the aforesaid, it was submitted that even if it was assumed that the demand of 0.50% mortgage fees was in the nature of a fee, it ought to be seen that there was no service being provided by the State Government while granting such permission to mortgage the said lands. The levy was only for the purposes of raising a general revenue of the State. There were no pleadings made on behalf of the State Government to indicate the nature of services being provided as the existence of *quid pro quo* was vital for justifying the levy and demand of fee. There was absence of any co-relation between the service rendered by granting permission to alienate the land and the fee sought to be recovered. In fact, no service was being rendered while

granting such permission. It was further submitted that by demand of *ad valorem* fee at 0.50% was in the absence of any justification for the demand as made. Inviting attention to the observations made by the Honourable Supreme Court in the decision *Calcutta Municipal Corporation and others vs. Shrey Mercantile (P) Limited and others [(2005) 4 SCC 245]* it was submitted that when identical services are provided then the quantum of fees could not be demanded on *ad valorem* basis and it would result in incidence of the levy falling differently on persons who were similarly situated and thus, violative of Article 14 of the Constitution of India. The levy of 0.50% mortgage fees was in the nature of a tax without any support of law. Neither Section 31 of the Code of 1966 nor executive instructions in the form of the Government Resolution dated 27.02.2009 could permit the State Government from demanding such mortgage fees. Attention was also invited to the judgment of the Full Bench of this Court in *Bharat Cotton Press Company and others vs. Municipal Council, Arvi and another [1989 Mh L J 703]* in that context.

It was thus submitted that on the grounds as urged it be declared that the demand of 0.50% mortgage fees as made by the Sub-Divisional Officer as a condition precedent for granting permission to mortgage the lands in question was without any authority in law and was liable to be set aside. The mortgage fees paid under protest were thus liable to be returned to the Company alongwith interest. It was thus submitted that the prayers made in

the writ petition be granted.

5. Ms. N. P. Mehta, learned Assistant Government Pleader for the respondents opposed the aforesaid submissions. It was submitted that the grant of land to the Company was in the nature of a contract and as per Condition No.7 of the *Sanad* dated 18.01.1968 it was necessary for the Company to obtain prior permission of the State Government before seeking to alienate the said lands. Since the Company was granted the lands on aforesaid conditions, the same were binding on the Company and it was required to comply with the same. The demand for 0.50% mortgage fees was based on the Government Resolution dated 27.02.2009 and there was nothing illegal in such demand. The same was in the nature of a fee and it was not a tax. The Government Resolution dated 27.02.2009 was issued in the name of the Governor as required by Article 166(1) of the Constitution of India. Reference was then made to Sections 31 and Section 328 (2) (x) of the Code of 1966 alongwith the Rules of 1971 under which such conditions could be imposed under the orders of the State Government. Reference was also made to the affidavit filed by the Tahsildar on behalf of the respondents in support of the stand taken while opposing the prayers made in the writ petition. It was thus submitted that the demand of 0.50% mortgage fees was in accordance with law and there was no reason to interfere in the writ petition.

6. We have heard the learned counsel for the parties and we have perused the documentary material on record. At the outset, it would necessary to refer to certain relevant factual aspects. Perusal of the *Sanad* dated 18.01.1968 indicates that reference therein has been made to an agreement dated 31.03.1947 between the Governor of the then Central Provinces and Berar on one part and the Company on the other. It is stated that from 26.01.1950 the provinces of Central Provinces and Berar came to be known as State of Madhya Pradesh. Pursuant to an agreement between the Government of Madhya Pradesh and the Company, the lands situated at Ballarpur were acquired and the Company paid the cost of acquisition of the said lands to the Government of Madhya Pradesh. The Company had made a request to the State Government to issue to it Deed of recognition of title of the said land and pursuant to that request the *Sanad* dated 18.01.1968 was executed under the signature of the Collector, Chanda on behalf of the Governor of the Maharashtra State. It was declared that the land was held by the Company as its property to be used by the Company for the purpose of construction of the paper mill subject to payment of agricultural, non-agricultural or other assessment under the Code of 1966 or any other law in that behalf for the time being in force and the Rules made thereunder. Various terms and conditions have been mentioned in the *Sanad* and Condition No.7 which is relevant for

the present purpose reads as under:

“7 . The Company shall not in any wise alienate the said land or any portion thereof by way of sale, mortgage, gift, lease exchange or otherwise however, except with the previous permission in writing of the Government.”

From the aforesaid it becomes clear that though the lands were acquired by the State of Madhya Pradesh to enable the Company to set up its paper manufacturing unit and the Company had paid the State Government the entire cost of acquisition, as per Condition No.7 it was not permissible for the Company in any manner to alienate the said lands or portion thereof in any mode without obtaining the previous permission of the Government in writing.

7. In this context when the provisions of Section 29 of the Code of 1966 are perused, it indicates that under the Code of 1966 three classes of persons holding land from the State have been identified. Occupants-Class I are those persons who hold unalienated land in perpetuity and without any restriction on the right to transfer. Occupants-Class II are persons who hold unalienated land in perpetuity subject to restrictions on the right of transfer. The third category of persons are Government lessees. As per Condition No.7 of the *Sanad*, prior permission of the State Government is necessary before the Company can alienate the lands in question by way of sale, mortgage, etc. It thus becomes clear from Condition No.7 that the Company is an Occupant-Class II since it has a right to hold the land in perpetuity but subject to

restrictions on the right of transfer. It has been pleaded in the writ petition that various conditions were attached in the *Sanad* which were not the conditions imposed under the grant initially made under the Code of 1954. It is also the case of the Company that on earlier occasions permission had been sought by the Company for mortgaging its land for obtaining loan and such permission had been so granted on 05.01.2009. Be that as it may, in view of Condition No.7 of the *Sanad* dated 18.01.1968 the occupancy of the Company would have to be treated as Occupant-Class II.

8. It is also necessary to refer to the provisions of Section 31 of the Code of 1966. Section 31 reads as under:

“31. It shall be lawful for the Collector subject to such rules as may from time to time be made by the State Government in this behalf, to require the payment of a price for unalienated land or to sell the same by auction, and to annex such conditions to the grant as may be prescribed by such rules before land is entered upon under section 30. The price (if any) paid for such land shall include the price of the Government right to all trees thereon and shall be recoverable as an arrear of land revenue”

The said provision indicates the power of the Collector to grant unoccupied land on such conditions as may be prescribed by such Rules before the land is entered upon under Section 30. Section 30 of the Code of 1966 refers to occupation of unalienated land granted under the provisions of the Code of 1966. It states when such land is granted under any provision of the Code of 1966, it would be the duty of the Tahsildar to call upon such person to enter

upon the occupation of such land in accordance with the terms of the grant.

It is clear from the aforesaid provisions that what is contemplated is a grant made of unalienated/unoccupied land under the provisions of the Code of 1966. Section 30 requires payment of the price of such land before it is entered upon under Section 30 of the Code. In the present case, the grant of the land is prior to coming into force of the Code of 1966. Further it is also clear from the *Sanad* dated 18.01.1968 that the Company has already paid the entire cost of acquisition of the said land to the State of Madhya Pradesh. It is however to be kept in mind that in view of the provisions of Section 29 (3) (c) of the Code of 1966 since the Company has been granted rights which entitle it to hold the land in perpetuity, all provisions of the Code of 1966 relating to the rights, liabilities and responsibilities of Occupants-Class II would be applicable to it as if they were Occupants-Class II under the Code of 1966. Though the grant of land to the Company is not under the Code of 1966 and especially Sections 30 and 31 thereof, nevertheless the rights, liabilities and responsibilities of Occupants-Class II which have been prescribed under the Code of 1966 would be applicable to the Company.

9. The Rules of 1971 have been made in exercise of powers conferred in that regard by the Code of 1966. Reference has been made to Rule 41 of the Rules of 1971 by the respondents in their affidavit in reply. Rule 41

prescribes conditions of grant of land for non-agricultural purpose. It contemplates disposal of unoccupied land under Section 20 read with Section 31 for any non-agricultural purpose for being used for the purpose for which it is granted. Such grant is subject to terms and conditions as the Collector may annex to the grant in accordance with the Rules of 1971 and the payment of non-agricultural assessment as may be fixed by the Collector under the provisions of Chapter-VII of the Code of 1966 and the Rules made thereunder. Under Rule 41(2)(viii) the Collector can impose such other conditions under the orders of the State Government.

Rule 41 also indicates that it would be applicable to the grant made of lands for non-agricultural purpose when such land is disposed of under Section 20 read with Section 31 of the Code of 1966. In other words, the Rules of 1971 are specifically made applicable where unoccupied land is disposed of under the Code of 1966.

10. The basis for the demand for mortgage fees is the Government Resolution dated 27.02.2009. Perusal of the said Government Resolution indicates that in the preamble it has been stated that the lands vesting with the Government are granted for various purposes with Occupancy Class-II rights. While granting land for non-agricultural purpose, permission of the State Government is contemplated before obtaining any financial assistance from

banks, co-operative societies, etc. Since no fees/charges were being imposed while granting such permission, it was proposed by the State Government to levy the same. Thereafter the Government Resolution states that when such lands are allotted on lease with Occupancy-Class II rights under the Rules of 1971 and the grantees desire to obtain loan by mortgaging such lands, mortgage fees would be payable in the manner stated therein. Various terms and conditions have thereafter been stipulated in Annexure-A to the said Government Resolution.

On a complete reading of the Government Resolution dated 27.02.2009, it is apparent that the State Government was of the view that when unoccupied land was being granted to various Institutions and Companies on lease with Occupancy-Class II rights under the Rules of 1971, it was necessary to levy mortgage fees whenever the said land was proposed to be mortgaged for raising loans. The Government Resolution also refers to the Code of 1966 and the Rules made thereunder. It is thus apparent that the Government Resolution dated 27.02.2009 seeks to regulate the matter with regard to grant of permission to alienate/mortgage the lands of Occupancy-Class II holders by demanding mortgage fees as stipulated. There is no reference to any statutory provision in the said Government Resolution to indicate the source of power for the State to levy mortgage fees. Mention however has been made to the allotment of such lands under the Rules of

1971. It is undisputed that the lands in the present case have been acquired by the Government of Madhya Pradesh and the Company had paid the cost of acquisition of such land to the said Government.

11. The demand of mortgage fees in view of Government Resolution dated 27.02.2009 having been challenged as being a demand without any authority of law, it would be necessary to keep in mind the observations in paragraphs 24 and 29 of the judgment of the Hon'ble Supreme Court in *Dilip Kumar and Company and others* (supra). It has been observed as under:

“24.Insofar as taxation statutes are concerned, Article 265 of the Constitution prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law.”.....

“29.We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely, contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute.”

12. To consider whether the Code of 1966 empowers the State to recover mortgage fees while granting permission to mortgage Occupancy-Class II lands, it would be necessary to consider the provisions of the Code of 1966. The objects and reasons behind enactment of the Code of 1966 indicate that different legislations on the subject of “land and land revenue” were in force in the State prior to 1966. The Code was enacted with a view to consolidate and unify various enactments so as to have a common land revenue Code for the State. Section 2(19) of the Code defines the expression “land revenue”. Chapter VII of the Code of 1966 relates to assessment and settlement of land revenue of lands for non-agricultural purposes. Chapter IV of the Code of 1966 deals with land revenue. All lands whether applied for agricultural or other purposes are liable for payment of land revenue as per Section 64. The manner of assessment and its alteration is stipulated by Section 67 and Section 68 requires the Collector to fix the assessment. Under Section 71 the fixing of assessment under the Code of 1966 is limited to ordinary land revenue.

Under the Deed of recognition – *Sanad*, the Company is liable to pay agricultural, non-agricultural or other assessments as the case may be under the Code of 1966. There is no challenge to this clause of the *Sanad* and the Company is under an obligation to pay non-agricultural assessments under the Code of 1966.

13. In this context it is necessary to refer to the provisions of Section 36 of the Code of 1966. Under this provision an occupancy is transferable and heritable subject to certain restrictions. Section 36(4) which is found relevant for the present purpose reads as under:

“36 (4) Notwithstanding anything contained in sub-section (1) or in any other provisions of this Code, or any law for the time being in force it shall be lawful for an Occupant Class-II to mortgage his property in favour of the State Government in consideration of a loan advanced to him by the State Government under the Land Improvement Loan Act, 1883, the Agriculturists Loans Act, 1884, or the Bombay Non-Agriculturists Loans Act, 1928 or in favour of a co-operative society [or the State Bank of India constituted under Section 3 of the State Bank of India Act, 1955, or a corresponding new bank within the meaning of clause(d) of Section 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, or the Maharashtra State Financial Corporation established under the relevant law] in consideration of a loan advanced to him by such co-operative society, [State Bank of India, corresponding new bank, or as the case may be, Maharashtra State Financial Corporation], and without prejudice to any other remedy open to the State Government, [the co-operative society, the State Bank of India, the corresponding new bank or as the case may be, the Maharashtra State Financial Corporation] in the event of such occupant making default in payment of such loan in accordance with terms on which such loan is granted, it shall be lawful for the State Government, [the co-operative society, the State Bank of India, the corresponding new bank, or as the case may be, the Maharashtra State Financial Corporation] to cause the occupancy to be attached and sold and the proceeds to be applied towards the payment of such loan.

The Collector may,[on the application of the co-operative society, the State Bank of India, the corresponding new bank or the Maharashtra State Financial Corporation,] and payment of the premium prescribed by the State Government in this behalf, by order in writing reclassify the occupant as Occupant-Class I; and on such reclassification, the occupant shall hold the occupancy of the land without any restriction on transfer under

this Code.”

It can be seen from the aforesaid provision that an Occupant-Class II can lawfully mortgage his property while seeking any loan or financial assistance from the State Government or the authorities/bodies specified therein. It is further provided that in case of default in repayment of such loan it would be lawful for the State Government or the authorities/bodies who have granted such loan to cause the occupancy to be attached and sold. The proceeds thereof can be applied towards re-payment of such loan. Further on an application made by such creditor who has advanced the amount of loan, the Collector can on payment of premium prescribed by the State Government re-classify the occupancy as Occupant-Class I. On such re-classification the occupant would be entitled to hold the land without any restriction on transfer under the Code of 1966.

14. On a plain reading of Section 36(4) of the Code, it recognises the right of an Occupant-Class II to mortgage his property while obtaining a loan. The said provision however nowhere empowers the State Government or the Collector to charge any fee while granting permission to mortgage such property. In other words, the said provision empowers an Occupant-Class II to mortgage his property while seeking a loan but it does not empower the State Government to demand any fee while granting such permission to mortgage

the land. In fact, Section 36(4) does not contemplate seeking any permission of the State Government or the Collector prior to mortgaging such land before obtaining any loan against the same. However, since the holding of the petitioner is as Occupant-Class II and Condition No. 7 of the Deed of recognition – *Sanad* requires obtaining of prior permission in writing of the State Government before the Company mortgages the land, it would not be permissible to hold that such prior permission was not liable to be obtained by the Company. However, Section 36(4) nowhere empowers the State Government to demand mortgage fees dependent upon the amount of loan sought to be borrowed by an Occupant-Class II while mortgaging such land. It will thus have to be held that the demand of mortgage fees is not relatable to any power conferred under the Code of 1966 and especially Section 36(4) thereof.

15. This aspect is also clear on the perusal of Section 328 of the Code of 1966. Under the said provision the State Government can make rules that are not inconsistent with the provisions of the Code with a view to carry into effect the provisions of the Code of 1966. Reference in sub-section 2(xiii) of Section 328 can be found to the provisions of Section 36(3) of the Code of 1966 but the said provision is not attracted in the present case. Reference to Section 36(4) cannot be found in any of the clauses of Section 328(2) of the Code of

1966 thereby empowering the State Government to make rules for carrying out the provisions of the Code. Since the State Government under Section 328 (1) cannot make rules which are inconsistent with the provisions of the Code, the reliance placed on the Rules of 1971 is misconceived. According to the State Government such demand of mortgage fees can be supported by relying upon Rule 41(2)(viii) of the Rules of 1971. Clause (viii) of sub-rule (2) of Rule 41 merely permits the Collector under the orders of the State Government to impose conditions while granting land for non-agricultural purpose. Such residuary power cannot clothe the State Government with the power to demand mortgage fees especially when Section 36(4) of the Code does not empower the State Government to demand such mortgage fees while seeking permission to mortgage Occupancy-Class II land.

It is well settled that for supporting the collection of tax/fee the same would mean an act of Legislature and not exercise of executive power under Article 162 of the Constitution of India by the State Government. Reference in this regard can be usefully made to the following observations in *Tata Iron and Steel Company Limited and another* (supra). Paragraphs 20 and 21 it has been observed as under:

“20. In CIT v. McDowell and Co. Ltd. held : (SCC 763, paras 21-22)

21. “Tax”, “duty”, “cess” or “fee” constituting a class denotes to various kinds of imposts by State in its sovereign power of taxation to raise revenue for the

State. Within the expression of each specie each expression denotes different kind of impost depending on the purpose for which they are levied. This power can be exercised in any of its manifestation only under any law authorizing levy and collection of tax as envisaged under Article 265 which uses only the expression that no "tax" shall be levied and collected except authorised by law. It in its elementary meaning conveys that to support a tax legislative action is essential, it cannot be levied and collected in the absence of any legislative sanction by exercise of executive power of State under Article 73 by the Union or Article 162 by the State.

22. Under Article 366(28) "Taxation" has been defined to include the imposition of any tax or impost whether general or local or special and tax shall be construed accordingly. "Impost" means compulsory levy. The well-known and well-settled characteristic of "tax" in its wider sense includes all imposts. Imposts in the context have following characteristics:

- i) The power to tax is an incident of sovereignty.*
- ii) "Law" in the context of Article 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority.*
- iii) The term "tax" under Article 265 read with Article 366(28) includes imposts of every kind viz. tax, duty, cess or fees.*
- iv) As an incident of sovereignty and in the nature of compulsory exaction, a liability founded on principle of contract cannot be a "tax" in its technical sense as an impost, general, local or special."*

"21. A nine-judge Constitution Bench of this Court in Jindal Stainless Ltd. & Another v. State of Haryana & Others, quoted the above mentioned statement of law with approval. Therefore, it is now well settled that the expression "fee" is also comprehended in the expression "tax" for the purpose of Article 265 and even for the collection of a "fee", authority of law (i.e. legislative support) is mandatorily required under the Constitution."

16. Similarly, the Division Bench of this Court in *Jaikumari Amarbahadursingh* (supra) while considering the question as to whether the State Government had the authority to levy or claim unearned income has after considering the provisions of Rules of 1971 observed in paragraph 19 as under:

“19..... There is no corresponding provision enabling the State Government to claim or levy unearned income in respect of grant of land for Agricultural use under Part III or residential use under Part IV of the said Rules. Besides, going by the provisions of the said Rules it would apply to fresh grants in respect of unoccupied lands. In other words, the State Government as of now has no authority to levy unearned income in respect of lands in question under whatever title, which would obviously include lands held by occupants-Class I. In absence of a specific law on this subject, the State Government or its Officers cannot usurp to itself power to levy such charges on the basis of a Government Resolution. That power to levy unearned income can be invested in the State Government only if the State Legislature expressly or by implication authorises it to do so and not otherwise. By no means such power can be usurped by an Executive fiat in the form of a Government Resolution. Suffice it to observe that a Government Resolution cannot be substitute for a "law" to be enacted by the competent legislature so as to affect the unconditional right of the Grantees to transfer and inherit the property.....”

Though the aforesaid observations were made in the context of lands used for agricultural purpose and the provisions of Rule 31 (2) (c) of the Rules of 1971 were noted in the context of lands used for industrial and commercial purposes, the fact remains that only on the basis of executive instructions it would not be permissible for the State Government to levy fees while granting

permission to mortgage rights in Occupancy-Class II under Section 36(4) of the Code of 1966.

17. Hence for the aforesaid reasons we are of the considered view that the demand of mortgage fees by the State Government while granting permission to mortgage Occupancy-Class II lands to banks and financial institutions, to the extent of 0.50% when such land is used for industrial and commercial purposes is without any authority being conferred on the State Government by the Code of 1966. While Section 36(4) of the Code of 1966 permits an Occupant-Class II land holder to mortgage his land while seeking loan, it does not empower the State Government to demand fees while granting such permission to mortgage those lands. The Rules of 1971 also cannot be relied upon to support such demand of levy of mortgage fees. Challenge in the present writ petition has been restricted to Clause (B) of Government Resolution dated 27.02.2009 to the extent it prescribes mortgage fees of 0.50% of the loan amount when the land is to be used for industrial and commercial purposes. Said levy is found to be without any authority of law in terms of Article 265 read with Article 366(28) of the Constitution of India. It is held that the Code of 1966 and especially Section 36(4) thereof does not empower the State Government to levy such mortgage fees while granting permission to an Occupant-Class II holder to mortgage such land

while seeking loan against the same.

18. Having found that the demand of mortgage fees pursuant to Government Resolution dated 27.02.2009 is without any authority of law, the prayer for refund of the amount of mortgage fees paid under protest would have to be considered. In *State of Madhya Pradesh vs. Bhailal Bhai and others [1964 Mh.L.J.601 (SC)]* the Constitution Bench of the Hon'ble Supreme Court has held that the High Court under Article 226 of the Constitution of India has the power while enforcing fundamental rights and statutory rights to grant consequential relief by ordering repayment of money realised by the Government without the authority of law.

Admittedly the Company has in terms of the Government Resolution dated 27.02.2009 paid the mortgage fees under protest. In the circumstances of the case, the respondents are directed to refund the amount of Rs.3,26,25,000/- with simple interest @4% per annum from the date of deposit till realisation.

19. Resultantly, the following order is passed:

- (i) Clause (B) of the Government Resolution dated 27.02.2009 seeking to levy mortgage fees is held to be without any authority of law and hence the same is quashed as being unconstitutional and invalid.

(ii) Condition No.5 in the order dated 09.05.2011 passed by the Sub-Divisional Officer to the extent the demand for mortgage fees has been made is set aside. Rest of the provisions of the said Government Resolution would continue to operate vide Condition No.5 in the order dated 09.05.2011.

(iii) Since it has been found that the demand of mortgage fees by the State Government by relying upon Government Resolution dated 27.02.2009 is without any authority of law and as the petitioner had deposited an amount of Rs.3,26,25,000/- with the Sub-Divisional Officer, Chandrapur, under protest, the petitioner would be entitled to receive back said amount with interest @ 4% per annum from the date of such deposit till the actual repayment.

(iv) The writ petition is allowed. Rule is made absolute in aforesaid terms with no order as to costs.

(URMILA JOSHI-PHALKE, J.)

(A.S.CHANDURKAR, J.)

Andurkar..