

# CONSTITUTION, SUPREME COURT AND REGULATION OF COAL SECTOR IN INDIA

*M P Ram Mohan\* & Shashikant Yadav\*\**

*The paper maps four decades of coal sector litigation before the Supreme Court of India and draws a narrative on the constitutional contestation and the legal position as it stands today. Coal is one of the most important minerals from an economic perspective, accounting for over sixty percent of India’s energy requirement. The Constitution of India empowers both the Centre and states with legislative powers relating to regulation and control over mines and minerals, including coal. The coal sector has witnessed highly contested and protracted litigation with respect to law-making powers between the Centre and state governments, and this has impacted business and society in many ways. Through a mapping of judicial decisions of Supreme Court, the contested nature of governance of Indian coal sector is detailed in the paper. The Court has consistently maintained a greater responsibility of regulating mines and mineral development on the Union government. However, advocating sustainable use of coal resources, the Court emphasised that the regulatory power vested with Centre and states must have its basis on public interest and coal must be treated as a material resource of the community.*

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## I. INTRODUCTION

The ever-increasing energy demand and power-parity gap in India make the coal sector an imperative asset to the Indian economy.<sup>1</sup> While coal production in India has increased manifold in the past five decades, India still has nearly 300 million people without access to electricity.<sup>2</sup> Even though the latest climate commitment has projected an increase in the cumulative energy from non-fossil fuels to forty percent by 2030, coal will still continue

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\*Associate Professor, Business Policy Area, Indian Institute of Management Ahmedabad, email: mprmoohan@iima.ac.in

\*\* Doctoral Scholar, TERI School of Advanced Studies, New Delhi, email: shashikant8@live.com

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<sup>1</sup> Ministry of Coal, *Annual Report 2016-17*, 20.

<sup>2</sup> International Energy Agency, *Energy Access Database*, available at <https://www.iea.org/energyaccess/database/> (Last visited on October 6, 2017).

to feature prominently in India's energy basket.<sup>3</sup> Currently, around 390 coal mines (approximately eighty-eight percent of coal production) in India is under the direct or indirect control of state-owned corporation Coal India Limited; however, there has been a concerted effort in opening the coal industry for Indian private investors through public-private partnership.<sup>4</sup> Nonetheless, as witnessed in the course of the last several decades, many of these projects got intertwined in legislative conflict between Centre and states on diverse issues leading to regulatory paralysis.

Under the Indian Constitution, legislative powers over various subject matters are distributed through three lists – Union list (List I: subject matter on which Parliament can make law), State List (List II: subject matter on which state legislature makes law), and Concurrent List (List III: subject matter on which both Parliament and state legislature can make law).<sup>5</sup> In case of conflict between these subject matters, any Central law shall be supreme and states are denuded from legislating on such matters already dealt with by the Parliament of India.<sup>6</sup> The basic framework of Centre-State relationship related to coal sector has been enunciated by the Indian Constitution through Article 246 read with Seventh Schedule.<sup>7</sup> The overlapping nature of many of the legislative subjects as well as the power to make laws led to constant judicial intervention in the nature of judicial review.<sup>8</sup> Moreover, uniquely, the Supreme Court ('SC') in the last seventy years of Indian democracy not only interpreted and guarded the Constitution but also committed itself to broaden the reach of the Constitutional rights by liberally undertaking judicial legislations and policies.<sup>9</sup> These Constitutional provisions together with the decisions of an active judiciary form the contours of the Constitutional mandate governing coal sector.

Although in broad terms, the governance and management of mineral resources are divided between the states and the Central Government. The Mines and Minerals (Development and Regulation), 1957 ('the 1957 Act'), which is one of the overarching pieces of legislation in India affecting coal governance, reserves exclusive power to regulate coal mining operations including the power to make laws related to "Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war",<sup>10</sup> for the Central Government. The Constitution further empowers the Central Government to legislate on "Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest".<sup>11</sup> Accordingly, the legislative

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<sup>3</sup> Ministry of Environment, Forest and Climate change, *India's Intended Nationally Determined Contributions*, 2016, available at <http://envfor.nic.in/sites/default/files/press-releases/revise%20PPT%20Press%20Conference%20INDC%20v5.pdf> (Last visited on October 6, 2017).

<sup>4</sup> Devleena Ghosh, "We don't want to eat coal": *Development and its Discontents in a Chhattisgarh District in India*, 99 ENERGY POLICY 252 (2016).

<sup>5</sup> The Constitution of India, 1950, Schedule VII.

<sup>6</sup> The Constitution of India, 1950, Art. 246(3).

<sup>7</sup> The Constitution of India, 1950, Schedule VII, List I, *Union List*, Items 53, 54; List II, *State List*, Items 23, 50.

<sup>8</sup> Upendra Baxi, *The Judiciary as a Resource for Indian Democracy*, 2010, available at [http://www.india-seminar.com/2010/615/615\\_upendra\\_baxi.htm](http://www.india-seminar.com/2010/615/615_upendra_baxi.htm) (Last visited on March 7, 2018).

<sup>9</sup> Fali S. Nariman, *The Way Forward*, 2010, available at [http://www.india-seminar.com/2010/615/615\\_fali\\_s\\_nariman.htm](http://www.india-seminar.com/2010/615/615_fali_s_nariman.htm) (Last visited on March 7, 2018); S. P. Sathe, *Judicial Activism: The Indian Experience*, 6(1) WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 29 (2001).

<sup>10</sup> The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 7.

<sup>11</sup> The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 52.

power of states in this respect is limited to “Industries subject to Entry 7 and 52 of List I.”<sup>12</sup> Importantly, Central Government has the prerogative to promulgate “Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest”<sup>13</sup> and “Regulation of labour and safety in mines and oilfields”<sup>14</sup> for the purpose of legislative and regulatory power. Accordingly, states have the power to pass “Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.”<sup>15</sup>

Similarly, List II, Entry 24, elucidates on the law-making power of the states. However, it is pertinent to mention that the constitutional interpretation of List I, Entry 54 and List II, Entry 23 gives legislative powers to both the Centre and states to regulate mines and mineral development. However, since the legislative power of the state governments is subject to the powers of the Central Government,<sup>16</sup> the SC has comprehensively analysed the Centre-State interactions concerning the coal sector.

Additionally, the SC, on several occasions, has scrutinized coal legislations using the test of ‘public interest’.<sup>17</sup> These dynamics of the Centre-state relationship with regard to their respective law-making powers and the meaning of the term “public interest” in the context of the Union List have time and again created ambiguity resulting in the need for constant judicial intervention. Jarvis fittingly describes that when there is constant contestation between institutions of governance on nature of neo-liberal economy, role of the State transforms.<sup>18</sup> In the case of coal sector in India, an institution of the State – the SC has taken over the mantle of governance of coal sector.

Overall, over the past years, the SC has played a pragmatic role in shaping business rules and regulation for Indian coal sector. While the SC has upheld the validity of many laws relating to the coal sector, it has likewise declared several laws to be *ultra vires* to the Constitution of India. This paper covers the last few decades of jurisprudence in this respect and maps all the important cases analysing constitutional issues related to the coal sector.

These cases comprehensively cover issues including but not limited to constitutional validity of state legislations, Centre-state conflicts over land acquisition, nationalisation of coal industry, law making powers of Centre and states, states’ power to levy cess over minerals, thereby weaving a judicial narrative of all the contentious issues, concluding with the legal position as it stands today.

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<sup>12</sup> The Constitution of India, 1950, Schedule VII, List II, *State List*, Item 24; *See Bihar Distillery v. Union of India*, AIR 1997 SC 96.

<sup>13</sup> The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 54.

<sup>14</sup> The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 55.

<sup>15</sup> The Constitution of India, 1950, Schedule VII, List II, *State List*, Item 23.

<sup>16</sup> The Constitution of India, 1950, Schedule VII, List II, *State List*, Item 23 is subject to The Constitution of India, 1950, Schedule VII, List I, *Union List*, Item 54.

<sup>17</sup> *See Bajinath Kedio v. State of Bihar*, (1969) 3 SCC 838; *see also State of West Bengal v. Kesoram Industries Ltd.*, (2004) 10 SCC 201; *Monnet Ispat & Energy Pvt. Ltd v. Union of India*, (2012) 11 SCC 1; *State of Kerala and Ors. v. Kerala Rare Earth and Minerals Limited and Ors.*, AIR 2016 SC 181; *Tara Prasad Singh v. Union of India*, AIR 1980 SC 1682; *Sachidanand Pandey v. State of West Bengal*, (1987) 2 SCC 295.

<sup>18</sup> Darryl S.L. Jarvis, *Institutional Processes and Regulatory Risk: A Case Study of the Thai Energy Sector*, 4(2) REGULATION AND GOVERNANCE, 175 (2010).

## II. CENTRE -STATE RELATIONSHIP REGARDING ACQUISITION OF LAND

After a decade of India being a constitutional republic, the coal sector posed an issue in the realm of Centre-state relationship regarding the acquisition of land and related natural resources. The SC in *State of West Bengal v. Union of India* ('West Bengal case')<sup>19</sup> reiterated the concept of quasi-federalism and stated that the Indian Constitution does not propound a principle of absolute federalism. The State of West Bengal, in this case, had challenged the Centre's Coal Bearing Areas (Acquisition and Development) Act, 1957, which gave power to the Union Government to compulsorily acquire land and related properties, including coal, owned by or vested in a state or sovereign authorities of a state. The state argued that the impugned legislation intends to cover land vested or owned by a juristic person or by an individual and therefore the impugned legislation is not applicable to land vested or owned by the state. However, the SC observed that the state's arguments were not supported by the Preamble of the impugned Act which in fact, empowered the Centre to supersede the states' rights in coal-bearing lands. The SC resolved the issue by analysing List III, Entry 42 of the Constitution of India relating to "Acquisition and requisitioning of property". It observed that the impugned Act was not *ultra vires* as it was within the Centre's competence to make laws for the acquisition of state's property. The SC concluded that:

"[...] the rule that the State is not bound [by any central legislation] unless it is expressly named or by necessary implication in a statute is one of interpretation. In interpreting a provision conferring legislative power must normally be interpreted liberally and in their widest amplitude. There is no indication in the Constitution that the word 'property' in Entry 42 of List III is to be understood in any restricted sense; it must accordingly be held to include property belonging to the States also."<sup>20</sup>

Emphasising on the supremacy of Union's power over the state, the SC stated that List III, Entry 42 is an accessory to the effectuation of the power under List I, Entry 52 and List II, Entry 54.

Though the West Bengal case settled the specific issue of 'Centre and state' division of powers concerning land acquisition for the mining purposes, states in India continued to legislate and undertake executive functions on regulating coal, justifying the power under the Constitution.<sup>21</sup>

## III. CENTRE-STATE CONFLICT OVER LEGISLATIVE POWERS CONCERNING COAL SECTOR

As discussed, the SC has clarified in many cases that states cannot override the parliamentary power to legislate on the subject matter concerning the development of mines and minerals. However, a certain amount of ambiguity has arisen on the magnitude of state's power related to mines and mineral development especially after Centre

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<sup>19</sup> *State of West Bengal v. Union of India*, AIR 1963 SC 1241.

<sup>20</sup> *Id.*, ¶69.

<sup>21</sup> For instance, The Bihar Land Reforms Act, 1964, gave the state government the power to make rules and regulations regarding licensing and leasing of minor minerals.

comprehensively covered the “Regulation and Development” of mining sector through enactment of the 1957 Act. The issues mainly pertained to the validity and scope of existing state legislations after enactment of the 1957 Act, and concerned executive powers which were drawn from such legislations. The SC adjudicated extensively on these matters.

One such issue concerning nature and scope of state legislation was first addressed by the Court in *Hingir Rampur Coal Co. v. State of Orissa* (‘Hingir Rampur’)<sup>22</sup> while analysing the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952. The monthly returns of the companies involved in mining operations in the state of Orissa were requested by the Administrative Officer enforcing this Act for assessment of cess. Subsequently, a warning was issued under §9 threatening prosecution for non-submission of returns. The validity of the Act was *inter alia* challenged by the companies on the ground that the state legislature exceeded its jurisdiction under List II, Entry 23, since it is subject to development and regulation under control of the Parliament provided for in List I, Entry 54. The SC determined that the impugned Act was beyond the constitutional competence of the Orissa legislature and observed that

“[...] if a central act has been passed which contains a declaration by Parliament as required by Entry 54, and if such declaration covers the field occupied by the impugned Act, the impugned Act will be *ultra vires* not because of any repugnance between the two statutes but because the State Legislature has no jurisdiction to pass a law.”<sup>23</sup>

The above proposition found reiteration in *State of Orissa v. MA Tullock & Co.* (‘MA Tullock’),<sup>24</sup> where the same Act was again challenged before the SC. However, there was a contrast between the two judgments owing to the enforcement of the 1957 Act in the latter case. In the Hingir Rampur case, the main issue was whether the then prevailing Central legislation, Mines and Minerals (Regulation and Development) Act, 1948, completely covered the field of “conservation and development of minerals” or did it leave room for states to legislate on this subject.<sup>25</sup> The Court noted that since the Centre did not make any declaration under its Act to regulate the “conservation and development of minerals”, the state could legislate on the concerned subject matter and therefore Orissa Mining Areas Development Fund Act, 1952 was held to be valid. However, at the time when MA Tullock was decided, the Centre had made a declaration governing the concerned subject matter at issue through §2 of the 1957 Act and therefore the SC held, that the enforcement of the 1957 Act, made the applicability of the impugned Orissa Act non-existent. The SC said, “[...] as §18(1) and (2) of the 1957 Act were very wide they ruled out legislation by the State Legislature. Where a superior legislature evinced an intention to cover the whole field, the enactments of the other legislature whether passed before or after must be held to be overborne.”<sup>26</sup> It further clarified that since §18(1) of the 1957 Act widely covered the entire subject matter at issue the state legislation must be considered *ultra vires*.

Similarly, in *Bajinath Kedia v. State of Bihar*, (‘Bajinath Kedia’)<sup>27</sup> a lease was purchased by the appellant in 1963, for quarrying minor minerals, from a vendor who had

<sup>22</sup> *Hingir Rampur Coal Co. v. State of Orissa*, AIR 1961 SC 459.

<sup>23</sup> *Id.*, ¶24.

<sup>24</sup> *State of Orissa v. MA Tullock & Co.*, AIR 1964 SC 1284.

<sup>25</sup> *Hingir-Rampur Coal Co. v. State of Orissa*, AIR 1961 SC 459.

<sup>26</sup> *State of Orissa v. MA Tullock & Co.*, AIR 1964 SC 1284, ¶14.

<sup>27</sup> *Bajinath Kedia v. State of Bihar*, (1969) 3 SCC 838.

taken the original lease from the then landlords in 1955. As per §10(1) of the Bihar Land Reforms Act, 1950 ('Reforms Act') the rights of the intermediary landlord are vested in the State of Bihar and thereby the State became lessor of the appellant's lease.<sup>28</sup> The lease was confirmed on behalf of the State and the payment of rent by the appellant continued under the original lease up to September, 1965.

As per §15(1) of the 1957 Act, it is within state governments' power to make rules and regulation regarding licensing and leasing of minor minerals.<sup>29</sup> Furthermore, §15(2) of the 1957 Act clarifies that the rules in force would continue unless the states formulate rules and regulations pertaining to the 1957 Act.<sup>30</sup>

However, the state of Bihar had no rules that could be preserved under §15(2) when the lease was executed. In 1964, the Reforms Act was amended, subjecting the lease of minor minerals to The Bihar Minor Mineral Concession Rules ('Concession Rules'). Subsequently, the vendor filed a petition arguing that the regulation of mines and mineral development is under the exclusive jurisdiction of the Parliament and therefore the Concession Rules under the Reform Act were unconstitutional. The SC held that the subject matter governed by the Concession Rules had already been covered under the 1957 Act and therefore the concerned Reform Act was left with no scope for the enactment of the rules at issue. The Court stated that:

"Entry 54 is contained in S.2 of 1957 Act and the central government is given control as to regulation of mines and mineral development to the extent provided in the Act, thus, what is left within the competence of State Government has to be worked out from the terms of the Act itself."<sup>31</sup>

Here, the SC emphasised on the Centre's responsibility to safeguard the 'public interest' and on the subject of the dynamics of Centre-state power, it observed that "it is open to Parliament to declare that it is expedient in the public interest that the control should rest in the Central Government. To what extent such a declaration can go is for the Parliament to determine and this must be commensurate with the public interest."<sup>32</sup> The SC further clarified that:

"[...] once this declaration is made and extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. Any legislation by the State after such declaration and trenching upon the field disclosed in the declaration must necessarily be unconstitutional because that field is abstracted from the legislative competence of the State Legislature."<sup>33</sup>

Taking the same position forward, in *Bharat Coking Coal Ltd. v. State of Bihar*,<sup>34</sup> the SC held that the state is not allowed to exercise its executive power in regard to subject matters covered by the 1957 Act and its related rules. This view had been reiterated

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<sup>28</sup> Bihar Land Reforms Act, 1950, §10(1).

<sup>29</sup> Mines and Minerals (Development and Regulation), 1957, §15(1).

<sup>30</sup> *Id.*, §15(2).

<sup>31</sup> *Id.*, ¶14.

<sup>32</sup> *Bajinath Kedio v. State of Bihar*, (1969) 3 SCC 838, ¶13.

<sup>33</sup> *Id.*, at 847-848.

<sup>34</sup> *Bharat Coking Coal Ltd. v. State of Bihar*, (1990) 4 SCC 557.

by the SC in *Sandur Manganese & Iron Ores Ltd. v. State of Karnataka*,<sup>35</sup> by mentioning that the state has no power to frame a policy regarding a subject matter that falls under the ambit of the 1957 Act and the Rules. The Court stated that:

“[...] the State Government has no authority under the Act 67 of 1957 to make commitments to any person that it will, in future, grant a mining lease in the event that the person makes an investment in any project. Assuming that the State Government had made any such commitment, it could not be possible for it to take an inconsistent position and proceed to notify a particular area.”<sup>36</sup>

From the foregoing cases, we can see that wherever there was room for interpretation of regulatory power between the Union and state governments, the SC has in almost all cases curtailed the state’s legislative power and reserved most of the administrative power for the Central Government. However, minor minerals are not subject to the general restriction on the undertaking of mining operations stated under §§4 to 9 of the 1957 Act, and the exploration of these minor minerals is being regulated by the minor mineral concession rules, which have been formulated by the state governments under the 1957 Act.

#### IV. CENTRE-STATE RELATIONSHIP OVER OWNERSHIP OF ‘MINING AREA’ AND PUBLIC INTEREST

Ownership of mining areas has a direct relation with the governance of proprietary rights over coal. The SC has time and again dealt with the issue relating to ‘ownership’ of coal mines and, whether a state, if it were the owner, reserve or restrict the use of a particular coal mine. Clarifying on how the 1957 Act has curtailed the jurisdiction of States with respect to mines and mineral development regulation, the Court in *State of West Bengal v. Kesoram Industries Ltd. and Others* (‘Kesoram Industries’)<sup>37</sup> defined the areas of mining that are covered by the §2 of the 1957 Act. The SC held that “[...] Section 2 of the 1957 Act indicates the assumption of Centre’s control in public interest is for (i) regulation of mines, (ii) development of minerals, and (iii) to the extent hereinafter provided.”<sup>38</sup> Emphasising further, the SC said, “[...] No state legislature shall have the power to enact any legislation touching: (i) regulation of mines, (ii) development of minerals, and (iii) to the extent provided by the 1957 Act.”<sup>39</sup>

An additional point of law emerged before the SC in *Monnet Ispat & Energy Pvt. Ltd. v. Union of India* (‘Monnet Ispat’),<sup>40</sup> when a notification issued by the Jharkhand state government regarding reserving a particular mining area only for the public sector was challenged by the petitioners stating that the 1957 Act confers such power on the Central Government. The question before the Court was related to ownership of these mines and, whether by virtue of being the owner, the state government could reserve or restrict the use of a particular coal mine. In this case, an application was made by Monnet, the appellant company, to the State of Jharkhand for a mining lease, in order to mine iron ore for the purpose of setting up a steel plant. Following the necessary procedures, an application was recommended to the Central Government by the state. When the state government realised

<sup>35</sup> *Sandur Manganese & Iron Ores Ltd. v. State of Karnataka*, (2010) 13 SCC 1.

<sup>36</sup> *Id.*, ¶80.

<sup>37</sup> *State of West Bengal v. Kesoram Industries Ltd. and Others*, (2004) 10 SCC 201.

<sup>38</sup> *Id.*, ¶95.

<sup>39</sup> *Id.*, at 307.

<sup>40</sup> *Monnet Ispat & Energy Pvt. Ltd. v. Union of India*, (2012) 11 SCC 1.

that it had reserved certain portions of the applicant's chosen land for the purpose of public exploitation, a request to return the proposal was made to the Central Government, following which an order accepting the request was passed by the Government of India. Monnet argued that the state's reservation over the land was outside the purview of the 1957 Act as such power of making reservation vested in the Central Government and consecutively, land recommended for allocation was not affected by the state's reservation.

The SC, in this case, discussed the intent behind formulating legislations governing mines and mineral development. It observed:

“If Parliament by its law has declared that Regulation of mines and development of minerals should in the public interest be under the control of Union, which it did by making a declaration in §2 of the 1957 Act, to the extent of such legislation incorporating the declaration, the power of the State Legislature is excluded. Any legislation by the State after such declaration, trespassing the field occupied in the declaration cannot constitutionally stand.”<sup>41</sup>

Accordingly, in this case, the Court reiterating its observations made in *Amritlal Nathubhai Shah v. Union of India*,<sup>42</sup> held that the 1957 Act nowhere questions the fact that ownership of coal mines is vested in state government and the state of Jharkhand had complete power to reserve certain areas of coal mines for public purpose.

In 2014, the SC had another opportunity to comprehensively deal with the ownership rights of state on coal mines while deciding *Goa Foundation v. Union of India*.<sup>43</sup> After receiving various reports of widespread illegal mining of iron and manganese ore from state governments, the Central Government constituted the Justice Shah Commission to study the issue. On the basis of findings, the Goa Foundation filed a public interest litigation, asking authorities to take steps for termination of mining leases operating illegally. The petitioner also sought that an independent authority be appointed with powers to regulate and supervise the mining operations in Goa. There were multiple issues which were considered by the SC in detail. The lessees foremost challenged the Shah Committee report as being invalid on the ground that, the commission was inquiring into illegal mining, without giving any opportunity of hearing to lessees of alleged illegal mining. However, the Central Government and Goa state government pleaded that they would not take any action against said lessees on the basis of findings without giving an opportunity of hearing.

Another imperative issue concerning the Centre-state relationship which was often disputed was the ownership of land and minerals between the state and the Central Government. Questions were raised as to who had the right to allot the land for mining operations, and how much power did the state governments actually have in such decision-making. The State of Goa submitted that Article 39(b) of the Indian Constitution explicitly states that the “material resources of the community should be owned and controlled in such a way that it serves common good.”<sup>44</sup> Therefore, the state alone cannot distribute these resources and the Centre must intervene under the 1957 Act. The SC held that any policy

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<sup>41</sup> *Id.*, ¶130.

<sup>42</sup> *Amritlal Nathubhai Shah v. Union of India*, (1976) 4 SCC 108.

<sup>43</sup> *Goa Foundation v. Union of India*, (2014) 6 SCC 590.

<sup>44</sup> The Constitution of India, 1950, Art. 39(b).

decision of states on leases of these minerals should be in conformity with the constitutional provisions and the 1957 Act, thus highlighting the power of states to regulate the leases of mineral resources. The SC nevertheless stated that if required, it would examine the decision of grant of a mining lease in a particular manner by way of judicial review.

Following a similar trend, the SC further strengthened the governing powers of the states in the recent case of *State of Kerala v. M/S Kerala Rare Earth & Minerals*.<sup>45</sup> The SC decided on the issue of whether the Kerala state government had ownership over the mineral reserves and in case of the answer being in the affirmative, whether the state had the right to decline leases on the ground that the minerals or the areas where the same are found have been reserved for exploitation by government companies or corporations. The SC observed that the ownership of the state of the minerals within its territory is not denuded by the 1957 Act. It reiterated that once the Parliament, in public interest, brings in a law to regulate and develop mines and minerals under its control, the subject to that extent comes within the exclusive domain of the Parliament. The SC emphasised that any state legislation, after such a declaration by the Parliament, effectively entrenches upon the field and is thus unconstitutional.

The 1957 Act clearly stipulates that the rule making power related to “regulation and development” of coal sector is with the Centre.<sup>46</sup> The moot issue was whether states retain ownership rights over the minerals and if so, what were the rights of state *vis-à-vis* the Centre. The SC through a number of decisions explained that the state ownership over the minerals is limited to being a trustee and it is the Centre that has dominion rights to legislate over the minerals. This legislative right of the Centre is subject to the test of public interest.<sup>47</sup> The recent judicial trend suggests that a state can challenge Central legislations if their implementation is against public interest.

## V. CONSTITUTIONAL CHALLENGES TO THE COAL NATIONALISATION ACTS

The Coal Mines Nationalization Act, 1973 strengthens the spirit of the 1957 Act, as coal has been firmly consigned to the purview of the public sector by the act of nationalising the mines.<sup>48</sup> The spirit behind the idea of nationalising coalmines was to avoid mismanagement and unsound mining methods including slaughter mining, uneconomic collieries, unfair labour practices like underpayment of wages and malpractice in sales, which were then used by private actors exploiting the minerals.<sup>49</sup> The coal industry had reached a point where it required uniform authority, standardised rules, and a complete revision of administrative methods of management.<sup>50</sup>

In 1976, in order to retrospectively apply the nationalisation acts, the Central government passed the Coal Mines (Nationalisation) Amendment Act, 1976 (‘Nationalisation Amendment Act’), covering mines which were leased prior to enactment of the

<sup>45</sup> *State of Kerala and Ors. v. Kerala Rare Earth and Minerals Limited and Ors.*, AIR 2016 SC 1817.

<sup>46</sup> The Mines and Minerals (Development and Regulation) Act, 1957, §13.

<sup>47</sup> *Bajinath Kedio v. State of Bihar*, (1969) 3 SCC 838, ¶13.

<sup>48</sup> Ministry of Coal, *supra* note 1; *see* The Coal Mines (Nationalisation) Act, 1973, §3; *see also* The Coal Mines (Nationalisation) Act, 1973, Schedule.

<sup>49</sup> Ministry of Coal, *History/Background*, available at <http://coal.nic.in/content/historybackground> (Last visited October 6, 2017).

<sup>50</sup> Ghosh, *supra* note 4.

Nationalisation Acts. *Tara Prasad Singh v. Union of India* ('Tara Prasad Singh')<sup>51</sup> involved a challenge to this amendment. The petitioners argue that the Central government's law making power is subject to the test of 'public interest', however, the Nationalisation Amendment Act prohibited leaseholders from carrying on work and such prohibition was contended to be completely against the public interest. The SC did not accept this contention and appended a broad interpretation to List I, Entry 54,<sup>52</sup> of the Constitution of India. It observed that the 1976 amendment was made to conserve scarce mineral resources, which was within the jurisdiction of the Centre. The SC held that:

"[...] we see no substance in the contention that no public purpose is involved in the termination of the interest of the lessees and sub-lessees which were brought about by the Nationalisation Amendment Act. The purpose is to re-organise and re-structure coal mines so as to ensure the rational, coordinated and scientific development and utilisation of coal resources consistent with the growing requirements of the country. The Statement of Objects and Reasons of the Nationalisation Amendment Act points in the direction. Public purpose runs like a continuous thread through the well-knit scheme of the three Acts under consideration."<sup>53</sup>

In *Sanjeev Coking Coal v. Bharat Coking Coal Ltd* ('Sanjeev Coking Coal'),<sup>54</sup> the constitutionality of the Coking Coal Mines (Nationalization) Act, 1972 ('1972 Nationalisation Act') was further challenged before the SC on the grounds that it was violative of Article 14 of the Constitution of India (right to equality). The Constitution under Article 39(b) directs the State to frame a "policy towards securing that the control and ownership of the material resources are so distributed as to best sub serve the common good."<sup>55</sup> This provision empowers the Central government to take various steps in order to preserve and protect the material resources. In consonance with above-stated provision nationalisation of coal was undertaken by the Parliament. The question before the SC was that whether the 1972 Nationalisation Act could be protected under Article 31C of the Constitution of India (saving of laws giving effect to certain directive principles). The SC answered it in the affirmative observing that in the steel industry, a pivotal role is played by coking coal & coke oven plants. It further confirmed that the Act was in consonance of the aforementioned Article 39(b) of the Constitution. Justice Amarendra Nath Sen observed:

"I am further of the opinion that even if on the basis of a doctrinaire and formalistic attitude, it could be said that Art. 14 had been infringed, Art. 31C of the Constitution and the appropriate declaration, in the peculiar facts and circumstances of this case, would provide the necessary remedy for such violation, if there be any. Applicability of Art. 31C and the validity of the declaration will, to my mind, depend on the particular facts and circumstances of a case. In the present case as the State has enacted the law in directing its policy towards securing the principles formulated in Art. 39 (b) of the Constitution, Article 31C is properly attracted and the declaration is valid."<sup>56</sup>

<sup>51</sup> *Tara Prasad Singh v. Union of India*, AIR 1980 SC 1682.

<sup>52</sup> Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by the Parliament by law to be expedient in the public interest.

<sup>53</sup> *Tara Prasad Singh v. Union of India*, AIR 1980 SC 1682, ¶65.

<sup>54</sup> *Sanjeev Coking Coal v. Bharat Coking Coal Ltd.*, AIR 1983 SC 239.

<sup>55</sup> The Constitution of India, 1950, Art. 39(b).

<sup>56</sup> *Id.*, ¶35.

Here, the SC additionally had to determine whether mines and coke oven plants are the mineral resources of the community even if they are under private ownership. The SC concluded that:

“Everything of value or use in the material world is material resources and the individual is a member of the community his resources are part of those of the community. To exclude ownership of private resources from the coils of Article 39(b) is to ciphers its very purpose of redistribution the socialist way. A directive to the State with a deliberate design to dismantle feudal and capitalist citadels of property must be interpreted in that spirit and hostility to such a purpose alone can be hospitable to the meaning which excludes private means of production or goods produced from the instruments of production.”<sup>57</sup>

The objective as stated in the Nationalisation Act of 1972 and 1973 was to foster the judicious use of the natural resource and to ensure “common good” through a scientific exploitation of mineral resources.<sup>58</sup> Analysing the retrospective applicability of nationalisation of the coal sector, the SC found that it was imperative to cover all leases under nationalisation to achieve the objective under the Nationalisation Acts.

## VI. REGULATION OF COAL MINE ALLOCATION: CONSTITUTIONAL ISSUES

Before 2010, the allocation of coal mines was not comprehensively regulated. Any non-arbitrary, just or reasonable method, other than auctions to allocate the natural resources, so long as it ultimately served the common good and larger public interest, was constitutionally acceptable.<sup>59</sup> Apart from the Centre-state conflict, the mode of allocation of coal mines had been a subject matter of judicial scrutiny for the past five decades. There have been a series of judicial pronouncements on the specific question of means of resource allocation.

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<sup>57</sup> *Id.*, ¶19.

<sup>58</sup> The Coal Mines (Nationalisation) Act, 1973, Preamble

(“An Act to provide for the acquisition and transfer of the right, title and interest of the owners in respect of the coal mines specified in the Schedule with a view to re-organising and reconstructing such coal mines so as to ensure the rational, co-ordinated and scientific development and utilisation of coal resources consistent with the growing requirements of the country, in order that the ownership and control of such resources are vested in the State and thereby so distributed as best to subserve the common good, and for matters connected therewith or incidental thereto.”);

*See also* The Coking Coal Mines (Nationalisation) Act, 1972, Preamble

(“An Act to provide for the acquisition and transfer of the right, title and interest of the owners of the coking coal mines specified in the First Schedule, and the right, title and interest of the owners of such coke oven plants as are in or about the said coking coal mines with a view to reorganising and reconstructing such mines and plants for the purpose of protecting, conserving and promoting scientific development of the resources of coking coal needed to meet the growing requirements of the iron and steel industry and for matters connected therewith or incidental thereto.”).

<sup>59</sup> *Natural Resource Allocation, In Re: Special Reference No. 1 of 2012*, (2012) 10 SCC 1; *see also* *Haji T.M. Hassan Rawther v. Kerala Financial Corporation*, (1988) 1 SCC 166; *Ashoka Smokeless Coal India Pvt. Ltd. & Others v. Union of India*, AIR 2006 SC 696; *Sachidanand Pandey v. State of West Bengal*, (1987) 2 SCC 295.

In *M/s Kasturi Lal Laxmi Reddy v. State of Jammu and Kashmir*,<sup>60</sup> the dispute related to the validity of the allotment of blazes for extraction of resin by the Jammu and Kashmir state government. The petitioners argued that such an allotment is invalid because the government did not advertise for inviting offers and thus created a monopoly favouring the person who was allotted the blazes. The SC observed that:

“State is not bound to advertise and tell the people that it wants a particular industry to be set up within the State and invite those interested to come up with proposals for the purpose. The State may choose to do so if it thinks fit and in a given situation, it may even turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to set up an industry, the State would not be committing breach of any constitutional or legal obligation if it negotiates with such party and agrees to provide resources and other facilities for the purpose of setting up the industry.”<sup>61</sup>

Holding the order for allotment to be valid, the SC said that a state is free to negotiate with the private entrepreneurs and that such an order was in the interest of the State.

Following this case, in *Sachidanand Pandey v. State of West Bengal*,<sup>62</sup> where Taj Group was granted lease of four acres of zoological parkland for construction of a hotel, the appellant argued that “it was necessary either to hold a public auction or to invite tenders at least from the limited class of persons interested in utilising the land for the purpose for which the land was proposed to be transferred.”<sup>63</sup> The SC, in this case analysed whether the State of West Bengal could justify not inviting tenders or holding a public auction if it did so in pursuance of its socio-economic objectives. It held that “State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive and certain principles have to be observed, with public interest being a paramount consideration.”<sup>64</sup> The SC mentioned that while it is the ordinary rule that public interest can be secured through auction, it was not an invariable or inflexible rule. The SC stated that:

“There may be situations where there are compelling reasons necessitating a departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. The appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism.”<sup>65</sup>

Further, the SC observed that the Government of West Bengal was perfectly justified in entering into negotiations with the Taj Group of Hotels instead of inviting tenders in which leading hoteliers did not participate. In *Haji T.M. Hassan Rawther v. Kerala Financial Corporation*,<sup>66</sup> the SC, following an exhaustive review of the precedent,<sup>67</sup>

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<sup>60</sup> *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir*, (1980) 4 SCC 1.

<sup>61</sup> *Id.*, ¶22.

<sup>62</sup> *Sachidanand Pandey v. State of West Bengal*, (1987) 2 SCC 295.

<sup>63</sup> *Id.*, ¶31.

<sup>64</sup> *Id.*, ¶40.

<sup>65</sup> *Id.*

<sup>66</sup> *Haji T.M. Hassan Rawther v. Kerala Financial Corporation*, (1988) 1 SCC 166.

<sup>67</sup> *Kasturi Lal Lakshmi Reddy v. State of J&K*, (1980) 4 SCC 1; *Sachidanand Pandey v. State of West Bengal*, (1987) 2 SCC 295.

concluded that public auction or inviting tender sale should generally be the method for the sale of a public property owned by a state or its instrumentality. However, it further said that a deviation from publicly disposing of the property could be justified and be made reasonable by compelling reasons, though it would not be permissible to do so just for convenience. The SC clarified that the sale of public property cannot be challenged for not being sold through public auction unless sale involved favouritism or extraneous considerations. It also added that the principle of reasonableness and rationality are essential elements of non-arbitrariness and equality projected by Article 14 and it must reflect in every action of the State.

Maintaining its position on the state's mines allocation schemes, the SC in *Netai Bag v. State of West Bengal*,<sup>68</sup> held that it would not be deemed arbitrary exercise of executive power to not hold a public auction. Similarly, in *M&T Consultants, Secunderabad v. S.Y. Nawab*,<sup>69</sup> the SC while dismissing the contention that the methods other than auctions could be abused, held that a provision cannot be struck down just because there is potential for abuse; the actual abuse must be brought before the SC and tested for constitutionality. It added, "In fact, it may be said that even auction has a potential for abuse, like any other method of allocation, but that cannot be the basis of declaring it an unconstitutional methodology either." In *Ashoka Smokeless Coal Ind. Pvt. Ltd. v. Union of India*,<sup>70</sup> the SC was adjudicating upon the constitutionality of e-auction scheme introduced by the Central Government. It was observed that coal indisputably plays an important role in the economy and is a primary raw material in various core sectors which are vital for the economy such as power, steel and oil. However, the SC opined that public sector companies dealing with coal resources must not resort to sheer profit-making as their agenda. They must act in public interest and in a fair manner; emphasising its view in *Tara Prasad Singh case*<sup>71</sup> it held that coal mines were nationalised to ensure rational, scientific and co-ordinated development of resources as per the growing needs of the nation.

More recently, in 2012 owing to the infamous 2G spectrum corruption case,<sup>72</sup> the practice of distributing natural resources through auction was subjected to a constitutionality test through a special Presidential reference under Article 143<sup>73</sup> of the

<sup>68</sup> *Netai Bag & Ors. v. State of West Bengal*, (2000) 8 SCC 262.

<sup>69</sup> *M&T Consultants, Secunderabad v. S.Y. Nawab*, (2003) 8 SCC 100.

<sup>70</sup> *Ashoka Smokeless Coal India Pvt. Ltd. & Others v. Union of India*, AIR 2006 SC 696.

<sup>71</sup> *Tara Prasad Singh v. Union of India*, AIR 1980 SC 1682.

<sup>72</sup> In 2008, the Central Government of India granted 122 telecom licenses to various companies in response to 575 applications for licenses. In a report in 2010-11, the Comptroller and Auditor General (CAG) of India concluded that the allocation of these 122 licenses was characterised by policy gaps and irregularities in procedure. On February 2, 2012, the Supreme Court of India, in response to a Public Interest Litigation (PIL), cancelled all 122 telecom licenses granted in 2008 and directed that the spectrum linked with these licenses be auctioned.

<sup>73</sup> It says:

"(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon and  
(2) The President may, notwithstanding anything in the proviso to Article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon".

Constitution.<sup>74</sup> The SC analysed whether the conduct of auctions was the only acceptable method under the Indian Constitution, for comprehensive disposal of natural resources. The SC held that auction, which was one of the several price recovery mechanisms, cannot be said to be the only constitutionally recognised method for alienation of natural resources.

In the course of this case, the SC opined on two important aspects: *first*, “[...] there is no express assurance in §11A of the 1957 Act that every entrepreneur who sets up a power project, having succeeded on the basis of competitive bidding, would be allotted a coal mining lease” and *second*, “if such an allotment is actually made, it is apparent, that such entrepreneur would get the coal lot, without having to participate in an auction, free of cost.”<sup>75</sup>

The SC concluded that the legislative policy is to serve common good, and there will be situations where the material resource is given for free. Taking the position forward, the SC said that “[w]hat appears to be free of cost in the proviso in §11A of the 1957 Act is in actuality consideration enmeshed in providing electricity at a low tariff.”<sup>76</sup>

The SC stated although auction could not be considered as the only constitutionally valid method for allocation of natural resources, it should not be interpreted to mean that the disposal of natural resources could never be done in an auction. The SC made an observation that “reading an auction as a constitutional mandate would distort other constitutional principles such as those enshrined in Art. 39(b), that is, that ownership and control of resources be so distributed as to serve the common good.” The SC interestingly gave a legislative interpretation to the word “distribution” enshrined in Article 39(b) of the Constitution of India in the light of natural resource allocation. It restricted the meaning of ‘distribution’ within the spirit of ‘common good’. The SC concluding its findings in the case stated that, “It is manifest that there is no constitutional mandate in favour of auction under Art.14. The government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions.”<sup>77</sup>

While analysing the constitutionality of the allocation procedure the SC in *Manohar Lal Sharma v. The Principal Secretary*<sup>78</sup> held that it was not possible to trace the allocation of coal blocks back to the 1957 Act or the Nationalisation Acts. It also determined that the Central Government’s practice and related procedure to allocate coal blocks through administrative route was inconsistent with the law. The SC, reiterating its ruling in the 2G Scam case, held that:

“The Government has repeatedly deviated from the course of auction and the Court has repeatedly upheld such actions. The judiciary tests such deviations on the limited scope of arbitrariness and fairness under Article 14 and its role is limited to that extent. Essentially whenever the object of policy is anything but revenue maximization, the Executive is seen to adopt methods other than auction.”<sup>79</sup>

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<sup>74</sup> In re: Special Reference No. 1 of 2012, (2012) 10 SCC 1.

<sup>75</sup> *Id.*, ¶195.

<sup>76</sup> *Id.*

<sup>77</sup> In re: Special Reference No. 1 of 2012, (2012) 10 SCC 1, ¶129.

<sup>78</sup> *Manohar Lal Sharma v. The Principal Secretary*, (2014) 9 SCC 516.

<sup>79</sup> *Id.*, ¶99.

Taking a proactive stance to check the allocation activities, the court observed that “When questioned, the courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are *ultra vires* and *intra vires* the provisions of the Constitution.”<sup>80</sup>

In this case, the SC analysed the constitutional validity of coal mining allocations to State/State PSUs made through the recommendation of a screening committee. Taking a firm view, the SC observed that:

“There is no evaluation of merit and no inter se comparison of the applicants. No chart of evaluation was prepared. The entire exercise of allocation through Screening Committee route thus appears to suffer from the vice of arbitrariness and not following any objective criteria in determining as to who is to be selected or who is not to be selected.”<sup>81</sup>

The SC specifically stated that State/State PSUs must not exploit mineral resources for core commercial use. It observed that “The Coal Mine Nationalisation Act do not allow PSUs to mine coal for commercial use. This modus operandi has virtually defeated the legislative policy in the Act and winning and mining of coal mines has resultantly gone to the hands of private companies for commercial use.”<sup>82</sup>

Reiterating that the allocation through screening committee was arbitrary the SC analysed the logic of §3(3)(a) of the Nationalisation Act, 1973. As per this section, only two entities can carry out mining operation: *first*, Central Government or its undertakings/corporations; or *second*, companies having end-use plants in iron and state, power, washing of coal, or cement. Accordingly, the screening committee route that allocated commercial mining operations to State PSUs or the unqualified private companies were determined to be invalid. Further, the SC categorically stated that it was beyond the powers of the Central Government to deviate from Nationalisation Act 1973 and the 1957 Act while determining any allocation method.

## VII. CONSTITUTIONAL ASSESSMENT OF THE ‘ROYALTY-CESS’ ISSUE

Another important aspect of the Centre-state relationship in the coal sector, regulated by the judiciary, is ‘cess’ and ‘cess on royalty’ which states have, time and again, levied on the extraction of minerals from the lessee. §9 of the 1957 Act specifies the royalties in respect to mining leases. The SC in *Sethi Marble and Stone Industry v. State of Rajasthan*<sup>83</sup> stated that “royalty” is considered to be a payment made to an owner for the right to exploit his property. It is, therefore, indisputable that it would be open to the state as being the owner of the minerals to charge a royalty whether directly by itself or through a contractor. Further, Indian Bureau of Mines clarified that royalty may be charged as “so much per weight” or on the value of the produce.<sup>84</sup>

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<sup>80</sup> *Id.*, ¶101.

<sup>81</sup> *Id.*, ¶160.

<sup>82</sup> *Id.*, ¶162.10.

<sup>83</sup> *Sethi Marble and Stone Industries, Chittorgarh v. State of Rajasthan*, AIR 1958 Raj 140.

<sup>84</sup> Indian Bureau of Mines, *Mineral Royalties*, available at <http://www.ibm.nic.in/writereaddata/files/06302014174344mineralroyalties2011.pdf> (Last visited October 6, 2017).

The constitutionality of cess levied on mining land was first discussed in the Hingir Rampur case in which the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952 was challenged by the petitioners.<sup>85</sup> The Act empowered the state government to constitute mining areas for the purpose of their better development by providing them with certain amenities, whose costs were to be met by imposing and collecting a cess depending upon the value of the minerals produced. The State contended it had the power to impose such cess as it was a tax under List II, Entry 50 of the Constitution of India, which provides for taxes on mineral rights, subject to limitations by Parliament. While determining the levy of such cess by the state legislature to be invalid, the SC held

“[...] that taxes on mineral rights are taxes on the right to extract minerals and not taxes on the minerals actually extracted. Thus, tax on mineral rights would be confined, for example, to taxes on leases of mineral rights and on premium or royalty for that, while taxes on the minerals actually extracted would be duties of excise. ... (cess in) the present case is not a tax on mineral rights; it is a tax on the minerals actually produced and can be no different in pith and substance from a tax on goods produced which comes under Entry 84 of List I, as duty of excise. The present levy therefore cannot be justified as a tax on mineral rights.”<sup>86</sup>

Elucidating upon the issue concerning the imposition of state tax on mining land, the SC discussed the constitutional validity of ‘cess on royalty’ in *H.R.S. Murthy v. Collector of Chittoor* (‘H.R.S. Murthy’).<sup>87</sup> In this case, the power of the state legislature to impose cess on royalty, payable under the 1957 Act, was upheld by the SC, stating:

“[...] it is clear that the land cess is in truth a ‘tax on lands’ within the Entry 49 of the State List (Taxes on lands and buildings). Where the land is held under lease it is the lease amount that forms the basis. Where land is held under a mining lease, that which the occupier is willing to pay is accordingly treated as the ‘annual rent value’ of the property; such rent value would, therefore, necessarily include not merely the surface rent but the dead rent, as well as the royalty payable by the licensee, lessee or occupier for the user of the property.”<sup>88</sup>

Taking a contrary stance to the H.R.S Murthy case, the SC in *India Cement Ltd. v. State of Tamil Nadu* (‘India Cement’),<sup>89</sup> highlighted the distinction between royalty and land revenue while interpreting §115(1) of Madras Panchayats Act, 1958. §115 of the impugned Act was amended imposing a cess on the land revenue which was paid to the government. The amendment also included royalty in the definition of ‘land revenue,’ on which cess was imposed. The writ petition filed in the High Court was dismissed stating that such a cess, being a tax on land, falls under List II, Entry 49. The SC, on appeal, observed that the cess was not on land, but on royalty. It further observed, “[...] It is, therefore, recognised by the very force of that Explanation and the amendment thereto that the

<sup>85</sup> *Hingir-Rampur Coal Co. v. State of Orissa*, AIR 1961 SC 459.

<sup>86</sup> *Id.*, ¶53.

<sup>87</sup> *H.R.S. Murthy v. Collector of Chittoor & Ors.*, AIR 1965 SC 177.

<sup>88</sup> *Id.*, ¶11.

<sup>89</sup> *India Cement Ltd. v. Union of India*, AIR 1990 SC 85.

expression 'royalty' in §115 and §116 of the Act cannot mean land revenue, which is separate and distinct from royalty.”<sup>90</sup> The respondents referred to the H.R.S. Murthy case,<sup>91</sup> where the land cess paid on royalty was held to be having a direct relation to the land and only a remote relation to mining. The SC in this case however considered it to be an incorrect approach and held

“[...] royalty is a tax, and as such a cess on royalty being a tax on royalty, is beyond the competence of the state legislature because §9 of the central act covers the field and the state legislature is denuded of its competence under list II, Entry 23. In any event, cess on royalty cannot be sustained under List 2, Entry 49 Constitution as being a tax on land. Royalty on mineral rights is not a tax on land but a payment for the use of land.”<sup>92</sup>

The SC further stated, “[...] as amounts of cess have been collected on the basis of the decision of this Court in H.R.S. Murthy's case, which now stood overruled, it was therefore justified that the cess be ultra vires the power of the State legislature, prospectively only.”<sup>93</sup>

The SC reiterated findings of India Cement case,<sup>94</sup> that a cess on royalty is invalid, in *Orissa Cement v. State of Orissa* (‘Orissa Cement’).<sup>95</sup> In this case, the assessee challenged the constitutional validity of cess being levied on royalty by the states of Orissa, Madhya Pradesh, and West Bengal. The applicant argued that the state government acted beyond its legislative competence in imposing such ‘cess’. They claimed that the SC’s decision in the India Cement case squarely covered the issue and that the amounts collected without the authority of law should be refunded. The High Court of Orissa declared the cess to be unconstitutional, but the prayer to grant refund of cess already collected by the state government was rejected. The assessee filed an appeal in the SC for a refund, while a cross-appeal was preferred by the states. The SC held

“[...] imposition of cess based on royalty, for the purpose of development of mineral areas, being neither a 'tax' on land, nor a 'fee' with regard to land is beyond the competence of the state legislature. [...] Even otherwise, the competence of the state legislature is circumscribed by the 1957 Act. §9(3) of the 1957 Act states that the royalties’ payable under the Act shall not be enhanced more than once during a period of three years. This is a clear bar on the state legislature (to impose cess on royalty), as it would tantamount amending the central Act.”<sup>96</sup>

While deciding on the issue of refund the SC noted:

“[...] even where the levy of taxes is found to be unconstitutional, the Court is not obliged to grant an order of refund. ...we are of opinion that, though the levy of the cess was unconstitutional, there shall be no direction to refund to

<sup>90</sup> *Id.*, ¶21.

<sup>91</sup> H.R.S. Murthy v. Collector of Chittoor & Ors., AIR 1965 SC 177.

<sup>92</sup> India Cement Ltd. v. Union of India, AIR 1990 SC 85, ¶34.

<sup>93</sup> *Id.*, ¶35.

<sup>94</sup> India Cement Ltd. v. Union of India, AIR 1990 SC 85.

<sup>95</sup> Orissa Cement Ltd. and Ors. v. State of Orissa, AIR 1991 SC 1676.

<sup>96</sup> *Id.*, ¶39.

the assesses of any amounts of cess collected until the date on which the levy in question has been declared unconstitutional.”<sup>97</sup>

However, in the *Kesoram Industries* case,<sup>98</sup> the SC, deviating from its stance in *India Cement* case, upheld the cess on royalty to be constitutionally valid. It observed:

“a state legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of ‘Regulation and control’ belonging to the Central Government.”<sup>99</sup>

The High Court, in this case, had struck down certain levies by way of cess on coal as unconstitutional for want of legislative competence in the state legislature, while referring to two earlier decisions of the SC in *India Cement*<sup>100</sup> and *Orissa Cement*.<sup>101</sup> However, the SC explained the distinction between the terms ‘tax’ and ‘cess/fee’, while relying on the decision in *Hingir Rampur* case. The SC observed:

“the term cess, although commonly connoted a ‘Tax’, also means an assessment or levy, which is dependent on the context and purpose of a levy. Only, availability of 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 fee.”<sup>102</sup>

Further, the SC observed that considering royalty as a tax was an inadvertent error made in *India Cement* case, which has resulted into throwing on the loop line the movement of later cases namely, *State of M.P. v. Mahalaxmi Fabric Mills Ltd.* (‘Mahalaxmi Fabric Mills’)<sup>103</sup> and *Saurashtra Cement and Chemicals Industries v. Union of India*.<sup>104</sup> Specifically, in *Mahalaxmi Fabric Mills*, the SC had made a note of several earlier judicial decisions and also dictionaries defining royalty and came to a conclusion that traditionally speaking, “royalty is an amount which is paid under contract of lease by the lessee to the lessor” but then it felt bound by the view taken in *India Cement* case and held royalty to be a tax. The SC clarified that the *India Cement* case never found royalty equivalent to a tax and also dissented with the part of the judgment in *Mahalaxmi Fabric Mills*,<sup>105</sup> which observed that ‘typographical error’ was not committed in *India Cement* case.

The arguments presented in *India Cement*<sup>106</sup> were also rejected by the SC in *Kesoram Industries*.<sup>107</sup> It held that

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<sup>97</sup> *Id.*, ¶72.

<sup>98</sup> *State of West Bengal v. Kesoram Industries Ltd. and Others*, (2004) 10 SCC 201.

<sup>99</sup> *Id.*, ¶129(8).

<sup>100</sup> *India Cement Ltd. v. Union of India*, AIR 1990 SC 85.

<sup>101</sup> *Orissa Cement Ltd. and Ors. v. State of Orissa*, AIR 1991 SC 1676.

<sup>102</sup> *State of West Bengal v. Kesoram Industries Ltd. and Others*, (2004) 10 SCC 201, ¶146.

<sup>103</sup> *State of M.P. v. Mahalaxmi Fabric Mills Limited & Ors.*, [1995] 1 SCR 756.

<sup>104</sup> *Saurashtra Cement & Chemical Inds. and Anr. v. Union of India and Ors.*, (2001) 1 SCC 91.

<sup>105</sup> *State of M.P. v. Mahalaxmi Fabric Mills Limited & Ors.*, [1995] 1 SCR 756.

<sup>106</sup> *India Cement Ltd. v. Union of India*, AIR 1990 SC 85.

<sup>107</sup> *State of West Bengal v. Kesoram Industries Ltd. and Others*, (2004) 10 SCC 201, ¶146.

“[...] it is well-known that one of the major factors contributing to the value of the land is what it produces or is capable of producing. And, merely because the quantum of coal produced and dispatched is the factor taken into consideration for determining the value of the land, it does not become a tax on coal or minerals. Thus, being a tax on land it was fully covered by Entry 49 in List II.”<sup>108</sup>

The SC further noted that

“assuming it (cess) to be a tax on mineral rights, covered by Entry 50 in List II, the taxes on mineral rights still lie within the legislative competence of the State Legislature. And although it is ‘subject to’ any limitation imposed by Parliament by law, relating to mineral development, centre does not cast any limitations on State Legislature’s power to tax mineral rights and therefore impugned cess was properly covered by Entries 49 and 50 of list II.”<sup>109</sup>

Lastly, the SC stated “‘royalty’ is a share of produce reserved to the owner for permitting another to exploit and use property, it was not held to be a tax, and thus, cess wasn’t a tax on tax.”<sup>110</sup>

In *Mineral Area Development Authority v. Steel Authority of India*,<sup>111</sup> the SC was again approached to decide upon the issues relating to ‘royalty’ and ‘levy of Tax’ as prescribed under List II, Entries 49 and 50 read with List I, Entry 54 of the Seventh Schedule to the Constitution of India<sup>112</sup> and other identical questions. The three-judge bench of the SC, after hearing the matter for a considerable length of time, came to a conclusion that there was a conflict between the decision of the SC in *Kesoram Industries case*,<sup>113</sup> delivered by a five-judge bench and *India Cement case*,<sup>114</sup> delivered by a seven-judge bench. Thus, the matter was directed to be placed before the Chief Justice on administrative side with a request for reference to a nine-judge bench. The SC while referring the matter to the Chief Justice observed that

“What is the effect of the expression... ‘subject to any limitation imposed by Parliament by law relating to mineral development’ on the taxing power of the State Legislature in Entry 50 of List II, particularly in view of its uniqueness in the sense that it is the only entry in all the entries in three Lists (Lists I, II and III) where the taxing power of the State Legislature has been subjected to any limitation imposed by Parliament by law relating to mineral development.”<sup>115</sup>

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<sup>108</sup> *Id.*, ¶130.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*, ¶59.

<sup>111</sup> *Mineral Area Development Authority v. SAIL*, (2011) 4 SCC 450.

<sup>112</sup> It says:

“List II, 49. Taxes on lands and buildings and 50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.” And “List I, 54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.”

<sup>113</sup> *State of West Bengal v. Kesoram Industries Ltd. and Others*, (2004) 10 SCC 201.

<sup>114</sup> *India Cement Ltd. v. Union of India*, AIR 1990 SC 85.

<sup>115</sup> *Mineral Area Development Authority v. SAIL*, (2011) 4 SCC 450, ¶1.11.

The matter is referred to the Chief Justice through a 2011 order and is currently *sub judice*.

Until *Kesoram Industries*,<sup>116</sup> the SC on numerous occasions held that the tax on mineral rights (in nature of ‘cess’) is unconstitutional. However, from the *Kesoram Industries* case onwards the SC has taken contrary positions while dealing with the issues concerning states’ power to levy a ‘cess’ or ‘royalty’ over exploitation of mineral resources. Initially, the SC considered such imposition of cess by a state to be unconstitutional and reiterated supremacy of the Union over the subject matter. However, the recent judicial trends indicate that the SC has consistently noted that the differences between a ‘cess’, ‘royalty’, and ‘tax’ finding that the state, as an owner, has power to levy a cess on a reasonable basis.

## VIII. CONCLUSION

The coal revolution in India is best seen and understood through the lens of the decisions rendered by the SC. The analysis of the above SC judgments is evidence to the important role that the judiciary has played in contouring the constitutional regime for the coal legislations. The most significant aspect that has impacted the dynamics of administrative policies in the coal sector in India is the interpretation the SC has given in understanding the Centre-state relationship within the constitutional regime. Although, the Constitution has established contours for the coal sector, the judiciary, through its intervention, has time and again put the Centre in the front seat, giving it priority over the states in administration and governance of major minerals. These interpretations clear up most of the grey areas regarding ownership, allocation, and administrative power and have eventually catered to the development of the coal sector.

Centre-State power-play concerning acquisition of land for mining was one of the foremost issues in which the judiciary clarified that even though the Centre has an upper hand in framing the regulations in this respect, such regulations must necessarily be subject to public interest. Judiciary through its active involvement has ensured that the resource of coal is utilised in the interest of masses. Although, in a majority of its decisions, the SC has denuded the powers of states to the extent that the Centre has legislated over a subject matter, it has ensured that the Central regulations cater to the community as a whole. Further, expanding the horizon of the coal sector beyond Article 294, the Indian judiciary has linked the sector with Directive Principles of State Policy, ensuring the judicious use of the resource. Moreover, the issues regarding the extent of the power of state governments *vis-à-vis* the Union have been comprehensively dealt with by clarifying that although the Centre, vide the 1957 Act, has restricted the states’ power, but the ownership over the resources still vests with the respective states.

Additionally, judicial intervention has ensured that the nationalisation of the coal sector meets its objective of common good. It has further defined the boundaries of interaction between Directive Principles of State policy and Central legislations, stating that the interaction must be substantive to give effect to a judicial pronouncement. Considering the evolving nature of the constitutional issues related to the coal sector, the judiciary has dissented from its previous decisions giving states a power to levy ‘royalty-cess’ in certain conditions on revenue concerning mining activities. Although, initially the SC assessed royalty as being equal to tax, but later it gave states a wider power considering that the state

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<sup>116</sup> *State of West Bengal v. Kesoram Industries Ltd. and Others*, (2004) 10 SCC 201.

remains the owner of the minerals. Coal is the most reliable and widely used natural resource in India and it appears that there is a gradual shift in judicial decisions, favouring a federalist model over the unitary model of governance of coal, such that the SC is vesting more power in the states while keeping the public interest intact.