State Of Bihar And Ors vs Indian Aluminium Company And Ors on 24 September, 1997

Equivalent citations: AIR 1997 SUPREME COURT 3592, 1997 AIR SCW 3704, (1997) 8 JT 201 (SC), 1997 (6) SCALE 210, 1997 (8) SCC 360, 1997 (8) JT 201, (1997) 3 SCJ 664, (1998) 1 BLJ 721, (1997) 6 SCALE 210, (1997) 8 SUPREME 428

Bench: J.S. Verma, B.N. Kirpal, S.P. Kurdukar

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           CASE NO.:
Appeal (civil)  2406-25 of 1994

PETITIONER:
STATE OF BIHAR AND ORS.

RESPONDENT:
INDIAN ALUMINIUM COMPANY AND ORS.

DATE OF JUDGMENT: 24/09/1997

BENCH:
J.S. VERMA, CJ & B.N. KIRPAL & S.P. KURDUKAR

JUDGMENT:
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JUDGMENT 1997 Supp(4) SCR 222 The Judgment of the Court was delivered by KIRPAL, J. The common question which arises for consideration in these appeals on special leave being granted, is about the validity of the Bihar Forest Restoration and Imporvement of Degraded Forest Land Taxation Act, 1992 (hereinafter referred to as the 'said Act'). The Patna High Court, on writ petitions having been filed by the respondents in these appeals, having upheld the challenge to the validity of the said Act, the State of Bihar has filed these appeals challenging the correctness of the High Court's decision.

The facts which are essential for the decision of these appeals are similar and tie in a very narrow compass, therefore, it is not necessary to refer to the facts of each case. It will be sufficient to refer to the facts in the appeal pertaining to Indian Aluminium Company Ltd. The said company, like all the respondents, had been granted by the State of Bihar leases for different areas under the provisions of Mines and Minerals Regulation Act, 1957. These leases pertained to various tracts of land situated in different villages but all the said leases related to lands in the forest areas. These leases had been granted long prior to the promulgation of the ordinance which led to the passing of the aforesaid Act. The respondents, on the basis of the leases which had been granted to them, worked on the said lands and extracted the minerals for which the leases had been granted.

As far as Steel Authority of India is concerned the State of Bihar became interested in setting up a steel plant in its State. Certain Government land including forest land was given to the Hindustan Steel Ltd. (later re- named Steel Authority of India) and a steel plant including a township was set up at Bokaro, The land which was made available to this plant included forest land in ten villages which was transferred to the respondent company on 24th May, 1962. According to the respondents, and this is not disputed, it had paid compensation for the trees which it had acquired on the transfer of forest land, the amount paid being Rs. 28.5 lacs. According to the respondents several lacs of trees in various parts of the township have been planted and this process is still continuing.

On 29th February, 1992 the Governor of Bihar promulgated the Bihar Forest Restoration and Imporvement of Degraded Forest Land Taxation Ordinance under Article 213 of the Constitution so as to take immediate action for the purpose of providing resources and restoration of degraded land and improvement of forest area. This Ordinance was subsequently replaced by the Act. Pursuant to the promulgation of the said Ordinance, rules were notified on 5th June, 1992. Consequent upon the promulgation of the ordinance and the rules thereunder several writ petitions were filed, including those by the respondents herein, before the Patna High Court challenging the ordinance and the rules, inter alia, on the ground that it was beyond the legislative competence of the State Legislature of Bihar. It was also contended that the said Act which replaced the Ordinance was repugnant to the Indian forest Act 1927 and the rules framed thereunder and that it was ultra vires Articles 14, 19, 240. 265 and 300A of the Constitution. With regard to the legislative competence it was contended by the respondents that in view of Entry 54 List 1 providing for regulation of mines and mineral development, the State Government had or authority or jurisdiction to promulgate the Act, the field being occupied by the Parliament alone.

On behalf of the State Government reliance was placed on the provisions of Entry 49 List II in support of its contention that the State Legislature had the legislative competence to enact this law. Shortly put the case of the appellants herein was that what was now sought to be levied by the impugned act was tax on land which was covered by Entry 49 List II and the tax was not on or in relation to any mining activity.

The High Court by a common judgment allowed the writ petitions and quashed the aforesaid Act by holding that the same was beyond the legislative competence of the State Legislature on the ground that in pith and substance it was not a tax on the land and building within the meaning of Entry 49 List II; that in view of the provisions of Mines and Minerals (Regulation and Development) Act, 1957 and the rules farmed thereunder it was an occupied field and, therefore, the State Legislature was denuded of all its power to enact the said Act; that in view of the Forest Conservation Act, 1980 it was doubtful whether the Impugned Act could impose the tax. It was also held by the High Court that the Act and the Ordinance were unconstitutional and void as they were vague and uncertain and conferred naked and arbitrary power, that no machinery was provided for the purpose of levy imposition and assessment of the tax; Section 3(4) was in any event unconstitutional and void and the Act and the Ordinance were violative of Article 301 read with Article 30 (b) of the Constitution. It was further declared by the High Court that all actions taken under the said Act, ordinance and rules framed thereunder were unconstitutional and void and writ of mandamus was issued

restraining the respondents therein and its officers from giving effect to the Act or the ordinance or the rules or any order or direction or instruction or notification which may have been issued in any manner whatsoever.

Mr. Kapil Sibal, learned senior counsel for the appellants, submitted that the studies which were conducted by the State indicated that mines had been abandoned and void created in forest land by the respondents and other persons who carried out non-forest activities in forest which had created serious problem of land degradation. As an example it was stated that in Jharia alone there was a total area of 6284 hectares of degraded land which required improvement. The degradation having been caused and void created on account of abandoned mines, the lands and its soil were required to be treated and it was thought proper that if the land was not reclaimed the State would not only lose that land forever but there would also be adverse effect on the surrounding area. It was in this background that the ordinance was issued, which was later replaced by an Act. The purpose of enacting this piece of legislation, it was contended, was provided in the preamble to the Bill, which was introduced for replacing the ordinance which was as follows:

> "To provide adequate resources for restoration and improvement of degraded unproductive forest land, compensate losses caused by the use of forest land for non-forest purposes and improve life support system for which an Ordinance, namely, The Bihar Restoration and Improvement of Degraded Forest and Taxation Ordinance, 1992 was promulgated.'"

It was, therefore, submitted that this Act was clearly relatable to Entry 49 of List II. The further contention was that the Act and its various provisions did not suffer from any other infirmity as held by the High Court. Mr. K.K. Venugopal, learned senior counsel and other learned counsel on behalf of the respondents contended that in pith and substance the tax in question cannot be regarded as a tax on land falling under Entry 49 List II. It was submitted that the impugned Act represents the third attempt to transgress to the occupied field and to tax minerals and mining activities by the State. The initial attempt was struck down by this Hon'ble Court in Orissa Cement Ltd. v. State of Orissa and Ors. [1991] Supp. 1 SCC 430 . According to the learned counsel the second attempt was made by the Cess and Other Minerals (Validation) Act 1992 passed by the Union Parliament but this also failed as the operation of the said Act which was initially stayed by the High Court, and was then read down by it in its judgment dated 17th January, 1996 as having a limited application in only staying the refund of taxes already recovered by the State of Bihar prior to 4th April, 1991, the date of the Orissa Cement judgment. Therefore, it is contended, the history prior to the promulgation of the impugned act clearly shows that this a colourable piece of legislation brought about in an attempt to continue to levy the tax, cess or royalty which had been declared to be void but had been validated by the Parliament only for a limited period upto 4th April, 1991. Though the law had been cast in such a fashion so as to give an environmental flavour, in effect, the only purpose of this Act was to tax the mining or the non forest activities and the Act in question has transgressed the field occupied by the Central Act and the same could not be regarded as falling under Entry 49 of List II.

In order to appreciate the rival contentions of the parties, it will be appropriate to refer to the salient features of the impugned Act and the Rules framed thereunder. The relevant provisions of the said Act are as follows:

> "1. Short title, extent and commencement-[l] This act may be called the Bihar Restoration and Improvement of Degraded Forest Land Taxation Act, 1992.
>
> (2) It extends to the whole of the forest land in the State of Bihar.
>
> (3) It shall come into force at once.
>
> 2. Definition - In this Act unless the context otherwise requires-
>
> (a) "appellate authority" means an authority appointed under sub-section (1) of section 7 by the State Government;
>
> (b) "biological reclamation" means restoration of vegetal cover by such means as may be deemed suitable;
>
> (c) "Collector" means the Collector of the District and the Additional Collector and any other officer, specially empowered as Collector by the State Government under this Act;
>
> (d) ' 'excavation" means making hollows either on surface or under ground by whatsoever means;
>
> (e) "forest land'' means any land notified as such under any Act and/or recorded as forest in revenue records;
>
> (f) "forest use" means use of forest land for the purpose of forestry, agriculture, horticulture, or any allied and ancillary activities;
>
> (g) "government" means the Government of the State of Bihar;
>
> (h) "mechanical reclamation" means restoring the original contour as far as possible and/or filling up of void;
>
> (i) "non-forest use" means any use other than forest use;
>
> (j) "open cast excavation" means an excavation confined to land surface only;
>
> (k) "occupied" means a person in possession of an area of excavated and voided land;
>
> (1) ' 'prescribed'' means prescribed by the rules named under this Act;

(m) "user" means a person who used or shall use an area of forest land for non-forest purpose or purposes, to use such area of forest land;

(n) "vegetative density" 10, 0.9,0.8,0.7, 0.6, 0.5,0.4, 0.3,0.2 and 0.1 density means 100.90, 80, 70,60, 50,40,30,20, and 10 per cent respectively of a unit area of the forest land not receiving sunlight due to effective tree growth or green canopy;

(o) "void" means any area of left over forest land from where soil, any mineral or rock or ore or anything being fastened with the earth has been removed for non-forest purpose, transported or dumped at a place other than the place from where the same was taken;

(p) "Zero density" means a forest land having only bushes and grass but no tree.

3. Levy and collection of tax-(1) There shall be levied, assessed and collected a tax called the Bihar Restoration and improvement of Degraded Forest Land Tax for mechanical and biological reclamation of forest land and for rehabilitation so that the land is reclaimed as far as possible and the tax shall be levied, assessed and collected at the rate specified under the schedule appended to this Act in the manner as may be prescribed :

Provided that the Government shall have the power to amend the schedule by rules as and when considered necessary.

2 The tax under sub-section (1) shall be payable by

(a) every user allowed by the State Government to use forest land for non-forest purpose;

(b) every occupier responsible for creating void/voids by indulging in any developmental activities including mining.

3. (a) The rate of taxation given against serial numbers (a), (b) and (c) of the Schedule shall apply to forest land already voided immediately before the date of commencement of this Act, and the areas of the forest land being voided, or the area that may be voided after the date of commencement of this Act;

(b) The rate of taxation given against serial numbers (d) to (f) of the Schedule shall be applicable in case of use of forest land with different vegetative density which is used for non-forest purpose;

(c) An user/occupier engaged in excavational activities against serial numbers (a), (b) and (c) and also using forest land for non-forest purpose against serial numbers (d), (e) and (f) shall be liable for taxation at the rate as specified in the Schedule.

SCHEDULE (SEE SECTIONS 3)

(a) In respect of mechanized Rs. 40/M of land voided, subject open cast excavation. to a Maximum of Rs. 55.00 lacs per hectare of land excavated.

(b) In respect of non-mechanical Rs. 21/M of land voided, open cast excavation.

(c) In respect of underground excavation/subsidence area.

Rs. 30/M of land voided/subsided subject to a maximum of Rs. 45.00 lacs per hectare of land excavated/ subsided.

(d) In respect of use of forest Rs. 125 lacs per hectare land for land of density 1.0 (1.0 use for 50 years thus Rs. 2.50 lacs density means 100% of a unit per hectare for one year, area of the land not receiving sunlight due to effective growth of tree or green canopy).

(e) For forest land with density varying from 0.9 to 0.1.

(f) In respect of use of forest land having zero density (No tree, only bushes, and grass) Tax in proportion to the rates in category (d) in accordance with density.

Rs. 6 lacs per hectare of land for use for 50 years thus Rs. 12,000 per hectare of land for one year.

By notification dated 5th June, 1992 Rules were framed which required furnishing of return within thirty days of the notification and thereafter by 31st January of every year showing the area of forest land voided and/or being voided and the area of forest land used and/or being used for non- forest purposes. Rule 5 provides for assessment of tax and the issuance of demand notice indicating the amount of tax payable by the user and/or occupier as the case may be.

Mr. Kapil Sibal fairly conceded that in view of the provisions of the Mines and Minerals Development Act and the Forest Conservation Act, 1980 unless it could be established that this Act is relatable to Entry 49 of List II and can be regarded as a tax on land, the State Legislature would not have the legislative competence to enact the same, It was, therefore, submitted by Mr. Sibal that the tax fails within Entry 49 of List II since the same is levied on land as a unit and the legislation does not relate to regulation of mines and minerals development. He referred to the aforesaid provisions of the Act and submitted that Section 3 was the charging section and the same had to be read along with the schedule. Reading the two together, it was clear that the levy of tax is relatable to the rehabilitation of the land which had been voided, wholly or in part. In computing the amount of tax to be paid the schedule to the Act indicated that the rate is relatable to the extent to which the land has been voided. The levy, it was contended, is not with reference either to the quantum of mineral produced or the value of mineral recovered and nor is the levy related to the royalty recovered by the State at the pit-head. The tax is related to the cost of reclamation and the same is recoverable from the occupier responsible for creating voids by indulging in developmental activities including mining. The operation of the two acts, namely, the MMRD Act and the impugned Act were

in entirely different fields and nor did the operation of the impugned legislation directly or indirectly deal with matters covered by the Forest Conservation Act, 1980. It was contended that even though a part of the said legislation may effect another entry in the Union List, the same will not render the State Legislature unconstitutional once in pith and substance the impugned legislation fell within the entry in the State List. It was submitted that looking at the Act as a whole the tax in question, in pith and substance, was a tax on land to the extent to which it had been voided. That the tax not relatable to the carrying on of the non-forest activity was sought to be demonstrated from the fact that if the land had been rehabilitated or restored by the occupiers, and there was no voiding of land, then no tax was leviable.

What is the 'tax on land' has been a subject matter of judicial decisions of this Court. Therefore, before examining the submissions of the parties it will be appropriate to refer these decisions and then to examine whether the tax in question can be regarded as tax on land as envisaged by Entry 49 of List II.

In Sudhir Chandra Nawn v. Wealth Tax Officer, Calcutta and Ors., [1961] 1 SCR 108, in relation to the challenge to the Wealth Tax Act a contention had been raised to the effect that the expression 'net wealth' in that Act included non-agricultural lands and buildings and the power to levy tax on that was reserved to the State Legislatures by Entry 49 of List II of the 7th Schedule and, therefore, the Parliament was incompetent to legislate for the levy of wealth tax on the capital value of assets which included non-agricultural lands and building. While upholding the validity of the Act this Court neld that Entry 49 of List II of the 7th Schedule contemplates the levy of tax on lands and buildings or both as units. Tax on lands and buildings is directly imposed on lands and buildings and bears a definite relation to it. This decision was followed in the case of Second Gift Tax Officer, Mangalore, Etc. v. D.H. Nazareth Etc., [1971] 1 SCR 195, where this Court had to deal with the validity of the Gift Tax Act 1958. The contention raised was that gift tax could not be levied by the Parliament on the gift made by the assessee of a coffee plantation and other properties in favour of his sons. The High Court had upheld the contention and had held that Entry 49 of List II read with Entry 18 of the same list reserved the power to tax lands and buildings to the Legislature of the States and the Parliament could not, therefore, use the residuary power conferred by Entry 97 of the Union List. While allowing the appeal this Court held at page 200 that "Since entry 49 of the State List contemplates a tax directly levied by reason of the general ownership of lands and buildings, it cannot include the gift tax as levied by Parliament," Entry 49 of List II came up for consideration, once again, in India Cement Ltd and Ors., v. Stole of Tamil Nadu and Ors., [1990] 1 SCC

12. The Court was considering the validity of the levy of cess on royalty payable by a lessee on the extraction of minerals. In defending the validity of the levy the State Government had, inter alia, sought to rely on Entry 49 of List II and had contended that in pith and substance the cess was a tax on land. While approving the decision of a Division Bench of the Madhya Pradesh High Court in the case of Hiralal Rameshwar Prasad v. State of Madhya Pradesh, (1986) MPLJ 514 in which it had been held that the development cess levied by Section 9 of the M.P. Karadhan Adhiniyam 1982 was ultra vires, this Court held that cess on royalty could not be sustained under Entry 49 of List II as being a tax on land. In coming to this conclusion it was observed at page 26 that "It appears that in the instant case also no tax can be levied or leviable under the impugned Act if no mining activities

are carried on. Hence it is manifest that it is not related to land as a unit which is the only method of valuation of land under Entry 49 of List II, but is relatable to minerals extracted," Again at page 27 of the report it was held that "The expression 'land' according to its legal significance has an indefinite extent both upward and downwards, the surface of the soil and would include not only the face of the earth but everything under it or over it." in Union of India v. H.S, Dhillon, [1972] 2 SCR 33 a seven judge Bench of this Court was again called upon to consider the validity of the Wealth Tax Act and in dealing with the contention relating to Entry 49 of List II at page 70, after reviving the earlier decision, the entry was explained as follows :

> "The requisites of a tax under entry 49, List II may be summarised thus:
>
> (1) It must be a tax on units, that is lands and building separately as units.
>
> (2) The tax cannot be a tax on totality, i.e.., it is not a composite tax on the value of all lands and buildings.
>
> (3) The tax is not concerned with the division of interest in the building or land. In other words, it is not concerned whether one person owns or occupies it or two or more persons own or occupy it.

In short, the tax under entry 49, List II is not a personal tax but a tax on property."

The validity of the levy of cess on royalty charged for mining levied by the Cess Acts of the States of Orissa, Bihar, Bengal and Madhya Pradesh came up for consideration before this Court in the case of Orissa Cement Ltd. v. State of Orissa and Ors., [1991] Supp. 1 SCC 430 where again relying upon the earlier decisions, this Court held that tax on land envisaged by Entry 49 of List II "must be one directly imposed on land levied on land as a unit and bearing a direct relationship to it." The last authority which needs to be referred to in this connection is of State of Orissa and Ors., v. Mahanadi Coalfields Ltd. and Ors., [1995] Supp. 2 SCC 686 where this Court was called upon to determine the competence of the State Legislature to levy tax on coal bearing lands levied under Orissa Rural Employment, Education and Production Act, 1992. This Act had been promulgated with a view to provide additional resources for promotion of education and employment in rural areas and for implementing rural employment, education and production programmes. The Act sought to levy rural employment, education and production tax only on mineral bearing land and coal bearing land. The validity of the Act having been challenged, the High Court held that the State Legislature did not have the competence to levy tax on coal bearing land. In appeal the legislative competence was sought to be derived from Entry 49 of List II. Rejecting this contention and following the ratio of the earlier decision of this Court, it was held that the levy in that case was in substance on minerals and mineral rights and not on land and was beyond the competence of the State Legislature and did not fall within Entry 49 of List II. Applying the ratio of the aforesaid decisions to the facts of the present case we find that the position is no different. Entry 49 of List II has been interpreted to mean the levy of tax directly on land as a unit. The land has been regarded as meaning the land on surface and also below the surface. Therefore, in order that a tax can be levied under Entry 49 of List II it is essential that 'land' as a unit must exist on which the tax is imposed. In the

instant case the tax is, in effect, being levied not on land but on the absence of land. The levy is on the void which has been created. The forest land which is being used is not subjected to tax. The schedule to the Act itself shows that the assessment of tax is on excavation and use of forest land for non- forest purpose. The schedule further says that the rate of tax to be levied, in the case of mining or excavation varies with the extent of the land voided. In case the land has been rehabilitated no tax is to be levied. The tax is levied in effect on the activity of the removal or excavation of land. In other words the tax is squarely on the activity of mining because it is under the mining lease that mechanized and non- mechanized excavation as well as underground excavation takes place and this is what is referred to in column 1 of the schedule to the Act while determining the amount of tax leviable. Levy in other words is on the activity of removal of earth and not on the land itself and is, therefore, outside the ambit of Entry 49 of List II.

There is yet another reason why this tax cannot be regarded as being a tax on land. Section 3 read with the Schedule (and clauses (a), (b) and (c) of the Act says that the tax is not on the surface of the land but is on the extent to which destruction has taken place. It is with reference to the extent of the empty space or the void which has been created as a result of the mining activity that the tax is levied. Tax, in effect, is levied on the absence of land and not on land itself. At the most this may be regarded as a tax in respect of land but it is certainly not a tax on land. The existing land or trees are not taxed the tax is leviable only when a non-forest activity takes place and the land is not rehabilitated. Therefore, in pith and substance it is a tax on activity on land and not on land itself.

Mr. Sibal placed strong reliance on the decision in the case of Goodriche Group Ltd and Ors. v. State of West Bengal and Ors., [1995] Suppl. 1 SCC 707 in support of his contention that the levy was on land itself and that the Act would be covered by Entry 49. Goodriche'si case is clearly distinguishable. There education cess and rural employment cess were levied on certain lands and buildings in the State of West Bengal. The estates were carved out as a separate category and a different rate was prescribed therefor. The cess on tea estates was calculated on the basis of yield of tea whereas cess on other lands was determined having regard to the development value of the same. It was held that the tax was upon land though the cess was quantified on the basis of produce of the tea estate. In the present case, however, we do not find that the tax is on land. In fact what is sought to be taxed is in the absence on land. There being this fundamental difference the decision in Goodriche's case can have no application merely because in that case the quantum of cess on the estate to be charged depended on the quantity of tea dispatched from the tea estate. The tax, in other words, was on the existing tea estate but, for the purpose of calculating the tax it was relatable to the quantum of the tea dispatched as a measure of the tax.

One of the facets of tax being levied on land is that the primary responsibility of the payment of tax is on the owner of the land. In the instant case the levy is not on the general ownership of the land but is on the person who uses it and who may or may not be the owner. The primary liability is on the use by the occupier and if the occupier and the owner are two different persons the liability would be that of the occupier alone and not of the owner.

The provisions of clauses (d), (e) and (f) of the schedule of the Act, in effect and substance, amount to levy of tax on the use of forest land for non-forest purposes and for rehabilitating the forest land.

The Forest Conservation Act, 1980 and the rules and guidelines made thereunder contain complete provisions for reclamation and rehabilitation of such land. Planting and re-planting trees thereon is a matter clearly covered by the said Act, 1980 and therefore, the said clauses (d) to (f) of the Schedule in the impugned Act directly impinge on the analogous provisions of the Forest Conservation Act, 1980.

From the aforesaid discussion it is obvious that the present tax is one on the excavation and use of forest land and not on the forest land as such. Taxing of the undertaking of non-forest activity in a forest land cannot be regarded as being covered by Entry 49 of the State List because what is sought to be taxed is not land but the tax is on absence of land or forest by reason of the activity of excavation and/or mining or use of forest land for a non-forest purpose. The High Court was, therefore, right in allowing the writ petitions filed by the respondents. As, in our opinion, legislative competence was lacking in the enactment of this Act, it is not necessary for us to consider the other questions or issues which were raised and decided by the High Court.

For the aforesaid reason we find no merit in these appeals which are consequently dismissed with costs.

Appeals dismissed.