A GOODRICKE GROUP LTD. ETC.

v.

STATE OF WEST BENGAL AND ORS.

NOVEMBER 25, 1994

B [B.P. JEEVAN REDDY, SUHAS C. SEN AND K.S. PARIPOORNAN, JJ.]

Constitution of India—Entry 249, List II, Seventh Schedule—West Bengal Taxation Laws (Section Amendment) Act 1989—Sections 2, 3, amending West Bengal Primary Education Act 1953 and West Bengal
C *Rural Employment Production Act 1976, Section 4—Cess on tea estates levied annually assessed on the basis of plucked and unprocessed green tea leaves—Whether cess is levy on land or tax on production of tea—Held, calculation of cess on the basis of yield is accepted mode of levy of tax on land—Cess is upon 'tea estate' quantified on basis of quantum of produce of tea estate—It is not cess on production—State legislature, therefore, has*
D *power to levy impugned cess—India Cement case, which held cess on royalty to be beyond competence of State legislature, distinguished—Entry 45, List II, Seventh Schedule—Legislature competence—Precedent.*

Constitution of India—Entry 249, List II, Seventh Schedule—Pith and substance—Legislative lists—Held, where there are three lists containing
E *large number of entries, overlapping inevitable—Rule of pith and substance to be applied to determine the entry to which given legislation relates—Once determined, any incidental trenching on field reserved to other legislature of no consequence—Power of legislature to make law with reference to entry 249, List II is plenary—Interpretation of statutes—*
F *Legislative competence.*

Constitution of India—Entry 249, List II, Seventh Schedule—Levy on land—Incidents of—Held, tax need not be uniform or constant over number of years—Held further, tax may be based on current years income—Removing produce of the land from plant or tree before assessing tax
G *doesn't alone sever connection between land and tax—Making person in possession of land or building liable for payment of tax, held, is well-known feature of enactments relatable to entry 249, List II—Labour and capital investment on land in producing yield or income does not alter character of tax on land—Prescribing uniform method of levy of cess not*
H *discriminatory—Taxing statutes—Statute law.*

West Bengal Taxation Laws (Second Amendment) Act 1989—Retrospectivity—Rectified and remedied enactment given retrospective effect for period covered by anterior provisions which were struck down, held, valid.

Constitution of India—Entry 52, List I, Seventh Schedule—Tea Act 1953—Sections 2 and 25—West Bengal Taxation Laws (Second Amendment) Act 1989—Section 4—Whether declaration under Tea Act affects competence of legislature to levy cess on land comprised in tea estate—Held, Tea Act concerned with tea industry, whereas impugned cess is on land comprised in tea estate—State legislature's competence upheld—Pith and substance.

Statute Law—Validity—Held, validity of laws to be judged with reference to ordinary, prudent person.

The West Bengal legislature enacted the West Bengal Primary Education Act, 1953 and the West Bengal Rural Employment and Production Act, 1976 to provide for primary education throughout the State and to provide employment in rural areas, respectively. For raising funds for the said purposes, the State legislature imposed two cesses upon certain lands and buildings in the state. By the West Bengal (Taxation Laws) Amendment Act, 1981, tea estates were carved out as a separate category of immovable properties on which cess was levied. The separate rate prescribed therefore was based upon the despatches from the tea estates on the tea grown therein, and the state government was empowered to make certain exemptions in this regard. This amendment was questioned by a number of tea estates in writ petitions and decided by a two-member Bench of this Court in *Buxa Dooars Tea Co. Ltd.* v. *State of West Bengal,* [1989] 3 SCC 211.

This Court found that the levy was essentially upon despatches though purporting to be a levy upon the tea estates. They pointed out further that the quality of tea produced in all tea estates in the state was not uniform, that there was no nexus between the tea estate and the varied treatment accorded in respect of despatches of the different kinds of tea. The amendment was accordingly held to be violative of Article 301 of the Constitution. Further, referring to the Tea Act, 1953 by which Parliament assumed control over the tea industry including the tea trade, and that, if the levy is in substance on despatches of tea it cannot be held to be tax on lands under Entry 49 List II, this Court found the impugned amendment void for want of legislative competence as it pertained to a covered field.

A Following this decision, the State of West Bengal enacted the West Bengal Taxation Laws (Second Amendment) Act, 1989 ('Amendment Act, 1989') with retrospective effect. By this amendment, the cesses were to be levied annually on a tea estate at the rate of 12 paise for each kilogram of plucked and unprocessed green tea leaves produced in each tea estate. The State Government was empowered to exempt certain B categories of tea estates from the cess. The cess collected, and assessments made on proceedings taken under the Amendment Act, 1981 were validated.

The levy of the cess by the Amendment Act, 1989 was challenged in writ petitions before this Court. It was contended that the impugned C levy was not upon land within the meaning of Entry 49 List II of the Seventh Schedule and therefore the State legislature lacked legislative competence. In this context, it was argued that the levy in question was really a tax on production of tea and not on land; that a tax on land must be a constant figure whereas the impugned levy would vary from D year to year based as it is on the quantity of tea produced in a tea estate in a given year; that in fact there may be no production of tea leaves at all in a given year if, for instance, an owner were to decide to leave the leaves unplucked; that the definition of tea estate which included fallow land and land covered by the factory and other buildings further establishes the absence of nexus between the cess and the land. Strong E reliance was placed upon the decisions of a seven judge bench in *India Cement Ltd.* v. *State of Tamil Nadu,* [1990] 1 SCC 12 and a three judge bench in *Orissa Cement Ltd.* v. *State of Orissa,* [1991] 1 SCC 430. It was also pointed out that the provision for exemption, which *Buxa Dooars* pointed out was a vitiating factor, continues in the present Act.

F For the State it was argued that the impugned cesses were within the purview of "taxes of lands and buildings" in Entry 49 of List II of the Seventh Schedule. Alternatively, it was sought to be justified as "land revenue" within the meaning of Entry 45 of List II of the Seventh Schedule.

G Dismissing the petitions, this Court

HELD : 1. The State legislature has the power to levy the impugned cess. Since the impugned levy is in pith and substance a levy of tax on land and the produce of the land is merely brought in for the H purpose of quantifying the tax, it is not outside the competence of the

State legislature either as being an imposition of excise duty within the meaning of entry 84 List II, or by virtue of section 2 of the Tea Act, 1953 as contemplated by entry 52 List I. [162 A, 161 G] A

Baijnath Kadio v. *State of Bihar,* [1969] 3 SCC 838, referred to.

2. The declaration under section 2 of the Tea Act has no relevance to the State legislature's competence inasmuch as the impugned cess is not a cess on the tea industry but a cess on the land comprised in a tea estate. The levy contemplated under section 25 of the Tea Act, 1953 and the levy provided by the impugned enactment are altogether different and distinct in character, inasmuch as the Tea Act, 1953 is concerned with the tea industry whereas the impugned cess is not a cess on the tea industry but a cess on the land comprised in the tea estate. The fact that ultimately the tax may have to be borne by the tea industry is no ground for holding that the said levy is upon the tea industry. B C

[161 E, D, F]

Ganga Sugar Co. v. *State of U.P.,* [1980] 1 SCR 769 and Federation of Hotel and Restaurant Association (supra), referred to. D

3. Merely because a tax on land or buildings is imposed with reference to its income or yield, it does not cease to be a tax on land or building. The income on yield of the land or building is taken merely as a measure of the tax; it does not alter the nature or character of the levy. It still remains a tax on land or building. There is no set pattern of levy of tax on lands or buildings— indeed there can be no such standardisation. The legislature is free to adopt such method of levy as it chooses and so long as the character of the levy remains the same, *i.e.*, within the four corners of the particular entry, no objection can be taken to the method adopted. [141 D, E] E F

Sir Byramjee Jeejeebhoy v. *State of Bombay,* AIR (1940) Bom 48, *Ralla Ram* v. *Province of East Punjab,* AIR (1949) FC 81, v. *Pattabhiraman* v. *Asst. Commr., Urban Land Tax,* AIR (1971) Mad 61, *Ajoy Kumar Mukherjee* v. *Local Board of Barpeta,* AIR (1965) SC 1561, *Kunnathat Thathunni Moopil Nair* v. *State of Kerala,* [1961] 3 SCR 77, *Assistant Commissioner* v. *Buckingham and Carnatic Co. Ltd.,* [1970] 1 SCR 268, *Subramanyam Chettiar* v. *Muthusami Goundar,* (1940) FCR 188, *Federation of Hotel and Restaurant Association* v. *Union of India,* [1989] 3 SCC 634, *Express Hotels (P) Ltd.,* v. *State of Gujarat,* [1989] 3 SCC 677 and *Governor General in Council* v. *Province of Madras,* (1945) FCR 179, relied on. G H

A The cess in the cases before this Court is calculated on the basis of yield— for every kilogram of tea leaves produced in a tea estate, a particular cess is levied. That is a well-accepted mode of levy of tax on land. The tax is upon the land— upon the tea estate which is classified as a separate category, as a separate unit, for the purpose of levy and assessment of the said cess quantified on the basis of the quantum of B produce of the tea estate. It cannot be characterised as on production for this reason. [141 F, G]

Kunnathat Thathunni Moopil Nair v. *State of Kerala* supra, relied on.

4. There is no basis for saying that the impugned cess is not a tax C upon the land directly. The mere fact that it is measured with reference to the yield of the land does not make it any the less a tax upon the land directly. [151 A]

Sudhir Chandra Nawn v. *Wealth Tax Officer, Calcutta,* [1969] 1 SCR 108 and *Second Gift Tax Officer, Mangalore* v. *D.H. Nazareth,* [1971] 1 D SCR 195, explained and distinguished.

Ajoy Kumar Mukherjee supra relied on.

Assistant Commissioner of Urban Land Tax v. *Buckingham and Carnatic Co. Ltd.,* [1970] 1 SCR 268, referred to.

E 5. Tea estate is a well-understood entity and can legitimately and reasonably be classified as a separate category for the purpose of taxation and the rate of tax. Such classification has, in any event, not been questioned in this case. [134 G]

F 6. That a wide discretion has to be conceded to the legislature in matters of taxation is well-established. So also is the proposition that the several entries in the Seventh Schedule are legislative heads and must be construed liberally. It is equally well-recognised that where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation, the rule G of pith and substance has to be applied to determine to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The extent of encroachment may however be an element in determining whether the Act is a colourable piece of legislation. Where the legislative competence of Parliament to enact a H law is questioned, all that one has to ask is whether it relates to any of

the entries in List II and if it is not, no further question need be asked and Parliament's legislative competence must be upheld. [134 F, 135 B to D]

H.S. Dhillon v. *Union of India,* AIR (1972) SC 1061 relied on.

However, before exclusive legislative competence can be claimed for Parliament, the legislative competence of the State legislature must be clearly established. [135 E]

International Tourist Corporation v. *State of Haryana,* AIR (1981) SC 774, relied on.

In our constitutional system, where all important legislative heads are assigned to the Centre, the court should be slow to adopt any interpretation which tends to deprive the States of the few powers assigned to them under the Constitution. [135 F]

B.P. Jeevan Reddy J., *in S.R. Bommai* v. *Union of India,* [1994] 3 SCC 1 and *Sundararamier* v. *State of A.P.,* [1958] SCR 1422, referred to.

7. The presumption in favour of constitutionality obliges the court to sustain an enactment, if necessary, by relating it to an entry other than the one relied upon by the government, if that can be reasonably done. Moreover it is the function and power of the court to interpret an enactment. It is equally the function and power of the judiciary to say to which entry does an enactment relate. The opinion of the government in this behalf is but an opinion and no more. [156 A, B]

Sanjeev Coke Mfg. Co. v. *Bharat Coking Coal Ltd. and Anr.,* [1983] 1 SCR 1000, referred to.

8. The decision in *India Cement* is distinguishable and not relevant herein as the levy in that case is altogether on a different basis for which reason it was held to be outside entry 49 List II. The Court in *India Cement* found that it was a case where the tax was measured not with reference to or on the basis of income or yield of the land, but with reference to the amount of royalty payable by the lessee to his lessor. It was for this reason that the tax was held to be not upon the land. Royalty is a matter of agreement between the lessor and the lessee, it may also be determined by a statutory provision. But royalty is not the produce of the land; royalty is not the income of the land nor is it the yield of the land— and that is the distinction. It is significant that the concept of royalty was understood by the court in India Cement to be a

A tax, and as such a cess on royalty being a tax on royalty was found to be beyond the competence of the State legislature. It would be wrong to read the India Cement decision as overruling the innumerable decisions rendered with reference to entry 49 List II (or the corresponding entry in the Government of India Act, 1935) which have upheld levy upon land and building measured on the basis of their yield or income. The B decision in India Cement must be understood consistent with and in continuation of the earlier decisions on the subject.

[142 H, D, E, F, 143 A, B]

India Cement Ltd. v. *State of Tamil Nadu,* [1990] 1 SCC 12, explained and distinguished.

C

Orissa Cement Ltd. v. *State of Orissa,* [1991] 1 SCC 430, following India Cement (supra) distinguished.

H.R.S. Moorthy v. *Collector of Chittoor,* [1964] 6 SCR 666, referred to.

D 9. Tax on royalty is not tax on land with reference to income since royalty is not the income of the land but an exaction payable by the lessees of the land to the lessor/owner. A tax imposed on land measured with reference to or on the basis of its yield, however, is certainly a tax directly on the land. Apart from income, yield or produce there can E perhaps no other basis for levy. [145 C, D]

India Cement Supra distinguished.

State of A.P. v. *Nalla Raja Reddy,* [1967] 3 SCR 28, referred to.

10. In deciding whether there is a reasonable connection between F the tax and the land, one has to go by the generality of the situation. The validity of laws are not to be judged with reference to freaks, but an ordinary prudent owner/occupier. No ordinary person would leave the tea estates to nature or leave the leaves to wither on bushes. Moreover section 16 B (1) (b) of the Tea Act, 1953 read with sections 16C and 16D provides for investigation into the affairs of the tea estate G and even assuming management of the estate by the Central Government to ensure the production of tea at the expected levels.

[153 G, D, F]

India Cement supra distinguished.

H *R. K. Garg* v. *Union of India,* [1982] 1 SCR 947, relied on.

11. G.L. Oza, J.'s opinion in India Cement that the three elements of land, labour and capital are required for extracting minerals, that royalty is therefore a tax/imposition/levy not on land alone but on labour and capital as well, and that cess levied on royalty could not be said to be tax on land, was not shared by the other learned judges. Moreover, the said theory flies in the grain of all the previous judgments of this Court and the Federal Court on the subject. It has been held uniformly that a tax on land within the meaning of entry 49 List II can be levied with reference to their yield or income. It will be difficult to imagine a situation where a land yields income worth the name without any labour and/or capital investment. On that account, the tax levied on land but quantified with reference to the income/yield of the land cannot be characterised as a tax other than tax on land. [148 A, C, D, E]

G.L. Oza, J. in *India Cement* dissented from

12. It is not the essence of a tax— nor a condition of its validity - that the tax must be constant or uniform for all the years or for a particular number of years. The variation between the amount of tax from year to year does not reflect upon the character of the tax. [151 C, D]

13. If a tax on land can be assessed on the basis of the previous year's income, there is no reason why it cannot be levied on the current year's income. The power of the legislature to make law with reference to entry 49 List II is plenary like any other entry in List II. It is open to the legislature to adopt such formula as it thinks appropriate for levying the tax and so long as the character of the tax remains the one contemplated by the entry, it does not matter how the tax is calculated, measured or assessed. [151 H, G]

Venkateshwara Theatre v. *State of A.P.*, [1993] 3 SCC 677, referred to

14. The income on yield of land and building, reasonably speaking, cannot include income from the manufacturing activity carried on such land or the income of an industry if run upon such land. The products of such manufacturing activity and industry would be the products of such manufacturing activity and industry, as the case may be, and not of land, whereas the tea leaves are the produce/yield of the land. The distinction is too obvious to be glossed over. [153 B]

15. It cannot be said that the moment tea leaves are plucked, they are no longer attached to or form part of the land, and that levy of tax

A with reference to such plucked tea leaves cannot be called a tax on land. Generally speaking, unless the produce of the land is removed from the plant or tree, as the case may be, the yield of the land or its income cannot properly be assessed. If the tax is calculated or assessed on the basis of such yield or income, it cannot be said that for that reason alone there is no reasonable connection between the land and the tax.
B [154 A, B]

16. The main holding in Buxa Dooars is that levy impugned therein violates Article 301. The argument about entry 49 of List II was referred to only for the purpose of saying that the levy on the despatches of the tea cannot be related to the said entry. The provision
C for exemption contained in the impugned enactment, cannot be treated as a ground or reason for holding the said levy to be a levy not on land but on something else. There is no principle nor any authority in support of the said proposition. [155 A, B]

Buxa Dooars supra explained

D

17. Making the person in actual possession of land or building, whether it be the owner or the transferee, liable for the payment of the tax is a well-known feature in enactments relatable to entry 49 List II and cannot be faulted. [155 E]

E 18. There is force in the alternative submission for the State of West Bengal that the impugned levy can also be sustained with reference to entry 45 of List II as land revenue. [155 F]

19. Prescribing a uniform method of levy on all tea estates, where the quality of tea produced in one estate may differ from that produced
F in another estate is not discriminatory. [156 C]

Twyford Tea Co. Ltd. v. *State of Kerala,* AIR (1970) SC 1133, followed

20. Retrospective effect has been given to the enactment for the
G period covered by the anterior provisions which were struck down in *Buxa Dooars*. Once it is held that the defect pointed out in *Buxa Dooars* is rectified and remedied in the impugned enactment, it can be given retrospective effect to cover the period covered by the earlier enactment which is not only a well-known but a frequently adopted measure by all the legislatures. If the Act is good, it is good both
H prospectively and retrospectively. [162 H, 163 A, 162 G]

CIVIL ORIGINAL JURISIDCTION : Writ Petition (C) No. 1215 of 1989 Etc. Etc. A

(Under Article 32 of the Constitution of India)

Dr. D.P. Pal, K.K. Venugopal, Ashok H. Desai, R.F. Nariman, Ms. Priya Hingorani, D.P. Mukherjee, Rahul Dave, S. Ganesh, Sumoy J. Khaitan, P.P. Tripathi, Darshan Singh, Ms. Vijaylakshmi Menon and H.K. Dutt for the Petitioners. B

Shanti Bhushan, Santosh Hegde, T. Ramachandran, S.K. Dholakia, D.K. Sinha, J.R. Dass, A. Bal, A. Bhattacherjee and Ms. A. Subhashini for the Respondents. C

The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. The validity of the levy of education cess and rural employment cess created by the West Bengal Taxation Laws (Second Amendment) Act, 1989 is called in question in these writ petitions preferred by several tea estates in West Bengal. D

LEGISLATIVE BACKGROUND:

For a proper appreciation of the questions arising herein, it is necessary to have a glimpse of the legislative history behind the impugned Amendment Act. E

The West Bengal Legislature enacted The West Bengal Primary Education Act, 1953 and The West Bengal Rural Employment and Production Act, 1976 to provide for primary education throughout the State and to provide employment in rural areas respectively. For raising funds for the said purposes, the State Legislature imposed two cesses upon certain F lands and buildings in the State. Since the relevant provisions of both the enactments are similar, it would be sufficient to notice the relevant provisions of the West Bengal Rural Employment and Production Act, 1976. Section 4 (1) of the 1976 Act levies rural employment cess on all immovable properties on which road or public work cess is assessed or G liable to be assessed according to the provisions of the Cess Act, 1880. Section 4 (2), as originally enacted, prescribed different rates in respect of lands, coal mines and other mines on an annual basis. By virtue of the West Bengal Taxation Laws (Amendment) Act, 1981, tea estates were carved out as a separate category and a separate rate prescribed therefore. Sub-section (2) of Section 4, as amended in 1981, read as follows : H

A "4 (2) The rural employment cess shall be levied annually –

(a) in respect of lands, other than a tea estate, at the rate of six paise on each rupee of development value thereof;

(aa) in respect of a tea estate at such rate, not exceeding
B rupees six on each kilogram of tea on the despatches from such tea estate of tea grown therein, as the State Government may, by notification in the official Gazette, fix in this behalf:

Provided that in calculating the despatches of tea for the purpose of levy of rural employment cess, such despatches
C for sale made at such tea auction centres as may be recognised by the State Government by notification in the Official Gazette shall be excluded:

Provided further that the State Government, may fix different rates on despatches of different classes of tea.

D

Explanation : – For the purpose of this section, "tea" means the plant Camellia Sinensis (L) O. Kuntze as well as all varieties of the product known commercially as tea made from the leaves of the plant Camellia Sinensis (L) O. Kuntze, including green tea and green tea leaves, processed or
E unprocessed."

Sub-section (4) was introduced in Section 4 which empowered the State Government to exempt "such categories of despatches of such percentage of despatches from the liability to pay the whole or any part of the rural employment cess or reduce the rate....." By another amendment
F effected in 1982, the first proviso to clause (aa) in Section 4 (2) was omitted. Several notifications were issued by the Government from time to time as contemplated by Section 4 (2).

The levy of the said cess was questioned by a number of tea estates by way of writ petitions filed in this Court. Certain writ petitions filed in the
G High Court were transferred to this Court to be heard alongwith the said writ petitions, all of which were disposed of on May 12, 1989 by a Bench comprising R.S. Pathak, C.J. and M.H. Kania, J. [reported as *Buxa Dooars Tea Company Ltd. and Ors.* v. *State of West Bengal and Ors.*, [1989] 3 SCC 211. The challenge to the levy was based upon violation of Article 14 and Article 301 of the Constitution as also on the ground of lack of
H legislative competence on the part of the State Legislature. This court

examined the attack based upon Article 301 in the first instance. It held that the levy was really on the despatches of tea from the tea estates. It noted that the first proviso to Section 4 (2) (aa), since deleted, excluded the despatches of tea for sale made at such tea auction centres as may be recognised by the State Government by notification in the official Gazette from the levy. It further pointed out that the second proviso empowered the State Government to fix different rates on despatches of different classes of tea. Section 4(4), it noted further, empowered the Government to exempt such categories of despatches or such percentage of despatches from levy as the Government may think appropriate. Having regard to the said features, the Bench held, the levy was essentially upon despatches though purporting to be a levy upon the tea estates. The entire structure of the levy, the Bench pointed out led to the conclusion that it was a levy on despatches and not on tea estates and that there was no nexus between the levy and the tea estates. The learned Judges rejected the argument that the mode of levy was merely a measure of the tax. They pointed out further that the quality of tea produced in all tea estates in the State was not uniform and that the benefit of exemption or reduction in levy has no relation to the need of a particular tea estate for exemption from the levy. The learned Judges concluded, "when the provisions before us are examined in their totality, we find no such relationship or nexus between the tea estate and the varied treatment accorded in respect of despatches of different kinds of tea. It seems to us that having regard to all the relevant provisions of the statute, including Section 4 (2) (aa) and Section 4(4) in substance the impugned levy is a levy in respect of despatches of tea and not in respect of tea estates." Accordingly, the levy was held to be violative of Article 301 of the Constitution. The learned Judges then proceeded to consider the question of legislative competence and held that if the levy is, in substance, on despatches of tea, it cannot be held to be tax on lands. They referred to the declaration by the Parliament in Section 2 of the Tea Act, 1953 to the effect that it was expedient in public interest that Union should take under its control the tea industry and observed that Parliament has thereby assumed control of the tea industry including the tea trade and has also imposed a cess on tea produced in India under Section 25. The learned Judges observed: "it appears to us that the impugned legislation is also void for want of legislative competence as it pertains to a covered field."

A B C D E F G

As a result of the Judgment in *Buxa Dooars*, the State became liable to refund the cess already collected and the relevant schemes came under jeopardy. The West Bengal Legislature intervened to remedy the situation and enacted the West Bengal Taxation Laws (Second Amendment) Act, 1989, impugned herein.

H

A Section 2 of the impugned Act contains amendments tc West Bengal Primary Education Act while Section 3 sets out the amendments to West Bengal Rural Employment and Production Act, 1976. As mentioned hereinbefore, it would be enough to notice the amendments to the 1976 Act since the amendments to both enactments are identical.

B Clause (aa) in sub-section (2) of Section 4 was omitted with effect from April 1, 1981. After sub-section (2), sub-section (2A) was introduced with retrospective effect from April 1, 1981. Sub-section (2A) reads:

> "(2A) The rural employment cess shall be levied annually on a tea estate at the rate of twelve paise for each kilogram of
> C green tea leaves produced in such estate.
>
> *Explanation* — For the purposes of this sub-section, sub-section (3) and section 4B.
>
> (i) "green tea leaves" shall mean the plucked and unprocessed
> D green leaves of the plant Camelia Sinensis (L) O. Kuntze;
>
> (ii) "tea estate" shall mean any land used or intended to be used for growing plant Camelia Sinensis (L) O. Kuntze and producing green tea leaves from such plant, and shall include land comprised in a factory or workshop for producing any
> E variety of the product known commercially as "tea" made from the leaves of such plant and for housing the persons employed in the tea estate and other lands for purposes ancillary to the growing of such plant and producing green tea leaves from such plant."

F Clause (a) in sub-section (3) was also substituted which had the effect of making the owner of the tea estate liable for the said cess. The other provisions required the owner of the tea estate to maintain true and correct account of green tea leaves produced in a tea estate. Sub-section (4) was also substituted. The substituted sub-section (4) empowered the State Government to exempt from the cess such categories of tea estate
G producing green tea leaves not exceeding two lakhs fifty thousand kilograms and located in such area as may be specified in such notification. Section 4-B contains the validation clause. It says that any cess collected for the period prior to the said Amendment Act shall be deemed to have been validly levied by it and collected under the Amended Act. Any assessment made or other proceedings taken in that behalf for assessing and collecting
H the said tax were also to be deemed to have been taken under the Amended

Act. It is the levy of said cess (alongwith the Primary Education Cess) that is challenged in this batch of writ petitions filed under Article 32 of the Constitution. While issuing *Rule Nisi*, this Court directed that these writ petitions be heard by a Bench of three Judges and that is how they are now posted before us.

WHETHER THE IMPUGNED LEVY IS A LEVY UPON THE LANDS WITHIN THE MEANING OF ENTRY 49, LIST II. SCHEDULE VII OF THE CONSTITUTION?

The first and the main submission of the learned counsel for the petitioners in all its facets runs thus: the levy created by Section 2 and 3 of the impugned Amendment Act is not a tax on lands and buildings within the meaning of Entry 49 of List-II of the Seventh Schedule to the Constitution and is, therefore, beyond the competence of the State legislature; for being a tax on land, the levy must be directly upon the land whereas the levy in question is really a tax on production of tea, a subject covered by Entry 84 of List-I. A levy on tea leaves is not a levy upon the land. The defect pointed out in *Buxa Dooars* still continues under the impugned Amendment Act inasmuch as all that the impugned Act does is to levy the cess on production of green leaves instead of on despatches (as was done by the provisions struck down). A tax on land must be a constant figure whereas the impugned levy varies from year to year, based as it is on the quantity of tea produced in a tea estate in a given year; indeed, there may be a case where there is no production of tea leaves at all in a particular tea estate in a particular year in which event no cess would be payable in that year. The definition of 'tea estate' further establishes the absence of nexus between the cess and the land; 'tea estate' is defined to include not only the land covered by tea bushes but also the land covered by the factory and buildings; even fallow land within the tea estate is within the definition— all the same, the tea leaves produced in the land covered by tea bushes is made the basis of levy of cess upon the entire land comprised in a tea estate; if in a given year, the owner of the estate decides not to pluck the leaves at all, there would be no cess leviable altogether. All this shows that the tax is not really upon the land; there is no direct connection between the land and the levy; the levy is related to some other thing than the land. Strong reliance is placed upon the ratio of the seven-Judge Bench decision of this Court in *India Cement Ltd. and Ors.* v. *State of Tamil Nadu and Ors.*, [1990] 1 SCC 12 and the three Judge Bench decision in *Orissa Cement Ltd.* v. *State of Orissa and Ors.*, [1991] 1 SCC 430. It is pointed out that the provision for exemption, pointed out in *Buxa Dooars* as a vitiating factor, still continues under the impugned Act. For all these reasons, it is

A submitted, the levy is outside the purview of Entry 49, List-II of the Seventh Schedule to the Constitution.

The relevant provisions of the impugned Amendment Act have been set out by us hereinbefore. The levy of cess, according to sub-section (2A) (introduced by the said Amendment Act) is an annual levy. The levy is
B upon "a tea estate" at the rate of twelve paise for each kilogram of green tea leaves produced in such estate. Green tea leaves are defined to mean "the plucked and unprocessed green leaves" of the plant. Tea estate is defined to mean "any land used of intended to be used for growing (tea) plant.....and producing green tea leaves from such plant." The definition further includes the land comprised in a factory, workshop and buildings housing the
C persons employed in the tea estate as well as the lands ancillary to growing of tea plants within the definition of tea estate. Any land not falling within the aforementioned categories does not fall within the definition of tea estate. *Sub-section (2A) classifies the tea estate as a unit by itself for the purpose of levy of the cess and its rate.*

D It is evident that the definition reflects the generally obtaining situation. A tea estate normally has a factory, buildings for housing its officers and employees and land ancillary to the growing of tea plants. We are told that the tea plant has a life of fifty to ninety years. After forty to fifty years, however, it is stated, the yield starts diminishing and it gradually becomes uneconomic. Such bushes are generally removed and new bushes planted. It
E is thus a continuous process. For this reason, land intended for being planted with bushes is also included within the definition. The fact that in some cases there may be no factory or no building hardly makes a difference to the validity of the definition of the tea estate. The entire land covered in a tea estate as defined is treated as a separate category of land, as
F a unit, for the purposes of levy of the cess. That a wide discretion has to be conceded to the Legislature in matters of taxation is so well established as not to call for a reference to the decisions saying so. Indeed, classification of tea estates as a separate category for the purposes of the said levy is not even questioned before us. It may also be noticed that generally speaking no tea estate markets green tea leaves. By applying a particular process, the
G green tea leaves are converted into tea as commercially known and then marketed. It is thus clear that tea estate is a well-understood entity and hence can legitimately and reasonably be classified as a separate category for the purpose of taxation and the rate of tax.

According to the State, the impugned cesses are within the purview of
H "taxes on lands and buildings" in Entry 49 of List-II of the Seventh

Schedule. Alternately, they seek to justify it as "land revenue" within the meaning of Entry 45 of List-II.

The scheme of the entries in the three Lists in the Seventh Schedule is set out in the decision of this court in *Sunderaramier* v. *State of Andhra Pradesh,* [1958] SCR. 1422 and needs no reiteration. Similarly, the proposition that the several entries are legislative heads and must be construed liberally is too well-settled to require any elaboration. It is equally well-recognised that where there are three Lists containing a large number of entries, there is bound to be some over-lapping among them. In such a situation, the rule of pith and substance has to be applied to determine to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. Of course, the extent of encroachment may be an element in determining whether the Act is a colourable piece of legislation. Yet another relevant principle is the one enunciated in *H. S. Dhillon* v. *Union of India* A.I.R. (1972) S.C. 1061; where the legislative competence of the Parliament to enact a law is questioned, all that one has to ask is whether it relates to any of the entries in List-II and if it is not, no further question need be asked and the Parliament's legislative competence must be upheld. This decision also explains why did the founding fathers find it necessary to have three Lists. In *International Tourist Corporation* v. *State of Haryana,* A.I.R. (1981) S.C. 774, however, a caution has been administered that before exclusive legislative competence can be claimed for Parliament, the legislative incompetence of the State Legislature must be clearly established. In *S.R. Bommai* v. *Union of India,* [1994] 3 SCC 1, one of us (B.P. Jeevan Reddy, J.) cautioned that in our constitutional system, where all important legislative heads are assigned to Centre, the courts should be slow to adopt any interpretation which tends to deprive the States of the few powers assigned to them under the Constitution.

We may now deal with the question whether the levy in question is a levy on lands and buildings within the meaning of Entry 49 of List-II or whether it is outside the purview of the said entry?

In *Sir Byramjee Jeejeebhoy* v. *Bombay,* [1940] Bombay 48, property tax was levied 10% on the annual letting value of lands and buildings by the Bombay Finance (Amendment) Act, 1939. The levy was impugned as *ultra vires* the provincial legislature on the ground that it was in truth a tax on income or on the capital value of assets. Negativing the said contention, Broomfield, J. observed :

A "The main ground on which it is sought to be shown that the impugned tax is a tax on income is that it is assessed on the same basis as income-tax, that is on annual value or the amount at which the property may reasonably be expected to be let. *But the mode of assessment does not determine the character of a tax.* Annual value may be the basis of
B assessment of income-tax. It may also be the basis of assessment of a tax on capital, *e.g.*, in the case of succession to land under the Succession Duties Act in England; In *re Elwes* (1858) 28 L.J. Exch. 46, or again it may be the basis of assessment of rates such as the ordinary municipal rates in
C England, which are neither taxes on income nor taxes on property, but a personal charge on the occupier. Clearly it is impossible to say that the employment of annual value as the measure of the impugned tax is any indication that it is a tax on income."

D (emphasis added)

This Judgment was affirmed by the Federal Court in *Ralla Ram* v. *East Punjab,* A.I.R. (1949) F.C. 81 which has been followed ever since. In *Ralla Ram*, the question was whether the tax imposed by Punjab Urban Immovable Properties Act, 1940 was within the legislative competence of
E the provincial legislature or whether it was in truth and substance a tax upon the income of the person owning the property? The tax was levied on the basis of annual value of the buildings and lands. The '*annual value' was to "be ascertained by estimating the gross annual rent at which such land or building with its appurtenances and any furniture that may be left for use or enjoyment with such building might reasonably be expected to let from*
F *year to year.....*" The Federal Court exhaustively dealt with several English and Indian decisions on the subject and evolved the following principles:

"The principles deducible from these pronouncements are, (1) that where there is an apparent conflict between an Act of the Federal Legislature and an Act of the Provincial
G Legislature, we must try to ascertain the pith and substance or the true nature and character of the conflicting provisions, and (2) that before an Act is declared *ultra vires*, there should be an attempt to reconcile the two conflicting jurisdictions, and, only if such a reconciliation should prove impossible, the impugned Act should be declared invalid."

H

The learned Judge quoted with approval the observations in a Reference under the Government of Ireland Act, 1920 (1936 A.C. 352) to the following effect:

> "It is the essential character of the particular tax charged that is to be regarded, and the nature of the machinery, often complicated, by which the tax is to be assessed is not of assistance except in so far as it may throw light on the general character of the tax."

The Federal Court emphasised that "the annual value is not necessarily actual income, but is only a standard by which income may be measured", and pointed out further that merely because the Income Tax Act has adopted the annual value as the standard for determining the income, it does not follow that if the same standard is employed as a measure for any other tax, that tax becomes a tax on income. Applying the doctrine of pith and substance, it held that the Punjab tax is not a tax on income even though the basis of tax is the same as the one adopted by the Indian Income Tax Act. The encroachment into the federal field, it held, is not so great as to characterise it as a colourable piece of legislation. This decision has been uniformly followed by this court without exception.

In *V. Pattabhiraman v. Assistant Commissioner, Urban Land Tax,* (1971) Madras 61 the validity of Sections 5 and 6 of the Madras Urban Land Tax Act, 1966 was challenged on the ground that since the tax was based on the market value of the land it is really an income tax and, therefore, outside the purview of Entry 49 of List-II. The contention was negatived following *inter alia* the decision of the Federal Court in *Ralla Ram.*

In *Ajoy Kumar Mukherjee v. Local Board of Barpeta,* A.I.R. (1965) S.C. 1561 a Constitution Bench of this Court dealt with the challenge to the constitutionality of an annual tax levied by local boards upon land used for holding markets created by Section 62 of the Assam Local Self-Government Act, 1963. While dealing with the challenge, Wanchoo, J., speaking for the Court, observed:

> "It is well-settled that the entries in the three legislative lists have to be interpreted in their widest amplitude and, therefore, *if a tax can reasonably be held to be a tax on land it will come within entry 49.* Further *it is equally well-settled that tax on land may be based on the annual value of the land and would still be a tax on land and would not be beyond the*

A *competence of the State legislature on the ground that it is a tax on income.* [See *Ralla Ram* v. *Province of East Punjab,* (1948) FCR 207: AIR (1949) FC 81)]. *It follows, therefore, that the use to which the land is put can be taken into account in imposing a tax on it within the meaning of entry 49 of List II, for the annual value of land which can certainly* B *be taken into account in imposing a tax for the purpose of this entry would necessarily depend upon the use to which the land is put."*

(emphasis added)

C In *Kunnathat Thathunni Moopil Nair* v. *The State of Kerala and Anr.,* [1961] 3 S.C.R. 77, the Constitution Bench speaking through B.P. Sinha C.J., observed:

"Ordinarily, a tax on land or land revenue is assessed on the actual or the potential productivity of the land sought to be D *taxed. In other words, the tax has reference to the income actually made, or which could have been made. With due diligence,* and, therefore, is levied with due regard to the incidence of the taxation."

(emphasis added)

E In *Assistant Commissioner* v. *Buckingham and Carnatic Co. Ltd.,* [1970] 1 S.C.R. 268, the Constitution Bench observed:

"For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. F But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two entries overlapping. The two taxes are entirely different in their basic concept and fall on different subject matters."

G Ramaswami, J., speaking for the Constitution Bench, quoted with approval the classic observations of Sir Maurice Gwyer, C.J. in *Subramanyam Chettiar* v. *Muttuswami Goundan,* (1940) F.C.R. 188 at 201 to the effect:

"It must inevitably happen from time to time that legislation, H though purporting to deal with a subject in one list, touches

also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would résult in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance' or its 'true nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or in that : *Citizens Insurance Company of Canada* v. *Parsons* [1881] 7 A.C. 97; *Russell* v. *The Queen* [1882] 7 A.C. 829; *Union Colliery Co. of British Columbia* v. *Bryden* [1899] A.C. 580; *Att. Gen. for Canada* v. *Att. Gen. for British Columbia* [1930] A.C. 111; *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters,* [1940] A.C. 513. In my opinion this rule of interpretation is equally applicable to the Indian Constitution Act."

In *Federation of Hotel and Restaurant Association* v. *Union of India,* [1989] 3 S.C.C. 634, the Constitution Bench, speaking through M. N. Venkatachaliah, J. (as he then was) made the following pertinent observations:

"The subject of a tax is different from the measure of the levy. The measure of the tax is not determinative of its essential character or of the competence of the legislature. In *Sainik Motors* v. *State of Rajasthan,* [1962] 1 S.C.R. 517, the provisions of a State law levying a tax on passengers and goods under Entry 56 of List I were assailed on the ground that the State was, in the guise of taxing passengers and goods, in substance and reality taxing the income of the stage carriage operators or, at any rate, was taxing the "fares and freights", both outside of its powers. It was pointed out that the operators were required to pay the tax calculated at a rate related to the value of the fare and freight. Repelling the contention, Hidayatullah, J. speaking for the court said:

"We do not agree that the Act, in its pith and substance, lays the tax upon income and not upon passengers and goods. Section 3, in terms, speaks of the charge of the tax 'in respect of all passengers carried and goods transported by motor

A vehicles', and though the measure of the tax is furnished by the amount of fare and freight charged, it does not cease to be a tax on passengers and goods."

In the said decision, it has been further pointed out that:

B *"the true nature and character of the legislation must be determined with reference to a question of the power of the legislature. The consequences and effects of the legislation are not the same thing as the legislative subject matter. It is the true nature and character of the legislation and not its ultimate economic results that matters."*

C (emphasis added)

The decision also refers to what is known as the "aspects" doctrine and it is on the basis of the said doctrine that both the Expenditure Tax levied by Parliament and Luxury Tax levied by the Gujarat Legislature [subject matter of the decision in *Express Hotels Pvt. Ltd.* v. *State of Gujarat,* D [1989] 3 S.C.C 677 were sustained though they appeared to relate to the same matter. It was held:

"Indeed, the law with respect to a subject might incidentally 'affect' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be E overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects."

Reference was made *inter alia* to the decision of the Privy Council in F *Governor General in Council* v. *Province of Madras,* (1945) F.C.R. 1/9 where the distinction between the duties of excise and tax on sale of goods was explained in the following words:

"The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, G may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imports. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first H time on the occasion of its sale."

It was further pointed out, and which is of some relevance to us in this case, that : A

> "Petitioner's reference to legislative practice as determining the scope of the present legislation does not assist them. There are two infirmities in the contention....Secondly, there is no conclusive material indicating that the appropriate legislature had limited the notion of a tax of this kind within any confines. It is relevant to recall the words of Lord Uthwatt in *Wallace Brothers case* quoted in *State of Madras* v. *Gannon Dunkerley and Co.,* [1959] SCR 379: B
>
> "The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words in the enabling Act." C

It is thus clear from the aforesaid decision that merely because a tax on land or building is imposed with reference to its income or yield, it does not cease to be a tax on land or building. The income or yield of the land/building is taken merely as a measure of the tax; it does not alter the nature or character of the levy. It still remains a tax on land or building. There is no set pattern of levy of tax on lands and buildings— indeed there can be no such standardisation. No one can say that a tax under a particular entry must be levied only in a particular manner, which may have been adopted hitherto. The Legislature is free to adopt such method of levy as it chooses and so long as the character of levy remains the same, *i.e.*, within the four corners of the particular entry, no objection can be taken to the method adopted. In the cases before us, the cess is no doubt calculated on the basis of the yield— for every kilogram of tea leaves produced in a tea estate, a particular cess is levied. But that is well-accepted mode of levy of tax on land. The tax is upon the land— upon the 'tea estate' which is classified as a separate category, as a separate unit, for the purpose of levy and assessment of the said cess quantified on the basis of the quantum of produce of the tea estate. It cannot be characterised as a tax on production for that reason. As pointed out in *Moopil Nair,* "a tax on land is assessed on the actual or potential productivity of the land sought to be taxed." There cannot be uniform levy unrelated to the quality character or income/yield of the land. Any such levy has been held to be arbitrary and discriminatory. D E F G

We shall now deal with the two decisions in *India Cement* and *Orissa Cement,* upon which strong reliance is placed by the learned counsel for the H

A petitioners. *India Cement* dealt with a levy under Section 115 of the Madras Panchayat Act which imposed a local cess @ 45 paise on every rupee of land revenue payable to the government in respect of land for every fasli. The explanation to Section 116 defined "land revenue" to mean "public revenue due on land *and includes* water cess payable to the government for water supplied or used for the irrigation of land, *royalty*, lease amount or B other sum payable to the government in respect of land held direct from the government on lease or licence.....". *What is of crucial relevance is that the levy of cess was not upon the land or upon its yield (or its income) but upon the royalty amount payable to the lessor*, which was included within the definition of the expression "land revenue". Question, therefore, arose whether such cess levied with reference to or calculated on the basis of C amount of royalty can be called a tax on land. It was held that it could not be. It was pointed out that the royalty varies according to the mineral quarried in a given year and if no mineral is quarried, no royalty will be payable but this reasoning, as we shall explain a little later, is not the ratio of the judgment apart from being inapplicable in the case of land or tea estates. The basis of the judgment— and the ratio of the decision— in our D respectful opinion is that it was a case where the tax was measured not with reference to or on the basis of the income or yield of the land but with reference to the amount of royalty payable by the lessee to his lessor. It was for this reason that the tax was held to be not upon the land. Royalty is a matter of agreement between the lessor and the lessee; it may also be determined by a statutory provision. But *royalty is not the produce of the* E *land; royalty is not the income of the land nor is the royalty the yield of the land*— and that is the distinction. Now, it is significant to notice how the concept of royalty was understood in *India Cement*. The following observations from the judgment are opposite: "It is therefore, not possible to accept Mr. Krishnamurthy Iyer's submission that a cess on royalty F cannot possibly be said to be a tax or an impost on land (p. 26).....*In the aforesaid view of the matter, we are of the opinion that royalty is a tax and as such a cess on royalty being a tax on royalty is beyond the competence of the State legislature* (p. 30)". Indeed, the petitioners' contention was "that the impugned measure being a tax not on share of the produce of the land but on royalty" the levy is bad. This contention was G upheld by Mukherjee, J. The learned Judge held, "in any event, we are of the opinion that cess on royalty cannot be sustained under Entry 49 of List-II as being a tax on land." The learned Judge characterised the cess impugned therein as "*an additional charge on royalty*". We are, therefore, of the opinion that the decision in *India Cement* can have no relevance herein inasmuch as the levy in that case was altogether on a different basis H and for which reason it was held to be outside Entry 49 of List-II. It would

be wrong to read this decision as over-ruling the innumerable decisions rendered with reference to Entry 49, List-II (or the entry corresponding to it in the Government of India Act, 1935) which have upheld levy upon land and building measured on the basis of their yield or income. Only *H.R.S. Murthy* was overruled in *India Cement* and not others. The decision in *India Cement* must be understood consistent with and in continuation of the earlier decisions on the subject.

Now coming to *Orissa Cement*, it was again a case where the cess was imposed on royalty. As amended by Act 15 of 1988, Section 5 (2) of the Orissa Cess Act, 1962 read as follows:

"(2) The rate at which such cess shall be levied shall be —

(a) in case of lands held for carrying on mining operations in relation to any mineral, on such percentum of the annual value of the said lands as specified against that mineral in Schedule II; and

(b) in case of other lands fifty percentum of the annual value."

Clause (a) in sub-section (2) was amended by Act 17 of 1989, after which amendment, clause (a) read thus:

"(a) in the case of land held for carrying on mining operations in relation to any material, such percentum of the annual value as the State Government may, by notification, specify from time to time in relation to such mineral."

The expression "annual value" occurring in clause (a) (both prior to Amending Act 17 of 1989 and thereafter) was defined in Section 7 of the Act. Sub-section (3) of Section 7 provided that "in the case of lands held for carrying on mining operations, the annual value shall be the royalty or, as the case may be, the dead rent payable by the persons carrying on mining operation (s) to the Government." It is for this reason that the Division Bench, speaking through Ranganathan, J., held that the case was squarely covered by *India Cement*. When it was contended by the Sate that the royalty payable in respect of a land on which mining activity is carried on is only a measure of the tax on land relying upon *Ralla Ram* and *Ajoy Kumar Mukherjee*. Ranganathan, J., made the following perceptive observations, which are of great significance to the cases before us:

> "But here the levy is not measured by the income derived by the assessee from the land as is the case with lands other than

A mineral lands. The measure of the levy is the royalty paid, in respect of the land, by the assessee to his lessor which is quite a different thing."

The learned Judge pointed out that the decision in *H.R.S. Murthy* v. *Collector of Chittoor,* [1964] 6 S.C.R. 666— which was overruled in *India* B *Cement*— also purported to levy land cess on the "annual rental value", which expression was defined to mean *inter alia* royalty or other sum payable to the government in the case of lands held on lease/licence and that the reason, for which *Murthy* was over ruled in *India Cement* was also present in the Orissa Act before them. The following observations bring out the distinction made by the learned Judge:

C

> "But the question is, what is it that is really being taxed by the Legislature? So far as mineral-bearing lands are concerned, is the impact of the tax on the land or on royalties? The change in the scheme of taxation under section 7 of 1976; the importance and magnitude of the revenue by D way of royalties received by the State; the charge of the cess as a percentage and, indeed, as multiplies of the amount of royalty; and the mode and collection of the cess amount along with the royalties and as part thereof are circumstances which go to show that the legislation in this regard is with respect to royalty rather than with respect to land." E

In our opinion, therefore, the ratio of *India Cement* and *Orissa Cement* is clearly distinguishable and has no relevance to the cases before us. In the case or the impugned West Bengal enactment, the cess is upon the land measured on the basis of the quantum of its produce. Being measured with F reference to the yield of land, it is a levy upon the land, as explained in *Ralla Ram, Moopil Nair* and *Ajoy Kumar Mukherjee.*

Strong reliance is placed by the learned counsel for the petitioners upon the following sentence in para (22) of *India Cement*: "There is a clear distinction between tax directly on land and tax on income arising from the G land" to contend that levy of tax on income of land is not tax on land. We are afraid, the learned counsel are tearing one sentence out of context and are seeking to construe it as a statute. That the tax on land and building can be levied with reference to, *i.e.*, measured on the basis of their yield or income is the uniform view taken in the cases referred to hereinbefore. For instance, how is the property tax levied on a building in a municipality? It is H only on the basis of its annual rental value, *i.e.*, on the basis of the rent it is

fetching when let out or the rent it would fetch if let out. It is open to the Legislature to say that rent of previous year or the average rent of previous two, three or more years shall be the basis. Indeed, there is nothing to prevent the legislature from taking the rent of that very year as the basis for levying the tax. In the case of a new building, the tax for the first year would naturally be based upon the rental value for that year. And what is rent, if not the income of the building— its yield? In *India Cement*, the court pointed out that the levy in that case being on royalty, it cannot be called a tax on land. The court said "(B)ut in the instant case, royalty being that which is payable on the extraction from the land and cess being an additional charge on that royalty, cannot, by the parity of the same reasoning, be considered to be a tax on land." As pointed out hereinabove, tax on royalty is not tax on land with reference to income since royalty is not the income of the land but an exaction payable by the lessee of the land to the lessor/owner. In *India Cement*, the court took the view that royalty is a tax and hence, a tax upon such royalty (tax) is not permissible in law. It is for this reason that the court held agreeing with Sri Nariman that "royalty which is indirectly connected with land cannot be said to be a tax directly on land as a unit" (para 23). A tax imposed on land measured with reference to or on the basis of its yield, however, is certainly a tax directly on the land. Apart from income, yield or produce, there can perhaps be no other basis for levy. A uniform tax levied without reference to yield, quality and character was held to be bad in *State of Andhra Pradesh* v. *Nalla Raja Reddy,* [1967] 3 S.C.R. 28.

Counsel for the petitioners also laid emphasis on the following observation in para (23) of *India Cement*: "It appears that in the instant case also no tax can be levied or is 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. Royalty is payable on a proportion of the minerals extracted. It may be mentioned that the Act does not used dead rent as a basis on which land is to be valued. Hence, there cannot be any doubt that the impugned legislation in its pith and substance *is a tax on royalty and not a tax on land.*" Firstly, the situation contemplated in the said observation does not obtain in the present case. Here are tea estates, the tea bushes wherein yield tea leaves in the natural course. If they are properly tended and nurtured, they yield more but even otherwise they do yield— though may be in lesser quantity. Moreover, we must take the example of an ordinary prudent owner/occupier of tea estate and not of a freak. No ordinary person would leave the tea estates to the nature or leave

A the leaves to wither on bushes. A freak may do it but the validity of laws are not to be judged with reference to freaks. May be, in certain extra-ordinary exigencies, it may happen that the tea leaves are not plucked but that is not the generality of the situation. That the basis of this argument is unrealistic and improbable would be evident from the provisions of the Tea Act, an aspect dealt with at a later stage. We are, therefore, of the opinion
B that taking the quantum of yield of a tea estate for measuring the amount of tax cannot be equated to the situation in *India Cement.*

In judging the validity of taxing laws, it is always instructive to remember the following observations of this court in *R.K. Garg* v. *Union of*
C *India,* [1982] 1 S.C.R. 947:

> "Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes,
D J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with,
E greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial difference to legislative judgment in the field of economic regulation other in other areas where fundamental human rights are involved. Nowhere has this admonition been more
F felicitously expressed than in *Morey* v. *Doud,* [1957] 354 US 457 where Frankfurter, J., said in his inimitable style:
>
> "In the utilities, tax and economic relation cases, there are good reasons for judicial self-restraint if not judicial difference to legislative judgment. The legislature after all
G has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events self-limitation can be seen to be the path to judicial
H wisdom and institutional prestige and stability."

The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry" that exact wisdom and nice adoption of remedy are not always possible and that "judgment is largely a prophecy based on meagre and uninterpreted experience." Every legislation particular in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The Courts cannot, as pointed out by the United States Supreme Court in *Secy. of Agriculture* v. *Central Rolg. Refining Co.,* (1950) 94 L. ed. 381, be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or possibilities of abuse come to light the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

Before we take up the next aspect, we may deal with another submission based upon the separate opinion of G.L. Oza, J., *India Cement.* Oza, J., in his separate opinion, concurred with the conclusion arrived at by Mukherjee, J., but on a slight different basis. The learned Judge was of the opinion that whether "royalty is a tax or not is not very material for the purpose of determination of this question in this case." The learned Judge rested his opinion on this basis: the mineral extracted from the land is the

result of three elements, *viz.*, (1) land from which mineral could be extracted, (2) capital for providing machinery, instrument and other requirements, and (3) labour; for this reason, the unit of charge of royalty is not only land but land + labour + capital; the royalty is thus a tax imposition/levy not on land alone out on two other items aforesaid; if therefore the cess is levied on royalty, it could not be said to be a *tax on land* within the meaning of Entry 49 of List-II. The aforesaid reasoning is relied upon by Dr. Pal to say that the tea leaves produced in a tea estate are equally the produce of land+capital+labour and any tax/cess imposed with reference to such produce cannot be said to be a tax on land within the meaning of Entry 49 of List-II. We must say that we are unable to appreciate the logic of the said reasoning. Firstly, the opinion expressed by Oza, J., is not shared by other learned Judges in *India Cement*. Secondly, the said theory, in our respectful opinion, flies against the goal of all the previous judgments of this Court and Federal Court on the subject. Take the case of land revenue. If land revenue is levied with reference to the income or yield of land, can it not be said that income or yield of land is equally the result of land+capital+labour. Can it be said that on that account the land revenue is not a levy on land. It has been held uniformly in several decisions referred to hereinbefore that a tax on land within the meaning of Entry 49 of List-II can be levied with reference to their yield or income. It will be difficult to imagine a situation where a land yields income worth the name without any labour and/or capital investment. Not only labour has to be employed but also some capital has to be invested for raising the produce. On that account, the tax levied on land but quantified with reference to the income/yield of the land cannot be characterised as a tax other than tax on land. Whether it is an agricultural land, an orchard or a tea estate, they do require some capital and labour to make them yield and to produce income. Such yield or income can always be taken as a measure for quantifying the tax, which is undoubtedly levied upon the land. We cannot, therefore, agree with the said contention of Dr. Pal.

Relying upon the decisions in *Sudhir Chandra Nawn* v. *Wealth Tax Officer, Calcutta,* [1969] 1 S.C.R. 108, *Assistant Commissioner of Urban Land Tax* v. *Buckingham and Carnatic Co. Ltd.,* [1970] 1 S.C.R. 268 and *Second Gift Tax Officer, Mangalore* v. *D.H. Nazareth,* [1971] 1 S.C.R. 195 it is contended by S/Sri K.K. Venugopal, Ashok Desai and R.F. Nariman, learned counsel for the petitioners, that a tax to be within the purview of Entry 49 of List-II should be a tax *directly* on the lands and buildings and that in the absence of such direct nexus it would cease to be a tax on lands and buildings. In the first two cases, the question was whether the levy of wealth tax created by the Wealth Tax Act, 1957 was outside the

Parliament's competence inasmuch as it operates as a tax on lands and buildings, which is within the exclusive competence of the State Legislature, while the question in *Nazareth* was whether the levy of gift tax created by the Gift Tax Act is a tax on lands and buildings? In the former cases, it was held that wealth tax is not a tax upon lands and buildings but is a tax upon the wealth of an individual. It was pointed out that the tax was upon the total assets owned by an individual minus his total liabilities, *i.e.*, upon his net wealth. Similarly, in *Nazareth* it was pointed out that the tax was on the gift of the lands and buildings and not upon the lands and buildings as such. Doctrine of pith and substance was applied in each case to find out to which entry did the particular enactment relate in truth and substance. It is in this connection, while comparing the contending entries in List-I and Entry 49 in List-II that this court observed that a tax to be a tax on lands and buildings within the meaning of Entry 49 List-II should be a tax directly on lands and buildings. It would be sufficient to refer to the observations to the above effect in *S.C. Nawn* which run to the following effect:

> "The argument advanced by counsel for the petitioner is wholly misconceived. The tax which is imposed by entry 86 List-I of the Seventh Schedule is not directly a tax on lands and buildings. It is a tax imposed on the capital value of the assets of individuals and companies, on the valuation date. The tax is not imposed on the components of the assets of the assessee; it is imposed on the total assets which the assessee owns, and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owns no debts and is under no enforceable obligation to discharge any liability out of his assets, it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case, the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under entry 49 List-II. But the legislative authority of Parliament is not determined by visualising the possibility of exceptional cases of taxes under two different heads operating similarly on tax payers. Again *entry 49 List-II of the Seventh Schedule contemplates*

A *the levy of tax on lands and buildings or both as units.* It is normally not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. *Tax on lands and buildings is directly imposed on lands and buildings and bears a definite relation to it.* Tax on the capital value of assets bears no definable B relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under entry 86 List-I tax is contemplated to be levied on the value of the assets. For the purpose of levy tax under entry 49 List-II the State Legislature may adopt for determining the incidence of tax the annual or the capital C value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not, in our judgment, make the fields of legislation under the two entries overlapping."

From the above observations, in our opinion, it cannot be inferred that D the position of law regarding Entry 49 of List-II is different from the law obtaining under other entries in the Seventh Schedule. It cannot be. The proposition that the several entries in the Seventh Schedule are merely legislative heads and must be liberally construed applies to all the entries including Entry 49 of List-II. The above observations in *Nawn* and other cases were made merely with a view to emphasise the distinction between E one tax and the other. The said expression was used to point out that the particular enactment is in truth not relatable to Entry 49, List-II but to the entries in List-I. In that connection, it was pointed out that the tax in question before them was not a tax directly upon the land and building but a tax upon the wealth of an individual or upon the transaction of gift, as the case may be. It is relevant to note that in *Ajoy Kumar Mukherjee*, the F Constitution Bench has stressed this very aspect when it stated "it is well-settled that the entries in the three legislative lists have to be interpreted in their widest amplitude *and, therefore, if a tax can reasonably be held to be a tax on land it will come within entry 49.*" The question of direct or reasonable connection arises only where one has to find out whether a G particular enactment is within the competence of the Legislature which enacted it. Applying the doctrine of pith and substance, the court has to determine and answer the question. There may be competing entries in List-I and List-II, their content may look somewhat similar but yet the question has to be answered with the aid of the said doctrine. The said observation, which is also repeated in *India Cement*, means that levy should not be an H indirect levy on land like the one in *India Cement* but it cannot be

understood to say that levy on land quantified on the basis of its yield cannot be treated as a direct levy upon the land. There is no basis, therefore, for saying that the impugned cess is not a tax upon the land directly. As repeatedly pointed out above, the mere fact that it is measured with reference to the yield of the land does not make it any the less a tax upon the land directly.

Now coming to the argument that since the production of tea leaves varies from year to year, the cess would also vary correspondingly from year to year and for that reason it cannot be called a tax on land, is again, in our opinion, unsustainable. It is not of the essence of a tax— not a condition of its validity— that the tax must be constant or uniform for all the years or for a particular number of years. The fact that generally property taxes on buildings and lands are revised every five years by the municipal bodies is a matter of convenience and not a matter of law. The tax can be revised every year, if the municipality so decides. Dr. Pal, learned counsel for the petitioners conceded - and in our opinion, rightly - that the tax on land or building can be levied and assessed with reference to previous year's income or yield. In such a situation too, the tax may vary from year to year depending upon the income/yield of the previous year. The variation between the amount of tax from year to year, in our opinion, does not reflect upon the character of tax. Dr. Pal evidently draws inspiration for the said argument from the fact that land revenue upon the land is fixed and constant. But this is to ignore the fact that land revenue (Entry 45, List-II) is different from the tax on lands and buildings contemplated by Entry 49 of List-II. The characteristics, if any, of the land revenue - assuming for the sake of argument that constancy is one of the characteristics of the land revenue - cannot be attached to the tax under Entry 49 to restrict its field of operation. Dr. Pal next contended that while a tax on land or building can be assessed with reference to the previous year's income, it cannot be assessed with reference to the current year's income. We confess, we are unable to see any principle behind this submission, much less any authority. We also fail to see any logic behind such a restriction upon the legislative power. The power of the Legislature to make law with reference to Entry 49 of List-II is plenary like any other entry in List-II. It is open to the legislature to adopt such formula as it thinks appropriate for levying the tax and so long as the character of the tax remains the one contemplated by the entry, it does not matter how the tax is calculated, measured or assessed. If a tax on land can be assessed with reference to or on the basis of the previous year's income, we fail to see why it cannot be levied on current year's income. For example, take the case of a newly constructed building which is let out soon after its

A completion. Can the rent realised for the first year not to be taken as the basis for determining the rental value for levying property tax for that year? Indeed, that can be and should be the only basis. In this behalf, we may refer to the decision of this court in *Venkateshwara Theatre* v. *State of Andhra Pradesh,* [1993] 3 S.C.C. 677, where this court sustained the levy of entertainment tax on cinemas levied *not* with reference to the number of B shows or the number of tickets sold for a show *but with reference to the gross collection capacity of the theatre,* determined for each show, week, month or year, as the case may be. The fact that the Legislature departed from the rule 'no show, no tax' did not affect the competence of the Legislature or the character of tax.

C Sri K.K. Venugopal, learned counsel for some of the writ petitioners sought to establish the absence of connection between the tax (cess) and the land on the following basis: the entire land comprised in a tea estate may not be covered with tea bushes; for instance, a tea estate comprising 1000 acres may have tea bushes only on 400 acres while another 400 acres may be kept fallow and the remaining 200 acres is covered by factory, buildings D and the like. A tax on land to be a tax within the meaning of Entry 49 of List-II must be levied upon the entire 1000 acres but in the case of impugned levy, the tax is determined, or assessed, as the case may be, on the entire 1000 acres with reference to the yield of 400 acres only; thus it is clear, says the learned counsel, that the true nature of the tax is not a tax E upon land but upon produce of land comprised in a tea estate. The learned counsel gives yet another example. A tea estate-owner may decide, for his own reasons - justified or unjustified— not to pluck the tea leaves in a given year. He may leave the leaves to wither on the bushes. In such a case, no cess would be payable in respect of the tea estate. If so, the learned counsel asks, can it be said that the tax is connected with land. Would it not F be more correct to say that the tax is upon the produce of the land, asks the counsel. In our opinion, the above reasoning is untenable for more than one reason. Once the classification of "tea estate" as a separate category of land, as a separate unit, for the purposes of levy of the said cess is conceded, the edifice of the entire argument falls to the ground. Once, a tea estate is treated validly as a unit for levy of tax/cess - it is not questioned before us - G the yield of the land comprised in such unit can validly constitute the basis of levy and assessment. Sri Venugopal stressed that accepting the said contention of the State would set up a dangerous precedent inasmuch as it would permit the State Legislature hereafter to levy tax on land based on the gross income from a manufacturing activity or industry run upon the H land by taking the gross income of such manufacturing activity or industry

as the measure of tax. We are afraid, the learned counsel is overdrawing the picture. The tax on land or building can be levied, according to the well-established decisions referred to hereinbefore, with reference to their yield or income. The income on yield of land and building, reasonably speaking, cannot include income from a manufacturing activity carried on such land or the income of an industry run upon such land. The products of such manufacturing activity and industry would be the products of such manufacturing activity and industry, as the case may be - and not of land whereas the tea leaves are the produce/yield of the land. The distinction is too obvious to be glossed over. Similarly, the income of a building would mean the rent that is or that can be received, it cannot include the income of some activity carried on therein. We are, therefore, of the opinion that the said apprehension of the learned counsel is clearly unfounded.

Secondly, the tea bushes, being not seasonal plants but of durable nature, sprout leaves in the natural course. Of course, they require to be tended, nurtured and cared for by providing fertilizers, labour and attention to yield more. The fact remains that there is bound to be some yield each year. One need not take the case of a freak owner choosing not to pluck the leaves at all in a given year. Such a person is an exception and not the rule. One has to go by the generality of situation. The validity of a law - more so of a tax law cannot be judged by taking a freak case or an unusual situation. No such instance of any tea estate, in any year, has been brought to our notice. This aspect has been dealt with by us hereinabove and need not be repeated here. Once a tea estate is validly classified as a unit of taxation, as held hereinbefore, the levy of tax on the basis of the produce of such tea estate - unit - cannot be faulted. More important, the situation envisaged by Sri Venugopal cannot really come to pass Section 16B (1)(b) of the Tea Act read with Section 16-C and Section 16-D provides that if the Central Government is satisfied with respect to a tea estate that the average yield in three out of five preceding years is lower by 25% or more than the district average yield, it can order investigation into the affairs of the tea estate, give appropriate directions and can even assume management of the estate - all with a view to ensure the production of tea at the expected levels. The situation contemplated by the learned counsel, therefore, is an unrealistic one and cannot in any event furnish a ground for holding that there is no reasonable connection between the tax and the land. To repeat, once the tea estate is validly classified as a unit for the purpose of levy of tax (cess) and for applying a particular rate of tax, the levy of tax thereon quantified on the basis of production of tea leaves of such a unit - tea estate cannot be found fault with.

Sri Ashok Desai urged a further contention that inasmuch as the moment tea leaves are plucked, they can no longer be said to be attached to or forming part of the land, levy of tax with reference to such plucked tea leaves cannot be called a tax on land. We are unable to appreciate the distinction sought to be made. Generally speaking, unless the produce of the land, whether it is food-grains or fruits, is removed from the plant or the tree, as the case may be, the yield of the land or its income cannot properly be assessed. If the tax is calculated or assessed on the basis of such yield or income, it cannot be said that for that reason alone there is no reasonable connection between the land and the tax.

Dr. Pal contended, relying upon certain observations in *Buxa Dooars* that the provision for exemption contained in Section 4(4) of the impugned Act, has the effect of changing the character of tax. Learned counsel relied upon the following observations in paragraphs 10 and 11 of the judgment in *Buxa Dooars*: "the nexus with the tea estate is lost altogether in the provisions for exemption or reduction of levy and that throughout the nexus is confined to despatches of tea rather than related to the tea estate. Ultimately the benefit of exemption or reduced levy must be related to the need for exempting the tea estate from that levy or relieving it from part of the normal levy. When the provisions before us are examined in their totality, we find no such relationship or nexus between the tea estate and the varied treatment accorded in respect of despatches of different kinds of tea." It is not possible to agree. We have carefully perused paras 10 and 11 of the said judgment and we are of the considered opinion that the main basis of the holding in the said two paragraphs is that the tax being levied upon the despatches of tea - and because no distinction is made with reference to the quality of tea produced in each estate - the levy cannot be said to be a levy upon the land. Though a reference is made to the power of exemption but that is not the reason for holding that it is not a tax on land. We are of the further opinion that if the said observations are so read, it would not be possible for us to agree with the same. Every tax enactment contains a provision for exemption. There is hardly a tax enactment which does not contain such a provision. The power of exemption is normally given to the government to be exercised in appropriate cases. The said provision, in our opinion, can make no difference to the character of the tax. We can understand saying that the tax impugned in *Buxa Dooars* was bad on account of levy being related to despatches and, therefore, the tax impinged upon Article 301 of the Constitution but we find it difficult to agree that because of the exemption provision contained in the enactment, the character of levy changes from levy on land to something else.

The main holding in *Buxa Dooars* is that levy impugned therein violates Article 301. The argument about Entry 49 of List-II was referred to only for the purpose of saying that the levy on despatches of the tea cannot be related to the said entry. The provision for exemption contained in the impugned enactment, therefore, can certainly not be treated as a ground or reason for holding the said levy to be a levy not on land but on something else. There is no principle nor any authority in support of the said proposition.

Yet another contention by Dr. Pal is that inasmuch as the impugned enactment makes the owner liable to pay cess and the owner is defined (by Explanation-II) to mean, the transferee in possession in case of lease, mortgage or other transfer of possession, the levy cannot be said to be upon the land. We are unable to appreciate the submission. The fact that the person in possession and enjoyment of the tea estate is made liable to pay the cess shows in fact the connection between the land and the levy - it is not an indication to the contrary. Moreover, the liability of the transferee in possession is brought in and the definition of 'owner' provided to ensure *payment* of cess, which would be evident from the substituted clause (a) in sub-section (3) of Section 4, which reads: "(a) the rural employment cess *payable under sub-section (2A) shall be paid by* the owner of a tea estate in such manner, for such period and by such date as may be prescribed." Similarly, it is the owner, as defined in the Act, that is required to maintain the accounts etc., which is as it ought to be. A person other than the person in possession could not have been made so liable. Making the person in actual possession of land or building for payment of tax is well-known feature in enactments relatable to Entry 49 of List-II and cannot be faulted.

In view of our finding that the impugned cesses are clearly relatable to Entry 49 of List-II, it is really unnecessary to deal at length with the alternative submission of Sri Shanti Bhushan, learned counsel for the State of West Bengal that the impugned levy can also be sustained with reference to Entry 45 of List-II, *i.e.*, as land revenue. Learned counsel submits that there can be more than one law levying land revenue and all of them will be relatable to Entry 45. He submits that the impugned levy can be treated as additional land revenue. Counsel gives instances of more than one Act levying excise duty on manufacture and production of goods. He relies upon the following observations of Mukherjee, J. in *India Cement* :

> "It is, however, clear that over a period of centuries, land revenue in India has acquired a connotative meaning of share in the produce of land to which the king or the government is entitled to receive."

A The force of the submission cannot be denied. The presumption in favour of constitutionality obliges the court to sustain an enactment, if necessary, by relating it to an entry other than the one relied upon by the government, if that can be reasonably done. Moreover, as pointed out by this Court in *Sanjiv Coke Mfg. Co.* v. *Bharat Coking Coal Ltd. and Anr.*, [1983] 1 S.C.R. 1000, it is the function and power of the court to interpret B an enactment. It is equally the function and power of the Judiciary to say to which entry does an enactment relate. The opinion of the government in this behalf is but an opinion and no more.

Yet another argument put forward on behalf of the petitioners is that C the quality of tea produced in one tea estate may differ from the quality of tea produced in another tea estate. Prescribing an uniform method of levy on all tea estates, without regard to the quality of tea produced, it is submitted, is discriminatory. It is not possible to agree. It would be sufficient to refer to the judgment of Hidayatullah, C.J., in *Twyford Tea Co. Ltd.* v. *State of Kerala and Anr.*, A.I.R. (1970) S.C. 1133, where a similar D argument was rejected in the following words:

> "The burden is on a person complaining of discrimination. The burden is proving not possible "inequality" but hostile 'unequal' treatment. This is more so when uniform taxes are levied. It is not proved to us how the different plantations can E be said to be hostility or unequally treated. A uniform wheel tax on cars does not take into account the value of the car, the mileage it runs, or in the case of the taxis, the profits it makes and the miles per gallon it delivers. An Ambassador taxi and a Fiat taxi give different out-turns in terms of money and F mileage. Cinema pay the same show fee. We do not take a doctrinaire view of equality. The Legislature has obviously thought of equalising the tax through a method which is inherent in the tax scheme. Nothing has been said to show that there is inequality much less 'hostile treatment'. All that is said is that State must demonstrate equality. That is not the G approach. At this rate nothing can ever be proved to be equal to another."

The effect of the declaration in Section 2 of the Tea Act, 1953 and the Tea Act on the legislative competence of the State Legislature to levy the impugned tax.

H

The learned counsel for the petitioners submitted that the Parliament has by making a declaration, in Section 2 of the Tea Act, to the effect that "it is expedient in the public interest that the Union should take under its control the tea industry" deprived the State Legislature to impose the disputed cess. It is submitted that the Tea Act has taken over not only the control over the tea industry but also the cultivation of tea by the said enactment. It is pointed out that under Section 25 of the Tea Act, the Parliament has levied a cess on all tea produced in India. It is pointed out that the expression 'tea' is defined in Section 3(n) to mean "the plant Camellia Sinensia (L) O. Kuntze as well as all varieties of the product known commercially as tea made from the leaves of the plant Camellia Sinensis (L) O. Kuntze including green tea", that according to this definition, tea leaves also fall within the expression 'tea' and since the Parliament has already levied a cess on the said produce, *viz.*, tea leaves, an identical levy cannot be imposed by the State Legislature. Certain provisions of the Tea Act relating to control over cultivation and production of tea are brought to our notice for buttressing the said argument. For a proper appreciation of these submissions, it is necessary to refer briefly to the provisions of the Tea Act, 1953.

The preamble to the Act says that the Act is intended "to provide for the control by the Union of the tea industry including the control, in pursuance of the International Agreement now in force, of the cultivation of tea in, and of the export of tea from. India and for that purpose to establish a Tea Board and levy of duty of excise on tea produced in India." Section 2 contains the declaration within the meaning of Entry 52 of List-I of the Seventh Schedule to the Constitution. It is thus evident that the Act is relatable not only to Entry 52 of List-I but also to Entry 14 of List-I. Entry 14 reads:

> "14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

It is for this reason that not only the tea industry but also the cultivation of tea has been taken under the control of the Parliament, which probably could not have been done by a mere declaration under Entry 52 of List-I.

Section 3 defines certain expressions occurring in the Act. The definition of 'tea' in clause (n) has already been set out by us hereinabove.

Chapter-II containing Sections 4 to 11 pertains to the Constitution of Tea Board, its composition, its functions and its dissolution. Sub-section (1)

A of Section 10 sets out the functions of the Board. It says, "it shall be the duty of the Board to promote, by such measures as it things fit, the development under the control of the Central Government of the tea industry." Sub-section (2) specifies the several matters in respect of which measures can be taken by the Tea Board. They include "(a) regulating the production and extent of cultivation of tea [and] (b) improving the quality B of tea."

Chapter-III containing Sections 12 to 16 provides for control over the extension of tea cultivation. Section 12 says that no one shall plant tea on any land not planted with tea on the date of commencement of the Act unless permission therefor has been granted by the Tea Board in writing. C The restriction applies to replanting as well. Section 13 sets out the limitations subject to which permission under Section 12 can be granted. Section 14 prescribes the manner in which applications for grant of permission under Section 12 have to be filed. Section 15 provides for grant of permission to plant tea in certain special circumstances. Section 16, however, permits the owner of a tea estate to establish nurseries on land not D previously planted with tea for growing of plants intended for in filling or supplying vacancies etc. Thus no fresh area can be brought under tea plantation except with the permission of the Tea Board.

Chapter-IIIA provides for management or control of tea undertakings E or tea units by the Central Government in certain circumstances. The chapter contains Section 16A to Section 16N. We have referred at an earlier stage to the provisions of Sections 16B, 16C and 16D which empower the Central Government to take steps for ensuring that the production of tea in a tea estate does not fall below a particular level. The powers includes the power to order investigation, to issue directions as well as to assume F management or control of the tea undertakings or tea units, as the case may be. ["Tea undertaking" is defined by clause (e) in Section 16A (1) to means "an undertaking engaged in the production or manufacture or both of tea through one or more different units" whereas the expression "tea unit" is defined in clause (f) to mean, "a tea estate or garden, including a sub-division thereof, which has a distinct entity for which accounts are kept and G has a factory of its own for the production and manufacture of tea."] Section 16E empowers the Central Government to take over a tea undertaking or a tea unit without ordering a prior investigation, in certain specified circumstances. Section 16F specifies the powers of the Central Government where it takes over the management of a tea undertaking/tea H unit under Section 16D or Section 16E, as the case may be. So does Section

16G. The other provisions in this chapter are ancillary and supplemental to the power to ensure the production of tea at a particular level.

Chapter-IV containing Sections 17 to 24 provide for control of the Tea Board/Central Government over the export of tea and tea seed.

Chapter-V contains Sections 25 to 29 and they provide for finance, accounts and audit. Since Section 25 is strongly relied upon by the learned counsel for the petitioners, it is necessary to set out the section in full:

> "25.(1) There shall be levied and collected as a cess for the purposes of this Act a duty of excise on all tea produced in India at such rate not exceeding fifty paise per kilogram as the Central Government may, by notification in the Official Gazette, fix:
>
> Provided that different rates may be fixed for different varieties or grades of tea having regard to the location of, and the climatic conditions prevailing in the tea estates or gardens producing such varieties or grades of tea and any other circumstances applicable to such production.
>
> (2) The duty of excise levied under sub-section (1) shall be in addition to the duty of excise leviable on tea under the Central Excises and Salt Act, 1944, or any other law for the time being in force.
>
> (3) The provisions of the Central Excises and Salt Act, 1944, and the rules made thereunder, including those relating to refund and exemption from duty, shall, so far as may be, apply in relation to the levy and, collection of the duty of excise under this section as they apply in relation to the levy and collection of the duty of excise on tea under the said Act."

A perusal of sub-section (1) makes it clear that it empowers the Central Government to levy and collect "as a cess for the purpose of this Act a duty on excise on all tea produced in India." The proviso to sub-section (1) empowers the Central Government to prescribe different rates of cess for different varieties or grades of tea having regard to the circumstances mentioned therein. Sub-section (2) says that the duty of excise levied under sub-section (1) shall be in addition to the duty of excise leviable on tea under the Central Excise and Salt Act, 1944. Sub-section (3) makes certain

machinery provisions of the Central Excise Act applicable in the matter of levy and collection of the duty of excise levied under sub-section (1). Section 26 says that out of the duty of excise collected under Section 25 appropriate amounts shall be made over to the Tea Board by the Central Government from time to time. Section 26A empowers the Central Government to make grants or loans to the Tea Board. Section 27 provides for the constitution of Tea Fund to which all the monies including the duty of excise levied under Section 25 is to be credited.

Chapter-VI containing Sections 30 to 32 empowers the Central Government to control the price and distribution of tea or tea waste while Chapter-VII contains certain miscellaneous provisions to which it is not necessary to refer.

The learned counsel for the petitioners have also placed before us a copy of the notification issued under Section 25 (1) of the Tea Act being the Ministry of Commerce Notification No. S.O. 488 (E) dated 13.8.1986 [as amended by S.O. 799 (E) dated 30.10.1986]. The notification reads as follows:

> "In exercise of the powers conferred by sub-section (1) of section 25 of the Tea Act, 1953 (29 of 1953), the Central Government hereby notifies, with effect from the 15th day of August, 1986, the rate of cess as specified in column (2) of the Table below on the variety/grade of teas specified in column (1) of the said Table.

TABLE

Variety/grade of tea	Rate of cess
(1)	(2)
1. All tea except those produced in the areas specified under column (1) of serial number 2.	Paise fifteen per kilogram.
2. All teas produced in the Sadar Sub-division and Kurseong sub-division excluding the areas in the jurisdiction list Nos. 31, 29, 33, 20, 21, 22, 23 and 24 comprising Subtriguri sub-division of New Chumta tea estate, Smilbarie and Marionbarie; Tea Estates of Kurseong Police Station in Kurseong sub-division of the district of Darjeeling in the State of West Bengal.	Paise eight per kilogram.

It is true that the 'tea' as defined in Section 3 (n) means the tea plant and in that sense, it may also include tea leaves. For that reason it may probably be open to the Parliament to levy a duty of excise, by way of cess, on tea leaves. But a perusal of the aforesaid notification makes it appear that the levy of duty of excise/cess is really on tea, as commercially known. We need not, however, express any opinion on the scope of Section 25 or of the Notification. We shall assume for the sake of argument that such a duty can be and is imposed on the tea leaves produced in tea estates. The question is whether such levy has the effect of denuding the State legislature of its power to levy the impugned cess which, we have held, is a cess/tax on land measured by the quantum of the tea leaves produced in a tea estate. We think not. We have also held that the levy is not upon the produce of land but upon the land and that 'tea estate' can be validly classified as a unit for the purpose of levying the cess. It is thus clear that the levy contemplated by Section 25 and the levy provided by the impugned enactment are altogether different and distinct in character. The fact that the Tea Act empowers the Central Government to levy a duty or cess upon tea or tea leaves for the purpose of that Act can in no manner deprive the Legislature of its power to tax the land comprised in a tea estate. This is the purport of the several decisions discussed hereinbefore. Similarly, the fact that the Tea Act controls the cultivation of tea is again not a factor affecting the competence of the State Legislature inasmuch as the State Legislature is not seeking to control the cultivation of tea but only to levy the tax on land comprised in a tea estate. The declaration in Section 2 of Tea Act, it is evident, has again no relevance on the State Legislature's competence inasmuch as the impugned cess is not a cess on the tea industry but a cess on the land comprised in a tea estate. The fact that ultimately the tax may have to be borne by the tea industry is not ground for holding that the said levy is upon the tea industry. For that matter, even the imposition of a land revenue or non-agricultural cess upon the land comprised in a tea estate will ultimately affect the tea industry but that is no ground for invalidating those taxes. This proposition is too well-established and it would be enough to refer to the decisions in *Ganga Sugar Co.* v. *State of Uttar Pradesh,* [1980] 1 S.C.R. 769 and *Federation of Hotel and Restaurant* (at page 655 para 37).

It is contended by Sri Ashok Desai that the impugned imposition is really an imposition of duty of excise on the goods produced in India within the meaning of Entry 84 of List-I and, therefore, outside the competence of the State Legislature. The learned counsel also pointed out that the Central Excise Tariff Act levies a duty upon the tea as well. This contention is again premised upon the assumption that the impugned levy is a levy upon

A the produce of the tea estate and not upon the land comprised in a tea estate. Since we have already held that in pith and substance the impugned levy is a levy of tax on land and that produce of the land is merely brought in for the purpose of quantifying the tax, *i.e.*, as a measure, the said argument becomes out of place and unsustainable.

B Sri Ashok Desai submitted that by virtue of the declaration made by Parliament in Section 2 of the Tea Act, as contemplated by Entry 52 of List-I, the State Legislature is denuded of the power to levy any tax on tea. Reliance is placed upon the decision of this Court in *Baijnath Kadio* v. *State of Bihar,* [1969] 3 S.C.C. 838. This argument again proceeds on the assumption that the impugned cess is a tax upon the tea or tea industry and C not a tax upon the land, which assumption we have rejected hereinbefore. As pointed out repeatedly in the several decisions referred to earlier in this judgment, "measure of tax is not determinative of its essential character" and further that "the same transaction may involve two or more taxable events in its different aspects" and "the fact that there is an overlapping D does not detract from the distinctiveness of the aspects." The question of superior legislature or inferior legislature does not really arise herein. Once the impugned legislation is held to be relatable to Entry 49 of List-II, it will be within the exclusive competence of the State Legislature. In that behalf, the State Legislature is not inferior to Parliament. The reference to the decision of this Court in *Synthetics and Chemicals* v. *State of Uttar* E *Pradesh,* [1990] 1 S.C.C. 109 is equally of no assistance to the petitioners inasmuch as in that case vend fees was levied by the State Government, under the State Excise Act, upon industrial alcohol which industry was taken within the purview of the I.D.R. Act. It is for the said reason that it was held to be incompetent. The decision cannot be read as disentitling the State Legislature to levy a tax upon the land or upon a building merely F because such land or building is held or owned by an industry which is within the purview of the I.D.R. Act - or which is governed by the Tea Act, as in the present case.

Lastly, the learned counsel for the petitioners questioned the validity of G the retrospective effect given to the impugned enactment. We fail to see any substance in this submission. If the Act is good, it is good both prospectively and retrospectively. Retrospective effect is given for the period covered by the anterior provisions which were struck down in *Buxa Dooars*. Once it is held that defect pointed out in *Buxa Dooars* is rectified and remedied in the impugned enactment, it can certainly be given H retrospective effect to cover the period covered by the earlier enactment

which is not only a well-known but a frequently adopted measure by all the Legislatures. A

For the above reasons, the writ petitions fail and are accordingly dismissed. The interim orders made in these writ petitions shall also come to an end. The petitioners shall pay the cesses stayed by the orders of this court alongwith interest @ 12% p.a. There shall be no order as to costs. B

U.R. Petitions dismissed.