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2026 INSC 1192

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8763 OF 1994

ARJUN FLOUR MILLS — **APPELLANT (S)**

VERSUS

THE STATE OF ODISHA FINANCE DEPARTMENT SECRETARY & ORS. — **RESPONDENT (S)**

W I T H

CIVIL APPEAL NO. 8909 OF 1994

CIVIL APPEAL NO. 7485 OF 2001

CIVIL APPEAL NO. 98 OF 2003

SPECIAL LEAVE PETITION (CIVIL) NOS. 22159-22180 OF 2002

CIVIL APPEAL NOS. 831-850 OF 2003

CIVIL APPEAL NO. 851 OF 2003

CIVIL APPEAL NO. 99 OF 2003

CIVIL APPEAL NO. 100 OF 2003

CIVIL APPEAL NO. 5046 OF 2003

CIVIL APPEAL NO. 5637 OF 2008

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JUDGEMENT

SURYA KANT, CJI.

A. PROLOGUE

1. The present reference raises a question as to the legislative competence of a State Legislature, to levy a tax on the sale or purchase of goods under Entry 54 of List II of the Seventh Schedule to the Constitution on sales tax payable by a dealer rather than directly on his turnover.

2. The dichotomy in interpretation arises on account of competing claims wherein it is the contention of the assessees that such a levy could be construed as a 'tax on tax'. It was urged that a levy measured by the quantum of tax already payable does not fall upon the 'sale' or 'purchase of goods', which alone is the subject of Entry 54 of List II, but is, in substance, a levy upon the 'income' or the 'fiscal burden' of the dealer, and therefore lies beyond the competence of the State Legislature. The States, on the other hand, maintain that such a surcharge is nothing more than an enhancement of the rate of sales tax for a class of dealers, and that the mode of its computation does not alter its essential character as a tax on sales.

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3. This issue, over the course of nearly three decades, has travelled from a Two Judge Bench to a Constitution Bench, and thence to a Seven Judge Bench for consideration. However, it appears that the legal landscape against which the reference was made has since undergone a fundamental transformation.

4. In the years during which the reference remained pending, the legal landscape against which it was made has not stood still. Three developments, in particular, call for close examination. *First*, the decision of a Seven Judge Bench in ***India Cement Ltd. & Ors. v. State of Tamil Nadu & Ors.***,[1] which was perceived to have unsettled the law, has since been revisited by a Nine Judge Bench in ***Mineral Area Development Authority & Anr. v. Steel Authority of India & Anr***.[2] *Second*, the question whether such a levy falls within the competence of the State Legislature was considered by a Constitution Bench in ***S. Kodar v. State of Kerala***,[3] and the continued authority of that decision must be assessed in the light of these subsequent developments. *Third*, the sales tax regime under which the impugned levies were imposed has since given way to newer legislation, first the Value Added Tax enactments and thereafter the Goods and Services Tax Act, 2017. Each of these

[1] (1990) 1 SCC 12.
[2] (2024) 10 SCC 1.
[3] (1974) 4 SCC 422.

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developments bears upon whether the reference continues to survive, and we shall examine them in the brief course of this judgment.

5. The narrower question which, therefore, falls for our consideration at the threshold is whether the reference continues to survive for adjudication by this Bench, or whether, in the light of these subsequent developments, it has been rendered academic. Since the answer to that question depends on a careful appreciation of the impugned levies, the constitutional framework, the decisions that gave rise to the reference, and the subsequent developments, we deem it appropriate to set out each of these in some detail before recording our conclusions.

B. THE IMPUGNED LEVIES

6. The matters before us arise out of three distinct sets of proceedings, which, though tagged together on account of a common question, are not identical in all respects. It would, therefore, be beneficial to notice each of them separately.

B.1. THE ORISSA SURCHARGE UNDER SECTION 5-A OF THE ORISSA SALES TAX ACT, 1947

7. The lead matter arises out of a challenge to Section 5-A of the Orissa Sales Tax Act, 1947 (**Orissa Act**), which was inserted by the Orissa Sales Tax (Amendment) Act, 1990, with effect from 01.07.1990. The provision required every dealer whose gross turnover exceeded Rs. 10

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lakhs to pay, in addition to the tax payable under the Orissa Act, a surcharge of 10 per cent of the total tax payable.

8. To put it simply, the structure of the levy demonstrated that the charge under the Orissa Act continued to be upon the sale or purchase of goods, at the rates prescribed. However, for the class of dealers whose gross turnover crossed the statutory threshold, the quantum of tax so computed was enhanced by one-tenth. The surcharge did not arise independently of the sales tax; it attached only to a dealer who was liable to pay sales tax, and it rose or fell in direct proportion to the tax payable by him, which, in turn, rose or fell with his taxable turnover.

9. The challenge laid by the appellants is that, because the surcharge is computed with reference to the tax payable and not with reference to the turnover, it is not a tax on the sale or purchase of goods within the meaning of Entry 54 of List II, but a tax on a tax, for which no entry in List II authorises.

B.2. THE PUNJAB SURCHARGE UNDER SECTIONS 5(1-C) AND 30-AA OF THE PUNJAB GENERAL SALES TAX ACT, 1948

10. The second set of matters arises from the State of Punjab, where Section 5(1-C) of the Punjab General Sales Tax Act, 1948 (**Punjab Act**) is materially similar to Section 5-A of the Orissa Act. It imposes a similar surcharge at the rate of 10 per cent, calculated on the tax

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payable by a dealer on his taxable turnover, rather than on the turnover itself.

11. The Punjab Act, however, contains a further feature. Section 30-AA thereof provides that industrial units which were otherwise exempted from the payment of sales tax under Section 30-A, by way of incentive or otherwise, would nonetheless be liable to pay the surcharge. This provision, therefore, raises an additional question, namely, whether a surcharge which is described as a percentage of the tax payable can be levied upon a unit which, by reason of an exemption, has no tax liability, and whether such a levy retains its character as a surcharge on sales tax.

12. The Punjab and Haryana High Court upheld the validity of both Section 5(1-C) and Section 30-AA of the Punjab Act. The special leave petitions preferred against the said judgment expressly frame their challenge as raising the very question under Entry 54 of List II which had, by then, been referred to a larger Bench in the lead matter. It is in this manner that these issues came to be tagged with the present batch.

B.3. THE CESS UNDER THE PUNJAB SOCIAL SECURITY ACT, 2000

13. The third set of matters arises out of challenges to the Punjab Social Security Act, 2000. Under the said enactment, the State of Punjab imposed a cess, calculated as a percentage of the sales tax payable

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by a dealer, the proceeds of which were earmarked for funding social security measures through the Punjab Social Security Fund.

14. The High Court of Punjab and Haryana struck down the said enactment, holding, *inter alia*, that the proceeds of the cess could not be credited directly to the Punjab Social Security Fund without first forming part of the Consolidated Fund of the State under Article 266 of the Constitution. The State of Punjab has assailed those judgments before this Court.

15. The aforementioned matters, therefore, raise an issue which is wholly distinct from the question referred, namely, the constitutional mode in which revenues raised by the State are to be received and appropriated. They have been tagged with the present batch only because they also involve the anterior question as to whether the State Legislature was competent, under Entry 54 of List II, to impose such a levy in the first place.

16. It may thus be seen that while all three sets of matters share a common question of legislative competence, the second and third sets raise further questions which are peculiar to them, and which were not necessarily the subject matter of the reference. This particular aspect shall be revisited towards the later part of this judgment.

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C. THE CONSTITUTIONAL FRAMEWORK

C.1. THE DISTRIBUTION OF TAXING POWERS

17. The scheme of distribution of legislative powers under the Constitution is contained in Article 246, read with the three Lists in the Seventh Schedule. Article 246(3) expressly confers upon the Legislature of a State the exclusive power to make laws with respect to the matters enumerated in List II, subject to clauses (1) and (2) of the said Article. Article 265, in turn, mandates that no tax shall be levied or collected except by authority of law, which necessarily means a law enacted by a Legislature competent in that behalf.

18. It is a settled feature of our constitutional scheme that the power to tax is not to be inferred from a general legislative entry, but must be traced to a specific taxing entry. This Court, in ***M.P.V. Sundararamier & Co. v. State of Andhra Pradesh***,[4] noticed that in the Lists, the entries relating to taxation are enumerated separately from the general subjects of legislation, and that the power to tax a subject is not comprised within the power to legislate generally upon that subject. The question of competence in the present batch must, therefore, be answered by reference to the taxing entry invoked by the States, namely, Entry 54 of List II.

[4] AIR 1958 SC 468.

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19. During the time material to the present batch, and prior to its substitution by the Constitution (One Hundred and First Amendment) Act, 2016, Entry 54 of List II used to be read as follows:

> "54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I."

20. The entry thus conferred upon the State Legislatures a plenary power to tax the sale or purchase of goods, other than newspapers, subject only to the provisions of Entry 92-A of List I, which reserves to Parliament the power to tax sales or purchases in the course of inter-State trade or commerce. The amplitude of this power was emphasised by a Three Judge Bench of this Court in ***Hoechst Pharmaceuticals Ltd. & Ors. v. State of Bihar & Ors.***,[5] in the following terms:

> *"72. ... It is axiomatic that the power of the State legislature to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule and to make ancillary provisions in that behalf, is plenary and is not subject to the power of Parliament to make a law under Entry 33 of List III. ... When one entry is made 'subject to' another entry, all that it means is that out of the scope of the former entry, a field of legislation covered by the latter entry has been reserved to be specially dealt with by the appropriate legislature. Entry 54 of List II of the Seventh Schedule is only subject to Entry 92-A of List I ..."*

[5] (1983) 4 SCC 45.

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21. It is equally well established that a legislative entry, particularly a taxing entry, should be given its broadest amplitude, and that every ancillary or subsidiary matter that may fairly and reasonably be understood as falling within it is included within its ambit. Accordingly, the power to tax the sale or purchase of goods necessarily encompasses the power to determine the tax rate, vary the rate according to turnover volume, identify the class of dealers on whom the tax burden is imposed, and prescribe how the tax is to be computed, assessed, and recovered.

C.2. THE SUBJECT OF A TAX AND ITS MEASURE

22. In this legal background, the submission that a surcharge computed on the tax payable is a 'tax on tax' draws its force from a conflation between two distinct concepts, namely, the subject matter of a tax and the measure by which the tax is quantified. The distinction between the two is now firmly entrenched in our jurisprudence. To explicate, the subject of a tax is the taxable event whereupon the levy is imposed, thereby determining the legislative entry to which the law is relatable, whereas the measure of the tax is the yardstick adopted by the Legislature to compute the quantum payable.

23. This Court, in ***Union of India v. Bombay Tyre International Ltd.***,[6] in the context of a duty of excise, held that the nature of the levy is

[6] (1984) 1 SCC 467.

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to be distinguished from the measure of the levy, and that the measure adopted for assessing a tax does not determine its character. To the same effect is the decision in ***Federation of Hotel & Restaurant Association of India v. Union of India***,[7] where it was observed that the measure employed for assessing a tax must not be confused with the nature of the tax, and that the Legislature has, within reasonable limits, a wide latitude in selecting the measure.

24. It may also be observed that the device of computing a levy as a percentage of another tax is neither novel nor unique to the States. The Constitution itself, in Article 271, empowers Parliament to increase the duties or taxes referred to in Articles 269 and 270 by a surcharge for purposes of the Union. A surcharge on income tax, for instance, has always been computed as a percentage of the income tax payable, and it has never been suggested that such a surcharge is, for that reason, a tax on a tax charge that falls outside the entry under which the principal tax is levied. The surcharge is understood, on all hands, to be an enhancement of the principal levy, partaking of its character and drawing its validity from the same source.

25. The position thus can be no different when a State Legislature, acting within its own taxing entry, enhances the tax on the sale or

[7] (1989) 3 SCC 634.

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purchase of goods for a class of dealers by adopting the same mode of computation.

D. THE PRECEDENTIAL LANDSCAPE

26. Having briefly traced the constitutional framework that animates the present controversy, it would be apposite to turn to the three decisions of this Court which lie at the heart of the reference. Two of them have upheld levies of the very kind impugned before us; the third, rendered in an altogether different context, was perceived to cast a shadow upon them. Each of these decisions warrants careful examination, as whether the reference remains viable depends, to a significant extent, on what they decided, or perhaps what they did not decide.

D.1. THE FIRST INSTANCE

27. The earliest, and in our view the most significant, of these decisions is that of a Five Judge Bench in ***S. Kodar (supra)*** concerning a batch of writ petitions and civil appeals challenging the validity of the Tamil Nadu Additional Sales Tax Act, 1970.

28. It is pertinent to note that the scheme of that enactment bears a striking resemblance to the provisions impugned before us. Section 2(1) thereof provided that the tax payable under the Tamil Nadu General Sales Tax Act, 1959, shall, in the case of a dealer whose total turnover for a year exceeds Rs. 10 lakhs, be increased by an

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additional tax at the rate of 5 per cent of the tax payable by that dealer for that year. Section 2(2) provided that, notwithstanding anything contained in the principal enactment, no dealer referred to in sub-section (1) shall be entitled to collect the additional tax payable under the said sub-section. A similar levy was imposed by Section 3 upon importers and wholesale dealers under the Tamil Nadu Sales of Motor Spirit Taxation Act, 1939.

29. It is, therefore, evident that the additional tax considered in ***S. Kodar (supra)*** was computed precisely in the manner in which the levies before us are computed, namely, as a percentage of the tax payable by the dealer, and not as a percentage of his turnover. Indeed, the levy in ***S. Kodar (supra)*** went a step further than the Orissa surcharge, inasmuch as it expressly prohibited the dealer from passing on the incidence of the additional tax to the purchaser.

30. The first contention urged before the Constitution Bench therein was that the State Legislature had no power to enact the said Act, since the tax imposed thereby was a tax on the income of the dealer, and the imposition of such a tax was outside the scope of Entry 54 of List II. The contention was emphatically rejected, in the following terms:

> *"9. As regards the contention that the State Legislature has no power to pass the measure, we are of the view that additional tax is really a tax on the sale of goods. The object of the Act, as is clear from its provisions, is to increase the tax on the sale*

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> *or purchase of goods imposed by Tamil Nadu General Sales Tax Act, 1959 and the fact that quantum of the additional tax is determined with reference to the sales tax imposed would not alter its character. It may be noted that additional tax is to be imposed only if the turnover of a dealer exceeds Rs 10 lakhs. It is in reality a tax on the aggregate of sales effected by a dealer during a year. The additional tax, therefore, is an enhancement in the rate of the sales tax when the turnover of a dealer exceeds Rs 10 lakhs a year and it is a tax on the aggregate of the sales affected by the dealer during the year. ... This is the correct view. Entry 54 in List II authorises the state legislature to impose a tax on the sale or purchase of goods. So, the contention of the appellants that the additional sales tax is not a tax on sales but on the income of the dealer is without any basis."*

31. Three aspects of this reasoning merit emphasis: *First*, the Constitution Bench identified the object of the enactment as being to increase the tax on the sale or purchase of goods. *Second*, it held that the quantum of the additional tax is determined with reference to the sales tax imposed, which would not alter its character. This is a direct answer to the very contention which is now advanced before us. *Third*, it characterised the additional tax as an enhancement in the rate of sales tax for a particular class of dealers, and therefore as a tax on the aggregate of the sales effected by them.

32. The Constitution Bench then dealt with the contention that, since the dealer was prohibited from passing on the incidence of the additional tax to the purchaser, the additional tax was, unlike sales tax, a tax on the income of the dealer which he must pay whether or not he makes any profit. That contention, too, was repelled:

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> *"12. The legal incidence of a tax on sale of goods under the Tamil Nadu General Sales Tax, 1959 falls squarely on the dealer. It may be that he can add the tax to the price of the goods sold and thus pass it on to the purchaser. But it is not necessary that the dealer should be enabled to pass on the incidence of the tax on sale to the purchaser in order that it might be a tax on sales of goods.*
> * * *
> *15. As we said, the additional tax is a tax upon sales of goods and not upon the income of a dealer and so long as it is not made out that the tax is confiscatory, it is not possible to accept the contention that because the dealer is disabled from passing on the incidence of tax to the purchaser, the provisions of the Act impose an unreasonable restriction upon the fundamental rights of the appellants under Article 19(1)(g) or 19(1)(f)."*

33. In reaching this conclusion, the Constitution Bench relied upon the decisions in ***J.K. Jute Mills Co. Ltd. v. State of U.P.***,[8] and ***Konduri Buchirajalingam v. State of Hyderabad***,[9] which, in turn, followed ***Tata Iron and Steel Co. Ltd. v. State of Bihar***,[10] for the proposition that it is not an essential characteristic of a sales tax that the seller must have the right to pass it on to the consumer, and that a tax can be a sales tax though the primary liability for it is placed upon a person without giving him any power to recoup it from any other party.

34. Finally, the Constitution Bench turned down the challenge under Article 14, holding that a classification of dealers on the basis of their

[8] (1962) 2 SCR 1.
[9] AIR 1958 SC 756.
[10] (1958) 9 STC 267.

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turnover, for the purpose of graded imposition, is founded upon an intelligible differentia, since the large dealer occupies a position of economic superiority by reason of the greater volume of his business, and that to make his tax heavier, both absolutely and relatively, is not arbitrary discrimination but an attempt to proportion the payment to the capacity to pay.

35. The ratio of ***S. Kodar (supra)***, insofar as it bears upon the present batch, may thus be summarised as follows: an additional tax or surcharge, imposed upon a class of dealers and computed as a percentage of the sales tax payable by them, is in substance an enhancement of the rate of sales tax, and is therefore a tax on the sale or purchase of goods within Entry 54 of List II; and it does not cease to be so either because its quantum is determined with reference to the sales tax payable, or because the dealer is precluded from passing it on to the purchaser.

D.2. REAFFIRMATION OF THE PRINCIPLE IN THE SECOND CASE

36. The principle laid down in ***S. Kodar (supra)*** was applied, nearly a decade later, by a Three Judge Bench in ***Hoechst Pharmaceuticals (supra)***. The levy in that case was a surcharge under Section 5(1) of the Bihar Finance Act, 1981, which, by notifications dated 15.01.1981, was fixed at the rate of 10 per centum of the total amount of the tax payable by a dealer whose gross turnover during a

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year exceeded Rs. 5 lakhs, in addition to the tax payable by him. Section 5(3) of the said Act prohibited such a dealer from collecting the amount of the surcharge from the purchaser. The levy was, in every material particular, more or less identical to the surcharge under Section 5-A of the Orissa Act.

37. At the very outset, the principles laid down in ***S. Kodar (supra)*** stated as follows:

> *"10. In Kodar case, this court upheld the constitutional validity of the Tamil Nadu Additional Sales Tax Act, 1970 which imposes additional sales tax at 5 per cent on a dealer whose annual gross turnover exceeds Rs 10 lakhs. The charging provision in sub-section (1) of Section 2 of that Act is in terms similar to sub-section (1) of Section 5 of the Act, and provides that the tax payable by a dealer whose turnover for a year exceeds Rs 10 lakhs shall be increased by an additional tax at the rate of 5 per cent of the tax payable by him. ... The court laid down that: (1) The additional tax levied under sub-section (1) of Section 2 of that Act was in reality a tax on the aggregate of sales effected by a dealer during a year and therefore the additional tax was really a tax on the sale of goods and not a tax on the income of a dealer and therefore falls within the scope of Entry 54 of List II of the Seventh Schedule. ..."*

38. It is true that before the Bench in ***Hoechst Pharmaceuticals (supra)***, the relatability of the surcharge to Entry 54 of List II was not seriously disputed. The Court recorded as follows:

> *"13. It is fairly conceded that not only sub-section (1) of Section 5 of the Act which provides for the levy of surcharge on dealers whose gross turnover during a year exceeds Rs 5 lakhs, but also sub-section (3) of Section 5 of the Act which enjoins that no dealer who*

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> *is liable to pay a surcharge under sub-section (1) shall be entitled to collect the amount of surcharge payable by him, are both relatable to Entry 54 of List II of the Seventh Schedule ..."*

39. The principal distinction in ***Hoechst Pharmaceuticals (supra)*** was, therefore, fought on a different terrain, namely, the alleged repugnancy between Section 5(3) of the Bihar Finance Act and paragraph 21 of the Drugs (Prices Control) Order, 1979, issued under the Essential Commodities Act, 1955, which permitted manufacturers of drugs to pass on the liability to pay sales tax. The Court rejected that challenge, holding that the State's power of taxation under Entry 54 of List II is plenary and is not subject to the power of Parliament under Entry 33 of List III.

40. However, it would not be correct to say that ***Hoechst Pharmaceuticals (supra)*** did not engage at all with the character of the surcharge. While dealing with the challenge under Article 14, the Court observed that '***a surcharge in its true nature and character is nothing but a higher rate of tax to raise revenue for general purposes***'. More significantly, while dealing with the challenge under Article 19(1)(g), the Court squarely confronted the contention that the surcharge was, in truth, a tax on income, and rejected it, in the following terms:

> *"83. ... It is urged that the surcharge does not retain its avowed character as sales tax but in its true nature and character is virtually a tax on income, by*

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> *reason of the limitation contained in sub-section (3) of Section 5 of the Act. We are not impressed with the argument. Merely because a dealer falling within the class defined under sub-section (1) of Section 5 of the Act is prevented from collecting the surcharge recovered from him, does not affect the competence of the State legislature to make a provision like sub-section (3) of Section 5 of the Act nor does it become a tax on his income. It is no doubt true that a sales tax is, according to the accepted notions, intended to be passed on to the buyer, and the provisions authorizing and regulating the collection of sales tax by the seller from the purchaser are a usual feature of sales tax legislation. But it is not an essential characteristic of sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the legislature to impose a tax on sales conditional on its making a provision for sellers to collect the tax from the purchasers. ...”*

41. It is thus evident that the Court independently considered and rejected the contention that a surcharge computed on the tax payable is, in substance, a tax on income. In any event, the absence of a full-fledged discussion in ***Hoechst Pharmaceuticals (supra)*** is of little consequence, since the question had already been authoritatively determined by the Constitution Bench in ***S. Kodar (supra)***, which, being binding upon the Three Judge Bench, was faithfully applied.

D.3. THE THIRD CASE AND THE CONUNDRUM

42. The third decision, and the one which is said to have given rise to the difficulty, is that of a Seven Judge Bench in ***India Cement (supra)*** It is necessary to notice at the outset that the said decision was not concerned with sales tax at all.

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43. The appellant in that case held mining leases in respect of limestone and kankar, and was liable to pay royalty to the State Government under Section 9 of the Mines and Minerals (Regulation and Development) Act, 1957 (**MMDR Act**). Section 115 of the Madras Panchayats Act, 1958, as amended, levied a local cess at the rate of 45 paise on every rupee of land revenue payable, and the Explanation to Section 115(1) deemed 'land revenue' to include royalty payable in respect of minerals. Section 116 of the said Act empowered every panchayat union council to levy a local cess surcharge '*as an addition to the local cess levied ... under Section 115*'. The effect of these provisions was that a cess, and a surcharge upon that cess, came to be levied upon the royalty payable by mining lessees.

44. Section 116 of the Madras Panchayats Act, as it stood at the relevant time, and as extracted in paragraph 7 of the judgment, read as follows:

> *"116. Every panchayat union council may levy on every person liable to pay land revenue to the government in respect of any land in the panchayat union a local cess surcharge at such rate as may be considered suitable as an addition to the local cess levied in the panchayat development block under Section 115 provided that the rate of local cess surcharge so levied shall not exceed two rupees and fifty paise on every rupee of land revenue payable in respect of such land."*

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45. It may thus be seen that the local cess surcharge under Section 116 was itself a levy computed as an addition to another levy. Yet, the question that engaged the Seven Judge Bench was not whether a levy computed on another levy is permissible as such, but whether the State was competent to levy a cess, and a surcharge upon it, on royalty. The answer to that question turned entirely upon the nature of royalty and the field occupied by the MMDR Act.

46. The central question before the Seven Judge Bench was whether the State Legislature was competent to levy such a cess on 'royalty'. The State sought to sustain the levy under Entries 45 (land revenue), 49 (taxes on lands and buildings) and 50 (taxes on mineral rights) of List II. The Court, speaking through Sabyasachi Mukharji, J. (*as his Lordship then was*), rejected each of these justifications, and concluded as follows:

> *"34. In the aforesaid view of the matter, we are of the opinion that royalty is a tax, and as such a cess on royalty being a tax on royalty, is beyond the competence of the State legislature because Section 9 of the Central Act covers the field and the State legislature is denuded of its competence under Entry 23 of List II. In any event, we are of the opinion that cess on royalty cannot be sustained under Entry 49 of List II as being a tax on land. Royalty on mineral rights is not a tax on land but a payment for the user of land."*

47. The Court thus declared the cess under Section 115 of the Madras Panchayats Act to be *ultra vires*; the State of Tamil Nadu was

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restrained from enforcing the same, and it was directed that the respondents would not be liable for any refund of cess already paid or collected.

48. In his concurring opinion, G.L. Oza, J. approached the matter from a somewhat different perspective. The learned Judge observed that it was '*not very material*' whether royalty is a tax. He found that the cess was '*nothing but an additional tax*', which would fall within Entry 49 of List II if levied on land revenue. A cess charged on royalty, however, could not be called a levy on land and could not be sustained under Entry 49.

49. Read as a whole, the decision in ***India Cement (supra)*** turned upon the following considerations: (***i***) the subject of the impugned cess was royalty, which was payable under a Central enactment, namely, the MMDR Act; (***ii***) the field of royalty on minerals was fully occupied by Section 9 of the MMDR Act, made under Entry 54 of List I, so that the State Legislature stood denuded of its competence under Entries 23 and 50 of List II; and (***iii***) royalty was not land revenue, nor was a cess on royalty a tax on land, so the Entries 45 and 49 of List II were also unavailable. The observation that '*royalty is a tax*' was the premise on which the cess was characterised as a '*tax on royalty*', and therefore as a levy falling within a field occupied by Parliament.

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50. It is of some significance that the decision in ***India Cement (supra)*** did not hold that a levy computed as a percentage of another tax is, for that reason alone, beyond the competence of the Legislature which imposed the principal tax. On the contrary, as we have noticed, the Seven Judge Bench expressly approved the principle laid down in ***M/s Guruswamy & Co. etc. v. State of Mysore & Ors.***[11] that a cess levied as an increment to an existing tax must be judged in the same way as the tax to which it is levied. The invalidity of the cess in ***India Cement (supra)*** flowed not from the mode of its computation, but from the fact that the very foundation of its increment, namely, 'royalty', was itself treated as a levy, for which the State Legislature had no competence to impose or to tax.

E. THE GENESIS AND JOURNEY OF THE REFERENCE

51. It was against the backdrop of the three decisions explained above that the lead matter first came up for consideration before a Two Judge Bench (comprising S.P. Bharucha and V.N. Khare, JJ.). By an order dated 13.08.1998, the Bench took the view that ***Hoechst Pharmaceuticals (supra)*** and ***India Cement (supra)*** appeared to take different views on the true nature of a levy which is computed with reference to another levy. In its opinion, the matter raised a substantial question as to the true nature and character of the surcharge imposed under Section 5-A of the Orissa Act, and it

[11] [1967] 1 SCR 548.

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accordingly directed that the papers be placed before the Chief Justice for the constitution of a larger Bench.

52. Consequent thereto, the matter was placed before a Five Judge Bench comprising S.P. Bharucha, B.N. Kirpal, V.N. Khare, D.P. Mohapatra and N. Santosh Hegde, JJ. Upon a perusal of the order of reference, the Constitution Bench, by its order dated 06.10.1999, noticed that the decision of a Constitution Bench in ***S. Kodar (supra)*** would also have to be considered.

53. Such an observation had indeed been recorded on the basis that the initial Two Judge Bench had framed the reference owing to an apparent divergence between ***Hoechst Pharmaceuticals (supra)***, a decision of a Three Judge Bench, and ***India Cement (supra)***, a decision of a seven-Judge Bench. However, the question had, in fact, been decided by a Five Judge Bench in ***S. Kodar (supra)***, which had upheld a levy calculated in an identical manner. As any reconsideration of the correctness of ***S. Kodar (supra)*** could be undertaken only by a Bench of greater strength, the Five Judge Bench held that a reference to a seven-Judge Bench had become necessary and directed that the papers be placed before the Chief Justice for appropriate directions.

54. In the years that followed, the connected matters from the State of Punjab, noticed in Part B.2 and Part B.3 above, came to be tagged

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with the reference, on the footing that they too raised the question as to the competence of the State Legislature under Entry 54 of List II. Thereafter, by an order dated 09.01.2024, a Three Judge Bench presided over by the then Chief Justice of India, appointed Ms. Anindita Pujari as the common nodal counsel, with a view to facilitating the orderly hearing of the batch.

55. Thereafter, *vide* our order dated 12.08.2026, the matter was directed to be listed for hearing. In the *interregnum*, Ms. Anindita Pujari having been designated as a Senior Advocate, Ms. Samapika Biswal, learned Advocate on Record, was appointed as the nodal counsel in the matter.

F. DEVELOPMENTS SUBSEQUENT TO THE REFERENCE

56. Be that as it may, during the pendency of the reference, three significant developments have taken place, each of which bears directly upon the question whether the reference survives. We shall notice each of them in turn.

F.1. THE DECISION IN KESORAM INDUSTRIES: THE FIRST CORRECTION

57. The first development occurred in ***State of West Bengal v. Kesoram Industries Ltd.***,[12] wherein a Constitution Bench of Five Judges was called upon to consider, amongst other questions, the effect of the observation in ***India Cement (supra)*** that 'royalty is a tax'. The

[12] (2004) 10 SCC 201.

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majority in ***Kesoram (supra)*** held that the observation resulted from an inadvertent error, and that the Seven Judge Bench intended to say that a cess on royalty is a tax. The majority upon such reading held that royalty is not a tax, but a payment made to the owner of the land in consideration of the right to extract minerals.

58. ***Kesoram (supra)*** thus significantly narrowed the reach of ***India Cement (supra)***, and confined it to its context, namely, a cess levied on royalty in a field covered by Section 9 of the MMDR Act. However, ***Kesoram (supra)*** was a decision of a Five Judge Bench, which had sought to interpret the decision of a Seven Judge Bench. The controversy as to whether royalty is a tax could not be said to have been finally put to rest in ***Kesoram (supra)***. That question was thereupon, in due course, referred to a Nine Judge Bench.

F.2. MINERAL AREA DEVELOPMENT AUTHORITY: THE DOUBT FINALLY DISPELLED

59. The second, and in our view decisive, development is the judgment of a Nine Judge Bench of this Court in ***Mineral Area Development Authority & Anr. v. Steel Authority of India & Anr.***[13] The majority, speaking through the then Chief Justice of India, held that royalty is not a tax. It clarified and held that royalty is a contractual consideration paid by the mining lessee to the lessor for the

[13] (2024) 10 SCC 1.

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enjoyment of mineral rights, and that it does not bear the essential characteristics of a tax, namely, a compulsory exaction imposed by the sovereign by authority of law for public purposes.

60. Consequently, the majority held that the observation in ***India Cement (supra)*** that royalty is a tax was incorrect, and overruled the said decision to that extent. The majority further held that the MMDR Act does not denude the State Legislatures of their power to tax mineral rights under Entry 50 of List II, as it contains no express limitation on that power, and that a limitation on a taxing power of the States cannot be implied.

61. The effect of ***Mineral Area Development Authority (supra)*** upon the present reference is self-evident. The very premise on which ***India Cement (supra)*** characterised the cess on royalty as a 'tax on a tax', namely, that royalty is itself a tax, has been authoritatively displaced by a Bench of greater strength. Consequently, the observation which the Two Judge Bench perceived to be in tension with ***Hoechst Pharmaceuticals (supra)***, no longer holds the field.

F.3. THE CONSTITUTIONAL TRANSITION TO THE GOODS AND SERVICES TAX

62. The third development is of a different, but equally significant, character. With the enactment of the Constitution (One Hundred and First Amendment) Act, 2016, the constitutional scheme governing the taxation of goods and services underwent a fundamental

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restructuring. Article 246A was inserted, conferring upon Parliament and the Legislature of every State a concurrent power to make laws with respect to the Goods and Services Tax. Clauses (1) and (2) of Article 246A read as follows:

> *"246A. (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.*
>
> *(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce."*

63. Simultaneously, Entry 54 of List II was substituted, and now it reads as follows:

> *"54. Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods."*

64. The general power of the States to tax the sale or purchase of goods, under which the impugned surcharges were enacted, has thus ceased to exist in the form in which it was exercised. Entry 54 of List II now extends only to a limited and specified class of goods. The transitional provision in the said Amendment Act preserved existing laws relating to tax on goods or services only until they were amended or repealed by a competent Legislature, or until the

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expiration of one year from the commencement of the Amendment, whichever was earlier.

65. We may also notice that even prior to the introduction of the Goods and Services Tax, the sales tax regimes under which the impugned surcharges were levied had been replaced in both the States concerned, upon the adoption of the value added tax regime, by the Orissa Value Added Tax Act, 2004, and the Punjab Value Added Tax Act, 2005, respectively. The surcharges which are the subject matter of the present batch, therefore, relate exclusively to assessment periods under enactments which are no longer on the statute book, and no fresh levy of the kind impugned is, or can be, made under them.

G. THE RIVAL POSITIONS ON RECORD

66. Briefly put, the case of the assessees, as set out in the appeals and the special leave petitions, may be summarised thus: (***i***) Entry 54 of List II permits only a tax on the sale or purchase of goods, the taxable event being the transfer of property in goods; (***ii***) a surcharge computed as a percentage of the tax payable, as opposed to the turnover, is not measured by the sale, but by the burden of tax already imposed, and is therefore amounts to a 'tax on tax' which no entry in List II authorises; (***iii***) the decision in ***India Cement (supra)***, being that of a Seven Judge Bench, lays down the principle that a

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levy calculated with reference to another impost must be tested by what it is actually measured against, and not by the label which the enactment gives it; and (***iv***) the decision in ***Hoechst Pharmaceuticals (supra)*** proceeded on a concession and cannot, therefore, be treated as a binding precedent on the question of competence.

67. The States, on the other hand, maintain that the question is squarely covered by ***S. Kodar (supra)***, a decision of a Constitution Bench which has never been doubted; that the surcharge is nothing but an enhancement of the rate of sales tax for a class of dealers with a higher turnover; that the mode of computation of a tax does not determine its character; and that ***India Cement (supra)*** was concerned with an altogether different levy in a totally alien field. Insofar as the matters under the Punjab Social Security Act, 2000 are concerned, the State of Punjab additionally contends that the High Court erred in its interpretation of Article 266 of the Constitution.

68. It is in the light of these rival positions, and the developments noticed in Part F above, that the question as to whether the reference survives must be examined.

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H. ISSUES FOR CONSIDERATION

69. Having regard to the foregoing, the following singular issue falls for our consideration:

i. Whether, in view of the developments subsequent to the orders dated 13.08.1998 and 06.10.1999, the question referred to this Bench continues to survive for adjudication?

70. At the cost of repetition, we may clarify that the question which was proposed for answer in the reference was, in substance, whether the imposition of a tax, levy, surcharge or cess, which is calculated on the basis of a valid sales tax, is beyond the legislative competence of the State. Issue (i) requires us to consider whether that question remains a live one, or whether it stands answered by the existing law declared by this Court.

I. ANALYSIS

I.1. THE FRAMEWORK GOVERNING REFERENCES TO LARGER BENCHES

71. Article 145(3) of the Constitution mandates that a case involving a substantial question of law as to the interpretation of the Constitution shall be heard by a Bench of not less than five Judges. Beyond this constitutional prescription, the practice of referring a question to a Bench of larger strength is founded upon the doctrine of precedent and the binding nature of the law declared by this Court under Article 141. The practice ensures that the law declared by this

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Court speaks with one voice, and that a view expressed by a Bench of a particular strength is not unsettled by a Bench of lesser strength.

72. The governing principles were authoritatively crystallised by a Constitution Bench of this Court in ***Central Board of Dawoodi Bohra Community & Anr. v. State of Maharashtra & Anr.***,[14] wherein it was held as follows:

> *"12. ... (1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.*
>
> *(2) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. ..."*

73. The Constitution Bench further clarified that these rules are subject to the discretion of the Chief Justice, as the master of the roster, to direct any matter to be placed before a Bench of any strength, and that a Bench of larger quorum before whom a matter has come up for hearing may, by way of exception and for reasons to be recorded, examine the correctness of a view taken by a Bench of lesser quorum.

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[14] (2005) 2 SCC 673.

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74. Two corollaries follow from these principles, and they are of direct relevance to the present batch. *First*, the purpose of a reference is to resolve a genuine doubt or conflict in the law declared by this Court, which a Bench of lesser strength is not competent to resolve for itself. A reference is, therefore, inextricably tethered to the existence of such a doubt or conflict. *Second*, the law declared by a Bench of larger strength is binding upon all Benches of lesser or co-equal strength. Consequently, where the doubt which occasioned a reference is resolved by a subsequent decision of a Bench of even larger strength, the law stands declared by that decision, and the Bench to which the reference was made would only be called upon to restate what is already binding.

I.2. WHEN DOES A REFERENCE CEASE TO SURVIVE?

75. It is well established that a reference to a larger Bench is not a separate proceeding detached from the *lis*; rather, it constitutes a step in the adjudication of the appeals in which it is made, undertaken on account of the Bench hearing those appeals having considered that, in accordance with judicial discipline, it could not decide them without first resolving the doubt.

76. It must follow that the continued survival of a reference depends upon the continued existence of the doubt which occasioned it. Where the doubt has been authoritatively dispelled, in the

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interregnum, whether by a subsequent decision of a Bench of greater strength, by a legislative or constitutional amendment, or otherwise, the reference ceases to serve the purpose for which it was made. To answer it in such circumstances would be to render, in substance, an opinion on a question that no longer requires an answer, and to wastefully occupy a larger Bench's time in restating the settled law.

77. Suffice it to say that a Seven Judge Bench is a scarce institutional resource, and every such Bench constituted to answer a question which already stands answered is a Bench not available for the many questions of genuine constitutional import which await resolution. More importantly, the parties to the individual appeals, whose rights and liabilities depend upon the outcome, are compelled to wait for the answer to a question which the law has, in the meantime, already supplied. The principle that delay must not be compounded by procedural inertia applies with no less force to references than it does to any other proceeding before this Court.

78. We may hasten to add that we do not suggest that a reference must automatically be returned whenever there is some subsequent development in the law. There may well be cases where, notwithstanding subsequent developments, the question referred retains a live significance, either because it continues to govern a large number of pending disputes, or because the subsequent

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developments themselves give rise to fresh uncertainty. The inquiry in each case must be whether, having regard to the law as it stands on the date on which the reference comes up for hearing, there remains a genuine doubt which only a Bench of the strength to which the matter has been referred can resolve.

I.3. THE PERCEIVED CONFLICT REVISITED

79. The reference, as we have noticed, owes its origin to a perceived conflict between the ratio laid down in ***Hoechst Pharmaceuticals (supra)*** and ***India Cement (supra)***. With utmost respect to the Bench that passed the order dated 13.08.1998, we are of the considered view that, on a careful reading of the two decisions, the conflict was more apparent than real, even at the time the reference was made.

80. *First*, the two decisions were concerned with levies of an altogether different character, imposed under altogether different entries. ***Hoechst Pharmaceuticals (supra)*** was concerned with a surcharge on sales tax, imposed under Entry 54 of List II, which is a plenary taxing entry subject only to Entry 92-A of List I. Whereas, ***India Cement (supra)*** was concerned with a cess on royalty payable under a Central enactment, which the State sought to justify under Entries 45, 49 and 50 of List II, and which was held to fall within a field occupied by Parliament under Entry 54 of List I. Further, it is

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important to underscore that the decision in ***India Cement (supra)*** does not advert to the decision in ***S. Kodar (supra)*** or to ***Hoechst Pharmaceuticals (supra)***, nor to any levy under Entry 54 of List II.

81. *Second*, the reasoning in ***India Cement (supra)*** did not turn upon the mode of computation of the cess. The cess was not held to be invalid because it was computed on another levy. It was held to be invalid because the base on which it was levied, namely, royalty, was treated as a subject which the State Legislature had no competence to tax, namely the field being covered by Section 9 of the MMDR Act.

82. *Thirdly*, and perhaps most tellingly, the Seven Judge Bench in ***India Cement (supra)*** itself approved the principle laid down in ***Guruswamy (supra)***, that when a cess is levied as an increment to an existing tax, its validity must be judged in the same way as the validity of the tax to which it is an increment. Perhaps, far from being in conflict with ***S. Kodar (supra)*** and ***Hoechst Pharmaceuticals (supra)***, this principle furnishes the very foundation on which those decisions rest. A surcharge which is an increment to a sales tax is lawful if the sales tax is valid; a cess which is an increment to a levy which the State is incompetent to tax is invalid because the principal levy is beyond the State's reach.

83. Viewed thus, the observation in ***India Cement (supra)*** that '*a cess on royalty being a tax on royalty, is beyond the competence of the*

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State legislature' was not a declaration that every levy computed on another levy is beyond competence. It was a declaration that a levy on royalty, in the field occupied by the MMDR Act, was beyond the competence of the State Legislature. The two propositions are distinct, and the former cannot be extracted from the latter.

I.4. THE EFFECT OF *KESORAM INDUSTRIES (SUPRA)* AND *MINERAL AREA DEVELOPMENT AUTHORITY (SUPRA)*

84. Even if it were assumed that the observation in ***India Cement (supra)*** was capable of the wider reading which the assessees place upon it, that observation no longer holds the field. As noticed in Part F above, a Constitution Bench in ***Kesoram (supra)*** first read the observation that 'royalty is a tax' as an inadvertent error, and the Nine Judge Bench in ***Mineral Area Development Authority (supra)*** in any case has since authoritatively held that royalty is not a tax, and has overruled ***India Cement (supra)*** to that extent.

85. The consequence is that the premise on which the cess in ***India Cement (supra)*** was characterised as a 'tax on a tax' has since been removed. Royalty being a contractual consideration and not a tax, a cess on royalty is not a tax on a tax at all. The very formulation on which the assessees rely, namely, that a levy computed on another tax is impermissible as a 'tax on tax', thus finds no support in ***India Cement (supra)*** as it now stands.

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86. Respectfully following the principles enunciated in ***Dawoodi Bohra (supra)***, the decision of the Nine Judge Bench in ***Mineral Area Development Authority (supra)*** is binding upon this Bench of lesser strength. There is, therefore, no longer any decision of this Court of a strength greater than or equal to that of ***S. Kodar (supra)*** which can be said to be in conflict with it. The conflict which occasioned the reference, whether real or apparent, has ceased to exist.

I.5. THE CONTINUED AUTHORITY OF *S. KODAR (SUPRA)*

87. With the shadow cast by ***India Cement (supra)*** having been lifted, the question referred stands squarely answered by ***S. Kodar (supra)***. It bears repetition that the additional tax in ***S. Kodar (supra)*** was computed as a percentage of the tax payable by the dealer, which is precisely the mode of computation impugned in the present batch. The Constitution Bench held, in terms, that "***the fact that quantum of the additional tax is determined with reference to the sales tax imposed would not alter its character.***" No subsequent decision of this Court, of any strength, has doubted this proposition.

88. However, it may be apposite to note that the Union of India has filed a curative petition challenging ***Mineral Area Development Authority (supra)***. In 2026, the Parliament furthermore inserted Section 9D of the MMDR Act, which subjects the States' power to tax

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mineral rights or mineral-bearing land or mineral value or royalty payable to such conditions as prescribed by the Central Government.

89. Neither the pending curative petition nor the subsequent amendment to the MMDR Act affects the findings in ***Mineral Area Development Authority (supra)*** approving the ratio in ***S. Kodar (supra)*** that the legislative competence of the State Government to impose additional sales tax, which is determined with reference to the sales tax payable by a dealer whose annual turnover exceeds a minimum threshold and where there is no pass-through to consumers, is traceable to Entry 54 List II as tax on sales of goods and not ultra vires as a tax on income of such dealer.

90. The submission that a levy computed on the tax payable is a '*tax on tax*', and therefore not a tax on the sale of goods, does not, in our view, bear close scrutiny. We say so for the following reasons. A sales tax is itself computed as a percentage of the taxable turnover. A surcharge computed as a percentage of that tax is, therefore, by simple arithmetic, a further percentage of the same taxable turnover. To illustrate, a surcharge of 10 per cent upon a sales tax levied at the rate of 10 per cent of the turnover is, in substance, nothing but an additional levy of 1 per cent upon the turnover. The subject of the surcharge remains the sale or purchase of goods; the only difference lies in the arithmetical route by which the quantum is reached.

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Accordingly, the measure of a tax, as we have noticed, does not determine its character.

91. Equally, the contention that such a surcharge is, in truth, a tax upon the income of the dealer is belied by its very structure. The sales tax payable by a dealer, and consequently the surcharge computed thereon, escalates with his turnover, and not with his income. A dealer who has made no profit in a year, or who has suffered a loss, would nonetheless be liable to pay both the sales tax and the surcharge, so long as his turnover exceeds the prescribed threshold. A levy which is payable irrespective of the existence of income, and which bears no relation to the quantum of income, cannot, by any stretch, be characterised as a tax on income. This was precisely the reasoning of the Constitution Bench in ***S. Kodar (supra)***, and of the Three Judge Bench in ***Hoechst Pharmaceuticals (supra)***.

92. Nor are we persuaded that the concession recorded in ***Hoechst Pharmaceuticals (supra)*** detracts from the authority of the law on the point. It is our considered view that the binding force of the proposition does not rest upon ***Hoechst Pharmaceuticals (supra)***; instead, it rests upon ***S. Kodar (supra)***, a decision of a Constitution Bench in which the question of competence was squarely raised, contested and decided. In any event, as we have noted, the Bench in

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Hoechst Pharmaceuticals (supra) independently considered and rejected the contention that the surcharge was, in its true nature and character, a tax on income.

93. It may also be noticed that the challenge in the present batch does not rest upon any feature of the impugned surcharges which distinguishes them from the levy upheld in ***S. Kodar (supra)***. The Orissa surcharge and the surcharge under Section 5(1-C) of the Punjab Act, like the additional tax in ***S. Kodar (supra)***, are imposed upon a class of dealers defined by reference to the volume of their turnover, and are computed as a fixed percentage of the sales tax payable by them. No circumstance has been pointed out which would take them outside the ratio of that decision.

94. We are, therefore, of the considered view that the question referred to this Bench is fully answered by the law declared by the Constitution Bench in ***S. Kodar (supra)***, which continues to hold the field, and that there is no conflict in the law declared by this Court which requires resolution by a Seven Judge Bench.

I.6. THE ALTERED CONSTITUTIONAL LANDSCAPE

95. There is yet another reason why the reference does not merit adjudication by a larger Bench. As noticed in Part F.3 above, Entry 54 of List II, in the form in which it conferred a general power upon the States to tax the sale or purchase of goods, no longer exists. The

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impugned provisions were enacted under a constitutional entry which has since been substituted and replaced under State enactments, first by Value Added Tax legislation, and thereafter by the Goods and Services Tax regime.

96. The question referred is, thus, of no prospective significance for the States whose enactments are before us, and of limited significance for the legacy sales tax regime generally. Insofar as the residuary goods which continue to be taxed under the substituted Entry 54 of List II are concerned, the question, if it ever arises, stands governed by ***S. Kodar (supra)***.

97. We are conscious that the individual assessees continue to have a stake in the outcome of their appeals, since liabilities for the past assessment periods may yet be enforced. Our conclusion does not foreclose their rights. It merely recognises that those rights must be determined by the regular Benches in accordance with the law as it stands declared, and not by a larger Bench constituted to resolve a conflict which no longer exists.

I.7. THE RESIDUAL QUESTIONS

98. Before parting, we must notice that the batch contains matters which raise questions that were never the subject matter of the reference and that are not answered by ***S. Kodar (supra)***.

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99. The *first* such question arises under Section 30-AA of the Punjab Act. As we have noticed, the said provision requires industrial units which are otherwise exempted from the payment of sales tax under Section 30-A to pay the surcharge nonetheless. This raises distinct questions, including whether a surcharge which is defined as a percentage of the tax payable can be levied where, by reason of a statutory exemption, no tax is payable; whether such a levy, in its true nature, remains an increment to sales tax or becomes an independent levy; and whether its imposition is consistent with the scheme of exemption granted under the Punjab Act. These questions depend, in part, upon the construction of the provisions of the Punjab Act and the terms of the exemptions granted, and must be examined on their own merits.

100. The *second* such question arises in the matters under the Punjab Social Security Act, 2000. Article 266(1) of the Constitution provides, *inter alia*, that all revenues received by the Government of a State shall form one consolidated fund to be entitled 'the Consolidated Fund of the State'. Article 266(3) provides that no moneys out of the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in the Constitution. The High Court has held that the proceeds of the cess could not be credited directly to the Punjab Social Security Fund without first forming part of the Consolidated

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Fund of the State. Whether that view is correct is a question of the constitutional scheme governing public finance, which is wholly independent of the question of legislative competence under Entry 54 of List II.

101. We have refrained from expressing any opinion on either of these questions. Both of them, as also any other question peculiar to the individual matters, are left open, to be decided by the appropriate regular Bench on their own merits.

J. CONCLUSION AND DIRECTIONS

102. In the light of the foregoing discussion, our conclusions may be summarised as follows:

i. The reference arose out of a perceived conflict between ***Hoechst Pharmaceuticals (supra)*** and ***India Cement (supra)***, and was enlarged by the order dated 06.10.1999, on account of the need to consider ***S. Kodar (supra)***;

ii. The decision in ***India Cement (supra)*** was concerned with a cess on royalty in a field covered by the MMDR Act. It did not hold that a levy computed as a percentage of another tax is, for that reason, beyond the competence of the Legislature, and imputed that a cess levied as an increment to an existing tax is to be judged in the same way as that tax;

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iii. The premise of ***India Cement (supra)***, namely, that royalty is a tax, has been overruled by a Nine Judge Bench in ***Mineral Area Development Authority (supra)***. There is, therefore, no subsisting decision of this Court which is in conflict with ***S. Kodar (supra)***;

iv. ***S. Kodar (supra)*** squarely holds that an additional tax or surcharge computed as a percentage of the sales tax payable is an enhancement of the rate of sales tax and a tax on the sale or purchase of goods within Entry 54 of List II, as it then stood. That decision continues to hold the field;

v. The constitutional entry and the State enactments under which the impugned levies were imposed have since been substituted or replaced, and the question referred is of no prospective significance;

vi. Consequently, the question referred does not survive for adjudication by a Seven Judge Bench, and the reference has been rendered academic.

103. In light of these conclusions and findings, we deem it appropriate to accordingly direct as follows:

i. The reference is answered as having been rendered infructuous. The question of the legislative competence of the State

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Legislatures to levy the impugned surcharges shall be governed by the law declared in ***S. Kodar (supra)***;

ii. The questions as to (a) the validity of Section 30-AA of the Punjab General Sales Tax Act, 1948, insofar as it requires industrial units otherwise exempted from sales tax to pay the surcharge; and (b) whether the proceeds of the cess levied under the Punjab Social Security Act, 2000 could be credited directly to the Punjab Social Security Fund without first forming part of the Consolidated Fund of the State under Article 266 of the Constitution, are left open. Nothing stated in this order shall be construed as an expression of opinion on these questions;

iii. All other contentions of the parties in the individual matters, including those relating to the assessments, the periods of levy, and the consequential reliefs, are also left open;

iv. The Registry is directed to list the lead matter, and the connected matters before the appropriate regular Bench(es) for disposal on their individual merits, in accordance with the observations made hereinabove and after taking requisite directions from the Chief Justice of India on the administrative side.

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104. Before parting, we place on record our appreciation for the assistance rendered by learned counsel for the parties and by Ms. Samapika Biswal, learned nodal counsel.

105. Ordered accordingly.

.....CJI.
(SURYA KANT)

.....J.
(S.V.N. BHATTI)

.....J.
(JOYMALYA BAGCHI)

.....J.
(N.V. ANJARIA)

.....J.
(ARUN PALLI)

.....J.
(V. MOHANA)

NEW DELHI;
04.11.2026

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8763 OF 1994

Arjun Flour Mills .....Appellant(s)

Versus

The State of Orissa And Others ..... Respondent(s)

WITH

CIVIL APPEAL NO. 8909 OF 1994

CIVIL APPEAL NO. 7485 OF 2001

CIVIL APPEAL NO. 98 OF 2003

SLP (C) Nos. 22159-22180/2002

CIVIL APPEAL NOS. 831-850 OF 2003

CIVIL APPEAL NO. 851 OF 2003

CIVIL APPEAL NO. 99 OF 2003

CIVIL APPEAL NO. 100 OF 2003

CIVIL APPEAL NO. 5046 OF 2003

AND

CIVIL APPEAL NO. 5637 OF 2008

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J U D G M E N T

K. V. Viswanathan, J.

BACKGROUND:

1) In ***S. Kodar*** vs. ***State of Kerala,*** [1975] 1 SCR 121, K.K. Mathew, J. speaking for a five-Judge Constitution Bench of this Court, upheld the validity of the Tamil Nadu Additional Sales Tax Act, 1970 (for short 'the Tamil Nadu Act'). In a judgment marked by chilling clarity and characteristic brevity, the learned Judge held that the State Legislature had the legislative competence under Article 246 read with Entry 54 of List II of the Seventh Schedule to the Constitution of India to enact the law; that the levy was a tax on the sale of goods; and the fact that quantum of the additional tax was determined with reference to the sales tax imposed would not alter the character of the levy and that in reality, it was a tax on the aggregate of the sales effected by a dealer. It was further held that the provisions did not impose any unreasonable restrictions on the right to carry on trade and that only

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because a dealer was disabled from passing on the incidence of tax to the purchasers, the tax does not cease to be a sales tax and further that the classification made based on the turnover was valid. While ***S. Kodar (supra)*** was pronounced on 17.04.1974, a three-Judge Bench of this Court, on 06.05.1983, followed ***S. Kodar (supra)*** in ***Hoechst Pharmaceuticals Ltd. & Ors.*** vs. ***State of Bihar & Ors.*** (1983) 4 SCC 45.

2) When things stood thus, the constitutional validity of Section 5-A(1) and 5-A(3) of the Orissa Sales Tax Act, 1947 (for short 'the Orissa Act'), as amended by the Orissa Act No 11 of 1990, was raised before the High Court of Orissa. The said Section provided for levy of surcharge at the rate of 10 per centum of the total amount of tax payable by a dealer, whose gross turnover during any year exceeds Rs. 10 lakhs. Relevant parts of Section 5-A of the Orissa Act reads as under:-

> "5-A (1) Every dealer whose gross turnover during any year exceeds rupees ten lakhs shall, in addition to the tax payable by him under this Act, also pay a surcharge at the

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rate of ten per centum of the total amount of tax payable by him:

Provided that the aggregate of the tax and surcharge payable under this Act shall not exceed in respect of goods declared to be of special importance in inter-State trade or commerce by Section 14 of the Central Sales Tax Act, 1956, the rate fixed by Section 15 of the said Act:

Provided further that in the case of an Assessment year which has commenced before the commencement of the Orissa Sales Tax (Amendment) Act, 1990, turn over of the whole of such Assessment year shall be taken into account for purposes of determining whether the dealer is liable to pay surcharge under this section, but the surcharge shall be payable only in respect of that part of the turn over which relates to the period after the commencement of this section.

xxxxx

(3) Notwithstanding anything to the contrary contained in any other provisions of this Act, no dealer mentioned in sub-section (1), who is liable to pay surcharge, shall be entitled to collect the amount of this surcharge."

3) A Division Bench of the High Court of Orissa, speaking through Arijit Pasayat, J. (as the learned Judge then was), followed the judgment in ***S. Kodar (supra) & Hoechst (supra)*** to uphold the levy.

4) The assessees carried the matter to this Court with the lead matter being Civil Appeal No. 8763 of 1994, viz., M/s Arjun Flour Mills vs. State of Orissa & Ors.

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5) Similar issues arose in the State of Punjab. The Punjab legislature enacted the Punjab General Sales Tax (Amendment) Act, 2002 (for short 'the Punjab Act'). By the said Act, Section 5(1-C) and Section 30(AA) were introduced which provided for levy of surcharge at the rate of 10 per centum on the taxable turnover of a dealer, even on certain class of industries. The said Sections read as under: -

> "Section 5(1-C) -- Notwithstanding anything contained in this Act, there shall be levied and collected on the taxable turnover of a dealer, a surcharge, which shall be calculated at the rate of ten per centum of the tax payable by him under this Act:
> Provided that the aggregate of the tax and the surcharge payable under this Act, shall not exceed in respect of goods declared to be of special importance in inter-state trade or commerce by section 14 of the Central Sales Tax Act, 1956, the rate fixed by section 15 of that Act.
>
> Section 30(AA) -- Notwithstanding any exemption granted to any class of industries under Section 30-A of this Act, such industries shall pay the surcharge levied under sub-section (1-C) of section 5 of the Act, in the manner, as may be prescribed."

6) The said provisions were upheld by the High Court of Punjab & Haryana at Chandigarh vide judgment dated 04.03.2002 in Civil Writ Petition No. 3693 of 2002, in the following terms:-

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> "As observed by their Lordships of the Supreme Court in Sarojini Tea Co. (P) Ltd. Vs. Collector of Dibrugarh (1992) 2 SCC 156 and in Indian Aluminum Co. and others vs. State of Kerala and others, (1996) 7 SCC 637, "the expression 'surcharge' in the context of taxation means an additional imposition which results in enhancement of the tax and the nature of additional imposition is the same as the tax on which it is imposed as surcharge." The State Legislature being competent to levy tax on the sale or purchase of goods, the imposition of surcharge cannot be outside its purview. A tax being a compulsory exaction of money, it is not an unreasonable restriction on the freedom of trade and commerce. It is not unconstitutional."

7) There is one more set of matters from the State of Punjab where the challenge is to the levy of Social Security Cess under the Punjab Social Security Act, 2000. At the bar, counsel were *ad idem* before us, that this set of matters, arising under the Punjab Social Security Act, 2000 as amended by Punjab Act No 18 of 2000, needs to be segregated, delinked from this batch and heard separately by a Division Bench.

8) On 13.08.1998, when the appeals concerning the Orissa Act were taken up for hearing, a Division Bench of this Court referred the appeals to a larger Bench, by passing the following order:-

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> "It becomes necessary to refer these appeals for hearing by a larger Bench in the following circumstances:
>
> They challenge the validity of Section 5-A of the Orissa Sales Tax Act, 1947, which imposes a surcharge on the total amount of sales tax payable by a dealer. **A similar provision was upheld by a Bench of three learned Judges of this Court in Hoechst-Pharmaceuticals Ltd & Ors. vs. State of Bihar & Ors, [1983 (4) SCC 45], but it is pointed out by learned counsel for the appellants, with some justification that the judgment proceeded upon a concession that the provision was relatable to Entry 54 of List II of the VIIth Schedule of the Constitution.** The judgment does, however, add that the surcharge partook of the nature of the sales tax and, therefore, was within the competence of the State Legislature. **Learned counsel for appellants drew our attention to the judgment of a Bench of seven learned Judges of this Court in India Cements Ltd. & Ors. vs. State of Tamilnadu & Ors. [1990 (1) SCC 12] where the observations, particularly in paragraph 20, would seem to take a very different view: a cess on the royalty payable for excavation of land was held to be, not a tax on land, but on the royalty, which was land revenue.**
>
> The papers shall be placed before the Hon'ble the Chief Justice for appropriate directions."

9) Thereafter, on 06.10.1999, the matter came up before a five-Judge Bench, when it was felt that the judgment in ***S. Kodar (supra)*** is to be considered, and hence, a reference to seven-Judge Bench became necessary. The order reads as under: -

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> "We have read the referral order. We find that the decision of a Constitution Bench in S. Kodar vs. State of Kerala (1975 (1) SCR 121) will also have to be considered. Therefore, a reference to a Bench of seven learned Judges becomes necessary. The papers and proceedings may be placed before the Hon'ble Chief Justice for appropriate directions."

10) On 12.10.2023, the matter was placed before a Bench of seven Hon'ble Judges when the matter was directed to be placed on 09.01.2024 and on 09.01.2024 certain housekeeping directions were made.

11) On 12.08.2026, the matter was placed before the Hon'ble Chief Justice's Bench for directions, when the following order was made:-

> "1. In terms of the orders dated 13.08.1998 and 06.10.1999, these appeals/petitions, which raise the question of legislative competence of a State Legislature to levy an additional surcharge calculated on sales tax payable by a dealer, have been referred to a Bench of Seven Judges.
> 2. The reference was prompted by the conflicting views taken by a five Judge Bench in S. Kodar v. State of Kerala, 1975(1) SCR 121 and a Three Judge Bench in Hoechst Pharmaceuticals Ltd. v. State of Bihar and others, 1983(4) SCC 45. There also seems to be some degree of conflict with some observations made by a Seven Judge Bench in India Cements Ltd. and others v. State of Tamil Nadu and others, 1990 (1) SCC 12.
> 3. In this context, a Bench of Seven Judges ought to be constituted to hear this matter and adjudicate the following question of law:

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> (i) Whether the imposition of a surcharge/additional tax/levy/cess/sale/purchase, which is calculated on the basis of a validly levied sales/purchase tax, is beyond the competence of the State Legislature?
> (ii) Any other issue(s) that may arise during the course of hearing."

That is how the matter presents itself before us.

12) Heard Mr. Shubhranshu Padhi and Mr. Sandeep Sudhakar Deshmukh, learned counsel for the assessees; Mr. Tushar Mehta, learned Solicitor General, Mr. N Venkataraman learned Additional Solicitor General, Mr. Pitambar Acharya, learned Advocate General for Odisha & Mr Vivek Jain, learned Additional Advocate General for Punjab for the State.

13) At the hearing before us, a preliminary question was raised as to whether, at all, the reference was warranted and, in any event whether at all there was any life left in the reference.

14) To appreciate the above aspects, one needs to necessarily advert to the holding in ***S. Kodar (supra).*** Further, since the reference is pivoted on the holdings in ***Hoechst***

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(supra) and ***India Cements Ltd. and Others*** vs. ***State of Tamil Nadu and Others*** (1990) 1 SCC 12, there is a need to examine the said judgments also and the march of law thereafter. This exercise will also help us unravel whether at all there was any necessity to allude to the judgment in ***India Cements (supra),*** since that dealt with a wholly different issue altogether.

15) This judgment will only cover the reference arising out of challenge to the constitutional validity of the provisions in the Orissa Act and the Punjab Act, as referred to above.

S. KODAR VS. ***STATE OF KERALA [1975] 1 SCR 121***

16) In ***S. Kodar (supra)***, paraphrasing the legal provisions that were involved for consideration, the following was set out by this Court :- *[at page 123 of the Reports]*

> "The appellants filed writ petitions before the High Court of Madras challenging the validity of the Tamil Nadu Additional Sales Tax Act (Act No. 14 of 1970), 1970 (hereinafter referred to as the Act) on the ground that the State Legislature has no competence to enact it, that its provisions violated their fundamental rights under Article 19(l)(f), 19(1)(g) and article 14 of the Constitution. The High Court dismissed the writ petitions by a common Judgment. These appeals are filed on the basis of a certificate from the High Court.
>
> The material provisions of the Act are as follows. Section 2(1) provides that the tax payable under the Tamil Nadu

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> General Sales Tax Act, 1950, shall, in the case of a dealer whose total turnover for a year exceeds 10 lakhs of rupees, be increased by additional tax at the rate of 5 per cent of the tax payable by that dealer for that year and the provisions of the Tamil Nadu General Sales Tax Act, 1959, shall apply in relation to the additional tax payable under the said Act.
>
> Sub-section (2) of s. 2 says that notwithstanding anything contained in the Tamil Nadu General Sales Tax, 1959, no dealer referred to in sub-section (1) shall be entitled to collect the additional tax payable under the said sub-section.
>
> Sub-section (3) of s. 2 states that any dealer who collects the additional tax payable under sub-section (1), in contravention of the provisions of sub-section (2) shall be punishable with fine which may extend to one thousand rupees.
>
> Sub-section (1) of s. 3 says that the tax payable by any importer or wholesale dealer under the Tamil Nadu Sales of Motor Spirit Taxation Act, 1939, shall be increased by an additional tax at the rate of five per cent of the tax payable under the said Act and the provisions of the said Act shall apply in relation to the tax payable under the said Act. Sub-sections (2) and (3) of s. 3 are to the same effect as sub-sections (2) and (3) of s. 2"

17) As will be seen, Section 2(1) of the Tamil Nadu Act was in *pari materia* with the provisions under consideration in the Orissa Act and the Punjab Act and in ***S. Kodar (supra)***, the epicentre of the challenge was on the competence of the State to levy additional sales tax by virtue of the field demarcated under Entry 54 List II of the Seventh Schedule to the Constitution of India. A further argument was raised that, in

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substance, it was also a tax on income since there was a prohibition from passing on the tax liability onward to the purchasers.

18) Dealing with the aspect of legislative competence, this Court in ***S. Kodar (supra)***, while repelling the challenge, held as under:- *[at page 124 of the Reports]*

> "As regards the contention that the State Legislature has no power to pass the measure, we are of the view that additional tax is really a tax on the sale of goods. **The object of the Act, as is clear from its provisions, is to increase the tax on the sale or purchase of goods imposed by Tamil Nadu General Sales Tax Act, 1959 and the fact that quantum of the additional tax is determined with reference to the sales tax imposed would not alter its character. It may be noted that additional tax is to be imposed only if the turnover of a dealer exceeds Rs. 10 lakhs. It is in reality a tax on the aggregate of sales effected by a dealer during a year. The additional tax, therefore, is an enhancement in the rate of the sales tax when the turnover of a dealer exceeds Rs. 10 lakhs a year and it is a tax on the aggregate of the sales affected by the dealer during the year.** The decision in Ernakulam Radio Company v. State of Kerala which was affirmed by a Division Bench of the Kerala High Court in Kiliker v. Sales Tax Officer took that view. The same view was taken by the Andhra Pradesh High Court in A. S. Ramachandra Rao v. State of Andhra Pradesh. This is the correct view. **Entry 54 in List II authorises the state legislature to impose a tax on the sale or purchase of goods. So, the contention of the appellants that the additional sales tax is not a tax on sales but on the income of the dealer is without any basis."**

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19) Adverting to the aspect of whether a provision providing for additional sales tax would be bad because it prohibits the passthrough of the tax, this Court, while discountenancing the submissions, held as under:- *[at page 124 of the Reports]*

> "The legal incidence of tax on sale of goods under the Tamil Nadu General Sales Tax, 1959 falls squarely on the dealer. It may be that he can add the tax to the price of the goods sold and thus pass it on to the purchaser. **But it is not necessary that the dealer should be enabled to pass on the incidence of the tax on sale to the purchaser in order that it might be a tax on sales of goods."**

20) Further, holding that additional tax is not a tax on income, this Court, held as under:- *[at page 125 of the Reports]*

> "As we said, the additional tax is a tax upon sales of goods and not upon the income of a dealer and so long as it is not made out that the tax is confiscatory, it is not possible to accept the contention that because the dealer is disabled from passing on the incidence of tax to the purchaser, the provisions of the Act impose an unreasonable restriction upon the fundamental rights of the appellants under article 19(1)(g) or 19(1)(f)."

21) Equally, the argument on classification was repelled, by holding as under:- *[at pages 125 -126 of the Reports]*

> **"The last contention namely that the provisions of the Act impose different rates of tax upon different dealers depending upon their turnover which in effect means that the rate of tax on the sale of goods would vary with the volume of the turnover of a dealer and are, therefore, violative of article 14 is also without any basis. Classification of dealers on the basis of their**

respective turnover for the purpose of graded imposition so long as it is based on differential criteria relevant to the legislative object to be achieved is not unconstitutional. A classification, depending upon the quantum of the turnover for the purpose of exemption from tax has been upheld in several decided cases. By parity of reasoning, it can be said that a legislative classification making the burden of the tax heavier in proportion to the increase in turnover would be reasonable. The basis is that just as in taxes upon income or upon transfers at death, so also in imposts upon business, the little man, by reason of inferior capacity to pay, should bear a lighter load of taxes, relatively as well as absolutely, than is borne by the big one. The flat rate is thought to be less efficient than the graded one as an instrument of social justice. The large dealer occupies a position of economic superiority by reason of his greater volume of his business. And to make his tax heavier, both absolutely and relatively, is not arbitrary discrimination, but an attempt to proportion the payment to capacity to pay and thus to arrive in the end at a more genuine equality. The economic wisdom of a tax is within the exclusive province of legislature. The only question for the court to consider is whether there is rationality in the belief of the legislature that capacity to pay the tax increases, by and large, with an increase of receipts.

> "Certain it is that merchants have faith in such a correspondence and act upon that faith. . . If experience did not teach that economic advantage goes along with larger sales, there would be an end to the hot pursuit for wide and wider markets... In brief, there is a relation of correspondence between capacity to pay and the amount of business done. Exceptions, of course, there are. The law builds upon the probables, and shapes the measure of the tax accordingly... At the very least, an increase of gross sales carries with it an increase of opportunity for profit, which supplies a rational basis for division into classes, at all events when coupled with evidence of a high degree of probability that the opportunity will be fruitful".

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(See the dissenting judgment of Justice Cardozo, Justice Brandeis and Justice Stone).

The reasoning of the minority in that case appeals to us as more in consonance with social justice in an egalitarian state than that of the majority.

As we said, a large dealer occupies a position of economic superiority by reason of his volume of business and to make the tax heavier on him both absolutely and relatively is not arbitrary discrimination but an attempt to proportion the payment to capacity to pay and thus arrive in the end at a more genuine equality. The capacity of a dealer, in particular circumstances, to pay tax is not an irrelevant factor in fixing the rate of tax and one index of capacity is the quantum of turnover. The argument that while a dealer beyond certain limit is obliged to pay higher tax, when others bear a less tax, and it is consequently discriminatory, really misses the point namely that the former kind of dealers are in a position of economic superiority by reason of their volume of business and form a class by themselves. They cannot be treated as on a par with comparatively small dealers. An attempt to proportion the payment to capacity to pay and thus bring about a real and factual equality cannot be ruled out as irrelevant in levy of tax on the sale or purchase of goods. The object of a tax is not only to raise revenue but also to regulate the economic life of the society."

(Emphasis supplied)

HOECHST PHARMACEUTICALS LTD. & ORS. *VS.* ***STATE OF BIHAR & ORS., (1983) 4 SCC 45.***

22) ***Hoechst (supra)*** concerned the constitutional validity of sub-section (1) of Section 5 of the Bihar Finance Act, 1981 which provided for the levy of a surcharge on every dealer whose gross turnover, during the year, exceeds Rs. 5,00,000/,

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in addition to the tax payable by him, at such rate not exceeding 10 per centum of the total amount of tax. Further, Section 5 (3), the validity of which was also challenged, provided that a dealer was prohibited from collecting the said amount of surcharge from the purchasers. The principal contention advanced was that the field of price fixation of essential commodities in general, and drugs and formulations in particular, was occupied by the various control orders issued by the Central Government under Section 3(1) of the Essential Commodities Act, 1955 (for short "the EC Act"). It was argued that the EC Act allowed the manufacturer to pass on the liability to the consumer, and therefore, the State had no legislative competence to interdict the pass through. The provision was alternatively attacked on the plea of repugnancy also. Contending that Section 5(3) was repugnant to various control orders issued under the EC Act, it was also argued vis-à-vis Section 5(1) that including transactions relating to sale or purchase of goods which have taken place in the course of inter-State trade or commerce are outside the

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purview of the State legislature and that value cannot be taken for computation of the gross turnover. The High Court had upheld the levy relying on ***S. Kodar (supra).***

23) This Court, at the very outset, noticed that apart from the manufacturers and producers of medicines and drugs which are essential commodities, the dealers in other commodities would be indisputably governed by ***S. Kodar (supra).*** Hence, the case was primarily considered from the angle of the manufacturers and producers of medicines and drugs who were dealers in essential commodities, who contended that the controlled prices of which were exclusive of sales tax, as fixed by control orders issued by the Central Government under the EC Act.

24) Section 5(1) and 5(3) of the Bihar Act read as under: -

> "***5. Surcharge*** - (1) Every dealer whose gross turn over during a year exceeds rupees five lakhs shall, in addition to the tax payable by him under this Part, also pay a surcharge at such rate not exceeding ten per centum of the total amount of the tax payable by him, as may be fixed by the State Government by a notification published in the Official Gazette :
>
> Provided that the aggregate of the tax and surcharge payable under this Part shall not exceed, in respect of

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goods declared to be of special importance in inter-State trade or commerce by section 14 of the Central Sales Tax Act, 1256 (Act 74 of 1956), the rate fixed by section 15 of the said Act:"

"5(3) Notwithstanding anything to the contrary contained in this Part, no dealer mentioned in sub-s. (1), who is liable to pay surcharge shall be entitled to collect the amount of this surcharge."

25) There was a concession mentioned in the judgment which was noticed in the referral order dated 13.08.1998 which was to the following effect: -

"**13.** It is fairly conceded that not only sub-section (1) of Section 5 of the Act which provides for the levy of surcharge on dealers whose gross turnover during a year exceeds Rs 5 lakhs, but also sub-section (3) of Section 5 of the Act which enjoins that no dealer who is liable to pay a surcharge under sub-section (1) shall be entitled to collect the amount of surcharge payable by him, are both relatable to Entry 54 of List II of the Seventh Schedule which reads:

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I."

26) This Court, during the course of the discussion, rejected the argument that the controlled price is exclusive of sales tax by observing as under: -

"**27.....**The entire argument built upon sub-para (3) of para 3 and para 21 of the Control Order showing that the controlled price is exclusive of sales tax and therefore is in conflict with sub-section (3) of Section 5 of the Act appears to be wholly misconceived. It is urged that the appellants

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> in their price-lists have a term embodied that sales tax would be chargeable from a wholesaler or distributor and therefore they are entitled to recover sales tax on the sale of their medicines and drugs cannot possibly prevail. Such a term would be in clear violation of para 24 of the Control Order which is an offence punishable under Section 7 of the Essential Commodities Act….."

27) This Court noticed further that surcharge partook the nature of sales tax and it was within the competence of the State to enact Section 5(1). Further it was held that when the State legislature had competence to levy tax on sale and purchase of goods under Entry 54 of List II, it was equally competent to select the class of dealers on whom the charge was to fall. This Court held that if that were so, the State legislature could undoubtedly have enacted Section 5(3) prohibiting the dealers liable to pay surcharge under sub-section (1) thereof from recovering the same from the purchaser. This Court held that that Section 5(3) of the Bihar Act was also relatable to Entry 54 of List II.

28) The contention that survived the Court's examination, as advanced by the manufacturers and producers of essential commodities who were dealers, was set out in the following

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terms: -

> "**28.....**The contention however is that there is conflict between para 21 of the Control Order which allows a manufacturer or producer of drugs to pass on the liability to pay sales tax and sub-section (3) of Section 5 of the Act which prohibits such manufacturers or producers from recovering the surcharge and therefore it is constitutionally void....."

29) It was argued that the Court should try to adopt a harmonious construction and give effect to Paragraph 21 of the Control Order and hence by virtue of Section 6 of the EC Act, Paragraph 21 of the Control Order which provided for passing on of tax liability must prevail.

30) This contention was rejected by holding that it was misconceived since the appellants being manufacturers or producers of formulations are not governed by Paragraph 21 of the Control Order but by Paragraph 24 thereof, and therefore, the price chargeable by them to a wholesaler or distributor was inclusive of sales tax. This Court found no conflict between Section 5(3) and Paragraph 24 of the Control Order. Additionally, it was found that even if some of the appellants were found to be governed by Paragraph 21 of the

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Control Order, that would not make any difference. This Court found that the prohibition under Section 5(3) only meant that the surcharge payable by such dealers under Section 5(1) will cut into the profits earned by such dealers. Hence, this Court found that there was no conflict between Section 5(3) and Paragraph 21. This Court held that the EC Act was meant for protecting the consumer's interest and not the interest of the manufacturer or producer.

31) Thereafter, in an important paragraph explaining the distribution of the legislative fields under the Constitution, this Court, while rejecting the argument based on the theory of occupied field, explained how it was inapplicable in the context of Entry 54 of List II by observing as under: -

> "**71.** In *Ch. Tika Ramji case* [AIR 1956 SC 676 : (1956) SCR 393 : 1956 SCJ 625], the court observed that no question of repugnancy under Article 254 of the Constitution could arise where Parliamentary legislation and State legislation occupy different fields and deal with separate and distinct matters even though of a cognate and allied character and that where, as in that case, there was no inconsistency in the actual terms of the Acts enacted by Parliament and the State legislature relatable to Entry 33 of List III, the test of repugnancy would be whether Parliament and State legislature, in legislating on an entry in the Concurrent List, exercised their powers over the same subject-matter or whether the laws enacted by

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Parliament were intended to be exhausted as to cover the entire field, and added:

The pith and substance of argument cannot be imported here for the simple reason that, when both the Centre as well as the State Legislatures were operating in the concurrent field, there was no question of any trespass upon the exclusive jurisdiction of the Centre under Entry 52 of List I, the only question which survived being whether, putting both the pieces of legislation enacted by the Centre and the State Legislature, there was any such repugnancy, ...

This observation lends support to the view that in cases of overlapping between List II on the one hand and Lists I and III on the other, there is no question of repugnancy under Article 254(1). Subba Rao, J. speaking for the court in *Deep Chand case* [AIR 1959 SC 648 : 1959 Supp 2 SCR 8 : 1959 SCJ 1069] , interpreted Article 254(1) in these terms:

Article 254(1) lays down a general rule. Clause (2) is an exception to that Article and the proviso qualifies the said exception. If there is repugnancy between the law made by the State and that made by the Parliament with respect to one of the matters enumerated in the Concurrent List, the law made by Parliament shall prevail to the extent of the repugnancy and law made by the State shall, to the extent of such repugnancy, be void.

In all fairness to learned counsel for the appellants, it must be stated that they did not pursue the point any further in view of these pronouncements."

72. We are unable to appreciate the contention that sub-section (3) of Section 5 of the Act being a State law must be struck down as ultra vires as the field of fixation of price of essential commodities is an occupied field covered by a Central legislation. **It is axiomatic that the power of the State legislature to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule and to make ancillary provisions in that behalf, is plenary and is not subject to the power of Parliament to make a law under Entry 33 of List III. There is no warrant for projecting the power of Parliament to make a law under Entry 33 of List III into the State's power of taxation under Entry 54 of List II. Otherwise, Entry 54 will have to be**

read as: 'Taxes on the sale or purchase of goods *other than essential commodities et cetera'.* When one entry is made 'subject to' another entry, all that it means is that out of the scope of the former entry, a field of legislation covered by the latter entry has been reserved to be specially dealt with by the appropriate legislature. Entry 54 of List II of the Seventh Schedule is only subject to Entry 92-A of List I and there can be no further curtailment of the State's power of taxation. It is a well established rule of construction that the entries in the three lists must be read in a broad and liberal sense and must be given the widest scope which their meaning is fairly capable of because they set up a machinery of Government.

73. The controversy which is now raised is of serious moment to the States, and a matter apparently of deep interest to the Union. But in its legal aspect, the question lies within a very narrow compass. The duty of the court is simply to determine as a matter of law, according to the true construction of Article 246(3) of the Constitution, whether the State's power of taxation of sale of goods under Entry 54 of List II and to make ancillary provisions in regard thereto, is capable of being encroached upon by a law made by Parliament with respect to one of the matters enumerated in the Concurrent List. The contention fails to take into account that the Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246.

74. It is equally well settled that the various entries in the three Lists are not 'powers' of legislation, but 'fields' of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further, the element of tax does not directly flow from the power to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the Centre's power of price control.

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75. "Legislative relations between the Union and the States inter se with reference to the three Lists in Schedule VII cannot be understood fully without examining the general features disclosed by the entries contained in those Lists": Seervai in his *Constitutional Law of India*, 3rd Edn., Vol. 1 at pp. 81-82. A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States. Following the scheme of the Government of India Act, 1935, the Constitution has made the taxing power of the Union and of the States mutually exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation.

76. It would therefore appear that there is a distinction made between general subjects of legislation and taxation. The general subjects of legislation arc dealt with in one group of entries and power of taxation in a separate group. In *M.P.V. Sundararamier & Co.* v. *State of A.P.* [1958 SCR 1422] this court dealt with the scheme of the separation of taxation powers between the Union and the States by mutually exclusive lists. In List I, Entries 1 to 81 deal with general subjects of legislation; Entries 82 to 92-A deal with taxes. In List II, Entries 1 to 44 deal with general subjects of legislation; Entries 45 to 63 deal with taxes. This mutual exclusiveness is also brought out by the fact that in List III, the Concurrent Legislative List, there is no entry relating to a tax, but it only contains an entry relating to levy of fees in respect of matters given in that list other than court-fees. Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise. That being so, it is difficult to comprehend the submission that there can be intrusion by a law made by Parliament under Entry 33 of List III into a forbidden field viz. the State's exclusive power to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule. It follows that the two laws viz. sub-section (3) of Section 5 of the Act and para 21 of the Control Order issued by the Central Government

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> **under sub-section (1) of Section 3 of the Essential Commodities Act, operate on two separate and distinct fields and both are capable of being obeyed. There is no question of any clash between the two laws and the question of repugnancy does not come into play.''**
>
> (Emphasis supplied)

32) The Court further rejected the argument of treatment of unequals as equals; disproportionate nature of the burden and the provisions being arbitrary or irrational. Thereafter, following ***S. Kodar (supra)***, an argument based on discrimination on the basis of turnover was also rejected. Equally, the aspect of levy not being a pass through was also considered and rejected following ***S. Kodar (supra)*** and other line of judgments.

33) What is important to notice is that ***Hoechst (supra)*** followed ***S. Kodar (supra)*** and is in consonance with ***S. Kodar (supra).*** There is no conflict between ***S. Kodar (supra)*** and ***Hoechst (supra)***. Certain additional contentions peculiar to manufacturers and producers of drugs were also discussed since arguments based on the EC Act were advanced.

34) What is also crucial to note is that ***Hoechst (supra)*** explained the division of the fields of the legislative lists and

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expressed that Entry 54 of List II was only subject to Entry 92A of List I which dealt with taxes on sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of Inter-State trade or commerce. No part of the field demarcated in Entry 92 A of List I is trampled was an undisputed position in ***S. Kodar (supra).*** No contention on that score was canvassed before us either. This aspect would be relevant when Entry 23 and Entry 50 of List II is contrasted with Entry 54 of List I. It will be reverted to a little later in the judgment.

35) With this, the stage now shifts to examine the other aspect referred to in the referral order about the impact of the judgment in ***India Cements (supra)***. When ***India Cements (supra)*** is discussed, one must also discuss the subsequent developments right up to the judgment of the Nine-Judge Bench in ***Mineral Area Development Authority*** vs. ***SAIL***, (2024) 10 SCC 1. In the referral order dated 13.08.1998, a reference was made to the judgment in ***India Cements (supra)*** as an aspect which constrained the reference of the

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present matter to the larger Bench.

36) At the outset, it is to be noticed that ***India Cements (supra)*** and ***MADA (supra)*** were cases which dealt with mining leases. The legislative field governing them would be Entry 54 of List I and Entries 23, 45, 49, 50 and 66 of List II. The said entries are extracted here under: -

> **"List I- Union List**
> **54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of union is declared by parliament by law to be expedient in the public interest"**
>
> ****
>
> **List II- State List**
> **23. Regulation of mines and mineral development subject to the provisions of list one with respect to regulation and development under the control of the union.**
>
> **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**
>
> **49. Taxes on lands and buildings.**
>
> **50. Taxes on mineral rights subject to any limitations imposed by parliament by law relating to mineral development.**
>
> **66. Fees in respect of any of the matters in this List, but not including fees taken in any court."**
>
> (Emphasis supplied)

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INDIA CEMENTS LTD. AND OTHERS** VS. **STATE OF TAMIL NADU AND OTHERS (1990) 1 SCC 12,

37) That brings us to the issue whether the judgment in ***India Cements (supra)*** casts any doubt on the holding in ***S. Kodar (supra)*** warranting a reference to the larger Bench. To address this issue, a brief reference to the facts and the holding in ***India Cements (supra)*** is inevitable.

38) In ***India Cements (supra),*** the question involved was whether levy of cess on royalty by the State of Tamil Nadu was within the competence of the State legislature. The provision in question was Section 115 of the Tamil Nadu Panchayats (Amendment and Miscellaneous Provisions) Act, 1964 (hereinafter called "the Tamil Nadu Panchayats Act') which provided that there shall be levied in every panchayat development block, a local cess at the rate of 45 paise on every rupee of land revenue payable to the government in respect of any land in every Fasli. An explanation was appended which read as under: -

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> "Explanation.-In this section and in section 116, 'land revenue' means public revenue due on land and includes water cess payable to the Government for water supplied or used for the irrigation of land, royalty, lease amount or other sum payable to the Government in respect of land held direct from the Government on lease or licence, but does not include any other cess or the surcharge payable under section 116, provided that land revenue remitted shall not be deemed to be land revenue payable for the purpose of this section."

39) Section 116 of the Tamil Nadu Panchayats Act provided that every panchayat union council may levy on every person liable to pay land revenue to the government in respect of any land in the panchayat union, a local cess surcharge at such rate as may be considered suitable as an addition to the local cess levied in the panchayat development block under section 115 subject to certain cap provided there on.

40) The appellants therein were holding mining leases *inter alia* for limestone and kankar for use in their cement manufacturing plant. In the lease deed, they were obligated to pay royalty, dead rent and surface rent at differential rates. The appellants challenged the levy but the learned Single Judge of the High Court (Kailasam, J. as the learned Judge then

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was) dismissed the writ petition by relying on the judgment of the five-Judge Constitution Bench of this Court in ***H.R.S. Murthy*** vs. ***Collector of Chittoor***, [1964] 6 SCR 666. According to the High Court, the cess levied was a tax on land covered under Entry 49 of List II to the Seventh Schedule. The plea of arbitrariness vis-à-vis Section 116 was negated by holding that there was a cap provided and hence there was no arbitrariness in the levy. The Division Bench confirmed the judgment of the learned Single Judge and held that the levy is a tax on the land and the reference to land revenue, royalty, lease amounts were only measures of levy.

41) It was in this background, a seven-Judge Bench of this Court addressed the question whether cess on royalty is a demand on land revenue or additional royalty. This Court dealt with Section 9 of the Mines and Minerals (Regulation and Development) Act, 1957 (for short "the MMRD Act") and examined the issue whether the levy by the State would be covered in the fields demarcated under Entries 49, 45 or 50 of

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List II of the Seventh Schedule. The mining lessees (appellants therein) argued that the levy was nothing but a tax on royalty and was *ultra vires* the power of the State legislature, while the State defended it as a tax on land. This Court rejected the contention of the State by holding as under: -

> "**20.** The said observations were made in the dissenting judgment, but there was no dissent on this aspect of the matter. Relying on the aforesaid observations, Mr. Nariman appearing for the appellant and the petitioners suggested that the impugned levy in this case is nothing but a tax on royalty and is therefore ultra vires the State legislature. Mr. Krishnamurthy Iyer appearing for the State of Tamil Nadu submitted that the cess in question in the instant case is a levy in respect of land for every Fasli. He urged that the words "a local cess at the rate of 45 naye paise on every rupee of land revenue payable" qualify the words "land revenue". These words were only intended, according to Mr. Krishnamurthy Iyer, to mean cess payable. It is, however, not possible to accept this submission, in view of the obligation indicated by the language of the provisions. Cess is not on land, but on royalty which is included in the definition of 'land revenue'. **None of the three lists of the Seventh Schedule of the Constitution permits or authorises a State to impose tax on royalty....."**
>
> (Emphasis supplied)

42) Rejecting the contention of the State that the levy could be covered under Entry 45 of List II of the Seventh Schedule which dealt with land revenue, this Court held as under: -

> "**21.....** It has, however, to be borne in mind that Explanation to Section 115(1) was added and there was an

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> amendment as we have noted before. That very Explanation makes a distinction between land revenue as such and royalty which by amendment is deemed to be land revenue. It is, therefore, recognised by the very force of that Explanation and the amendment thereto that the expression 'royalty' in Sections 115 and 116 of the Act cannot mean land revenue properly called or conventionally known, which is separate and distinct from royalty."

43) Repelling the submission of the State that the levy could be justified under Entry 49 of List II, this Court held: -

> "**22.** …But in the instant case, royalty being that which is payable on the extraction from the land and cess being an additional charge on that royalty, cannot by the parity of the same reasoning, be considered to be a tax on land. But since it was not a tax on land and there is no entry like Entry 46 in the instant situation like the position before this Court in the aforesaid decision, enabling the State to impose tax on royalty in the instant situation, the State was incompetent to impose such a tax. There is a clear distinction between tax directly on land and tax on income arising from land. The aforesaid decision confirmed the above position…
>
> 23. …It is, therefore, not possible to accept Mr. Krishnamurthy Iyer's submission and that a cess on royalty cannot possibly be said to be a tax or an impost on land. Mr. Nariman is right that royalty which is indirectly connected with land, cannot be said to be a tax directly on land as a unit……It may be mentioned that the Act does not use dead rent as a basis on which land is to be valued. Hence, there cannot be any doubt that the impugned legislation in its pith and substance is a tax on royalty and not a tax on land."

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44) Thereafter, the Court took up the issue whether the levy would be covered under Entry 50 of List II. The submission based on Entry 50 of List II of the State was met with stiff resistance by the learned Attorney General, who appeared for the Union of India contending that even if the levy fell within the Entry 50 List II, it will be controlled by legislation under Entry 54 of List I. Similarly, the learned Attorney General resisted the attempt of the State to bring the levy as a fee contending that Entry 23 of List II with Entry 66 of List II is also subject to Entry 54 of List I and the declaration made under Section 2 of the MMDR Act.

45) This Court, in ***India Cements (supra)***, distinguished ***H.R.S. Murthy (supra)*** by holding that the attention of the Court in ***H.R.S. Murthy (supra)*** was not invited to the provisions of the MMDR Act and Section 9 thereof. Further, this Court pointed out that Section 9(3) of the MMDR Act, in turn, stated that royalty payable under Second Schedule of the Act shall not be enhanced more than once during the period

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of four years. Hence, the Court found that there was a clear bar on the State legislature taxing royalty so as to in effect amend the Second Schedule of the MMDR Act and recorded the following finding: -

> **"30. .In the premises, it cannot be right to say that tax on royalty can be a tax on land, and even if it is a tax, if it falls within Entry 50 will be ultra vires the State legislative power in view of Section 9(3) of the Central Act... "**

46) The Court further held that the field is fully covered by the Central legislation. It went on to hold that royalty is directly relatable only to the minerals extracted and on the principle that the general provision is excluded by the special one, royalty would be relatable to Entries 23 and 50 of List II and not Entry 49 of List II. In conclusion, the Court held as follows: -

> "**34.** In the aforesaid view of the matter, we are of the opinion that royalty is a tax, and as such a cess on royalty being a tax on royalty, ***is beyond the competence of the State legislature because Section 9 of the Central Act covers the field and the State legislature is denuded of its competence under Entry 23 of List II.*** In any event, we are of the opinion that cess on royalty cannot be sustained under Entry 49 of List II as being a tax on land. Royalty on

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> mineral rights is not a tax on land but a payment for the user of land."
>
> (Emphasis supplied)

The appeal of the mining lessees was allowed and the cess under Section 115 was held to be *ultra vires*.

47) As would be clear from the discussion above, ***India Cements (supra)*** concerned the question whether royalty was a tax and whether cess on royalty could have been imposed by the State legislature. The competing entries which were concerned in that case were Entry 54 of List I and Entries 23, 45, 46 and 49 of List II. In ***S. Kodar (supra),*** the entry concerned was only Entry 54 of List II which was only subject to Entry 92A of List I which dealt with tax on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce. There was no issue with regard to Entry 92A being engaged. The only other aspect on the issue of competence of the State legislature in ***S. Kodar (supra)*** was the argument that the levy was in the nature of tax on income since there was a prohibition to pass through. That argument was also repelled,

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as notice above. In ***Hoechst (supra)***, the only other Entry which was engaged along with Entry 54 of List II was Entry 33 of List III which dealt with the essential commodities.

48) ***India cements (supra)*** was a case wherein mining lessees sought to vest the power of levy of cess on royalty on the Union legislature by contending that royalty was a tax. ***India Cements (supra)*** involved qualitatively different issues, and the said case could not have been brought in by the assessees herein to try and make inroads into ***S. Kodar (supra)***.

MINERAL AREA DEVELOPMENT AUTHORITY *VS.* ***SAIL, (2024) 10 SCC 1 (MADA)***

49) The growth of jurisprudence post ***India Cements (supra)*** needs to be highlighted for complete narration of the legal aspect. Following ***India Cements (supra)*** came the case of ***State of W.B.*** vs. ***Kesoram Industries Ltd. and Others***, (2004) 10 SCC 201. In ***Kesoram (supra),*** a Constitution Bench was called upon to decide the validity of a cess levied by the State on coal-bearing lands. The measure was to be on the basis of

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the quantity of the minerals produced. R. C. Lahoti, J. (as the learned Judge then was), speaking for the majority, observed that ***India Cements (supra)*** contained a typographical error and it was held in ***Kesoram (supra)*** that what was to be intended to be held in ***India Cements (supra)*** was "…..that cess on royalty is a tax and as such a cess on royalty being a tax on royalty, is beyond the competence of the State legislature". ***India Cements (supra)*** was held not to be a correct declaration of law. ***Kesoram (supra),*** however, held that cess on royalty was beyond the competence of the State legislatures. This conflict resulted in a reference to a nine-Judges Bench to decide, the issue whether royalty is a tax or not.

50) Dealing with the essential characteristics of royalty, a Nine-Judge bench of this Court in ***MADA (supra)*** held: -

> "**103.** The essential characteristics of royalty are that:
>
> (*i*) it is a consideration or payment made to the proprietor of minerals, either the government or a private person;
>
> (*ii*) it flows from a statutory agreement (a mining lease) between the lessor and the lessee;

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(*iii*) it represents a return for the grant of a privilege (to the lessee) of removing or consuming the minerals; and

(*iv*) it is generally determined on the basis of the quantity of the minerals removed."

51) Similarly, dealing with the essential characteristics of a tax, this Court held as under: -

"**109.** A tax has the following essential characteristics:

(*i*) it is a compulsory exaction of money by a public authority;

(*ii*) it is imposed under statutory power without the consent of the taxpayer;

(*iii*) the demand is enforceable by law;

(*iv*) it is an imposition made for public purposes to meet the general expenses of the State without reference to any special benefit to be conferred on the payer of the tax; and

(*v*) it is part of the common burden."

52) Thereafter, the majority in ***MADA (supra)*** held that a liability arising out of contract cannot be termed as an impost or tax. After analysing various legislative entries and judgments, this Court categorically held as follows: -

"137. In view of the above discussion, we hold that both royalty and dead rent do not fulfil the characteristics of tax or impost. Accordingly, we conclude that the observation in *India Cement (Supra)* to the effect that royalty is a tax is incorrect."

(Emphasis supplied)

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53) There is one other aspect which requires mention from ***MADA (supra).*** ***MADA (supra)*** dealt with the well-settled concept of measure of tax. The majority in ***MADA (supra)*** held that measure of tax is a matter of legislative policy; that legislature can select any measure of tax to compute liability, as long as it had a reasonable nexus with the nature of the tax. Hence, it was for the legislature to devise an appropriate measure of tax to compute the tax liability, provided the measure had a nexus with the nature of levy, that is a tax on mineral rights. In ***MADA (supra), S. Kodar (supra)*** was expressly noticed on the aspect of measure of tax, when ***MADA (supra)*** held that quantification or measurement of liability is done on the basis of the procedures laid down by the competent legislature. Further, ***MADA (supra)*** held that royalty was relatable to the yield of the mineral bearing land as well as the income in case the minerals vest in a private person. Further, this Court held that since the yield of the land is directly connected to the land, the rate fixed on the basis of the yield cannot be said to be indirectly connected to the land.

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This Court, in ***MADA (supra)*** further held that yield of a mineral bearing land either in terms of the quantity produced or in terms of the rate of royalty, can be used as a measure to tax the mineral bearing land in List II.

54) The holding in ***MADA (supra)*** on this aspect, disapproving the holding in ***India Cements (supra),*** is set out hereinbelow:-

> "**351.** In *India Cement* [*India Cement Ltd.* v. *State of T.N.*, (1990) 1 SCC 12] , it was held that royalty cannot be a measure for tax on land because it is indirectly connected with land. [*India Cement Ltd.* v. *State of T.N.*, (1990) 1 SCC 12, para 23] In our opinion, this holding is not correct in view of the fact that royalty is directly relatable to the yield of the mineral-bearing land. Royalty is calculated on the basis of the output of the mineral produced. Since the yield of the land is directly connected to the land, a rate fixed on the basis of the yield cannot be said to be indirectly connected to the land.
>
> **352.** Similarly, *Orissa Cement* [*Orissa Cement Ltd.* v. *State of Orissa*, 1991 Supp (1) SCC 430, para 36] held that since royalty is not an income derived from land, it cannot be used to measure the tax on land. [*Orissa Cement case*, 1991 Supp (1) SCC 430, para 30] Royalty may not be an income in all aspects, but it is directly relatable to the yield of the land. The yield can be adopted as the basis for levy of tax on land. The decision in *Orissa Cement* [*Orissa Cement Ltd.* v. *State of Orissa*, 1991 Supp (1) SCC 430, para 36] has followed a narrow approach to the concept of royalty. Therefore, we hold that the yield of a mineral-bearing land, either in terms of the quantity of mineral produced, or in

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terms of the rates of royalty, can be used as a measure to tax the mineral-bearing land under List II Entry 49."

55) Dealing with Entry 50 of List II and the phrase "*any limitations imposed by Parliament by law relating to mineral development*" occurring therein, this Court held that the said entry did not constitute an exception to the principle in ***M.P.V. Sundararamaier & Co.*** vs. ***State of A.P.***, [1958] SCR 1422 as accepted in ***Jindal Stainless Steel*** vs. ***State of Haryana***, (2017) 12 SCC 1 to the effect that fields of taxation are distinct from the general subjects of legislation in the Union list and State list of the Seventh Schedule.

56) In conclusion, this Court in ***MADA (supra)*** held as under:-

"J. *Conclusions*

365. In view of the above discussion, we answer the questions formulated in the reference in terms of the following conclusions:

365.1. Royalty is not a tax. Royalty is a contractual consideration paid by the mining lessee to the lessor for enjoyment of mineral rights. The liability to pay royalty arises out of the contractual conditions of the mining lease. The payments made to the Government cannot be deemed to be a tax merely because the statute provides for their recovery as arrears;

365.2. List II Entry 50 does not constitute an exception to the position of law laid down in *M.P.V. Sundararamier*

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[1958 SCC OnLine SC 22]. The legislative power to tax mineral rights vests with the State Legislatures. Parliament does not have legislative competence to tax mineral rights under List I Entry 54, it being a general entry. Since the power to tax mineral rights is enumerated in List II Entry 50, Parliament cannot use its residuary powers with respect to that subject-matter;

365.3. List II Entry 50 envisages that Parliament can impose "any limitations" on the legislative field created by that entry under a law relating to mineral development. The MMDR Act as it stands has not imposed any limitations as envisaged in List II Entry 50;

365.4. The scope of the expression "any limitations" under List II Entry 50 is wide enough to include the imposition of restrictions, conditions, principles, as well as a prohibition;

365.5. The State Legislatures have legislative competence under Article 246 read with List II Entry 49 to tax lands which comprise of mines and quarries. Mineral-bearing land falls within the description of "lands" under List II Entry 49;

365.6. The yield of mineral-bearing land, in terms of the quantity of mineral produced or the royalty, can be used as a measure to tax the land under List II Entry 49. The decision in *Goodricke* [1995 Supp (1) SCC 707] is clarified to this extent;

365.7. List II Entries 49 and 50 deal with distinct subject-matters and operate in different fields. Mineral value or mineral produce can be used as a measure to impose a tax on lands under List II Entry 49;

365.8. The "limitations" imposed by Parliament in a law relating to mineral development with respect to List II Entry 50 do not operate on List II Entry 49 because there is no specific stipulation under the Constitution to that effect; and

365.9. The decisions in *India Cement* [(1990) 1 SCC 12], *Orissa Cement* [1991 Supp (1) SCC 430, para 36], *Federation of Mining Associations of Rajasthan* [1992 Supp (2) SCC 239], *Mahalaxmi Fabric Mills* [1995 Supp

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> **(1) SCC 642], *Saurashtra Cement* [(2001) 1 SCC 91], *Mahanadi Coalfields* [1995 Supp (2) SCC 686], and *P. Kannadasan* [(1996) 5 SCC 670] are overruled to the extent of the observations made in the present case."**
>
> (Emphasis supplied)

57) The above history leading up to the ***MADA (supra)*** is set out only to demonstrate that ***India Cements (supra),*** insofar as it held that royalty is a tax has been overruled and it has been held that royalty is a contractual consideration paid by the mining lessee to the lessor for enjoyment of mineral rights.

58) A close reading of ***MADA (supra)*** only reinforces the conclusion that the legal issue raised and decided in ***India Cements (supra)*** and reversed in ***MADA (supra)*** do not create any dent on the holding in ***S. Kodar (supra)***.

59) The Solicitor General of India submits that a curative petition has been filed challenging the judgment in ***MADA (supra).*** The statement is placed on record.

60) The Union Government had amended the MMDR Act through the Act 20 of 2026 by inserting Section 9-D thereby subjecting the power of State Government to impose tax, cess,

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or such other levy on mineral rights; or mineral bearing lands, either based on mineral quantity or mineral value or royalty payable or otherwise, to such conditions or restrictions as prescribed by the Central Government.

61) Neither the pendency of the curative petition nor the subsequent amendment to MMDR Act, affect the findings in ***MADA (supra)***, approving the ratio in ***S. Kodar (supra)***. ***S. Kodar (supra)*** rightly held that the legislative competence of the State Government to impose additional sales tax, determined with reference to the sales tax payable by a dealer whose annual turnover exceeds a minimum threshold and where there is no pass through to consumer, is traceable to Entry 54 List II as tax on sales of goods and is not *ultra vires* as a tax on income of such dealer.

62) So here, we are, back again to where it all began. As pointed out earlier, ***S. Kodar (supra)*** and ***Hoechst (supra)*** are consistent. The concession in ***Hoechst (supra)*** did not detract from the detailed discussion and holding therein on the aspect

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of legislative competence. There is no conflict between ***S. Kodar (supra)*** and ***Hoechst (supra).***

63) ***India Cements (supra)*** which was also a basis for the reference of ***S. Kodar (supra)*** had really no bearing, considering that the genre of the dispute involved there was totally different; the legislative entries were different and the principles of law that engaged the Court were completely different.

64) No other argument challenging the correctness of the finding in ***S. Kodar (supra)*** was made at the bar.

CONCLUSION:

65) For the reasons stated above, it is held that, ***S. Kodar (supra)*** has been correctly decided, continues to be a good law and needs no reconsideration.

66) Let the appeals arising out of challenge to the provisions under the Orissa Sales Tax Act, 1947 (Civil Appeal No 8763/1994 and Civil Appeal No 8909/1994) and the Punjab General Sales Tax Act, 1948 (Civil Appeal No 98/2003, Civil

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Appeal Nos. 831-850/2003, Civil Appeal No 851/2003, Civil Appeal No 99/2003 and Civil Appeal No 100/2003) be placed before the Hon'ble Chief Justice for assignment to an appropriate Bench to be decided in accordance with law as laid down in ***S. Kodar (supra)***.

67) Let the appeals concerning the validity of the levy under the Punjab Social Security Act, 2000 (Civil Appeal No 7485/2001, SLP (C) Nos 22159-22180/2002, Civil Appeal No 5046/2003 and Civil Appeal No 5637/2008) be segregated and placed before the Hon'ble Chief Justice for assignment to an appropriate Division Bench.

The reference is answered accordingly.

.....J.
[**K.V. VISWANATHAN**]

New Delhi;
November 4, 2026