IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.244 OF 2009
WITH
CIVIL APPLICATION NO.38 OF 2014
IN
WRIT PETITION NO.244 OF 2009

Sesa Sterlite Limited through Company Secretary
Chandrashekhar D. Chitnis & Anr. ... Petitioners
Versus
State of Goa through Chief Secretary ...Respondent

WITH
WRIT PETITION NO.233 OF 2009

D. B. Bandodkar And Sons Pvt. Ltd.
through Director & Anr. ... Petitioners
Versus
State of Goa through Chief
Secretary & Anr. ... Respondents

WITH
WRIT PETITION NO.593 OF 2009

Tata Metaliks Limited & Anr. ... Petitioners
Versus
State of Goa through Chief
Secretary & Anr. ... Respondents

WITH
WRIT PETITION NO. 277 OF 2010

Renuka Sugars Ltd & Anr. ... Petitioners
Versus
State of Goa, through its Chief
Secretary & Anr. ... Respondents

WITH
WRIT PETITION NO. 232 OF 2009

Orient (Goa) Pvt. Ltd. through Director
Shashikala Kakodkar & Anr. ... Petitioners
Versus
State of Goa through Chief Secretary & Anr. ... Respondents

WITH
WRIT PETITION NO. 594 OF 2009

Tata Metaliks Limited And Anr. ... Petitioners
Versus
State of Goa through Chief Secretary & Anr. ... Respondents

WITH
WRIT PETITION NO. 474 OF 2012

J.K. Cement Ltd Rep. By Senior
General Manager (Legal) & Anr. ... Petitioners
Versus
State of Goa through its Chief Secretary ... Respondents

WITH
WRIT PETITION NO. 842 OF 2009

Global Coke Limited & Anr. ... Petitioners
Versus
State of Goa through Chief
Secretary & Anr. ... Respondents

WITH
WRIT PETITION NO. 575 OF 2009

Prasanna V. Ghotage ... Petitioner
Versus
The State of Goa through Chief Secretary & Anr. …Respondents

Mr. Venkatesh Dhond, Senior Advocate with Mr. Abhijit Gosavi, Mr. Ivo D'Costa, Mr. Amey Phadte and Mr. Guruprasad V. Naik, Mr. G. Kerkar Advocates for the Petitioners in WP/244/2009.

Mr. Y. V. Nadkarni with Mr. Sanket Kamat, Ms. Simran Khadilkar, Advocates for the Petitioner in WP 474/2012.

Mr. Parikshit Sawant, Advocate for the Petitioners in WP 232/2009 and WP 233/2009.

Mr. Ramchandra S. Apte alongwith Mr. Harshal Nahata, Mr. Nikhil Vaze, Ms. Susan Linhares, Mr. Geetesh R. Shetye, Ms. Sapna Mordekar, Mr. Shubham Priolkar, Mr. Shivdutt P. Munj, Mr. Deep D. Shirodkar, Ms. Sulekha Kamat, Mr. Tukaram Gawas, Mr. Prashil Arolkar, Additional Government Advocates for the Respondents State in all Writ Petitions.

CORAM: G. S. KULKARNI &
BHARAT P. DESHPANDE, JJ.

DATED : 10 JANUARY, 2024.

JUDGMENT: (Per G. S. Kulkarni, J.)

The judgment is divided into the following sections to facilitate analysis:

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(A) Prelude

1. The Goa Rural Improvement and Welfare Cess Act, 2000 (for short '**the Goa Cess Act**') enacted with an object to augment revenue for improvement of infrastructure and health, to promote welfare of the people residing in rural areas, being affected by the use of plastics, dumping of garbage and spillage of materials is the subject matter of challenge in this batch of petitions, by the petitioners, who are *interalia* engaged in transportation of iron and coal into the State of Goa from the other States.

(B) Challenge

2. The challenge of the petitioners is primarily mounted on the following counts : **(i)** that the Goa Cess Act imposes an unconstitutional cess; **(ii)** The levy as imposed is violative of Articles 301, 303, and 304 of

the Constitution of India; **(iii)** the implementation of the Goa Cess Act violates the petitioner's rights under Article 14 of the Constitution of India, since the levy is on two classes of items, the 'Goan ore' on which royalty is paid and the 'non-Goan' ore on which royalty is not paid; and lastly **(iv)** that there is no power/competence to sustain the levy of cess since the State stands denuded of its power, under the Goa Cess Act, as such levy stands subsumed by the Goa Goods and Services Tax Act and the Central Goods and Service Tax Act 2017, (for short '**GST Act**').

3. At the outset, it is required to be noted that a batch of petitions in the case of "**Sociedade De Fomento Industrial Pvt. Ltd., Goa Vs. State of Goa**"[1] (of which the present proceedings were also a part) had assailed the Goa Cess Act. A Division Bench of this Court considered the challenge *interalia* to the constitutional validity of the Goa Cess Act and the Rules framed thereunder as also the Notification dated 8 October 2010, and the demand notices issued under the Goa Cess Act. The challenge as considered by the Division Bench was on two grounds; firstly, that the State not having the legislative competence to enact the Goa Cess Act; and secondly, on the issue as to whether the Goa Cess Act would have a retrospective application. Such challenge was repelled by the Division

1 AIR Online 2018 Bom 1112

Bench, by its judgment dated 26 September 2018, thereby upholding the constitutional validity of the Goa Cess Act as also the Rules, as also the notifications issued by the State Government were upheld, however, keeping open the other grounds which were raised in the companion petitions, being the subject matter of adjudication in the present proceedings. In such context, the relevant observations as made by the Division Bench are required to be noted, which read thus:-

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

4. Accordingly, the grounds as raised by the petitioners in the present petitions have fallen for consideration of this Court, as according to the petitioners, they were not subject matter of adjudication in the case of **Sociedade De Fomento Industrial Pvt. Ltd.** (supra).

5. Writ Petition No.244 of 2009 (Sesa Goa Limited & Anr. Vs. State of Goa) is argued as the lead matter. The issues of law as raised in the

connected proceedings are not different. Learned Counsel for the parties have also addressed the Court on such common issues of law. Hence, all these petitions are being disposed of by this common judgment.

(C) Facts

6. For convenience the facts as pleaded in the lead writ petition can be noted hereunder:

The petitioner company is stated to be engaged in the business of mining iron ore, extraction, processing, transportation, and export of iron ore from the State of Goa. It also carries on mining activity in the State of Karnataka and Orissa. It is contended that the mineral ore as also coal brought by the petitioner from the State of Karnataka, is required to be transported through the State of Goa, since Goa has a major port namely the Mormugao Port, from where the mineral ore is exported. That ore is imported by the petitioner which is also required for the petitioner's activities in Goa. It is the petitioner's case that the cess under the Goa Cess Act is levied both on the mineral ore as also on coal, which is being transported by the petitioner through the State of Goa.

7. The petitioner further contends that the petitioner is the grantee or concessionaire or holder in respect of leases of iron ore mines, in the State

of Goa and Karnataka. It *inter alia* transports iron ore from its mines and/or purchased by the petitioner, from other sources, in the State of Karnataka, into the State of Goa, wherein it is used in its pig iron plant at Amona- Goa, and/or is exported overseas from the Mormugao Port. It is on such commercial activity of the petitioner the cess being levied under the Goa Cess Act, the petitioner feels itself aggrieved, so as to file the present petition.

8. The relevant dates in regard to the 'Goa Cess Act" and the "Rules" can be noted :-

a) The Goa State Legislative Assembly passed the Goa Cess Act ("Goa Rural Improvement and Welfare Cess Act, 2000"), which received assent from the Governor of Goa on 28 September 2000. It was notified in the Goa Government Official Gazette on 16 October 2000.

b) On 12 January 2006, in exercise of powers conferred under Sections 4, 5, and 8 of the impugned Act, the Government of Goa framed Rules called "the Goa Rural Improvement and Welfare Cess Rules 2006."

c) In the exercise of powers conferred under Section 1(3) of the

said Act by a notification dated 23 January 2006, the Government of Goa notified the appointed date, for the Goa Cess Act to be brought in force, being 1 February 2006.

d) On 1 December 2008 by a notification issued by the Government of Goa, the Rules were amended.

e) Thereafter in exercise of powers conferred by sub-section (2) of Section 3 of the Goa Cess Act, by a notification dated 13 May 2008 issued by the Government of Goa, it revised the existing rates of the Cess as specified in "Schedule 1" appended to the said Act .

9. The petitioner contends that the revision in the rates by the notification dated 13 May 2008, was tenfold to the rates as earlier fixed. Thus, the petitioner being aggrieved by the levy of cess on transportation of mineral ore / coal under the Goa Cess Act and the Rules framed thereunder, has filed this petition on 13 April 2009 *inter alia* making the following substantive prayers:-

> "(A) That this Hon'ble Court be pleased to issue a Declaration that the Goa Rural Improvement and Welfare Cess Act, 2000; Rules made thereunder and the Notifications issued thereunder are ultra vires the Constitution and is therefore illegal, null and void;
>
> (B) That this Hon'ble Court also be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction for striking down the Goa

Rural Improvement and Welfare Cess Act, 2000; the Rules made thereunder and the Notifications issued thereunder and/or forebear the Respondent from enforcing the same;

(B1) That this Hon'ble Court be pleased to issue a Writ of Certiorari or Writ in the nature of Certiorari or any other appropriate Writ, order or direction calling for the records from the Respondents and upon examining the legality, propriety and reasonability thereof be pleased to quash and set aside the Corrigendum issued vide Notification dated 08/10/2010.

(C) In the alternative and without prejudice to Prayer Clauses (A) and (B) above, this Hon'ble Court be pleased to declare that the Notification dated 13/05/2008 is arbitrary, illegal, unconstitutional and therefore null and void.

(D) That this Hon'ble Court be pleased to issue a Writ of Mandamus or Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction commanding the Respondents, their servants and agents to refund to the Petitioners, a sum of Rs. 1,74,68,240/- (Rupees One crore seventy four lakhs sixty eight thousand two hundred and forty only) collected from it by way of cess on iron ore between the period April 2008 to March 2009, and any other further sums that may be paid by the Petitioner No. 1 along with interest thereon at the rate of 12 % per annum."

10. Thus, amongst other issues of challenge as raised by the petitioner, the challenge of the petitioners to the Goa Cess Act and the Rules and the notifications issued thereunder, is primarily on the ground that the provisions are *ultra vires* Article 14, and Articles 301,303 and 304 of the Constitution. According to the petitioners, the impugned Act, places restrictions on free trade and movement of the goods, from one State to

other. The petitioners contend that the impugned Act, does not fall within the exception carved out under Articles 304(a) and Article 304(b) of the Constitution. It is contended that the Goa Cess Act is also violative of Article 14 inasmuch as the iron ore produced in Goa does not attract any cess, while it is levied on the iron ore produced outside Goa. The petitioners contend that tax or cess under the impugned Act does not fulfill the concept of compensatory tax. In so far as the other challenge as inserted by an amendment to the petition is concerned, the same is on the ground that the Goa Cess Act has now stood subsumed in the GST Laws.

(D) Case of the Respondents (First Reply Affidavit)

11. At the outset it may be noted that two reply affidavits and two additional affidavits, which we would discuss hereinbelow, are filed on behalf of the State of Goa at the relevant time, when the present petitions were part of the batch of petitions in the case *Sociedade De Fomento Industiral Pvt. Ltd. (Supra)* which were decided by a co-ordinate Bench of this Court by its judgment dated 26 September 2018. Thus, the stand of the State Government as reflected in these affidavit on certain issues was already subject matter of consideration in the said decision of the Division

Bench. Be that as it may, for completeness, we note such pleadings on behalf of the State. There are about four reply / additional affidavits filed on behalf of the State.

12. The first affidavit is of Mr. Arun Dessai, Director, Department of Transport, Government of Goa dated 28 September 2010. At the outset, the affidavit referring to the decision of the Supreme Court in the case of "**State of A.P. Vs. Mc.Dowell & Co.**"[2] contends that none of the grounds as urged by the petitioner in assailing the constitutional validity are tenable to strike down the legislation. It is contended that there is neither violation of Article 301 of the Constitution nor there is an infringement of Article 14 or any other constitutional provision. In justifying the legislation it is contended that mining is one of the major industries in the State of Goa. Different ores like manganese and iron ore, which are extracted in Goa are exported by using facilities at the Mormugao Port. In addition to the ores extracted from Goa, the ores from various other places outside Goa, are also exported from the Mormugao port. Such ore is brought into Goa either by road transportation or by railway wagons. It is contended that in the case of railway transportation, the ore is brought at Sanvordem Railway Station and unloaded at the said station, from where

2 AIR 1996 SC 1627

the ore is taken by trucks to the Mormugao Port, for onward transportation by the sea route.

13. It is contended that the State charges royalties on the ore which is extracted in Goa. It is stated that at the relevant time almost 19 million tones of iron and manganese ore was mined in Goa. The royalty on such mining is fixed by the Central Government. It is contended that large quantities of ore is brought into the State of Goa from other States on which royalty is not charged by the Government of Goa. It is contended that the process of transportation of ore to the Mormugao Port by various routes had created severe dust pollution in various parts of the State creating heavy load on the infrastructures such as roads, water supply, environment, etc. It is stated that due to such heavy movement of the mining traffic, people in Goa have faced severe problems of dust/ environment pollution, traffic congestion and health conditions created by such activities. They resorted to agitations against the same on various occasions, resulting in the State facing law and order situations on many occasions. Such issues had also reached this Court. It is stated that confronted with such issues, the State Government contemplated constructing special by-pass roads for diverting the mining traffic and also

widening of the existing roads specifically to accommodate the mining traffic. It is next contended that apart from carrying the ores, there are various other materials that are carried from one place to another such as coal, coke, sand, murrum, debris, garbage, plastic water bottles which added to the woes of the people.

14. The affidavit contends that considering all these circumstances, "the Goa Rural Improvement and Welfare Cess Bill" was introduced before the legislature, with the object of levying cess on the trans-shipment *inter alia* on items like mineral ores, from one mode of surface transport to another. The other materials also included coal brought into the State for the purpose of shipping and transportation. The bill provided that the State Government proposed to utilize the funds generated, for the purpose of improvement of water supply and road as well as for afforestation and control of dust pollution, in the areas directly affected by mining activities. It is stated that at the time of the introduction of the bill in the year 2000, it was estimated that the annual revenue to be received would be in the tune of Rs.6 crores (approx.). The affidavit states that in these circumstances, the bill was passed by the Legislative Assembly, which was granted an assent by the Governor of Goa on 29 September 2000. Further

the rules under the Goa Cess Act namely the Goa Rural Improvement and Welfare Cess Rules 2001 were framed. It is stated that the Goa Cess Act was accordingly brought into force by a notification dated 23 January 2006, with effect from 1 February 2006.

15. The reply affidavit referring to the provisions of Section 3 of the Goa Cess Act, contends that it provides that there shall be levied and collected from the owner, a cess on all "carrier transporting material." It is stated that "carrier" has been defined under Section 2(a) to mean any mode or conveyance or facility by which material is transported from one place to another, by a mechanical device. It is contended that cess is levied not on the mineral or the ore as contended by the petitioner, it is levied on the carrier, which transports the material. Also referring to Section 4 of the impugned Act, it is stated that under the said provision, the amounts received by way of cess, reduced by the cost of collection, after due appropriation as may made by the State Legislature by law, is to be utilized by the Government to make various expenditures as provided for under Section 4, which is to meet the expenditures incurred in connection with the measures which are necessary or expedient to promote the welfare of the people residing in the rural areas affected by the movement of

carriers transporting material on public roads or dumping of garbage or use of plastics; improvement of public health, prevention of diseases and the provision for improvement of medical facilities; for provision and improvement of water supply; for improvement of public roads and the erection of tree barriers for arresting the dust levels; to meet the allowances, if any, of the Members of Advisory Committee constituted under Section 5 of the impugned Act and the salaries and allowances, if any, of the officers appointed under Section 6. It is next stated that Section 7 also makes a provision that a report on the activities financed under the Goa Cess Act shall be published in the Official Gazette. It is contended that it would hence, be not correct for the petitioner to contend that the levying of such cess on the carrier transporting the material in any manner imposes restrictions on trade, commerce or intercourse, when the carrier is transporting material into the State. It is contended that, Article 301 is hence not attracted, much less, there being any violation of Article 301. It is next contended that as Article 301 is not applicable, Article 304 which is in the nature of an exception to Article 301 would also be not applicable.

16. The State Government in its affidavit has also contended that the petitioner's case that the impugned Act encroaches or is inconsistent with the provisions of the Central Act namely the Mines and Minerals

(Development and Regulation) Act, 1957 (for short '**MMDR Act**'), is also not tenable. It is contended that, what was sought to be achieved by the Goa Cess Act is to make provision for additional resources for improvement of infrastructure and health, to promote the welfare of people residing in rural areas. It is stated that it is not a levy of cess on carrier transporting only mineral ore, as the levy of cess is on the carrier, which transports other materials also which are listed in 'Schedule I' of the Goa Cess Act. It is contended that the true nature of the legislation is to levy cess on the carrier for improvement of the infrastructure. It is contended that the legislation is essentially on facets which adversely affect the health of the people residing in rural areas. The entire structure of the Goa Cess Act is with a view to promote the welfare of the people by *interalia* having an infrastructure improvement. The levy is thus on the carrier alone. The measure of liability is defined in terms of weight of the items/materials as listed in the schedule to the Goa Cess Act. It is contended that, there is thus a clear relationship between the levy of cess on the materials and the criteria for determining the measure of liability. It is contended that the statutory provision for measuring the liability on account of the levy throws sufficient light on the general character of the levy.

17. The reply affidavit further contends that the regulatory measures or measures imposing the levy do not come within the purview of restriction contemplated by Article 301 and such measures need not comply with the requirement of proviso to Article 304(b) of the Constitution. It is stated that there is no restriction on the freedom of trade and commerce, on the contrary, instead of hindering the trade, the same would be facilitated by making provisions for roads, maintaining roads in good state of repairs and in providing better infrastructure. It is, therefore, contended that the provisions of the Goa Cess Act, imposing a cess on carrier transporting the material into/within the State, which is in the nature of a regulatory measure and such measures imposing compensatory tax, do not offend the provisions of Article 301 of the Constitution.

Second Reply Affidavit

18. There is an additional affidavit of Mr. Sunil Masurkar, Director of Transport, Government of Goa dated 12 February 2016 *inter alia* contending that the impugned Act is enacted under the powers vested in it under List II (the State List) under Entry 6, 13, 56 and 66 of the Seventh Schedule to the Constitution of India and is well within the legislative competence of the State. It is stated that under Entry 6 of List II, the State

is empowered to make laws with regard to public health and sanitation, hospitals and dispensaries. In the present case the activity of transportation of the materials mentioned in the Schedule of the impugned Act is largely undertaken in the rural areas, whereby the rural population's health is vulnerable and severally affected. It was therefore found expedient to have the legislation in question to ensure and safeguard their health by creating infrastructure, for their better living which is also clear from the preamble of the Goa Cess Act. The affidavit also reiterates that the transportation of the materials which are listed in the Schedule of the impugned Act results in pollution to the natural water sources, dumping of garbage, spillage of material, use of plastic, etc. It is contended that the cess as sought to be collected under the Goa Cess Act is to ensure infrastructural development and improvement of public health of the affected people. It is stated that the issue of dust and pollution are problems synonymous with transportation of materials listed in the Schedule to the impugned Act in question, as it is seen that large dumps of rejects (garbage) and pollution to rivers waterbodies and wells, air pollution, spillage, dust, and plastic are common problems caused by the transportation of materials under the Schedule affecting the health of people especially in rural areas, hence the Goa Cess Act provides to remedy such situation by imposing cess to have a

system to safeguard and improve the conditions of such affected people. It is next contended that the State has derived its powers under Article 246 of the Constitution and has passed the impugned Act under Entry 6 and 66 of List-II of Schedule VII to the Constitution. It is contended that the Court would be required to apply the doctrine of pith and substance to determine whether the impugned law relates to the particular subject mentioned in List II. It is contended that in substance the Goa Cess Act falls within the State List. There is no encroachment on the Union List in the present case. This affidavit also places on record the data/figures in relation to the expenditure incurred for the various infrastructural facilities provided by the State Government in order to meet the objects of the impugned Act in the rural areas as generated from the Goa Rural Improvement and Welfare Cess and deposited in the Consolidated Fund of the Goa Government.

Additional Affidavit I

19. There is an additional affidavit dated 29 March 2016 filed on behalf of the State by Mr. Sunil Masurkar, Director of Transport, Government of Goa, which is similar on the contentions as urged in the earlier affidavit dated 12 February 2016 filed on behalf of the State.

Additional Affidavit II

20. There is a further additional affidavit dated 20 April 2016 filed on behalf of the State by Mr. Sunil Masurkar, Director of Transport, Government of Goa, to place on record a notification dated 6 April 2016, by virtue of which the Schedule – I to the Goa Cess Act is amended, whereby in respect of the Iron ore, where royalty is paid to the Government, the cess has been notified to be 'nil'. Similar is the case in respect of the Manganese ore and Bauxite ore. It is contended that the petitioners dealing with such ore would not have any agitable claims, and the petitions would become infructuous. It is contended that this Court, in matters relating to constitutional challenge, would not entertain academic questions, hence, the Writ Petitions ought not to be entertained on such count. It is further contended that in matters relating to challenges to fiscal statutes, the Courts ought not to order refund of the tax collected as the State has not been unjustly enriched, especially in the light of the fact that the amounts have been spent on public health, infrastructure and development of persons living in the affected areas.

Additional Affidavit III (filed after the decision in Sociedade De Fomento Industrial Pvt. Ltd.)

21. There is another affidavit filed on behalf of the State Government of

Mr. Rajan Satardekar, Director of Transport, Government of Goa dated 17 November 2022. By this affidavit, the State Government has dealt with the amendments as made to the Writ Petition. By such amendments, the petitioner has contended that the cess under the Goa Cess Act stands subsumed on the enactment of the GST laws, and for such reason the Goa Cess Act would cease to be a good law. The affidavit contends that such contentions as urged by the petitioner are not tenable. It is contended that Article 279A was inserted in the Constitution of India by the Constitution (101st Amendment Act) 2016 under which clause 4(a) provides that the GST Council shall make recommendation to the Union and States on the taxes, cesses, and surcharges levied by the Union, the States, and the local bodies, which may be subsumed in the Goods and Services Tax. It is contended that accordingly on recommendation of the GST Council, the Ministry of Finance issued a Notification dated 14 November 2018, notifying the Acts which were subsumed under the GST Act in which the Goa Cess Act in question does not feature, therefore, the Goa Cess Act has not been subsumed by the GST Act.

22. It is on the above backdrop submissions are made on behalf of the learned Senior Counsel appearing for the parties which are as under:

(E) Submissions on behalf of the Petitioners

23. Mr. Dhond, learned Senior Counsel appearing for the petitioners in Writ Petition No. 244 of 2009 and Mr. Nadkarni and Mr. Sawant, learned Counsel appearing for the petitioners in Writ Petition No. 474 of 2012 have made the following submissions.

24. It is urged on behalf of the petitioners that the Cess as levied by the Goa Cess Act, is unconstitutional on the following counts:

I. At the outset, it is submitted that the decision of the Division Bench in the case **Sociedade De Fomento Industrial Pvt.Ltd., Goa** (supra) does not foreclose the petitioners' challenge on the grounds as urged as such grounds are expressly kept open by the Division Bench.

II. (i) The cess as assailed is a tax on the consignment of goods, in the course of inter-State trade and commerce. It is submitted that neither the State List (List II) nor the Concurrent List (List III) in the Seventh Schedule of the Constitution authorizes levy of such tax.

(ii) It is submitted that Entry 42 in List I

providing for inter-State trade and commerce and Entry 92-B in List I providing for taxes on the consignment of goods, where the consignment is to the persons making it or to any other person which takes place in the inter-State trade and commerce, and Entry 97 provides for any other matters not enumerated in List II or List III, including any tax not mentioned in either of those Lists, would demonstrate that the State would not have an authority to legislate on the subject to levy cess under the Act. Thus, levy of Cess under the impugned Act would be rendered illegal and unauthorised as such tax is levied on the petitioner in the course of inter-State trade and commerce.

(iii) The revenue realised is used for general welfare alone, as the cess is a tax, which the State is not authorized by law to levy.

(iv) The impugned cess, in fact, is a 'fee', as it is one 'in respect of the matters falling in the Union List under Entry 96 read with Entry 42.

(v) The imposition of the cess violates Articles 301, 303, and 304 of the Constitution.

(vi) Even if there is competence to levy such cess, the levy is discriminatory. The Goa Cess Act violates Article 14 since it subjects a non-Goan ore to a disproportionately higher incidence of levy.

(vii) Without prejudice to the above contention, it is submitted that the impugned cess subsumed in the GST.

III. <u>Fee or Tax</u>

(i) On the ground that the impugned cess is not a fee but a tax, the submission is to the effect that the fees, broadly speaking, are of two kinds: regulatory, or those for services rendered. The State has asserted that the impugned Cess is a fee for services rendered. Such a fee is meant as a payment for services rendered, benefit provided, or privilege conferred.

(ii) It is a settled principle of law that if the cess is to be regarded as a fee then essentially there needs to be an element of *quid pro quo* between the person who pays it and the authority that imposes

cess. The *quid pro quo* must involve the conferment of some benefit on the persons on whom the fee is imposed. While there is no requirement that such benefit should be in proportion with the amount of fee collected, if that to be confined to those from whom it is collected, there must be, at the very least, availability of indirect benefit or a general nexus between the persons bearing the burden of levy of fee or the services rendered out of the fee collected. The State has shown neither such indirect benefit nor any nexus whatsoever between the petitioners or the others like the petitioners and the services allegedly rendered from the impugned cess. In supporting such contention, reliance is placed on the decision in **Hingir-Rampur Coal Co. Ltd. Vs. State of Orissa**[3], **Corporation of Calcutta Vs. Liberty Cinema**[4] and **State of West Bengal vs. Kesoram Industries Ltd. & Ors.**[5]

(iii) At least three Constitution Benches of the Supreme Court in Hingir- Rampur Coal Co. Ltd. Vs. State of Orissa (supra), Corporation of Calcutta Vs. Liberty Cinema (supra) and State of West Bengal vs. Kesoram Industries Ltd. & Ors.(supra), have set

3 AIR 1961 SC 459
4 AIR 1965 SC 1107
5 (2004)10 SCC 201

down these essential characteristics of a fee which are firstly, there must be an element of *quid pro quo* between the person who pays it and the public authority that imposes it. In supporting this submission, reliance is placed on the decision in Hingir-Rampur Coal Co. Ltd. v. State of Orissa (supra); further, referring to the decision of the Supreme Court in Corporation of Calcutta Vs. Liberty Cinema (supra), such *quid pro quo* must involve the conferment of some benefit (whether primary or secondary) on the persons on whom the fee is imposed; and thirdly, while there is no requirement, that such benefit be in proportion with the amount of fee collected, or that it be confined to those from whom it is collected, there must be, at the very least, availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected. Such proposition is made relying on the decision in ***State of W.B. v. Kesoram Industries Ltd. & Ors.*** (supra). The State has shown neither such indirect benefit, nor any nexus whatsoever between Petitioners (or the others like them) and the services allegedly rendered, from the impugned Cess. In this context, it is submitted that the State presents its "Cess as fee" as contended in the reply

affidavit. It is submitted that in other words, the money to be paid by Petitioners is not at all meant to benefit the petitioners. It is submitted that, nor is there even remotely a nexus between Petitioners and "the services rendered out of the (impugned Cess) collected" by applying the principles in ***Kesoram Industries Ltd. & Ors.*** (supra). It is also submitted that the State's contention that Goa is a very small state and therefore the cess collected is bound to have some trickle-down benefit on all persons in the State including persons employed by the Petitioner, who will use roads in Goa, is too tenuous to justify characterization as a 'fee'. This is altogether more, because the persons employed, in the mining of the Petitioner's ore are in Karnataka. The impugned Cess, therefore, cannot but be a tax.

IV. It is next submitted that the State when it contends that Section 3 of the Goa Cess Act is the charging section, this would make it clear that the tax is on the carrier transporting the material. The State has also contended that the cess is levied only on account of transportation. The State of Goa has also taken a stand that the impugned "Cess is a tax". Consequently, the State having taken a stand that the impugned Cess is a tax, as opposed to a fee, is bound

by the said pleadings. The contention is supported relying on the decision in ***Nagindas Ramdas v. Dalpatram Ichharam***[6]. It is hence, submitted that the impugned Cess is avowedly a tax, and in its application to the Petitioners in this case, is a levy on the consignment of goods in the course of inter-State trade or commerce, for which the State has no legislative competence to impose it.

V. **Discriminatory**

On the ground that the impugned cess is discriminatory, the submissions are to the effect that both, as originally enacted and as on date, the impugned Act discriminates between persons who transport the ore which is locally mined, that is where mining-lease royalty is paid to the Government of Goa and those who mine it outside Goa, but transport it into the State of Goa, wherein such royalty is not paid to the Government of Goa. It is submitted that the case of the State that in this there is no discrimination, is misconceived. It is submitted that such distinction makes no difference for the reason that "royalty" is levied on all minerals wherever mined, by virtue of the MMDR Act. The ores are

6 (1974) 1 SCC 242

transported into the State of Goa in the course of inter-state commerce is not "royalty-free". In the petitioner's case royalty is paid on the ore in the State in which it is mined namely in Karnataka. As for the 10% of sales proceeds of ore, payable into the "Goa Iron Ore Permanent Fund" as charged as per the decision in ***Goa Foundation v. Union of India & Ors.***[7], that cannot justify the discriminatory, impugned Cess. It is submitted that the Cess in question is being levied from 7 October 2010 and that the 10% charge came only in 2014, which in any event was a charge on the 'mining activity' and not on its transportation, like the ore levied by the impugned Cess, and as to the latter, there is no rational distinction between ore mined in-State and that mined outside – both, use precisely the same means. There is thus, no rational nexus between the stated purpose of the impugned Act and the "distinction" between transportation from within or without the State. In any event, the stated basis for imposing 10% charge on Goan ore was because this was being done on Karnataka ore, under the Supreme Court decision in the case of ***Samaj Parivartan Samudaya vs. State of Karnataka***[8]. Thus, it is submitted, renders the

7 (2014) 6 SCC 590
8 (2013) 8 SCC 222

impugned Cess violative of Art. 14.

VI. It is next submitted that the impugned cess is subsumed by the GST regime. The submissions to this effect are:

(i) during the pendency of the Petition, and with effect from 16 September 2016, Parliament enacted the Constitution ("101st Amendment") Act,2016 *inter alia* incorporating Articles 246-A, 269-A and 366(12-A) & (26-A), to the Constitution, and by amending Articles 269 and 286 thereby giving it an overriding effect over Articles 246 and 254, by conferring "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.

(ii) The petitioner's contention on the applicability of GST laws and the Goa Cess Act, being subsumed by the incorporation of the GST laws, is on the premise that transportation is clearly a service and the levy imposed on all carrier transporting material is one on the supply of a service and therefore, in relation to any inter-State supply, it can be only the Parliament, which would be the Government of India, to levy and collect the tax. It is also the petitioner's case that all laws relating to tax on services in force in

any State, immediately before the implementation of the Constitution (101st Amendment) Act, 2016 would stand subsumed in the GST. The case of the State Government that such subsuming is not automatic and is only required to be made by the GST Council, is also untenable. The petitioner has also contended that Article 246A(2), Article 269 and Article 286 as amended by the Constitution (101st Amendment) Act operate *proprio vigore* and hence, would not depend on any recommendation by the GST Council. It is also the case of the petitioners that the State's case that the subsuming is restricted to Entries 66 read with Entries 52, 54, 55 and 62 of List II of the Seventh Schedule is affected by the Constitution(101st Amendment) Act, would not assist the State Government. It is submitted that in any case as held by the Supreme Court in ***Union of India v. Mohit Minerals (P) Ltd.,*** the recommendations of the GST Council are not binding and that the GST regime has subsumed all the indirect taxes.

On the above submissions, the writ petitions ought to be allowed.

(F) <u>Submissions on behalf of the Respondents</u>

25. Mr. Apte, learned Senior Counsel alongwith Mr. N. Vaze, Ms. S.

Linhares appearing for the respondent -State have made the following submissions :

(I) Once Constitutionality of a statute is upheld, its challenge on additional grounds is not permissible:

a) It is submitted that one batch of Petitions was disposed of by the judgment and order dated 26.09.2010 rendered by a co-ordinate Bench of this Court in the case of **Sociedade De Fomento Industrial Pvt. Ltd.** (supra) in Writ Petition No. 670/2010.

b) It is submitted that Paragraph 8 of the said judgment the Division Bench has observed that:-

> "when this petition along with the group of writ petitions came up for hearing, the counsel in other petitions requested that the two arguments raised in this petition, i.e. legislative competence of the state and the retrospective application, are common in almost all matters and they requested to be heard in support when this petition is heard. The counsel requested that after the decision is rendered in this Petition, the other petition be taken up for consideration on other individual grounds. Given this request by the counsel, the other grounds of challenge then the two argued before us in this petition, are not to be construed as foreclosed by this decision".

c) It is hence submitted that this Court in paragraph 59 of the said judgment held to the effect that "*thus, we conclude that the challenge of the petitioner on the constitutional validity of the Goa Cess Act and the Rules on the grounds of legislative competence*

must fail.”

d) It is hence submitted that once the said judgment holds that Sections of the Goa Cess Act, provide sufficient guidelines with respect to object of the Goa Cess Act, the Goa Cess Act is held constitutionally valid as far as legislative competence is concerned.

e) In so far as the point of challenge under Articles 301 to 304 was already taken in the Writ Petition no. 670 2010, which has been dismissed by the said judgment in Fomento’s case. In the present matter, the Petition seeks to agitate the issue of constitutional validity on grounds which were pleaded in Fomento's matter. It is trite law that once the constitutional validity of a statute is upheld, no challenge on additional grounds is permissible. To substantiate this, following precedents are relied on: (i) Delhi Cloth and General Mills Ltd. vs Shambhu Nath Mukherji and ors (1977) 4 SCC 415 (paragraphs 10 to 12); (ii) Tika Ram and ors vs State of Uttar Pradesh and Ors (2009) 10 SCC 689 (paragraphs 68 and 98); (iii) KAIL Ltd. vs Sahebrao Deshmukh Cooperative Bank Ltd. and ors. reported in (2016) SCC OnLine Bom 4471 paras 4, 5 and 6. It is thus submitted that the challenge to the constitutional validity on basis of additional grounds is required to be dismissed.

(II) It is submitted that the Goa Cess Act is a fee and therefore cannot be challenged for violation of Part XIII of the Constitution. The reasons being:-

a) this Court in Fomento's case has relied upon the ratio of the decision of the Supreme Court in the case **State of West Bengal vs Kesoram Industries reported in (2004) 10 SCC 201**, by rendering a specific finding that the Goa Cess Act and Rules thereunder can also be justified, as a fee and is relatable to Entry 66 of List II of Schedule VII to the Constitution of India. It is submitted that such finding is specifically found in paragraph 52 read with paragraph 37 of the judgment in Fomento's case in which in paragraphs 140 to 146 the decision of the Supreme Court in **Kesoram Industries** (supra) were considered by this Court.

b) It is submitted that fee is referable to Entry 66 of List -II of schedule VII of the Constitution of India. It is now well settled that the test of "quid-pro-quo" is now not applicable rigorously to "Fee". Broad co-relationship is sufficient for holding a "Fee" to be constitutionally valid.

c) Preamble of the Cess Act is sufficient guidance to indicate that the Goa Cess Act is for raising additional resources for improvement of infrastructure and public health as also to promote welfare of the people in rural areas. It is also for the benefit of the workforce of the Petitioner which is for the local area. The additional resources are to be used also to meet expenses for public health and welfare.

d) Section 4 of the Goa Act provides that "Cess" is for benefit of people affected by dumping of garbage, spillage and plastic in process of transportation by any carrier including railway. Benefit in the form of public health, prevention of diseases, water supply, tree barriers etc. In this context reliance is placed on the decision in **Goa State Co-operative Milk Producers Union vs State of Goa and others**[9].

e) The judgment of this Court in Fomento's case in paragraph 37 records that the State has relied upon Entry 6, 13, 23, 50, 56 and 66 of List II to contend that the State had the legislative competence to enact the legislation. . This Court considered the effect of the entire Act in paragraphs 41, 42, 43, 44, 55, 56, 57 and 58 of the said judgment, and thereafter has rendered a finding in paragraph 52

9 (2021) SCC OnLine Bom 481

when it observed that "the Goa Cess Act and Rules" are targeted for augmentation of revenue to provide infrastructure in the State without impinging on Mineral Regulation. The Act is traceable to the entries relied upon by the State.

III) It is submitted that assuming whilst denying that Cess is a tax, the same discloses reasonable classification and does not infringe Article 14 of the Constitution by considering the following:-

a) Assuming that the Goa Cess Act is a tax, there is no discrimination in either the Act or Rules. When a discrimination is alleged on fixation of rates by the executive in the Schedule of the Goa Cess Act, it must also be borne in mind that the Petitioner's contention/grievance is about discrimination in rates fixed in the Schedule based on origin of the iron ore, that is iron ore for which royalty is paid to the State of Goa which attracts nil cess and on the other hand the iron ore coming into Goa from other states for which royalty is not paid to the State of Goa.

b) Thus essentially, there is no grievance about either the Act or the Rules thereunder to be discriminatory. The grievance is about exercise of power by the executive in fixing the rates in the Schedule

is stated to be arbitrary. Such a ground has not been raised in this Petition at all and therefore the Petition must fail.

c) The Goa Cess Act confers powers on the executive to fix rates in the Schedule. This is a piece of delegated legislation. Different rates prescribed with respect to carrier, transportation of ore from outside the State is based on "reasonable classification", which is clear from the following:

i) In case of iron ore, a reasonable classification is made on basis of ore mined within the State in respect of which the State of Goa receives royalty and on the other hand the ore mined outside Goa no royalty is received by the State.

ii) It is submitted that in the matter of **Goa Foundation vs Union of India reported in (2014) 6 SCC 590,** the Supreme Court directed the Goa Iron Ore Permanent Fund to be created in which 10% of the sale proceeds of the iron ore excavated in the State of Goa and sold by the lessees is required to be contributed to the said Fund. The State of Goa has presented a comprehensive scheme before the Supreme Court for utilisation of the Goa Iron Ore Permanent Fund.

iii) Thereafter in 2016 the Mines and Minerals (Development

and Regulation) Act was amended by the Central Government and a District Mineral Fund was created in every district. The Petitioner moved IA Nos.87, 88 and 90 in the said Writ Petition (Civil) 435/2012 in which it was prayed that the contribution in Goa Iron Ore Permanent Fund be reconsidered in view of the District Mineral Fund. However, the Supreme Court did not reconsider the Goa Iron Ore Permanent Fund.

iv) In respect of the ore mined outside Goa but transported into Goa, such ore is not required to pay District Mineral Fund in Goa. Thus the classification between the ore on the basis of origin is reasonable classification.

d) It is not necessary or relevant as to whether compulsory expenditure with reference to the State ore is referrable to mining or transportation to justify reasonableness of classification. Once this is accepted, fixation of different rates ought not to be interfered with by Court in exercise of writ jurisdiction.

e) It is settled law that even a total prohibition (nil charges for state ore) is permissible by law. Thus the classification being reasonable, there is no discrimination by the Goa Act or Rules or

Schedule as and by way of fixation of rates by the states.

f) While considering the constitutional validity of a statute which is alleged to be violative of Article 14, there has to be a presumption in favour of constitutionality and the burden to prove otherwise heavily rests on the shoulder of Petitioner. The Petitioner has not discharged this burden.

g) It is submitted that the presumption of constitutionality is strong and in order to sustain it, this Court may have to take into consideration matters of common knowledge, matters of common report, the history of the times and also this Court may have to assume every state of facts which can be conceived at the time of legislation of the Act.

h) On the petitioner's case on Article 304, it is submitted that Article 304 (a) does not apply to the Goa Cess Act. The Cess Act is not relatable to any entry regarding trade or commerce. The judgment in the matter of Fomento (supra) upholds the validity of the Act on entries not related to trade and commerce.

i) In any case, there is no similar tax in other corresponding

States and hence the question of the Goa Cess Act being violative of Article 304 (a) does not arise.

j) It is submitted that the Goa Cess Act is not in relation to supply. The word “supply” was considered by the House of Lords in the matter of Regina vs Maginnis, reported in (1987) 2 WLR 765 wherein it is held **“***the word “supply” in its ordinary natural meaning conveys the idea of furnishing or providing to another something which is wanted or required in order to meet the wants or requirements of that other. It connotes more than the mere transfer of physical control of some chattel or object from one person to another. No one would ordinarily say that to hand over something to a mere custodier was to supply him with it. The additional concept is that to enable the recipient to apply the thing handed over to purposes for which he desires or has duty to apply it”.* In the present case, the Petitioner is bringing its own ore from Karnataka where it is subjected to royalty into the State of Goa for its own consumption. This can by no stretch of imagination be construed as a “supply” under part XIII of the Constitution of India.

k) Moreover, the Goa Cess Act is for the purpose of providing

additional resources for improvement of infrastructure and health with a view to promote welfare of the people residing in the rural areas affected by the use of plastics, dumping of garbage and spillage of minerals. The said Act thus cannot be stated to target supply of iron ore. It is hence, submitted that there is no merit in the contention of the Petitioner that the Goa Cess Act and the Rules are violative of part XII of the Constitution of India.

l) It is submitted that it is trite law that the laws related to economic activities should be viewed with greater latitude than laws touching civil rights. Holmes J. is quoted who said that "legislature should be allowed some play in the joints, because it has to deal with complex problems, which do not admit of solutions through any doctrinaire or straight jacket formula and this is particularly true in case of legislations dealing with economic matters, where, having regard to the nature of problems required to be dealt with greater play in the joints has to be allowed to the legislature." Also in support of the above contentions, the Respondent has placed reliance on the following decisions:

(i) R.K. Garg vs Union of India[10]; (ii) Income Tax Officer vs R.

10 (1981) 4 SCC 675 (paragraphs 6, 7 and 8)

Rakin Roy Rymbat and others[11]; (iii) Sanjeev Coke Manufacturing Company vs M/s Bharat Coking Coal Ltd. and another[12] ; (iv)Vivian Joseph Fereira vs Municipal Corporation of Greater Bombay[13] ; (v) Federation of Hotels and Restaurant Association vs UOI[14].

IV) It is next submitted that the Goa Cess Act is not subsumed under GST for the following reasons ;

a) It is submitted that the petitioners' contention that the Goa Cess Act is subsumed under the GST is not tenable in law for the reason that the Goa Cess Act, does not target supply of goods and in contrast the GST takes in its fold supply of goods. It is submitted that the Goa Cess Act also does not violate any provisions of 101 st Amendment Act of the Constitution.

b) It is submitted in this context reliance placed by the Petitioner on Section 19 of the 101 st Amendment Act is misplaced for the following reasons:

i) The Goa Cess Act does not levy tax on goods and services

11 (1976) 1 SCC 916(Paragraph 27).
12 (1983) 1 SCC 147 (Paragraph 25).
13 (1972) 1 SCC 70 (paragraph 14, 15 and 16)
14 (1989) 3 SCC 634 (paragraphs 46, 47 and 48)

and it is not referable to relevant entries. In fact, deletion of some of the entries supports the case of the Respondent in as much as it gives indication in regard to coverage of taxes by GST regime.

ii) The Constitution (101st Amendment) Act, 2016, more particularly Section 17 thereof provides for deletion of entries 84, 92 and 92 C of List-Union List and omission of Entry 52 and 55 and substitution of Entry 54 and 62 of the List II -State List.

iii) Perusal of the omitted entries prior to substitution in the List -II (State List) reflects that the said entries pertain to supply, sale, manufacturing, entertainment and luxury tax. Thus essentially it can be seen that any tax which would fall under the omitted entries 52 and 55 or entries 54 and 62 of List -II prior to substitution, would be subsumed by the GST.

iv) It is submitted that the judgment in Fomento's case in paragraph 37 records that the State has relied upon Entry 6, 13 , 23, 50, 56 and 66 of List II. This Court further considered the entire Act in paragraphs 41, 42, 43, 44, 55, 56, 57 and 58 and 1 thereafter has rendered a finding in paragraph 52 to state that "..... The Act is traceable to the entries relied upon by the State." Thus,

it can be seen that the said Act does not relate to any of the said entries which are subsumed under the GST.

v) Similarly, Article 279 A has been inserted in the Constitution of India pursuant to 101st amendment. Article 279A(4)(a) provides that GST Council shall make recommendation to the Union and States on the taxes and cesses and surcharges levied by the Union, States, and the local bodies which may be subsumed in the Goods and the Services Act.

vi) The Parliament has also enacted the Goods and Services Tax (Compensation to States) Act, 2017 and Section 5 (4) thereof provides for notification of the acts of the Central Government and State Government under which specific taxes are subsumed into the Goods and Services Tax to be notified.

vii) Accordingly, notification no. 01/2018 dated November 14, 20'18 in Part-II, Section 3 of the Extraordinary Gazette of India has been published and the Goa Cess Act has not been notified therein.

viii) The Goa Cess Act imposes "Cess" on the carrier transporting

goods. In present case, the ore is transported by the Petitioner for itself. It is thus clear that it is not a case of “supply” within the meaning of GST regime. For this reason also the Goa Cess Act falls outside the purview of GST Act.

ix) Thus, it is submitted that there is no merit in the argument that after enactment of GST, the Goa Cess Act and Rules are subsumed.

V) **Other Submissions:**

(a) It is submitted that the levy of the Goa Cess Act is referable to Entry 6, 13, 17, 18 and 66 of List -II of the Constitution of India. The Goa Cess Act is enacted in furtherance of Articles 38, 47 and 48-A (Directive Principles of State Policy) of the Constitution of India. The test of pith and substance to consider constitutional validity, if applied, will sustain the validity of the said Goa Cess Act. In pith and substance, Goa Cess Act is not relatable to mode of transportation. Section 2 (a) of the Goa Cess Act defines word “carrier”. The said definition supports this contention that the Goa Cess Act is not relatable to mode of transportation. Incidental encroachment on List-I of the VII schedule of the Constitution

would not invalidate the Goa Cess Act. Entries in Lists of Schedule VII of the Constitution must be given wide and broad interpretation while considering legislative competence of the state. It is specifically so in case of taxing statutes. The State has produced data regarding user of additional resources, and this has been noted in paragraph 56 in Fomento's judgment (supra).

(b) The Goa Cess Act is not on occupied field of MMDR Act 1957. MMDR Act is not a complete code and occupies a limited field pertinent to development and regulation of mining and the Goa Cess Act does not in any manner overlap the said field. Perusal of the preamble of the Goa Cess Act supports this contention.

(c) Levy of Goa Cess is on certain items mentioned in Schedule I of the Goa Cess Act pertaining to carrier transporting material.

(d) The judgment of the Supreme Court in **Jindal Stainless Ltd. & Anr. Vs. State of Haryana & ors.**[15] is essentially with respect to entry tax in relation to Article 301 to 304 of the Constitution of India. The Goa Cess Act is a fee and not a tax, much less an entry tax. The decision in Jindal Steels (supra) upholds the power to tax, but says it should not be discriminatory. As stated above, the Goa Cess

15 (2017) 12 SCC 1

Act, the Rules thereunder, the Schedule or the Rates in any case are not discriminatory. Paragraphs 123, 459.2, 487 and the final order in the said judgment of Jindal Steel (supra) specifically lay down inter alia that preferential treatment to local goods is not per se discriminatory. Also in paragraph 123, the Court *inter alia* observes that there is no question of any discrimination if the goods taxed from outside the State are not at a disadvantage *vis-a-vis* the goods produced or manufactured within that state and further asserted that a mere levy of tax on goods, that are not manufactured or produced in that State, making it costlier, does not necessarily make such levy unconstitutional. Responsive governance, democratic process and system which itself take care of any aberration in this regard and henceforth Article 304 (a) will not frown simply in such levy on mere differentiation and not on any discrimination. Further, in para 127, this Court substantially held that non discriminatory tax does not per se constitute restriction to right to free trade, commerce and intercourse guaranteed under Article 301 of the Constitution of India. It is therefore, submitted that the petition be dismissed.

(G) Analysis and Conclusion

26. As the question for consideration before the Court is to the validity of the Goa Cess Act, on the grounds as noted above, we may note the principles the Court needs to bear in mind in considering a challenge to Constitutional validity of the law made by the legislature. In State of **Andhra Pradesh Vs. Mcdowell and Company** (supra), the Supreme Court observed that law made by the Parliament or the legislature can be struck down by Courts on two grounds alone namely, firstly on legislative competence and secondly, violation of any of the Fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. It was held that there is no third ground. It was observed that if an enactment is challenged of being violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause /equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by Clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the Clauses (2) to (6) of Article 19 and so on. It was held that no enactment can be struck down by just saying that it is arbitrary or unreasonable. The Supreme Court observed that some or other constitutional infirmity needs to be found, before invalidating an Act, and that an enactment cannot be struck down on the ground that

Court thinks it unjustified. It was held that the Parliament and the Legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom. An enactment cannot be struck down by applying the principles proportionality when its applicability even in administrative law sphere is not fully and finally settled. The Court observed that it is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the Court can strike down enactment, if it thinks it to be unreasonable, unnecessary or unwarranted. These principles have been reiterated by the Supreme Court in **Goa Glass Fibre Ltd. Vs. State of Goa and another (2010) 6 SCC 499**.

27. The question which arises for consideration is as to whether the Goa Cess Act is constitutionally valid when tested on the anvil of Articles 14, 301, 303 and 304 of the Constitution; and whether the Goa Cess Act levys an unconstitutional fee or a tax; secondly, as to whether the State stand denuded of its power to levy cess under the said Act on the ground that levy stands subsumed by the GST Act.

28. Before we embark on the discussion to determine the aforesaid questions, we would discuss the statutory scheme of the Goa Cess Act.

29. The title of the Goa Cess Act namely "Goa Rural Improvement and Welfare Cess Act, 2000" as also the preamble of the Act would indicate that the object of the Act is to provide additional resources for improvement of infrastructure and health with a view to promote the welfare of people residing in the rural areas affected by the use of plastics, dumping of garbage and spillage of materials. It provides that the legislature thought it expedient to provide additional resources for improvement of infrastructure and health with a view to promote the welfare of people residing in the rural areas affected by the use of plastics, dumping of garbage and spillage of materials. The preamble and the long title of the Act need to be noted which read thus:

> **"Goa Rural Improvement and Welfare Cess Act, 2000"**
>
> **"An Act to provide additional resources for improvement of infrastructure and health with a view to promote the welfare of people residing in the rural areas affected by the use of plastics, dumping of garbage and spillage of materials.**
>
> **Whereas it is expedient to provide additional resources for improvement of infrastructure and health with a view to promote the welfare of people residing in the rural areas affected by the use of plastics, dumping of garbage and spillage**

of materials."

30. We also note the 'statement of object and reasons' leading to enactment which provides that the cess on transshipment of mineral ore from one mode of surface transport to another at the rate of Rs. 21/- per tonne of ore transported within the State and Rs. 5/- per tonne of ore (including coal) brought into the State for the purpose of shipping was proposed in the Budget Speech for the year 2000-2001, relating to Goa Fund. The proceeds were proposed to be put in the Green Goa Fund and utilized for the purpose of improvement of water supply and roads, as well as, afforestation and control of dust pollution in the region directly affected-by mining activity. It was, therefore, proposed to introduce such Bill for the levy of cess on the carriers which transport certain items like coal, coke, sand, murrum, debris, garbage, mineral water bottles using plastic packaging, iron ore, manganese ore, etc. The statement of object and reasons reads thus:

> "**Statement of Objects and Reasons**
>
> The cess on transhipment of mineral ore from one mode of surface transport to another at the rate of Rs. 21/- per tonne of ore transported within the State and Rs. 5/- per tonne of ore (including coal) brought into the State for the purpose of shipping has been proposed in the Budget Speech for the year 2000-2001, relating to Goa Fund. The proceeds are proposed to be put in the Green Goa Fund and utilized for the purpose of improvement of water supply and roads,-as well as, afforestation

> and control of dust pollution in the region directly affected-by mining activity. It is, therefore, proposed to introduce the present Bill for the levy of cess on the carriers which transport certain items like coal, coke, sand, murrum, debris, garbage, mineral water bottles using plastic packaging, iron ore, manganese ore, etc."

31. The relevant provisions of the Act are also required to be noted. The definition clause *interalia* provides for definition of "carrier", "material", "owner", "plastic" and "Schedule I", which read thus:

> **"Section 2. Definitions –** In this Act, unless the context otherwise requires,-
>
> (a) "**carrier**" means any mode or conveyance of facility by which material is transported from one place to another by mechanical device;
>
> (b) "**Government**" means the Government of Goa;
>
> (c) … … ..
>
> (d) "**material**" means the material specified in Schedule I;
>
> (e) "**owner**" means any person who is the immediate proprietor of items enlisted in Schedule I;
>
> (f) "**Plastic**" means compounds of hydrocarbons that are non-biodegradable and includes Polypropelene, Polyvinychloride, Polyethylene, Nylon and other plastic goods, such as, P.V.C., Polystyrene which are not capable of being destroyed by action of living beings;
>
> (g) … … .. .

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

32. Section 3 is the charging provision for levy and collection of cess. Section 4 provides for ‘Application of proceeds of cess’. Section 6 provides for ‘Appointment of Inspecting Authority, Welfare Administrator and their powers”. Section 7 provides for ‘Publication of annual report of activities financed under the Act’. Section 8 provides for ‘Power to make rules’. Section 9 provides for ‘Penalties’. Section 10 provides for ‘Cognizance of offences’. Section 11 provides for ‘Offences by Companies’. Section 12 provides for ‘Compounding of offences’. Section 13 provides for ‘Recovery of certain sums as arrears of land revenue.’ Section 14 provides for ‘Rules and notifications to be laid before State Legislature.’ Section 15 provides for ‘Power to Revise’.

33. The relevant provisions being Sections 3, 4, 5, 8 and Schedule I read thus:-

> **Section 3. Levy and collection of cess.**— (1) With effect from such date as the Government may, by notification in the Official Gazette, appoint, there shall be levied and collected from the owner a cess on all carrier transporting material and at such rates as specified in Schedule I, for the purposes of this Act.
>
> (2) The Government may, from time to time, by notification in

the Official Gazette, revise the items and the rates of cess by amending Schedule I.

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

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

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

(c) for provision and improvement of water supply;

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

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

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

(2) The Advisory Committee shall consist of such number of

persons and chosen in such manner as may be prescribed;

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

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

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

(5) The Government shall publish in the Official Gazette the names of all members of the Advisory Committee.

… .. ..

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

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

(a) the assessment and collection of cess levied under this Act;

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

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

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

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

(f) the furnishing by the owner of the carrier of statistical

and other information.

… .. ..

SCHEDULE – I
(See section 3)

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

	vii) Amonia, Phosphoric Acid and Sulphuric Acid and other raw material used in the manufacture of Chemical Fertilizers. viii) MS Scrap, MS Ingots, Sponge and Pig Iron. ix) Mineral ore used in the manufacture of Sponge Iron and Pig Iron an MSingots	
14	Any other items as notified by Government from time to time.	Rs. 2/- per ton/cubic meter/per package, as specified by the Government

34. In exercise of powers conferred under Sections 4, 5 and 8 of the Goa Cess Act, the Goa Rural Improvement and Welfare Cess Rules, 2006 were framed, which interalia provides for Assessment and collection of cess, Cost of collection of cess, manner in which amount of cess shall be applied, Composition of Advisory Committee, term of office, etc. Rules 3, 4 and 5 read thus:-

> "**Rule 3. Levy and collection of cess.**— (1) With effect from such date as the Government may, by notification in the Official Gazette, appoint, there shall be levied and collected from the owner a cess on all carrier transporting material and at such rates as specified in Schedule I, for the purposes of this Act.
>
> (2) The Government may, from time to time, by notification in the Official Gazette, revise the items and the rates of cess by amending Schedule I.
>
> **Rule 4. Application of proceeds of cess.**— An amount equivalent to the proceeds of cess levied under this Act, reduced by the cost of collection as determined by the Government in the prescribed manner together with any income from investment of the said amount and any other moneys received by the Government for the purposes of this Act shall, after due appropriation made by the

State Legislature by law, be utilized by the Government to meet the expenditure incurred in connection with measures which, in the opinion of the Government, are necessary or expedient to promote the welfare of the people residing in the rural areas affected by the movement of carriers transporting material on public roads or dumping of garbage or use of plastics and in particular:—

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

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

(c) for provision and improvement of water supply;

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

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

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

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

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

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

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

(5) The Government shall publish in the Official Gazette the names of

all members of the Advisory Committee."

35. We have already noted that the 'Schedule' to the Act prescribes the rates at which the cess would be levied on the materials as specified in the Schedule. Further thereto by a notification dated 13 May 2008 issued by the Government of Goa, in exercise of power under sub-section (2) of Section 3 of the Goa Cess Act, the rate of levy of cess as specified in Schedule I came to be revised which was the immediate grievance of the petition in filing of the present proceedings. The said notification reads thus:

"OFFICIAL GAZETTE GOVERNMENT OF GOA
EXTRAORDINARY
GOVERNMENT OF GOA
Department of Transportation
Directorate of Transportation

Notification
5/4/2000-Tpt/2008

In exercise of the powers conferred by sub-section (2) of Section 3 of the Goa Rural Improvement and Welfare Cess Act, 2000 (Act 29 of 2000), (hereinafter called as the "said Act"), the Government of Goa hereby revises the existing rates of cess on the following materials as specified in the Schedule-I appended to the said Act, follows:-

In the Schedule – I appended to the said Act, for the serial numbers 1 to 9 and the entries thereof, the following shall be substituted, namely:-

"1	Iron ore, where royalty is paid to the Government	Rs.20/- per metric ton
2	Manganese ore, where royalty is paid to the Government	Rs. 20/- per metric ton
3	Bauxite ore, where royalty is paid to the	Rs. 20/- per metric ton

	Government	
4	Iron ore, where royalty is not paid to the Government	Rs. 50/- per metric ton
5	Manganese ore, where royalty is not paid to the Government	Rs. 50/- per metric ton
6	Bauxite ore, where royalty is not paid to the Government	Rs. 50/- per metric ton
7	Coal	Rs. 50/- per metric ton
8	Coke	Rs. 50/- per metric ton
9	a) Sand, where royalty is paid to the Government b) Sand, where royalty is not paid to the Government	Rs. 2/- per cubic metre Rs. 20/- per cubic metre.”

This Notification shall come into force with effect from the date of its publication in the Official Gazette.

By order and in the name of the Governor of Goa.

Sandip Jacques, Director of Transport & ex officio JointSecretary (Tpt).
Panaji, 13th May, 2008.

In the said Notification, in the Schedule, for the serial No. 2 and the entries thereof, the following shall be substituted, namely:-

“2. South Goa Margao Salcete
Mormugao Mormugao
Quepem Qepem
Sanguem
Canacona.”

This Notification shall come into force with immediate effect.
By order and in the name of the Governor of Goa.
D. M. Redkar, Under Secretary (Rev-I).
Parvorim, 1st December, 2008.

36. During the pendency of the petition, a further notification dated 6 April 2016 came to be issued by the Government of Goa whereby Schedule I in regard to rate qua iron ore, manganese ore and bauxite ore

whereby royalty was paid to the Government was amended to provide "Nil" rate of levy. The said notification reads thus:-

"Department of Transport
Directorate of Transport

Notification
D.Tpt/EST/2397/2016/1206

Read: Government Notification No.5/4/2000-Tpt/2008/ dated 13-5-2008, published in the Official Gazette Seies I No. 6 (Extraordinary) dated 13-5-2008.

In exercise of the powers conferred by sub-section (2) of section 3 of the Goa Rural Improvement and Welfare Cess Act, 2000 (Act 29 of 2000) (hereinafter called as the "said Act"), and all other powers enabling it in this behalf, the Government of Goa hereby amends the Schedule-I appended to the said Act, as follows, namely:-

In the Schedule-I appended to the said Act, for the existing entries at serial numbers 1, 2 and 3, the following shall be substituted, namely:-

"(1) Iron ore, where royalty is paid to the Government -Nil
(2) Manganese ore, where royalty is paid to the Government-Nil
(3) Bauxite ore, where royalty is paid to the Government -Nil

This Notification shall come into force from the date of its publication in the Official Gazette.

By order and in the name of the Governor of Goa.

Sunil Masurkar, Director & ex officio Joint Secretary (Transport).
Panaji, 6th April, 2016.

37. Before we discuss the issues as raised by the parties, we may observe that the legislative competence to enact the Goa Cess Act has been upheld by a Division Bench of this Court in the case **Sociedade De Fomento Industrial Pvt.Ltd., Goa** (supra). The Division Bench has held that the

Goa Cess Act is relatable to Entries 6, 13, 23 and 66 of List II (State List) under the Seventh Schedule to the Constitution, and its validity is not impaired or affected by Entries 52 and 54 of List I. It is also held that it does not in any manner breach the mandate of the Central Act namely Mines and Minerals (Development and Regulation) Act,1957 read with Act 65 of 1951 and Act 53 of 1948 respectively. The Division Bench held that considering the substance and object of the Goa Cess Act and the Rules framed thereunder *vis a vis* MMDR Act and the Rules framed thereunder, there was no irrevocable conflict between the concerned Union Legislation and the State Legislation. It was observed that the Goa Cess Act and Rules thereunder are targeted for augmentation of revenue to provide infrastructures in the State without impinging on the mineral regulation. The Court observed that the Goa Cess Act is traceable to the entries relied upon by the State as noted above.

(I) <u>Whether Tax or Fee</u>

38. The petitioners have raised a contention that the Cess Act levies a 'tax' and not a 'fee'. It is the petitioners' case that there needs to be an element of *quid pro quo*, if the cess is to be regarded as a fee. It appears that the petitioners intention to re-raise this contention is to buttress their

challenge to the legislation on the ground that it is invalid when tested on the anvil of Part XIII of the Constitution namely Articles 301 to 304 of the Constitution. In any event, the law in the context of whether in a given situation cess can be categorized as a tax or a fee, is well settled. We discuss the legal position.

39. The Supreme Court in **Vijayalashmi Rice Mill and Ors. VS. Commercial Tax Officers, Palako & Ors.**[16] in the context of an issue arising under the Andhra Pradesh Rural Development Act, 1996 which levied cess on purchase of goods, considered the contentions as urged on behalf of the petitioner that there was no *quid pro quo* in the levy of the cess and hence, it could not be said to be a fee. Rejecting such contention, the Supreme Court held that ordinarily a cess is also a tax, but it is a special kind of tax. It was observed that generally tax raises revenue which can be used generally for any purpose by the State, however, cess is a tax which generates revenue which is utilized for a specific purpose. It was however observed that in the matters as in hand (which were similar to the legislation in question), the nomenclature was not very important and what has to be seen is the nature of the levy. It was observed that what is called a "cess may be in reality a fee" depending on its nature. The Court

16 (2006) 6 SCC 763

observed that it is well settled that the basic difference between a tax and a fee is that a tax is a compulsory exaction of money by the State or a public authority for public purposes, and is not a payment for some specific services rendered, on the other hand, a fee is generally defined to be a charge for a special service rendered by some governmental agency. The Court observed that however, the earlier view of the Supreme Court was to the effect that to sustain the validity of a fee, some specific service must be rendered to the particular individual from whom the fee was sought to be realised, had undergone a sea change. The Court observed that in regard to the concept of fee, it is no longer regarded necessary that some specific service must be rendered to the particular individual or individuals from whom the fee is realized, and what has to be seen is whether there is a broad and general co-relationship between the totality of the fee on the one hand and the totality of the expenses of the services on the other. It was observed that a broad co-relationship between the two is sufficient to sustain the levy. The relevant observations of the Supreme Court in this regard are required to be noted which read thus:

> "15. It is well settled that the basic difference between a tax and a fee is that a tax is a compulsory exaction of money by the State or a public authority for public purposes, and is not a payment for some specific services rendered. On the other hand, a fee is generally defined to be a charge for a special service rendered by some governmental agency. In other words there has to be quid pro quo

in a fee vide Kewal Krishan Puri v. State of Punjab, AIR (1980) SC 1008.

16. The earlier view of the Supreme Court was that to sustain the validity of a fee some specific service must be rendered to the particular individual from whom the fee is sought to be realized. However, subsequently in Sreenivasa General Traders v. State of Andhra Pradesh, AIR (1983) SC 1246, Supreme Court observed:

> "The traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the subsequent decisions. The distinctions between a tax and a fee lies preliminary in the fact that a tax is levied as part of a common burden, vide a fee is for payment of a specific benefit or privilege although the specific advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of the State predominates, the levy becomes a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered.......... There is no generic difference between a tax and a fee. Both are compulsory exaction of money by public authorities."

… … …

21. As already stated above, the concept of fee has undergone a sea change, and hence the writ petition is liable to fail on the mere ground that the writ petition was drafted under a total misconception about the legal position. As already stated above, the concept of fee has undergone a sea change, while the writ petition has been drafted in the light of the old concept of fee and not the new concept which was subsequently developed by the Supreme Court.

22. In Sona Chandi Oal Committee v. State of Maharashtra, AIR (2005) SC 635, this Court observed as under:

> "The traditional concept of quid pro quo in a fee has undergone considerable transformation. So far as the regulatory fee is concerned, the service to be rendered is not a condition precedent and the same does not lose the character of a fee provided the fee so charged is not excessive. It was not necessary that service to be rendered by the collecting authority should be confined to the

> contributories alone. The levy does not cease to be a fee merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have a direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. Quid pro quo in the strict sense was not always a sine qua non for a fee. All that is necessary is that there should be a reasonable relationship between the levy of fee and the services rendered and it is not necessary to establish that those who pay the fee must receive direct or special benefit or advantage of the services rendered for which the fee was being paid. It was held that if one who is liable to pay, receives general benefit from the authority levying the fee, the element of service required for collecting the fee is satisfied."

23. In State of West Bengal v. Kesoram Industries Ltd. and Ors., [2004] 10 SCC 201 a Constitution Bench of the Supreme Court (vide para 140) observed:

> "The imposition of cess envisaged through the SADA Act and the Rules was a step towards developing the special area. It is a matter of common knowledge, and does not need any evidence to demonstrate, that mining activity carried on the land within the special area involves extraction, removal, loading-unloading and transportation of the minerals accompanied by its natural consequences entailed on the environment and the infrastructure such as roads, water and power supply etc. within the special area. The impugned cess can, therefore, be justified as a fee for rendering such services as would improve the infrastructure and general development of the area, the benefits whereof would be availed even by the stone-crushers. Entry 66 in List II is available to provide protective constitutional coverage to the impugned levy as fee."

24. In Shiv Dayal Singh Ors. v. State of Haryana & Ors., AIR (1989) Punjab 87, the Punjab and Haryana High Court has upheld the validity of the Haryana Rural Development Act, which is similar to the Act in question. We are in respectful agreement with the view taken by the Punjab and Haryana High Court in the aforesaid decision. A similar view was also taken by the Supreme Court in M/s. Kishan Lal Lakhmi Chand & Ors. v. State of Haryana & Ors., [1993] Suppl. 4 SCC 461.

> 25. Learned counsel for the appellant has relied on the Constitution Bench decision of this Court in Jindal Stainless Ltd. & Anr. v. State of Haryana and Ors., JT (2006) 4 SC 611 and he relied on para 39 of the said judgment which refers to "the principle of equivalence". In our opinion the aforesaid decision cannot be interpreted to mean that the sea change which has taken place in the concept of fee (as noted above) has vanished, and that by this decision the old concept of fee has been restored, and that now it has to be established that the particular individual from whom the fee is being realized must be rendered some specific services.
>
> 26. … .. ..
>
> 27. In our opinion the cess in question is in substance a fee as it is being levied for rendering to the rural public the service of rural development for the purposes stated in para 9 of the Act. Clearly roads, bridges and storage facilities have to be built in rural areas for progress, and naturally this will require generating funds. Thus even if no specific service is rendered to any particular individual from whom the fee has been realized, the cess in question is nevertheless a fee, for the reasons already mentioned above. Services are being rendered to the people in the rural areas as mentioned in Section 9 of the Act."
>
> (emphasis supplied)

40. The decision in **Vijayalashmi Rice Mill and Ors.** (supra) was referred with approval in the decision of the Supreme Court in **Union of India & Ors. Vs. State of Uttar Pradesh & Ors.**[17], in which in paragraph 21 the Court observed thus:-

> "21. Our attention was also invited to a decision of this Court in Vijayalashmi Rice Mill and Ors. v. Commercial Tax Officers, Palakol and Ors. . In this case, their Lordships considered the distinction between fee, cesses and taxes. Their Lordships held that ordinarily a tax generates general revenue not for any service rendered. However, the nomenclature is not important. Sometimes

17 (2007)11 SCC 324

> a 'tax' may be in reality a fee, depending upon its nature. It was observed that the earlier concept of fee has undergone a sea change and rendering of some specific service to a particular payer of fee is no longer considered necessary to sustain the levy of fee provided there is a broad and general correlationship between the totality of the fee imposed and the totality of the expenses on the service rendered. This discussion makes it clear that the distinction between a tax and a fee remains, even though the concept of a fee has undergone a sea change."
>
> (emphasis supplied)

41. In **Consumer Online Foundation & Ors. Vs. Union of India & Ors.**[18] the Supreme Court was considering the decision of the Delhi High Court upholding levy of development fees on the embarking passengers, by the lessees of the Airports Authority of India, at the Indira Gandhi International Airport, New Delhi and the Chhatrapati Shivaji International Airport, Mumbai. The Supreme Court held that the nature of the levy under Section 22A of the Airports Authority of India Act, were not the charges or any other consideration for services for the facilities provided by the Airports Authority. Referring to the decision in **Vijayalashmi Rice Mills & Ors.** (supra), it was held that levy under Section 22A though described as fees, is really in the nature of a cess or a tax for generating revenue for the specific purposes mentioned in clauses (a), (b) and (c) of Section 22A. The observations in paragraph 22 are relevant

18 (2011) 5 SCC 360

which read thus:-

> "The nature of the levy under Section 22-A of the 2004 Act, in our considered opinion, is not charges or any other consideration for services for the facilities provided by the Airports Authority. This Court has held in Vijayalashmi Rice Mills & Ors. v. CTO, Palakot (2006)6 SCC 763, that a cess is a tax which generates revenue which is utilized for a specific purpose. The levy under Section 22A though described as fees is really in the nature of a cess or a tax for generating revenue for the specific purposes mentioned in clauses (a), (b) and (c) of Section 22-A."

42. It also needs to be observed that the Division Bench in **Sociedade De Fomento Industrial Pvt. Ltd., Goa** (supra) also considered the contention of the petitioners therein, that the State cannot levy any fee under Entries 6, 13 and 50 of List II, as it was required to provide some special service to the petitioner, and no such service, much less special service, was provided to the petitioners. The petitioners had also contended that the imposts can be by way of tax or fee, but not both. Considering such contention as raised on behalf of the petitioners the Division Bench referring to the decision in **Kesoram** (supra) had repelled the petitioners case that there must be a direct nexus between the fee levied and benefits rendered. It was held that what was necessary was a broad co-relationship, and that it was not necessary that services nor the incidence of the fee has to be uniform. It was observed that the element of

quid pro quo was not always possible nor necessary, to be established by direct evidence and the traditional view of strict *quid pro quo* has undergone a substantial change. The Division Bench thus observed that the State does not have to show with a mathematical exactitude, that the fee charged corresponds to the service provided, but some link is required to be established between the fees collected and the benefit conferred. It was observed that it was good enough to establish that a link exists but it need not be direct. Considering the material on record, it was observed that sufficient evidence was placed on record of spending the money, both on road infrastructure and welfare activities. It was observed that it could not be said that the petitioners do not benefit at all from the services rendered and that there is not even a remote connection. It was held that the Goa Cess Act and the Rules are a device for the State to augment its resources and the services rendered by the collection of the levy, benefits the petitioner as well, and there existed a co-relationship. It was thus observed that the Goa Cess Act and the Rules, whether it imposes a tax or fee, could not be said to be unconstitutional. The Division Bench referring to the decision in **Kesoram** (supra) it was observed that it was immaterial that the nature of the impost is fee or tax, if both could be justified and it was not necessary that one of the pleas must be given up. In our opinion,

as rightly urged on behalf of the respondents, the following observations of the Division Bench in **Sociedade De Fomento Industrial Pvt.Ltd., Goa** (supra) cannot be overlooked by the petitioners in raising the plea that cess is a tax and not fee:-

> "53. The next contention of the Petitioner is that the State cannot levy any fee under Entries 6, 13 and 50 as it is required to provide some special service to the Petitioner, and no such service, much less special service, is provided to the Petitioner. It is, therefore, contended that the entire endeavour is to raise revenue for building infrastructure. It is contended that the imposts can be by way of tax or fee, but not both. On the contention based on Entry 66, List II of the Petitioner pertaining power to charge fee, the Petitioners have relied on the decision in Tulloch to contend that upon enactment of the MMDR Act, no matter would be left in the State List for the State Legislature to levy fees.
>
> 54. The decision in Tulloch has been directly considered in Kesoram, and it has been held that the State is not denuded of its power. Kesoram has observed thus :
>
> > "146. As stated earlier also, the impugned cess can be justified as fee as well. The term cess is commonly employed to connote a tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary that the services rendered by the fee collected should remain confined to the persons from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged. The levy of the impugned cess can equally be upheld by reference to Entry 66 read with Entry 5 of List II."
> >
> > The Petitioner's contention that there must be a direct nexus between the fee levied and the benefits rendered, is not correct. Such exact proportion and direct links are not necessary. Services rendered is not a condition precedent, nor it is

> confined to the contributors alone. A broad co-relationship is all that is necessary. It is also not necessary that services nor the incidence of the fee has to be uniform. The element of quid pro quo is not always possible, nor necessary, to be established by direct evidence. Thus, the traditional view of strict quid pro quo has undergone a substantial change. The State does not have to show with a mathematical exactitude that the fee charged corresponds to the service provided, but some link is required to be established between the fees collected and the benefit conferred. It is good enough to establish that a link exists but it need not be direct.
>
> 58. <u>Sufficient evidence placed on record of spending the money, both on road infrastructure and welfare activities. It cannot be said that the Petitioners do not benefit at all from the services rendered and that there is not even a remote connection. The Goa Cess Act and the Rules are a device for the State to augment its resources. The services rendered by the collection of the levy benefits the Petitioner as well, and there exists a co-relationship. Therefore, the Goa Cess Act and the Rules, whether it imposes a tax or fee, cannot be said to be unconstitutional. Kesoram holds that it is immaterial if the nature of the impost is fee or tax, if both could be justified and it is not necessary that one of the pleas must be given up. It is not necessary to direct the State to choose whether the levy is a fee or tax. This distinguishing is only academic as far as legislative competence of the Goa Cess Act is concerned. It needs to be noted that by Notification dated 6 April 2016 the levy where royalty is paid to the Government has been reduced to 'nil'</u>.
>
> 59. Thus, we conclude that the challenge of the Petitioner on the constitutional validity of the Goa cess Act and the Rules on the ground of legislative competence must fail."
>
> (emphasis supplied)

43. It is thus clear that there is no substance in the contention of the petitioner that the Goa Cess Act levies a tax and not a fee.

(II) <u>Whether Goa Cess Act is violative of Articles 301, 303 and 304 of the Constitution</u>

44. Now coming to the challenge as raised by the petitioners that the impugned Act is violative of Article 301, 303 and 304 of the Constitution inasmuch as it affects the petitioners' rights of freedom of trade, commerce and intercourse.

45. Such contention as urged on behalf of the petitioners is premised on the ground that the ores as imported by the petitioners from the other States within the State of Goa, being subjected to the levy of cess under the Goa Cess Act, would hinder the free movement of goods between the two States and for such reason, the Goa Cess Act would violate the freedom of trade, commerce and intercourse as provided for under Article 301 of the Constitution. It is the petitioners' case that the Goa Cess Act does not fall in any of the exceptions as enunciated under Article 304(a) and Article 304(b) of the Constitution of India inasmuch as neither has such cess been levied on the goods produced in the State nor does the impugned Act lay down any restrictions which are reasonable and required in public interest. It is contended that the impugned Act on the face of it does not give any indication that the bill has been moved in legislature with the previous sanction of the President. It is thus contended that once the impugned Act does not fall in the categories as carved out in Article

304 of the Constitution, the same is required to be held as unconstitutional under the provisions of Article 301 of the Constitution.

46. As the challenge raised by the petitioner to the levy under the Goa Cess Act is premised on the provisions of Article 301, 302, 303 and 304 of the Constitution, the said provisions are required to be noted, which read thus:-

> "**Article 301 Freedom of trade, commerce and intercourse**.
> Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free. Freedom of trade, commerce and intercourse.
>
> **Article 302**. **Power of Parliament to impose restrictions on trade, commerce and intercourse.:** Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Power of Parliament to impose restrictions on trade, commerce and intercourse.
>
> **Article 303 Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce.**
> (1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule. Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce.
>
> (2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

> **304. Restrictions on trade, commerce and intercourse among States.** Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law—
>
> (a) impose on goods imported from other States or the Union territories] any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and
>
> (b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:
>
> Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

47. A cumulative reading of Articles 301 to 304 of the Constitution would indicate that trade, commerce or intercourse throughout India shall be free, however, which shall be subject to the other provisions of the Constitution as contained in Part XIII. Article 302 recognizes the power of the parliament to impose restriction on trade, commerce and intercourse by enacting law between one State and another or within any part of the territory of India as may be required in public interest. Article 303 is in the nature of an exception to Article 302 which provides that neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination

between two States, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule. However, the exception as made by sub-clause (2) of Article 303 is to the effect that the provision recognizes the power of the Parliament to make any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. Article 304 when it provides for restrictions on trade, commerce, and intercourse is again an exception to Article 301, or Article 303 which recognizes the powers with the legislature of a State to make law so as to impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so however as, not to discriminate between goods so imported and goods so manufactured or produced; and further to impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. However, for introducing such Bill, previous sanction of the President would be necessary as provided for in the proviso.

48. We may also note the relevant entries in the Union List and State

List, which have been referred on behalf of the parties in addressing the issues. The entries in the Union List are entries 42, 93, 96 and 97 whereas the entries referred to the State List (List II) are entries 6, 13, 56 and 66. Such entries read thus:

LIST I – UNION LIST

Entry	Content
42	Inter-State trade and commerce.
96	Fees in respect of any of the matters in this List, but not including fees taken in any court.
97	Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

LIST II – STATE LIST

Entry	Content
6	Public health and sanitation; hospitals and dispensaries.
13	Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.
56	Taxes on goods and passengers carried by road or on inland waterways.
66	Fees in respect of any of the matters in this List, but not including fees taken in any Court.

49. As noted above, Goa Cess Act is enacted with the object of augmenting additional revenue for improvement of infrastructure and health with the view to promote welfare of the people residing in the rural areas affected by use of variety of materials which are a source of patent

hazard to human health, namely, plastics, dumping of garbage and spillage of materials. Thus, the legislation can be directly related to entry 6 of the State List which provides for public health and sanitation. It can also be related to entry 66 of the State list inasmuch the Goa Cess Act provides for a pecuniary charge imposed by the State of Goa of carrier to meet public needs. It is now well settled that the word "Cess" can be interchangeably used as held by the Supreme Court in the case of **State of West Bengal vs. Kesoram** (supra).

50. The question, however, is whether the Goa Cess Act would violate Article 301 of the Constitution. For Article 301 to be attracted, the primary consideration would be whether the Goa Cess Act imposes restriction on trade, commerce and intercourse amongst the States within the meaning of Article 304(a) of the Constitution. Article 304(a) begins with the non-obstante clause when it provides "Notwithstanding anything in Article 301 or Article 303, so as recognized that the Legislature of a State may by law – a) impose on goods imported from other States or Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; b) so

as to impose such reasonable restriction on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest.

51. By now it is well settled that clauses (a) and (b) of Article 304 are required to be read disjunctively. Clause (a) of Article 304 provides for imposition of any tax on goods imported from other States or Union territories to which similar goods manufactured or produced in that State are subject with an intention as not to discriminate between goods so imported and goods so manufactured or produced. Thus, per se clause (a) of Article 304 is not attracted in the facts of the present case inasmuch as the Cess being levied by Goa Cess Act cannot be *strictu sensu* categorized as a "tax on goods" which are sought to be imported. This is clear from the plain reading of the charging section of the Goa Cess Act, namely, Section 3 providing for "Levy and Collection of cess". Section 3 clearly provides that there shall be levied and collected from the owner a cess on all "carriers transporting material", and at such rates as specified in Schedule I, for the purposes of this Act. We have already noted that the "carrier" has already been defined under section 2(a) of the Goa Cess Act to mean any mode or conveyance of facility by which material is transported from one

place to another by mechanical device. Section 2(d) has defined "material" to mean the material specified in Schedule I, which are about 13 items as specified, namely, Iron ore, where royalty is paid to Government, Manganese ore where royalty is paid to Government, Bauxite ore where royalty is paid to Government, Iron ore where royalty is not paid to Government, Manganese ore where royalty is not paid to Government, Bauxite ore where royalty is not paid to Government, Coal, Coke, Sand, Murrum, Debris, Garbage, Packaged water supplied in plastic bottles or sachet made up of plastic, sold for human consumption. Inflammable and hazardous materials like petrol, diesel and Light Diesel Oil, Aviation Turbine Fuel (ATF), Nafta and Furnace Oil, Kerosene sold through PDS, Liquefied Petroleum Gas, Waste and Pollutant gases including Argon gas, Ammonia, Phosphoric Acid and Sulphuric Acid and other raw material used in the manufacture of Chemical Fertilizers, MS Scrap, MS Ingots, Sponge and Pig Iron, Mineral ore used in the manufacture of Sponge Iron and Pig Iron and MS ingots. Thus, the Schedule covers a wide range of materials for which heavy transportation is required. The petitioners are merely concerned in regard to the iron ore/ores or coal. It is thus seen that what is sought to be included in the canvass of the Act is the massive and/ or mass transportation activity of such materials as listed under the

schedule to the Act, the spillage of which is a potential threat to the health and welfare of the people and a cause of serious concern to the environment necessitating its preservation.

52. Now we may test whether in reality any restriction is brought about in the rights of the petitioners on freedom of trade, commerce and intercourse. The case of the petitioners is that they are transporting the ores from Karnataka either for further transportation through the Mormugao Port in the State of Goa to other places and/or for the purpose of use in its own units situated in Goa. The carrier of such ore entering Goa is what would be subject to a levy of cess under the Goa Cess Act. The case of the petitioners is that such material ores which are being brought in from other States are subjected to levy of cess, whereas such cess is not levied on the ore which is mined in Goa and for which royalty and other charges are paid. On such reason, the petitioners contend that there is a restriction imposed on the petitioners by levy of cess under the Goa Cess Act and which would be violative of Article 301.

53. We are afraid to accept such contention for more than one reason. The first and foremost reason is that such contention is premised on a manifest and untenable comparison of two categories of ores, namely, the

ores brought in from Karnataka and ores as mined in Goa. The petitioner in raising such contention has overlooked that in the context and the implications which are brought about by the Goa Cess Act, a comparison between ores/materials brought from the State of Karnataka or other States into the State of Goa and the ore mined in Goa would not be well founded. The petitioners who are utilizing the roads and infrastructure in Goa by their carriers to transport iron ore or coal cannot be heard to say that levy of such cess is affecting their freedom of trade, commerce and intercourse, as the petitioners in making such argument are completely oblivious and have overlooked that they are the beneficiaries of the services and facilities which are made available by the State of Goa in enabling the petitioners to effectively undertake such transportation of material by using the rural infrastructure not only for the purpose of further transportation of the materials out of the State of Goa but also if the same is sought to be used in the petitioners own units in the State of Goa and aid trade. Thus, such measure which assists freedom of trade and intercourse can in no manner be called to be any restriction on freedom of trade and intercourse. In any event, once the cess is regarded as fee, cess would stand excluded from the purview of Article 304(a), which recognises the legislative authority of the State to enact law to impose tax

on goods *inter alia* imported from other States. As observed by the Division Bench in **Sociedade De Fomento Industrial Pvt. Ltd.** (supra), the Goa Cess Act would be necessarily required to be attributed to Entries 6 and 66 of State List under VII Schedule to the Constitution levying a fee. We are, therefore, of the clear opinion that Goa Cess Act, imposing a levy of cess in no manner whatsoever amounts to violating the petitioners' right of freedom of trade, commerce and intercourse. Thus, the levy of such cess is certainly beyond the purview of Article 304 read with Clauses (a) and (b) thereof, as we are fully in agreement with the contentions as urged on behalf of the State, that the Goa Cess Act does not impose any restriction on trade, commerce and intercourse so as to levy a tax in discriminating between the goods imported and goods so manufactured or produced in Goa as discussed hereinabove. It also does not impose any restriction whatsoever on the freedom of trade, commerce or intercourse with or within the State falling under the meaning of Clause (b) of Article 304. A reference to the position in law would aid the discussion.

54. In **State of West Bengal vs. Kesoram Industries Ltd.** (supra), a Constitution Bench of the Supreme Court in considering the levy of cess as imposed by the State of West Bengal *inter alia* on the coal bearing land

which was struck down by the High Court as unconstitutional for want of legislative competence observed that there was nothing wrong in the state legislation levying cess by way of tax so as to generate its funds. It was observed that although it was termed as, a 'cess on mineral right', the impact thereof fell on the land delivering minerals. It was observed that the levy of cess also fell within the scope of Entry 49 of List II apart from clearly falling under Entry 5 of List II and Entry 50 of State List II. It was observed that the levy of cess on mineral rights does not contravene any of the limitations imposed by the Parliament by law relating to mineral development. One of the significant observations made by the Constitution Bench was that the power to levy any tax or fee lying within the legislative competence of the State Legislature can certainly be delegated to any institution of local government constituted by law within the meaning of Entry 5 in List II and that the other Entries, namely, Entries 5, 23, 49, 50 and 66 of List II which provided for an adequate constitutional coverage to the impugned levy of cess. It was also observed that the method of quantifying the cess is by reference to the quantum of mineral produced. However, this would not alter the character of the levy. The Court observed that there are myriad methods of calculating the value of the Sand for the purpose of quantifying the tax. The Court justified the

impugned cess as a fee for rendering such services as would improve the infrastructure and general development of the area, the benefits whereof would be availed even by others like the stone crushers. It was observed that Entry 66 in List II is available to provide protective constitutional coverage to the impugned levy as a fee. Referring to the observations of the Constitution Bench in **Hingir-Rampur Coal Co., Ltd. vs. The State Of Orissa And Others**[19], it was observed that the impugned cess can be justified as a fee as well. The following are the observations of the Court:

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

55. We may also observe that the contentions of the petitioners in assailing the Goa Cess Act on the ground that it violates Article 301 even otherwise are also not well-founded for the reason that the freedom as enshrined under Article 301 would not mean that the State is denuded of

19 AIR 1961 459

its power to levy a fee or a tax within the source of its legislative power as conferred under List II and List III of the Constitution. Merely because a cess is levied, it cannot be said that *ipso facto* a restriction on freedom of trade is sought to be imposed. The endeavour of the Court would be to consider Article 301 in the context of Article 304, namely, as to whether any discrimination is brought about and secondly, whether any reasonable restriction on freedom of trade, commerce and intercourse is being foisted by the legislation. Thus, when neither a discrimination is brought about by imposing such levy or in other words, such levy which is non-discriminatory in nature and/or also when there is no restriction much less any reasonable restriction, is imposed/brought about on freedom of trade or commerce, there is no question of an argument of such levy being violative of Article 301 being attracted. The jurisprudence in relation to levy of such taxes which are cess, fees or taxes is to the effect that the Courts have repeatedly held that any levy when is recognized for providing facilities which are supportive and conducive to the activities of business and trade (as in the present case) like providing for roads, maintaining of rights which aid transportation of materials and for creation of necessary infrastructure to promote, facilitate free trade and commerce, it may not be correct to infer any restriction. Thus, for such

reason, the contention of the petitioner that the Goa Cess Act is violative of Article 301 read with 304 (a) and (b) deserves to be rejected.

56. In **Hingir-Rampur Coal Co. Ltd. Vs. State of Orissa** (supra), the Constitution Bench of the Supreme was considering the issue on the validity of the Orissa Mining Areas Development Fund Act,1952, which came to be upheld. The question before the Court was as to whether the Cess levied thereunder was a fee or a duty of excise on coal within Entry 84 of List I of the Seventh Schedule to the Constitution. The Constitution Bench reached to a conclusion that a cess was levied essentially for the services rendered in the areas which are declared as mining area in the State of Orissa, which was an area of about 3341.79 acres i.e. about 5.5 sq. miles. The Court held that the cess collected under the Act could be spent for improving the communications by constructing good roads and by providing means of transport such as tramways; supply of water and electricity as also to provide for amenities of sanitation and education to the labour force in order to attract workmen to the mining area in question. In such context the Court observed that it was constitutionally impermissible for any State Government to collect any amount which is not strictly of the nature of a fee in the guise of a fee.

57. Although in the context of "entry tax" which is not the legislation in question, the principle of law on the above constitutional provision find consideration in the nine Judges Constitution Bench decision of the Supreme Court in **Jindal Stainless Ltd. & Anr. Vs. State of Haryana & Ors.**[20]. The Supreme Court in such case was considering the question touching the interpretation of Articles 301 to 307 comprising Part XIII of the Constitution in the context of the State exercising its legislative power under Schedule VII List II Entry 52 to the Constitution in enacting laws that provided for a levy of tax on the "entry of goods into local areas comprising the States". The Constitutional validity of such levies was questioned before different High Courts by assesses / dealers aggrieved by the same, *inter alia* on the ground that the same were violative of the constitutionally recognized right to free trade commerce and intercourse guaranteed under Article 301 of the Constitution of India. The levies were also assailed on the ground that the same were discriminatory and, therefore, violative of Article 304(a) of the Constitution of India. Absence of Presidential sanction in terms of Article 304(b) of the Constitution of India was also set-up as a ground of challenge to the levies imposed by the respective State legislatures. A Division Bench of the Punjab and Haryana

20 (2017) 12 SCC 1

High Court had dismissed a writ petition which assailed the constitutional validity of the Haryana Local Development Act, 2000, relying upon the decisions of the Supreme Court in **Atiabari Tea Co. Ltd. v. State of Assam & Ors.**[21]; **Automobile Transport (Rajasthan) Ltd. etc. v. State of Rajasthan & Ors.**[22]; M/s. Bhagatram Rajeev Kumar v. Commissioner of Sales Tax, M.P. and Ors.[23]; and State of Bihar and Ors. v. Bihar Chamber of Commerce and Ors.[24].

58. The proceedings having reached the nine Judges Constitution Bench, wherein the Constitution Bench framed the following questions which fell for determination:

> **"11.1.** (*i*) Can the levy of a non-discriminatory tax per se constitute infraction of Article 301 of the Constitution of India?
>
> **11.2.** (*ii*) If answer to Question (*i*) is in the affirmative, can a tax which is compensatory in nature also fall foul of Article 301 of the Constitution of India?"

59. Considering the long line of the decisions holding the field and more particularly the decisions in **Atiabari Tea Co. Ltd. v. State of Assam & Ors.** (supra) and **Automobile Transport (Rajasthan) Ltd. etc. v. State of Rajasthan & Ors.** (supra), the majority judgment observed that the legal

21 AIR 1961 SC 232
22 AIR 1962 SC 1406
23 1995 Supp [1] SCC 673
24 (1996) 9 SCC 136

position, which held the field in the light of the said decisions, was that the compensatory taxes would fall outside Part XIII of the Constitution only if tax payers receive benefits and facilities commensurate to the levy. It was observed that any and every benefit howsoever remote or distant, would not save the levy from an attack on the ground of violation of Article 301. The majority judgment further observed that the concept of compensatory taxes is not recognised by the Constitution as a tax was a compulsory exaction of money for general public good and eventually meant to serve larger public good and for running the governmental machinery and providing to the people the facilities essential for civilized living, and there is no question of a tax being non-compensatory in character in the broader sense. It was observed that the concept of compensatory tax obliterates the distinction between a tax and a fee. The essential difference between a tax and a fee is that while a tax has no element of *quid pro quo*, a fee without that element cannot be validly levied. It is in such context examining the provisions of Articles 301, 302, 303 and 304 of the Constitution, the Court examined as to whether Article 304(a) treats taxes as a restriction so that any such levy may fall foul of Article 301. Such question was answered in the negative. The Court observed that Article 304(a) far from treating taxes as a restriction *per se*, specifically recognizes the State

legislature's power to impose the same on goods imported from other States or Union Territories. The observations of the Supreme Court in the majority judgment, relevant in the context in hand can be noted hereunder:

> **"67.** Three distinct aspects touching the question need be noticed straightaway:
>
> **67.1.** The first and the foremost of these aspects is that the concept of compensatory taxes is not recognised by the Constitution. A tax is a compulsory exaction of money for general public good and is defined as under by *Thomas M. Cooley* in his book *The Law of Taxation* at p. 61 (*Clark A. Nichols ed., 4th Edn. 1924*) as:
>
> > "Taxes are the enforced proportional contributions from persons and property, levied by the State by virtue of its sovereignty for the support of Government and for all public needs. This definition of taxes, often referred to as "Cooley's definition", has been quoted and endorsed, or approved, expressly or otherwise, by many different courts. While this definition of taxes characterises them as 'contributions', other definitions refer to them as 'imposts', 'duty or impost', 'charges', 'burdens', or 'exactions'; but these variations in phraseology are of no practical importance."
> >
> > ***
> >
> > The term is defined also in *The Major Law Lexicon by P. Ramanatha Aiyar*, Vol. 6, 4th Edn., pp. 6678 and 6679 in the following words:
> >
> > "The term "tax" and "taxes" have been defined as a rate or sum of money assessed on the person or property of a citizen by Government for the use of the nation or State; burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes, and the enforced proportional contribution of persons and property levied by authority of the State for the support of Government and for all public needs.
> >
> > ***
> >
> > Taxes are public burdens, of which every individual may be compelled to bear his part, and that in proportion to the

extent of protection he receives or the amount of property held by him, as the will of the legislature may direct. The power of taxation is said to be an incident of sovereignty, and co-extensive with that of which it is incident."

Blackwell on Tax Titles as cited in *TISCO Ltd.* v. *State of Bihar* [*TISCO Ltd.* v. *State of Bihar*, AIR 1991 Pat 75 : 1989 SCC OnLine Pat 186] , AIR Pat at p. 81 has the following to say about taxes : (SCC OnLine Pat para 33)

> "*33*. … 'Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes.'"

Black's Law Dictionary, 7th Edn., p. 1469 defines tax as under:

> "A monetary charge imposed by Government on persons, entities or property to yield public revenue."

If taxes are eventually meant to serve larger public good and for running the governmental machinery and providing to the people the facilities essential for civilised living, there is no question of a tax being non-compensatory in character in the broader sense.

67.2. Secondly, because the concept of compensatory tax obliterates the distinction between a tax and a fee. The essential difference between a tax and a fee is that while a tax has no element of quid pro quo, a fee without that element cannot be validly levied. The difference between a tax and the fee has been examined and elaborated in a long line of decisions of this Court. (See *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [*Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282 : 1954 SCR 1005], *Jagannath Ramanuj Das* v. *State of Orissa* [*Jagannath Ramanuj Das* v. *State of Orissa*, AIR 1954 SC 400], *Hingir-Rampur Coal Co. Ltd.* v. *State of Orissa* [*Hingir-Rampur Coal Co. Ltd.* v. *State of Orissa*, AIR 1961 SC 459], *Corpn. of Calcutta* v. *Liberty Cinema* [*Corpn. of Calcutta* v. *Liberty Cinema*, AIR 1965 SC 1107], *Kewal Krishan Puri* v. *State of Punjab* [*Kewal Krishan Puri* v. *State of Punjab*, (1980) 1 SCC 416], *Krishi Upaj Mandi Samiti* v. *Orient Paper and Industries Ltd.* [*Krishi Upaj Mandi Samiti* v. *Orient Paper and Industries Ltd.*, (1995) 1 SCC

655], *State of Gujarat* v. *Akhil Gujarat Pravasi V.S. Mahamandal* [*State of Gujarat* v. *Akhil Gujarat Pravasi V.S. Mahamandal*, (2004) 5 SCC 155] and *State of W.B.* v. *Kesoram Industries Ltd.* [*State of W.B.* v. *Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646])

67.3. Thirdly, and lastly, the concept of compensatory taxes being outside Part XIII, is difficult to apply in actual practice. Experience in the present batch of cases has amply demonstrated that difficulty. Most of the legislations enacted by the States in these cases have described the entry tax levied under the same to be compensatory in character. This may have been done to take the levy outside the mischief of Article 301 of the Constitution. The question however is whether tax amount collected in terms of the said legislation is really used by the State for the purpose of providing or maintaining services and benefits to the taxpayers and whether the courts can follow the money trail to determine whether the State concerned has actually used the amount for the avowed purpose underlying the legislation. This process is fraught with serious difficulties, a fact that was not disputed by the learned counsel for the assessees/dealers. Actual application of the Compensatory Tax Theory, therefore, runs into difficulties to an extent that the theory at some stage breaks down. M/s Salve, Rohatgi and Dwivedi were in that view perfectly justified in submitting that the Compensatory Tax Theory was legally unsupportable and deserved to be abandoned. We have no hesitation in agreeing with that submission, the arguments of M/s Ganguly and Bagaria to the contrary notwithstanding."

60. The conclusion as drawn in the majority judgment and sum total of what was observed on Articles 301 to 304 is summarized as under:-

"76. The sum total of what we have said above regarding Articles 301, 302, 303 and 304 may be summarized as under:

76.1. Freedom of trade, commerce and intercourse in terms of Article 301 is not absolute but is subject to the provisions of Part XIII.

76.2. Article 302 which appears in Part XIII empowers Parliament to impose restrictions on trade, commerce and intercourse in public interest.

> **76.3.** The restrictions which Parliament may impose in terms of Article 302 cannot however give any preference to one State over another by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.
>
> **76.4.** The restriction that Parliament may impose in terms of Article 302 may extend to giving of preference or permitting discrimination between one State over another only if Parliament by law declares that a situation arising out of scarcity of goods warrants such discrimination or preference.
>
> **76.5.** Article 304(*a*) recognises the availability of the power to impose taxes on goods imported from other States, the legislative power to do so being found in Articles 245 and 246 of the Constitution.
>
> **76.6.** Such power to levy taxes is however subject to the condition that similar goods manufactured or produced in the State levying the tax are also subjected to tax and that there is no discrimination on that account between goods so imported and goods so manufactured or produced.
>
> **76.7. The limitation on the power to levy taxes is entirely covered by clause (*a*) of Article 304 which exhausts the universe insofar as the State Legislature's power to levy of taxes is concerned.**
>
> **76.8. Resultantly, a discriminatory tax on the import of goods from other States alone will work as an impediment on free trade, commerce and intercourse within the meaning of Article 301.**
>
> **76.9. Reasonable restrictions in public interest referred to in clause (*b*) of Article 304 do not comprehend levy of taxes as a restriction especially when taxes are presumed to be both reasonable and in public interest.”**
>
> (emphasis supplied)

61. Answering question No.1 (as framed in paragraph 11.1) the majority judgment observed thus:

> **"127.** In the light of what we have said above, we answer Question (*i*) in the negative and declare that a non-discriminatory tax does not per se constitute a restriction on the right to free trade, commerce and intercourse guaranteed under Article 301. Decisions taking a contrary view in *Atiabari case* [*Atiabari Tea Co. Ltd.* v. *State of Assam*, AIR 1961 SC 232 : (1961) 1 SCR 809] followed by a series of later decisions shall, therefore, stand overruled including the decision in *Automobile Transport* [*Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan*, AIR 1962 SC 1406 : (1963) 1 SCR 491] declaring that taxes generally are restrictions on the freedom of trade, commerce and intercourse but such of them as are compensatory in nature do not offend Article 301. Resultantly decisions of this Court in *Jindal Stainless Ltd. (2)* v. *State of Haryana* [*Jindal Stainless Ltd. (2)* v. *State of Haryana*, (2006) 7 SCC 241] shall also stand overruled."

62. In considering the issue of discrimination in the context of Article 304(a) and the issue that of challenge to a fiscal enactment on the touchstone of the said Article, the Supreme Court observed thus:-

> **"134.** We respectfully agree with the line of reasoning adopted in *Video Electronics* [*Video Electronics (P) Ltd.* v. *State of Punjab*, (1990) 3 SCC 87 : 1990 SCC (Tax) 327] . The expression "discrimination" has not been defined in the Constitution though the same has fallen for interpretation of this Court on several occasions. The earliest of these decisions was rendered in *Kathi Raning Rawat* v. *State of Saurashtra* [*Kathi Raning Rawat* v. *State of Saurashtra*, (1952) 1 SCC 215 : AIR 1952 SC 123 : 1952 Cri LJ 805] , where a seven-Judge Bench of this Court held that all legislative differentiation is not necessarily discriminatory. Relying upon the meaning of the expression in *Oxford Dictionary*, Patanjali Sastri, C.J. (as his Lordship then was) explained : (AIR pp. 125-26, para 7)
>
> > "*7.* All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Article 14. The expression "discriminate against" is used in Article 15(1) and Article 16(2), and it means, according to the *Oxford Dictionary*,
> >
> > > 'to make an adverse distinction with regard to; to distinguish unfavourably from others'.

Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Article 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies."

135. Fazl Ali, J. in his concurring judgment explained the concept in the following words : (*Kathi Raning case* [*Kathi Raning Rawat* v. *State of Saurashtra*, (1952) 1 SCC 215 : AIR 1952 SC 123 : 1952 Cri LJ 805] , AIR p. 127, para 19)

> "*19.* I think that a distinction should be drawn between "discrimination without reason" and "discrimination with reason". The whole doctrine of classification is based on this distinction and on the well-known fact that the circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects, so that the question of unequal treatment does not really arise as between persons governed by different conditions and different sets of circumstances. The main objection to the West Bengal Act was that it permitted discrimination "without reason" or without any rational basis."

136. Any challenge to a fiscal enactment on the touchstone of Article 304(*a*) must in our opinion be tested by the same standard as in *Kathi case* [*Kathi Raning Rawat* v. *State of Saurashtra*, (1952) 1 SCC 215 : AIR 1952 SC 123 : 1952 Cri LJ 805] . The Court ought to examine whether the differentiation made is intended or inspired by an element of unfavourable bias in favour of the goods produced or manufactured in the State as against those imported from outside. If the answer be in the affirmative, the differentiation would fall foul of Article 304(*a*) and may tantamount to discrimination. Conversely, if the Court were to find that there is no such element of intentional bias favouring the locally produced goods as against those from outside, it may have to go further and see whether the differentiation would be

supported by valid reasons. In the words of Fazl Ali, J. discrimination without reason would be unconstitutional whereas discrimination with reason may be legally acceptable. In *Video Electronic case* [*Video Electronics (P) Ltd.* v. *State of Punjab*, (1990) 3 SCC 87 : 1990 SCC (Tax) 327], this Court noted that the differentiation made was supported by reasons. This Court held that if economic unity of India is one of the constitutional aspirations and if attaining and maintaining such unity is a constitutional goal, such unity and objectives can be achieved only if all parts of the country develop equally. There is, if we may say so, with respect considerable merit in that line of reasoning. A State which is economically and industrially backward on account of several factors must have the opportunity and the freedom to pursue and achieve development in a measure equal to other and more fortunate regions of the country which have for historical reasons, developed faster and thereby acquired an edge over its less fortunate country cousins. Economic unity from the point of view of such underdeveloped or developing States will be an illusion if they do not have the opportunity or the legal entitlement to promote industries within their respective territories by granting incentives and exemptions necessary for such growth and development. The argument that power to grant exemption cannot be used by the State even in cases where such exemptions are manifestly intended to promote industrial growth or promoting industrial activity has not appealed to us. The power to grant exemption is a part of the sovereign power to levy taxes which cannot be taken away from the States that are otherwise competent to impose taxes and duties. The conceptual foundation on which such exemptions and incentives have been held permissible and upheld by this Court in *Video case* [*Video Electronics (P) Ltd.* v. *State of Punjab*, (1990) 3 SCC 87 : 1990 SCC (Tax) 327] is, in our opinion, juristically sound and legally unexceptionable. *Video Electronics* [*Video Electronics (P) Ltd.* v. *State of Punjab*, (1990) 3 SCC 87 : 1990 SCC (Tax) 327], therefore, correctly states the legal position as regards the approach to be adopted by the courts while examining the validity of levies. So long as the differentiation made by the States is not intended to create an unfavourable bias and so long as the differentiation is intended to benefit a distinct class of industries and the life of the benefit is limited in terms of period, the benefit must be held to flow from a legitimate desire to promote industries within its territory. Grant of exemptions and incentives in such cases must be deemed to have been inspired by considerations which in the larger context help achieve the constitutional goal of economic unity."

63. As a sequel to the above discussion, in paragraph 144, the majority

judgment observed that so long as the intention behind the grant of exemption/adjustment/credit is to equalize the fall of the fiscal burden on the goods from within the State and those from outside the State such exemption or set off will not amount to hostile discrimination offensive to Article 304(a). The relevant observations in that regard can be noted which read thus:

> **"144.** Seen in the context of the above, we are inclined to accept the submission made on behalf of the State that so long as the intention behind the grant of exemption/ adjustment/ credit is to equalise the fall of the fiscal burden on the goods from within the State and those from outside the State such exemption or set off will not amount to hostile discrimination offensive to Article 304(*a*). … …. … .. .. ."

64. The order of the Court as signed by all the nine Judges is set out in paragraphs 1159 to 1161 which reads thus:-

> **"1159.** By majority the Court answers the reference in the following terms:
>
> **1159.1. Taxes simpliciter are not within the contemplation of Part XIII of the Constitution of India. The word "free" used in Article 301 does not mean "free from taxation".**
>
> **1159.2. Only such taxes as are discriminatory in nature are prohibited by Article 304(*a*). It follows that levy of a non-discriminatory tax would not constitute an infraction of Article 301.**
>
> **1159.3. Clauses (*a*) and (*b*) of Article 304 have to be read disjunctively.**
>
> **1159.4.** A levy that violates Article 304(*a*) cannot be saved even if the procedure under Article 304(*b*) or the proviso thereunder is satisfied.

1159.5. The Compensatory Tax Theory evolved in *Automobile Transport case* [*Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan*, AIR 1962 SC 1406 : (1963) 1 SCR 491] and subsequently modified in *Jindal case* [*Jindal Stainless Ltd. (2)* v. *State of Haryana*, (2006) 7 SCC 241] has no juristic basis and is therefore rejected.

1159.6. The decisions of this Court in *Atiabari* [*Atiabari Tea Co. Ltd.* v. *State of Assam*, AIR 1961 SC 232 : (1961) 1 SCR 809], *Automobile Transport* [*Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan*, AIR 1962 SC 1406 : (1963) 1 SCR 491] and *Jindal* [*Jindal Stainless Ltd. (2)* v. *State of Haryana*, (2006) 7 SCC 241] cases and all other judgments that follow these pronouncements are to the extent of such reliance overruled.

1159.7. A tax on entry of goods into a local area for use, sale or consumption therein is permissible although similar goods are not produced within the taxing State.

1159.8. Article 304(*a*) frowns upon discrimination (of a hostile nature in the protectionist sense) and not on mere differentiation. Therefore, incentives, set-offs, etc. granted to a specified class of dealers for a limited period of time in a non-hostile fashion with a view to developing economically backward areas would not violate Article 304(*a*). The question whether the levies in the present case indeed satisfy this test is left to be determined by the regular Benches hearing the matters.

1160. States are well within their right to design their fiscal legislations to ensure that the tax burden on goods imported from other States and goods produced within the State fall equally. Such measures if taken would not contravene Article 304(*a*) of the Constitution. The question whether the levies in the present case indeed satisfy this test is left to be determined by the regular Benches hearing the matters.

1161. The questions whether the entire State can be notified as a local area and whether entry tax can be levied on goods entering the landmass of India from another country are left open to be determined in appropriate proceedings."

65. Thus, even applying the principles as enunciated in the

Constitution Bench decision of the Supreme Court in Jindal (supra) we are not persuaded to come to a conclusion that the Goa Cess Act would fall foul of Part XIII of the Constitution that is violative of Article 301 read with 304 of the Constitution.

66. Now we refer to some of the decision as cited on behalf of the petitioners: Insofar as the decision in **Firm A.T.B Mehtab Masjid & Co v. State of Madras and Anr.**[25] as relied on behalf of the petitioners is concerned, we are afraid that such decision in the context in hand would assist the petitioners. The proceedings before the Supreme Court had arisen under Article 32 of the Constitution raising the question of validity of Rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. The sales tax was being levied on 'hides and skins' under the aforesaid Rules. The petitioners contended that the effect of the impugned rule was that the tanned hides or skins imported from outside the State and sold within the State were subject to a higher rate of tax than the tax imposed on hides or skins tanned and sold within the State, inasmuch as sales tax on the imported hides or skins tanned outside the State was on their sale price, while the tax on hides or skins tanned within the State, though ostensibly on their sale price, which was, in view of the proviso to

25 AIR 1963 SC 928

Clause (ii) of sub-rule (2) of Rule 16 and in reality really on the sale price of these hides or skins, when they were purchased in the raw condition which was substantially less than the sale price of tanned hides or skins. It was also contended that such material imported from outside the State after purchase in their raw condition and then tanned inside the State were also subject to higher taxation than hides or skins purchase in the raw condition in the State. It was contended that such discriminatory taxation was said to be offend the provisions of Article 304(a) of the Constitution. It was in such context, the Supreme Court considered the provisions of Article 301 of the Constitution and as construed in the case of **Atiabari** Tea Co. Ltd. Vs. State of Assam (supra) and in Automobile Transport (Rajasthan) Ltd. VS. State of Rajasthan (supra) (overruled in the decision in **Jindal** (Supra)). The Supreme Court held that the contention that Article 304(a) would be attracted only when the impost was at the holder that is when the goods enter the State on cross the border of the State, is not a sound proposition as Article 304 (a) allowed the Legislature of a State to impose taxes on goods imported from other States and does not support the contention that the imposition must be at the point of entry only. We are at a loss to understand as to how such decision can support the case of the petitioners, as certainly any principle which would be

applicable in the context of the Sales Tax Act, may not be relevant in trhe present context, where the question is imposition of cess on carriers transporting materials.

67. In **H. Anraj Vs. Government of Tamil Nadu**[26] as relied on behalf of the petitioners, the Supreme Court was considering the question whether the sales tax can be levied by the State Legislature on the sale of lottery tickets in the concerned State. It is in such context an issue had arisen whether any discriminatory treatment is meted out in the matter of levy of sales tax on imported lottery tickets, so as to hamper free flow of trade, commerce and intercourse. Considering the decisions in **Atiabari** Tea Co. Ltd. Vs. State of Assam (supra), Firm A.T.B Mehtab Masjid & Co. (supra) and other decisions, the Court held that lottery tickets to the extent they comprise the entitlement to participate in the draw are "goods" properly so called, squarely falling within the definition of that expression as contained in the legislation. Insofar as the notification issued under the Act was concerned, the same was struck down on the ground that because of the notification the imported goods were at a disadvantage as compared to indigenous goods both being of identical type. It was observed that what was levied was an unfavourable and discriminatory tax which

26 (1986)1 SCC 414

burdened the goods as imported within the State, when they were sold within the State of Tamil Nadu, as against indigenous goods from the point of view of the purchaser. It was observed that such question was required to be considered from the normal business or commercial point of view. It was observed that discriminatory treatment in the matter of levying the sales tax on imported lottery tickets which were similar to the ones issued by the State Government so as to hamper free flow of trade, commerce and intercourse was writ large on the face of the impugned Notification and it was violative of Article 301 read with Art. 304(a) of the Constitution. The challenge itself being in the context of levy of sales tax on lottery tickets and bring out discrimination in the price of lottery tickets as available to the purchasers of such tickets, the issues were examined.

68. In so far as the legislation in hand is concerned and considering the view we have taken, in our opinion, the circumstances are totally distinct as what fell for consideration in **H. Anraj (supra)** in which the Supreme Court reacted to a conclusion that the notifications were discriminatory while upholding the law. In any event the decision in H. Anraj (supra) was overruled by the Supreme Court in **Sunrise Associates vs. Govt. of NCT**

of Delhi & Ors.[27] holding that **H. Anraj** incorrectly held that sale of a lottery ticket involved a sale of goods. In such decision, it was held that there was no sale of goods within the meaning of Sales Tax Acts of the different States but at the highest a transfer of an actionable claim. The decision to the extent that it held otherwise was accordingly overruled though prospectively with effect from the date of the said judgment.

69. Similarly the decision in ***Goodyear India Ltd. v. State of Haryana*** (supra) as relied on behalf of the petitioners, is also not applicable in the facts of the present case. It was a case in regard to imposition of purchase tax under Section 9(1)(b) of Haryana General Sales Tax Act,1973, at the point of despatches of the goods made by the petitioner therein of the goods to the depots outside the State. It is seen that such decision has also been overruled.

70. On behalf of the petitioners, reliance is also placed on the decision in **Gujarat Ambuja Cements Ltd. & Anr. Vs. Union of India & Anr.**[28] wherein the Supreme Court was considering the effect of a validating Act, namely the constitutional validity of Sections 116 and 117 of the Finance

27 (2006)5 SCC 603
28 (2005)4 SCC 214

Act,2000 and Section 158 of the Finance Act,2003, by which the decision of the Supreme Court in *Laghu Udyog Bharati* case (1999)6 SCC 418, striking down Rule 2(1)(d)(xii) and (xvii) (as amended in 1997) of Service Tax Rules, 1994, was sought to overcome. It is in such context the Supreme Court considered the question whether levy of service tax on carriage of goods by transport operators was legislatively competent. Such question was not considered in the *Laghu Udyog Bharati*. It is in this context the scope of legislative entry namely Entry 97 of List I and Entry 56 of List II was to consider. The Supreme Court observed that legislative competence is to be determined with reference to the object of the levy and not with reference to its incidence or machinery. It was observed that broadly speaking the subject matter of taxation under Entry 56 of List II are goods and passengers and in such context discussed the principles for determining the constitutionality of the Statute. In our opinion, considering the context and the issue as arisen before the Supreme Court in Gujarat Ambuja Cements Ltd. (supra) which is on an issue of service tax, we are of the clear opinion that the same would not assist the petitioners.

71. We are also of the opinion that the Court cannot be oblivious as to

what is sought to be achieved and remedied by the legislation in question. It is well settled that the Court is required to consider the substance of the legislation and more particularly the wisdom of the State Legislature in a social welfare any legislation would intend to achieve. In such context, we may usefully refer to the observations of Justice Krishna Iyer in **Martand Diary and Farm vs. Union of India**[29] when His Lordship accepting the arguments on behalf of the Central Government observed that "after all the law is not always logic and taxation considerations may stem from administrative experience and other factors of life and not artistic visualization or neat logic and so literal, though pedestrian interpretation must prevail". These observations are extracted herein bellow:-

> "3. Fascinated we were by the imaginative and realistic picturisation of the expression 'products sold in sealed containers' projected by Shri S. T. Desai, counsel for the assessee appellant but, on further reflection, we veered round to the view presented by Shri Sanghi, for the state, that after all law is not always logic and taxation considerations may stem from administrative experience and other factors of life and not artistic visualisation or neat logic and so the literal, through pedestrian, interpretation must prevail."

72. In our opinion, these farsighted observations of Justice Krishna Iyer are aptly applicable in considering the legislation in hand. We discuss the reasons for the same. There cannot be two opinions that the transportation

29 AIR 1975 SC 1492

of materials of the nature which are provided for in Schedule I of the Goa Cess Act and that too within a small State like Goa, which has a meager land mass would certainly bring about situations of serious issues of public health, for the reason that it is undisputedly that not only normal transportation but such heavy transportation of materials in trucks/heavy vehicles are bound to cause large scale pollution and damage to the environment. There also cannot be two opinions that pollution caused by such transportation would be of varied nature which can be spillage of dust generated from the minerals, coal, fume generated from carriage of fluid substances apart from the smoke pollution and water pollution it would generate. Moreover, the effects on health of smokes/fumes generated from the exhaust of the heavy vehicles is to be imagined.

73. We are therefore, required to certainly bear in mind the direct impact of such activities of the carriers on the health of the people of Goa residing in such rural areas. Can we at all come to a conclusion that no pollution whatsoever would be generated by such activity and in no manner whatsoever the rural parts of Goa would stand unaffected and/or there would not be any concern for public health for the Government of Goa. If we reach to a conclusion that there would be no illeffects of such

activity, it would instantly sound quite preposterous nay unrealistic and unreasonable. If this be the position, we ask ourselves as to whether the State of Goa would be powerless under the factual structure our Constitution envisages and in the teeth of Entry 6 of List II to provide for such public welfare legislation, so as to cater to the situation created by mass transportation of the materials in the rural areas of Goa.

74. We may also observe that certainly it is an obligation of the State to balance the interests namely of development, commerce and economics on one hand and on the other hand the public interest in maintaining public health, sanitation and provide for all measures like dispensaries, hospitals etc. as clearly empowered to the State to frame such law under entry 6 of List-2 read with Articles 38, 47, 48A of the Directive Principles of State policy. Once the legislation is traceable under Entry 6 read with Entry 66 of List-II, which provides for fees in respect of any matter in List-2 (except fees taken in any Court) and when such legislation concerns an eminent interest in relation to public health, the Courts are required to be extremely slow to tinker with such legislation, as the direct impact of any interference by the Court would be a casualty to human health and life.

(III) <u>Challenge on the ground of Article 14 of the Constitution</u>

75. The petitioners contend that there is a violation of the petitioners rights guaranteed under Article 14 of the Constitution. The reason according to the petitioners being that the impugned cess discriminates between the ore which is locally mined, wherein mining-lease royalty is paid to the Government of Goa and the ore which is mined outside Goa and transport the ore into the State of Goa, in respect of which royalty is not paid to the Government of Goa. The petitioners have also contended that there is no distinction between such ores for the reason that "royalty" is levied on all minerals, wherever they are mined. Hence, the ores being transported into the State of Goa in the course of inter-state commerce is not "royalty-free", as the royalty on ore in the petitioner's case is paid in the State of Karnataka. Also 10% of sales proceeds of ore payable into the "Goa Iron Ore Permanent Fund" as per the decision of Supreme Court in ***Goa Foundation v. Union of India & Ors.*** (supra) cannot justify the discriminatory impugned Cess, as the ore in Karnataka is also subjected to such charge as per the decision of Supreme Court in ***Samaj Parivartan Samudaya vs. State of Karnataka*** (supra).

76. We are also not inclined to accept the petitioners' contention that the Goa Cess Act brings about any discrimination and is violative of

Article 14 of the Constitution. We do not find that the classification between the ores as brought within the State of Goa by the petitioners and the ore which is mined in Goa when considered in the context of the Goa Cess Act for levy of the cess, would cause any discrimination. In our opinion, the iron ore which is mined in Goa on which royalty is paid on such mining at the rates as fixed and specified and the nature of the ore as dealt by the petitioners, are certainly differently classified. The classification is certainly not arbitrary, it is rational as it is based on characteristics which are distinct. The classification is definitely founded on "*intelligible differentia*" when Schedule I of the Act differentiates between the iron ore, manganese ore and bauxite ore where royalty and other charges are paid to the Government of Goa. Such area is thus appropriately grouped to form a class from the iron ore which is mined not from the State of Goa but which is brought in the State of Goa from other States, for transportation or consumption and such transportation, the carrier uses the rural infrastructure in the State of Goa. For such reasons, we are quite astonished to hear from the petitioners that there is a discrimination amounting to violation of Article 14 of the Constitution in the classification as made by the State of Goa in regard to iron, manganese and bauxite ores. In any event, we are not considering any classification

from the point of view of any pricing policy in regard to consumers of such materials, as we are on the issue of imposition of cess on transportation of such materials, which certainly has caused concern in regard to development and creation of public facilities requiring the State to enact the law in question. In our opinion, on such count itself, the contention of the petitioners on Article 14 ought to miserably fail.

77. In this context we may refer to the decision of the Supreme Court in the case **Income Tax Officer, Shilong & Anr. Vs. N. Takim Roy Rymbai Etc.**[30] in which the Supreme Court observed that given the legislative competence, the State legislature has ample freedom to select and classify persons, incomes and objects which it would or would not tax. It was observed that so long as the classification made within this wide and flexible range by a taxing statute does not transgress the fundamental principles underlying the doctrine of equality, it is not vulnerable on the ground of discrimination merely because it taxes or exempts from tax some incomes or objects and not others.

78. It is well settled that Article 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the

30 AIR 1976 SC 670

purpose of attaining specific ends. Such principle was reaffirmed by the Supreme Court in **R.K. Garg And Ors. vs Union Of India (UOI) And Ors.**[31] when the Supreme Court in the context of a decision of the Supreme Court in **Re: Special Courts Bill** observed thus:

> "6. That takes us to the principal question arising in the writ petitions namely, whether the provisions of the Act are violative of Article 14 of the Constitution. The true scope and ambit of Article 14 has been the subject matter of discussion in numerous decisions of this Court and the propositions applicable to cases arising under that Article have been repeated so many times during the last thirty years that they now sound platitudinous. The latest and most complete exposition of the propositions relating to the applicability of Article 14 as emerging from "the avalanche of cases which have flooded this Court" since the commencement of the Constitution is to be found in the Judgment of one of us (Chandrachud, J. as he then was) in Re: Special Courts Bill, 1978. It not only contains a lucid statement of the propositions arising under Article 14, but being a decision given by a Bench of seven Judges of this Court, it is binding upon us. That decision sets out several propositions delineating the true scope and ambit of Article 14 but not all of them are relevant for our purpose and hence we shall refer only to those which have a direct bearing on the issue before us. They clearly recognise that classification can be made for the purpose of legislation but lay down that:
>
>> "1. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely,(l) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

31 (1981) 4 SCC 675

> 2. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned."

It is clear that Article 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. The question to which we must therefore address ourselves is whether the classification made by the Act in the present case satisfies the aforesaid test or it is arbitrary and irrational and hence violative of the equal protection clause in Article 14.

7. Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J. that the legislature

should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud 354 US 457 where Frankfurter, J. said in his inimitable style:

> "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial difference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

The court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meagre and un-interpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in "Secretary of Agriculture v. Central Roig Refining Company" be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses.

> Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

79. There is another facet which is required to be considered namely, that by the first notification issued under section 3 dated 13 May, 2008, the rates of cess were revised from Rs.5 per metric ton to Rs.50/- per metric ton in respect of coal and coke. By a further notification dated 1 September, 2009, the rates were further enhanced and fixed at Rs.250/- per metric ton both for coal and coke. Thereafter by a notification dated 3 February, 2011, the entries at sr. nos. 7 and 8 of Schedule I of the Goa Cess Act came to be substituted so as to levy a cess of Rs.250/- per metric ton, which are for coal, other than used by industries in the State of Goa and Rs.50/- per metric ton for the coal used by industries in the State of Goa and in the same proportion, i.e., at Rs.250/- per metric ton for Coke, other than used by industries in the State of Goa and for Coke, used by industries in the State of Goa at Rs.50/- per metric ton. It is in these circumstances, one of the petitioner- J.K. Cement Ltd. has approached this

Court with a case of discrimination. In such context, we may also observe that on 30 October, 2014, a notification was published substituting entries in Schedule I whereby the rate of Rs.50/- per metric ton insofar as Item Nos. 7 and 8 of Schedule I was restored in case of coal and coke. Thus, the primary grievance of the petitioners in enhancing the rates to Rs.250/- per metric ton in respect of coal and coke itself had ceased to subsist. In any case although the petitioner has contended that the petitioner was aggrieved by Notification dated 1 September, 2009, the petitioner had approached this Court by filing Writ Petition on 7 July, 2012 and the petitioner was not immediately aggrieved by Notification dated 1 September, 2009.

80. Be that as it may, as argued by Mr. Nadkarni, the contentions on behalf of the said petitioners are not different from the contentions as urged by Mr. Dhond in the lead petition including the contentions on the impugned Act violating the provisions of Articles 301 and 304(a) of the Constitution as also the Act being violative of Article 14 of the Constitution on the ground that there is no *intelligible differentia* distincting coal and coke used by industries in the State and outside the State, which we have extensively discussed hereinabove.

81. Insofar as Mr. Nadkarni's reliance on the decision of the Supreme Court in the case of **State of Uttar Pradesh & Ors. vs. Jaiprakash Associates Ltd. along with companion appeals**[32]**,** in our opinion, this decision would also not assist the petitioners. In such decision, the Court considering whether grant of rebate of tax by the State Government by issuing a notification in exercise of its powers under section 5 of the Uttar Pradesh Trade Tax Act. 1948 discriminates between the goods imported from neighbouring States and goods manufactured and produced in the State of Uttar Pradesh and it is in such context, whether the provisions would contravene the Constitutional provisions of Articles 301 and 304(a) of the Constitution of India. We may observe that the context in which the Supreme Court considered the issues as raised under Articles 301 and 304(a) of the Constitution of India is certainly not an issue as would be applicable in the facts of the present case. In any event, as discussed hereinabove, we are of the considered opinion that the levy as imposed by enactment in question, in the present facts cannot be nullified on the ground of a discrimination which is sought to be brought about on what would constitute a tax and/or a fee or the Act being violative of any provision in Part XIII of the Constitution as discussed hereinabove. We

32 (2014) 4 SCC 720

have discussed the law in this regard and considering the Constitution Bench decision of the Supreme Court in the case of **Jindal Stainless Ltd.** (supra), we accordingly cannot accept the contentions as urged on behalf of the petitioners, referring to the decision in **Jaiprakash Associates Ltd.** (supra).

82. The next judgment as relied by Mr. Nadkarni is the decision of the Supreme Court in the case of **Union of India & Ors. vs. N.S. Rathnam & Sons**[33] in which the issue involved concerned four exemption notifications issued by the Government of India in the years 1986 and 1987 under rule 8(1) of the Central Excise Rules, 1944 and the further notifications which pertain to iron and steel obtains from breaking of ship. The issue was whether the notifications suffer from the vice of arbitrariness. It is in such context, the Supreme Court examined the contentions of the petitioner on the touchstone of Article 14 of the Constitution. The petitioner's argument on the violation of Article 14 of the Constitution, that the State of Goa in fixing different rates under the notifications as noted above, is to the effect, that the principles of non-discrimination as enshrined under Article 14 would entitle the petitioner for refund of the cess which was paid by the petitioner between the years 2011 to 2014 till the rate was

33 (2015) 10 SCC 681

restored to its original position of Rs.50/- per metric ton in respect of coal and coke. In such context, Mr. Nadkarni has relied on paragraphs 13, 14 and 21 of the said decision. We are afraid that we cannot accept Mr. Nadkarni's contention as in the facts of the present case, the reliance on such decision is not well-founded. We may observe that the principles of law as discussed in the decision on interpretation of Article 14 of the Constitution are salutary, however, for the reasons which we have set out hereinabove, we are not persuaded to accept the petitioner's contention that there was any breach of the principles of equality as enshrined under Article 14 of the Constitution in the State of Goa, exercising powers under Section 3 of the Goa Cess Act in prescribing the rate of cess to be levied of different categories of materials. It is well settled that fixation of rates of cess is within the domain of the rule making power of the authority and unless there is some strong material, that the rates as fixed are unconscionable and/or are patently arbitrary, it would not be appropriate for the Court to question the wisdom of the Government in fixing of the rates. Even otherwise fixing of rates is a matter of expertise which would depend on several factors to be considered. It would completely lie within the powers of the rule making authority to fix the rates. Except for a bald case of breach of Article 14, no material is placed on record to contend that

the rates so arrived at and fixed by the State of Goa as issued by different notifications need interference. We, therefore, cannot accept the petitioner's case relying on the decision of **UOI vs. N.S. Rathnam and Sons** (supra).

(IV) Challenge on the ground of GST Laws

83. The contention as urged on behalf of the petitioners that in view of introduction of the GST laws by the Constitution (101st Amendment) Act, the Goa Cess Act stands subsumed in the GST Act, is also untenable, for more than one reason. Firstly, that the nature of levy as brought about by the Goa Cess Act is completely distinct and different from the Scheme of the GST laws, inasmuch as, what is imposed by the Goa Cess Act is a cess on the "carrier". The cess is intended to be levied for a specific object and purpose namely for providing additional resources for improvement of infrastructure and health with a view to promote welfare of the people residing in the rural areas affected by the use of plastics, dumping of garbage and spillage of minerals. In our opinion, it would be totally unfounded to compare the Goa Cess Act given its object, so as to consider the cess being levied under the regime of the Goods and Service Tax which has taken place by the introduction of the GST laws. It cannot be

held that the levy of cess under the Goa Cess Act stands subsumed in the GST law, brought about by incorporation of Articles 246A, 269A and 279A, and with an amendment as brought to Article 286 of the Constitution.

84. The power to recommend to the Union and the States on the taxes, cesses and surcharges levied by the Union, the States, the local bodies which may be subsumed in the Goods and Services Tax, is exclusively conferred with the GST Council under Article 279A of the Constitution. There is no material on record which would indicate that the GST Council has taken a decision to subsume the Goa Cess Act under the GST laws.

85. We may also observe that the attempt of the petitioners of micro dissection of the Constitution (101st Amendment) Act, in mounting a challenge to the Goa Cess Act to be violative of the GST regime, is quite surprising. We also find it to be totally unfounded. Such dissection is premised on the ground that the transportation of the ore would amount to a supply in the course of interstate trade and commerce. Once there is already a levy on such supply under the IGST Act, there cannot be a levy on the consignment/transportation. In our opinion, such assertion of the petitioners is unfounded for the reason the Goa Cess Act is certainly not a law which concerns or deals with the supply of goods. Moreover, in

raising such contention, the petitioners are encroaching upon the jurisdiction of the GST Council as conferred by Article 279A of the Constitution, in as much as, in the absence of the GST Council refraining from taking a decision to subsume the Goa Cess Act in the GST laws, it would not be correct for the petitioners to assert that the Goa Cess Act would fall within the ambit of the GST laws. Thus, such contention of the petitioners in reading transportation of iron ore in the context of Goa Cess Act, to be a supply/service under the GST Act is totally fallacious. The object of GST laws is totally distinct from the object and purpose of the Goa Cess Act. Even the expert body namely the GST council has refrained from subsuming and thereby recommending the repeal of the Goa Cess Act in view of the incorporation of the GST laws. It would not be out of place to mention that Entry 52 of List II which dealt with taxes on entry of goods into local area for consumption use or sale therein and Entry 55 of List II *inter alia* in regard to taxes on advertisement, have been repealed, that too without any corresponding amendment in Entry 66 of List II. It is therefore, an unwarranted exercise on the part of the petitioners in making an attempt to attack the validity of the Goa Cess Act on the incorporation of the GST laws.

86. Further Section 174 of the Goa Goods and Services Act, 2017

would list the Acts as existing on the date of introduction of the Goa Goods and Services Act, 2017 and the Acts which would stand repealed. The Goa Cess Act does not figure in the list of the Acts repealed. In fact what is significant is that an Act which is relevant for the entry of goods in the State of Goa namely the Goa Tax on Entry of Goods Act, 2000, has stood repealed by the introduction of the Goa Goods and Services Act, 2017. Thus, it is unfounded for the petitioners to contend contrary to the clear legislative intent as reflected under the Goa Goods and Services Act, 2017 that the Court needs to consider that the Goa Cess Act stands subsumed in the GST laws and therefore, is rendered invalid. Such contention of the petitioners is required to be rejected.

(H) Epilogue

87. The above discussion would lead us to the conclusion that none of the grounds on which the Court would exercise its powers of judicial review to invalidate an Act of the Legislature are made out by the petitioners so as to declare the Goa Cess Act to be in any manner unconstitutional. The petitions accordingly, need to fail on all counts.

88. Before parting and although little away from some of the legal issues as raised by the petitioners, and as to what Articles 14 and 21 of the

Constitution would make us to ponder as a constitutional Court, we may observe that it is not unknown that the issue of dust pollution is a problem synonymous to the transportation of materials. Environmental pollution including the pollution caused on the land resources are issue of serious concern, with which Governments all over the country are struggling. Such problems are purely human creations resulting in destruction of the natural resources and environment. Large cities are living examples of the damage being caused to the environment by the dust pollution. It may not be out of context for us to refer to a recent order passed by the first Bench of this Court in the case of *Suo Motu* Public Interest Litigation No. 3 of 2023 (**High Court of Judicature at Bombay on its Own Motion Vs. State of Maharashtra**) on Mumbai air pollution. The Division Bench in its order dated 6 November 2023, in the context of dust pollution *inter alia* generated from the transport vehicles, issued directions, the relevant in the present context are noted hereunder:

> " ....
>
> c) The Municipal Corporations shall ensure that the metal sheets around construction sites are erected of sufficient height to ensure that dust from the construction sites shall not be spread over.
>
> d) To separate the dust generated on construction sites, the Municipal Corporations shall ensure that regular and continuous water sprinkling is done by the project proponents/construction agencies.

> f) It shall be ensured by all concerned that no construction debris is carried or transported to or out of the construction site. It shall also be ensured that all construction material being taken to the construction site including the ready-mix concrete is transported to the construction site in fully covered trucks or mixer plants.
>
> g) On the next date, if the air quality does not substantially improve, the Court may pass an order banning transportation of the construction material in and out of the construction sites.
>
> h) We also direct that the Authorities shall ensure that no burning of any waste, including solid waste is permitted in open areas, specially at the dumping sites where the municipal solid waste is dumped."

89. We thus appreciate the endeavour of the Government of Goa in its awakening at the right time albeit on the call of "we the people", to have the enactment in question framed, as far as back in the year 2000 although implemented in the year 2006, so as to create a robust infrastructure to cater to the damage and ill-effects being created on the environment by mass transportation of the kind of materials as listed in the Schedule to the Goa Cess Act, as also to set up facilities in the interest of the health and welfare of persons living in rural areas.

90. It is rightly submitted on behalf of the State that the materials, as listed in the schedule appended to the Goa Cess Act, are materials which would generate large scale pollution, and it is in the context of the Government considering that large scale dumps of rejects (garbage) and

pollution to rivers waterbodies and wells, air pollution, spillage, dust, and plastic are common problems caused by the transportation of materials as listed in the schedule affecting the health of people in rural areas. It is for such purpose the Government in its wisdom thought it appropriate to enact the Goa Cess Act so as to remedy the situations by imposing cess and have a system to safeguard and improve the condition of such affected people.

91. There cannot be two opinions that considering the provisions of Articles 38, 47 and 48A of the Directive Principles of State Policy, it would be the paramount duty of the State to provide for welfare of the people, improve public health, and make all endeavors to protect and improve the environment, and to protect the fundamental rights of the citizens to have a pollution free environment which would certainly precede commercial interest. Preservation of the natural resources, environment and preventing any damage to it which in a given situation could be irreparable, are subjects which are required to be sensitively handled by the State. At the same time, to cater to human interests in regard to their health and well-being, if the same is being adversely affected by any human activity, also becomes an onerous responsibility of

the State, more particularly in balancing the economic interest of the State and its development in today's peculiar times of competition. In the facts of the present case, transportation of the iron ore/materials is certainly part of the business of the Petitioners, it is not in dispute that such transportation is causing environmental issues affecting the health of the citizens by such pollution, then certainly the State was not powerless under the federal structure of the Constitution and the legislative powers as it would wield to enact the legislation of the nature as impugned before us.

92. It also cannot be expected that a small State like Goa is Constitutionally prevented from augmenting revenue for the purpose of improvement of infrastructure and health with a view to promote welfare of the people and more particularly belonging to the rural areas, who become victims of such commercial activities. The polluter pays is the principle which is well recognised. The present Act therefore precisely deals with the societal needs of having an effective infrastructure, which would not only be in the interest of the commercial activities as undertaken by the Petitioners, but also in regard to the health and welfare of the people of Goa residing in rural areas. One can imagine a situation of

the persons residing in rural areas in the absence of such transportation activities and whether such persons would have at all suffered. If the answer is in the negative, then certainly considering the principles of Constitutional morality, there is nothing wrong even otherwise for the State to exercise its legislative powers as conferred by the Constitution and enact the law in question. In fact, a failure to enact such legislation would be unusual.

93. In the light of the above discussion, we are of the clear opinion that the Goa Cess Act is intra vires Articles 14, 301, 303 read with Article 304 of the Constitution of India. Also it is legal and valid being in no manner subsumed by the GST Laws.

94. The petitions are accordingly dismissed. No costs.

(BHARAT P. DESHPANDE, J.) **(G.S. KULKARNI, J.)**