

***M/S. ORISSA CEMENT LTD. AND ORS. V. STATE OF ORISSA AND ORS. -
IRAC ANALYSIS***

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CASE DETAILS

Name of the Case: *M/s. Orissa Cement Ltd. and Ors. v. State of Orissa and Ors.*

Citation: AIR 1991 SC 1676; [1991] 2 SCR 105.

Date of the Judgment: 04.04.1991

Names of the Judges: S. Ranganathan, N.M. Kasliwal, S.C. Agarwal, JJ.

FACTS IN BRIEF

1. Orissa Act XXVII of 1952 was invalidated in the year 1961 by way of a landmark pronouncement of the Supreme Court². This rendered it necessary for the State to bring in fresh legislation. Accordingly, the Legislature of this specific state enacted the Orissa Cess Act (Orissa Act II of 1962) which was subsequently amended by Act 42 of 1976.
2. The primary objective of the legislation was to condense and simplify the existing law on the subject by consolidating the different enactments, customs and usages relating to the levy of Cess in the State, to cure defects and deficiencies therein and to introduce uniformity in the levy of Cess throughout the State.
3. Similarly, the provisions of the Bengal Cess Act (Act XI of 1880) were made applicable to the State of Bihar for similar reasons as highlighted above. However over the course of time, certain amendments which were deemed fit were accordingly incorporated into the Act.
4. The third and final State where an Act for the purpose of Cess was levied was that of Madhya Pradesh, namely the Madhya Pradesh Upkar Adhiniyam, 1981 (Act 1 of 1982). The said act provided for the levy of an energy development Cess, an urban development Cess, a Cess on transfer of vacant land and a Cess on storage of Coal.
5. Each of these Legislations which envisaged the levy of a “Cess” based on the “Royalty” derived from mining lands was subsequently challenged as unconstitutional, by contending that in light of the Entries in the Union List of the Constitution; only the

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² *The Hingir – Rampur Coal Co. Ltd. and Ors. v. The State of Orissa and Ors.* [1961] 2 SCR 537

Central Government would be legally permitted to levy such a Cess the same falling under Entry 1 of the Seventh Schedule of the Constitution.

PROCEDURAL HISTORY

The instant dispute before the Supreme Court of India arose by way of connected batches of Civil Appeals and Special Leave Petitions, from various High Courts. The Supreme Court accordingly granted leave to appeal in all the Petitions, in addition to condoning the delay in filing of one specific petition. For the sake of convenience, the following is a summary of the High Court judgments from which the instant matter arises:

High Court	Date of Judgment	Civil Appeal/ S.L.P. Nos.	Name of the Appellant
1. Orissa	17 – 4 – 1980	C.A. 2053 – 2080/80	Tata Iron & Steel Co. Ltd.
	7 – 3 – 1983	C.A. 4353 – 4354/83	Orissa Cement Ltd.
	22 – 12 – 1989	S.L.P. 1479/90	State of Orissa
	22 – 12 – 1989	S.L.P./90	Orient Paper & Industries Ltd. & Anr.
	13 – 7 – 1990	S.O.P. 11939/90	-do-
2. Bihar	10 – 2 – 1986	C.A. 592/86	Tata Iron & Steel Co. Ltd.
3. Madhya Pradesh	28 – 3 – 1986	C.A. 1641 – 1662/86	State of Madhya Pradesh

ISSUES RAISED

1. Whether the levy of a “Cess” on Royalty derived from mining lands by the States of Bihar, Orissa and Madhya Pradesh was constitutionally valid in light of the Entries under the Union and State List of the Constitution of India, 1950.
 - 1.1 Whether “Cess” can be deemed to be “land revenue” under Entry 45 of the 7th Schedule (State List).
 - 1.2 Whether “Cess” can be considered “tax on land” under Entry 49 of the 7th Schedule (State List).
 - 1.3 Whether “Cess” would amount to “tax on mineral rights” under Entry 50 of the 7th Schedule (State List).
2. Whether Cess can be considered to be a “Fee” under Entry 23 of the State List or the State has been deprived of competence in light of the Mines and Minerals Regulatory and Development Act, 1957 where Issue 1 is decided in the negative.
3. Whether the Appellants would be entitled to a refund of the “Cess” illegally collected, having found the levy of Cess unlawful.

RULES APPLICABLE

Constitution of India, 1950:

List I – Union List (7th Schedule)

- **Entry 52:** Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.
- **Entry 54:** Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

List II – State List (7th Schedule)

- **Entry 18:** Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.
- **Entry 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.
- **Entry 45:** Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.
- **Entry 49:** Taxes on lands and buildings.
- **Entry 50:** Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.
- **Entry 66:** Fees in respect of any of the matters in this List, but not including fees taken in any court.

The Orissa Cess Act, 1962 (Orissa Act 11 of 1962):

- **Section 4:** All Lands to be liable to payment of Cess.
- **Section 5:** Rate of Cess, Assessment and Fixation of Cess Year.
- **Section 7:** Annual Value,
- **Section 10:** Application of Proceeds of the Cess.

The Cess Act, 1880 (Bengal Act IX of 1880):

- **Section 4:** Interpretation Clause.
- **Section 5:** All Immovable Property to be liable to a Local Cess.
- **Section 6:** Cess how to be assessed.
- **Section 9:** Application of proceeds of Road Cess.

The Madhya Pradesh Upkar Adhiniyam, 1981 (Act No I of 1982):

- **Section 9:** Levy of Cess on transfer of Vacant Land.
- **Section 11:** Levy of Cess on land held in connection with mineral rights.
- **Section 12:** Application of the Proceeds of the Cess.

ANALYSIS

The instant decision of the Supreme Court of India is an interesting look into the interplay between various entries in the Seventh Schedule of the Constitution of India. The decision clearly goes to the very root of the same, and seeks to understand the manner in which the Constitution seeks to lay bare the various subjects upon which the Union or State Government may legislate.

At the outset, it would be apposite to first take into account the earlier decisions of the apex court decided upon this aspect of law, such that the current dispute at hand may be understood better. Firstly, the court in *The Hingir – Rampur Coal Co. Ltd. and Ors. v. The State of Orissa and Ors.*³ was called upon to determine the Constitutional validity of the Orissa Mining Areas Development Fund Act, 1952. The law was challenged on the ground that the Cess was not a fee but a duty of excise on coal, a field covered under Entry 84 of List 1.

It was further contended that assuming the Cess was deemed to be a fee under Entries 23 and 66 of List II, the same would be hit by Entry 54 of List I read with either the Mines and Minerals (Development and Regulation) Act, 1948 or the Industries (Development and Regulation) Act, 1951.

On the basis of the above submissions, the court came to the conclusion that a declaration by Parliament in terms of Entry 54 of List I operated as a limitation on the legislative competence of the State Legislature. Further, it was seen that a declaration on the terms of Entry 54 of List I which was relied upon by the Coal Company was founded on Act LIII of 1948 which was an Act of the Dominion Legislature and not an Act of Parliament.

The Court further proceeded to review the provisions of the Central Act of LIII and found that it contained a declaration covered in Entry 23, as a result of which there would be no difficulty in holding that the field that it covered was similar to that of the impugned act. Under such circumstances, the court observed unequivocally that the impugned State Act would be *ultra vires*.

³ *The Hingir – Rampur Coal Co. Ltd. and Ors. v. The State of Orissa and Ors.* [1961] 2 SCR 537

Similarly, in *State of Orissa v. M.A. Tulloch and Co.*⁴ the apex court sought to rely upon the earlier decision referred to above⁵ and held on similar lines that the ambit of the Central as well as the State Act concerned was precisely the same and that under such circumstances, the Central Act would certainly prevail, rendering the Cess levied by the State Act illegal.

However quite contrary to the aforementioned decisions, the Supreme Court sought to deviate from this line of judicial thinking in *H.R.S. Murthy v. Collector of Chittoor and Anr.*⁶. The contentions raised was that in light of the *Hingir – Rampur* and *Tulloch* cases, the Madras District Boards Act, 1920 which imposed land Cess on Royalty should be repealed owing to the Mines and Mineral (Regulatory and Development) Act, of 1948 or in any event, the Act of 1957. The court sought to distinguish the said afore cited judgments. It categorically ruled that the land Cess in question was nothing but a land tax falling within the sweep of Entry 49 of the State List of the Seventh Schedule, as a consequence of which the State Legislature would be wholly justified in legislating upon this aspect enunciated in the Constitution.

The final verdict which sought to prove the legitimacy of the above jurisprudence was that of *India Cement Ltd. and Ors. v. State of Tamil Nadu and Ors.*⁷ The court finally put to rest a highly debated area of law. The court held that the Cess in question could not be supported under Entry 45, 49 or 50 of List II. Accordingly, it proceeded to hold that the decision in *Murthy*⁸ was not rightly decided, and thereby upheld the Appellants objection to the validity of the levy of the Cess. This accordingly brings us to the facts alleged in the current case at hand.

As far as the State of Orissa was concerned, the levy of Cess under Sections 5 and 7 of the Orissa Cess Act, 1962 was challenged as unconstitutional, the same falling within the prerogative of the Central Government under List I of the Constitution. It may be appropriate to understand that if one were to enable the State Government in levying such a Cess, it would be essential to determine that the same falls under either Entry 45, 49 or 50 of the State List under the Seventh Schedule.

⁴ *State of Orissa v. M.A. Tulloch and Co.* [1964] 4 SCR 461

⁵ *Supra* at Note 1.

⁶ *H.R.S. Murthy v. Collector of Chittoor and Anr.* [1964] 6 SCR 666

⁷ *India Cement Ltd. and Ors. v. State of Tamil Nadu and Ors.* (1990) 1 SCC 12

⁸ *Supra* at Note 5.

As far as Entry 45 is concerned, the Supreme Court sought to rely upon its earlier decision of *India Cement*⁹ where the statute in question sought to include Royalty within the meaning of land revenue, but there was no such provision in the Orissa Cess Act, 1962. Accordingly, the court held that Royalty or tax could not be equated with land revenue.¹⁰

As far as the scope of Entry 50 (Tax on Mineral Rights) is concerned, the court was on another occasion called to rely upon the *India Cement*¹¹ verdict which had held clearly that a tax on royalties would could be considered the same as tax on minerals, and the former judgment being that presided over by 7 judges ensured that the Supreme Court was bound by the observations of the same.

The third and question to be addressed by the court was whether the Cess in the instant case could be considered to be a “tax on land” within the meaning of Entry 49 of the State List of the Constitution. Relying upon the decisions in *Ajay Kumar Mukherjea v. Local Board of Barpeta*¹², *Ralla Ram v. The Province of East Punjab*¹³, and *Buxa Dooars Tea Co. v. State*¹⁴ to observe that the question of law involved the proper determination of the pith and substance of the legislation. After taking into account several factors like the change in the scheme of taxation, the importance of and magnitude of the revenue by way of royalties received by the State, the charge of the Cess as a percentage as multiples of the amount of Royalty, and the mode and collection of the Cess amount along with the Royalties and as part thereof were circumstances which clearly established the fact that the legislation was with regard to Royalty rather than with respect to land. In light of the above, the apex court held that the levy was not justified under Entry 45, 49 and 50 of List II of the Seventh Schedule.

The next question which the court was called upon to address is whether it was possible to treat the levy as a fee which the State Legislature was competent to legislate for under Entry 86 of the State List. The court perused Section 10 of the Orissa Cess Act, 1962 to find that it earmarked the purposes of utilization of only fifty percent of the proceeds of the Cess and was also limited

⁹ *Supra* at Note 6.

¹⁰ *M/s. Orissa Cement Ltd. and Ors. v. State of Orissa and Ors.* AIR 1991 SC 1676 at Para 15.

¹¹ *Supra* at Note 9.

¹² *Ajay Kumar Mukherjea v. Local Board of Barpeta* [1965] 3 SCR 47

¹³ *Ralla Ram v. The Province of East Punjab* [1948] F.C.R. 207

¹⁴ *Buxa Dooars Tea Co. v. State* [1989] 3 SCR 211; See also, *R.R. Engineering Co. v. Zilla Parishad, Bareilly* [1980] 3 SCR 1; *Bombay Tyer International Ltd.* MANU/SC/0224/1983; *Bhagwan Dass Jain* [1981] 128 ITR 315 (SC)

to the Cess collected in respect of “lands other than lands held for carrying on mining operations”. The court believed that therefore, the levy could not be correlated to any services rendered or to be rendered by the State to the class of persons from whom the levy was collected. Therefore, answering the question of whether Royalty was a tax or not, it was found that the Cess was only a tax and could not be properly described as a fee.¹⁵

The court went a step further to establish that even if one were to assume it was a fee, the State Legislature could impose a fee only upon those items enunciated in the State List. The relevant entry relied upon in the instant case was that of Entry 23. However, the court found *prima facie* that the said Entry was subject to the provisions of List I with respect to regulation and development of mines and minerals under the control of the Union. It was brought to the notice of the court that Entry 54 under List I was the relevant entry for the purpose.

The court observed that the declaration mandated by the afore mentioned entry was found within the purview of the Mines and Minerals (Regulation and Development) Act, 1957 under Section 2. The court therefore held that any State Legislation which encroached upon the field of the M.M.R.D Act, 1957 would be *ultra vires*. The contention that the Act levying a Cess was beyond the competence of the State Legislature by the passing of the M.M.R.D Act was accordingly accepted by the apex court in light of the decisions set out earlier in *Hingir – Rampur, Tulloch and India Cement*. The court sought to rely upon a catena of case law wherein the Supreme Court was called upon to deliberate upon the extent to which either of the Legislatures would have a say in the Legislation of a given set of subjects. Specifically, the court found vigour in the decisions of *Indian Tobacco Co. Ltd. v. Union*¹⁶, *Kannan Dewan Hills Co. v. State of Kerala*¹⁷ and *Ishwari Khetan Sugar Mills Ltd. v. State of U.P.*¹⁸ The court was convinced in establishing that upon a perusal of the above decisions on this aspect of law, one would be required to carefully understand the relevant scope of the M.M.R.D. Act, 1957 and a consequent assessment of the encroachment made by the impugned State Legislation into the field covered by it.

¹⁵ *M/s. Orissa Cement Ltd. and Ors. v. State of Orissa and Ors.* AIR 1991 SC 1676 at Para 28.

¹⁶ *Indian Tobacco Co. Ltd. v. Union* [1985] Supp. 1 SCR 145

¹⁷ *Kannan Dewan Hills Co. v. State of Kerala* [1973] 1 SCR 856

¹⁸ *Ishwari Khetan Sugar Mills Ltd. v. State of U.P.* [1980] 3 SCR 331; See also, *State of West Bengal v. Union* [1964] 1 SCR 371; *Bajjnath Kedia v. State of Bihar* [1970] 2 SCR 100; *State of Haryana v. Chanan Mal* [1976] 3 SCR 688; *Western Coalfields Ltd. v. Special Area Development Authority* [1982] 2 SCR 1; *Central Coalfields v. State of M.P.* AIR 1986 M.P. 33; *Karunanidhi* 1979 CriLJ 773

In order to give full effect to the above exercise, the court looked into the appropriate provision of the M.M.R.D. Act, 1957. The court was of the opinion that if an individual were to peruse the aforementioned provisions, bearing in mind that one would be guided not merely by the actual provisions of the Central Act or the rules made there under but should also take into account matters and aspects which could be legitimately brought within the scope of the said statute, the conclusion would be irresistible. Primarily, this would mean that the State Act had trespassed into the domain of the Central Act. While it was strenuously contended that that purpose of the Central and the State Act was different, this argument was repelled by the 3 judge bench.

Accordingly, the court finally came to the conclusion that the levy of Cess under Sections 5 to 7 of the Orissa Cess Act, 1962 was beyond the competence of the State Legislature. It would be sufficient to note that on similar grounds, the provisions of the State Legislatures of Bihar and Madhya Pradesh which sought to levy a Cess of a similar nature were held to be invalid by the Supreme Court, considering the observations as highlighted above.

Having found the levy of Cess by the Legislatures of the three states invalid, the final question which was required to be answered by the court was that of refund. Having given earnest consideration to the contentions put forth by the parties, the court came to a common conclusion that the ruling in *India Cement* concluded the issue as a whole. In the said case, the court was specifically called upon to consider as argument that, even if the statutory levy was found to be invalid, the court need not give directions to refund amounts already collected and such an argument found favour with the bench of seven judges, which had a binding effect upon the instant dispute. The court also held that the judges in the *India Cements* case were fully aware of the position that the effect of the legislation in question being found beyond the competence of the State Legislature was to render the same *void ab initio* and that the collections made there under would be deemed to be without the authority of law. Nevertheless, the court was convinced that a direction to refund all the Cess collected since 1964 would lead to hardship and injustice. It was therefore held that such a decision was given in the interest of equity and justice after due consideration and the apex court in the instant case could not take a contrary view.¹⁹

¹⁹ Relying upon the decisions in *State of Madhya Pradesh v. Bhailal Bhai and Ors.* [1964] 6 SCR 261; *Tilokchand Motichand v. Munshi* [1969] 2 SCR 824; *Ramchandra Shankar Deodhar v. State of Maharashtra* MANU/SC/0391/1973; *Shri Vallabh Glass*

CONCLUSION

The highlights of the instant decision of the Supreme Court of India as discussed above, is an interesting illustration of the potential that various subjects envisaged by the entries of the Seventh Schedule to the Constitution of India have in creating a highly dubious environment both, for the Legislature as well as the Judiciary. Owing to the manner in which they have been drafted, determining the appropriate Legislature which would have the legal competence to legislate upon a given entry often becomes a highly abstruse task.

It may be found that to answer this question, the Supreme Court sought to simply apply a precedent of a Seven Judge Bench which had already ruled on the matter, without discussing the same at the length which would ideally seal the matter. It is the submission of the author that this exercise is not entirely unjustified, but it certainly brings about an element of uncertainty as to the manner in which the apex court came to a specific conclusion.

If this is the practice, it becomes highly important that the Supreme Court at the time of setting a precedent minutely analyze the relevant provisions of law which it would be required to deliberate upon in a given set of facts and accordingly come to a plausible conclusion. Considering the binding nature of such judgments especially where the strength of the bench is large, it would be essential that the court analyze the facts in a highly sound, lucid manner. This ensures that the judgment which becomes a precedent thereby is right in law.

It is also the opinion of the author that while applying a specific precedent, the court should not take the precedent at face value, but understand the true purport of the same. If this is done, not only will the sanctity of the precedent remain, but also its application to subsequent facts would be wholly justified.

Works Ltd. v. Union of India [1985] 155 ITR 560 (SC); *State of M.P. v. Nandlal Jaiswal* [1987] 1 SCR 1; *D. Cawasji and Co. v. State of Mysore* MANU/SC/0060/1974; *Salonah Tea Co. Ltd. v. Superintendent of Taxes* [1988] 173 ITR 42 (SC).