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WHETHER ROYALTY IS TAX

[In memory of Late Sri. T.S. Krishnamoorthi Iyyer]

PREROGATIVE RIGHT -VS- PROPRIETARY RIGHT

(By M.K.S. MENON)

A. OWNERSHIP ON SUBSOIL RIGHTS INCLUDING MINERALS:

i) In India after the introduction of various agrarian reform legislations, there is a wrong belief that the entire subsoil rights are vested in the government. On the contrary there are so many exceptions to the said rule because presumption was applied purely on the basis of general postulation.Vestingof minerals depends on various land tenures enacted in different parts of the country and also on the language of different land reform legislations of different states. Eg. In Kerala Malabar has a different land tenures compared to Travancore-Cochin. One classic example is the 'ryotwari settlements' introduced in Madras and Andhra Pradesh during pre- independence era. These ryotwari lands were originally held to be excluded from the definition of 'Estate' under Article 31-A of the Constitution through judicial interpretations until those legislations were modified and included in the 9th Schedule so as to save it from the rigour of Part -III of the Constitution. However, in far as the ownership on minerals are concerned, it is still a grey area becauseas already said vesting depends upon the language of various legislations. In most of the cases, the mines and minerals are included in the vesting section so as to show the completeness of the vesting up to the centre of the earth. Halsbury Law of England and Broom's Law dictionary makes it clear that an owner of the surface is the owner of everything beneath up to the centre of the earth.

ii) In Thressiamma Jacob's case reported in 2013(3) KLT 275 = 2013 (9) SCC 725 larger bench of the Hon'ble Supreme Court (by Justices R,M. Lodha JJ, Chalameshwar JJ and Madan B Lokur JJ) held that

owners of mineral bearing lands (quarries) in Malabar District in Kerala are owners of the minerals as well. [Author of this article successfully argued the case for the appellants in that matter]. The wrong presumption that, 'all minerals are vested in the State', stands rebutted in this case by giving a complete answer to the question as to who is the owner of the subsoil right, in the absence of a specific vesting provision.

B. 'ROYALTY'&'DEAD RENT' ARE INCIDENTS OF PROPRIETARY RIGHT AND NOT A PREROGATIVE RIGHT:

i) The meaning of the expression "dead rent" and "royalty" and their connotation under various dictionaries:

Wharton's "Law Lexicon", Fourteenth Edition, at page 359, defines "dead rent" as:

> "Dead Rent is rent payable on a mining lease in addition to a royalty, so called because it is payable whether the mine is being worked or not."

The definition of "dead rent" given in. Black's "Law Dictionary", Fifth Edition, at page 359, is as follows:

> "Dead Rent. in English law, a rent payable on a mining Lease in addition to a royalty, so called because it is payable although the mine may not be worked.

Jowitt's "Dictionary of English Law", Second Edition, at page 555, defines "dead rent" as "Dead Rent, a term sometimes used in mining leases in contradistinction to a royalty, to denote a fixed rent to be paid whether the mine is productive or not. See RENT."

The same Dictionary states under the heading "Rent", at page 1544 :

> *"When a mine, quarry, brick-works, or similar property is leased, the lessor usually reserves not only a fixed yearly rent but also a royalty or galeage rent, consisting of royalties (q.v.) varying with the quantity of minerals, bricks, etc., produced during each year. In this case the fixed rent is called a dead rent."*

"Royalty" is defined in Jowitt's "Dictionary of English Law", Second Edition, at page 1595, inter alia, as :

> *"Royalty, a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of the right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the right. See Rent."*

"Royalty" is defined in Wharton's "Law Lexicon" Fourteenth Edition, at page 839, as :

> *"Royalty, payment to a patentee by agreement on every article made according to his patent; or to an author by a publisher on every copy of his book sold; or to the owner of minerals for the right of working the same on every ton or other weight raised".*

The definition of "royalty" given in Black's "Law Dictionary", Fifth Edition, at page 1195, is as follows :

> *"Royalty. Compensation for the use of property, usually copyrighted material or natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced. A payment which is made to an author or composer by an assignee, licensee or copyright holder in respect of each copy of his work which is sold, or to an inventor in respect of each article*

> *sold under the patent. Royalty is share of product or profit reserved by owner for permitting another to use the property. In its broadest aspect, it is share of profit reserved by owner for permitting another the use of property....*
>
> "*In mining and oil operations, a share of the product or profit paid to the owner of the property.....*"

In Halsbury's "Laws of England", Fourth Edition in the volume which deals with "Mines, Minerals and Quarries", namely, volume 31, it is stated in paragraph 224 as follows:

> *"224. Rents and royalties. An agreement for a lease usually contains stipulations as to the dead rents and other rents and royalties to be reserved by, and the covenants and provisions to be inserted in, the lease..... "*

The topics of dead rent and royalties are dealt with in Halsbury's "Laws of England" in the same volume under the sub-heading "Consideration", the main heading being "Property demised; Consideration". Paragraph 235 deals with "dead rent" and paragraph 236 with "royalties". The relevant passages are as follows :

> *"235. Dead rent. It is usual in mining leases to reserve both a fixed annual rent (otherwise known as a 'dead rent', 'minimum rent' or 'certain rent') and royalties varying with the amount of minerals worked. The object of the fixed rent is to ensure that the lessee will work the mine; but it is sometimes ineffective for that purpose. Another function of the fixed rent is to ensure a definite minimum income to the lessor in respect of the demise.*

If a fixed rent is reserved, it is payable until the expiration of the term even though the mine is not worked, or is exhausted during the currency of the term, or is not worth working, or is

difficult or unprofitable to work owing to faults or accidents, or even if the demised seam proves to be non-existent.

> *"236. Royalties. A royalty, in the sense in which the word is used in connection with mining leases, is a payment to the lessor proportionate to the amount of the demised mineral worked within a specific period."*

In paragraph 238 of the same volume of Halsbury's "Laws of England" it is stated :

> *"238. Covenant to pay rent and royalties. Nearly every mining lease contains a covenant by the lessee for payment of the specified rent and royalties.*

Rent is an integral part of the concept of a lease. It is the consideration moving from the lessee to the lessor for demise of the property to him. Section 105 of the Transfer of Property Act, 1982, contains the definitions of the terms "lease", "lessor", "lessee", "premium" and "rent" and is as n follows :

> *"105, Lease defined. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.*

Lessor, lessee, premium and rent defined. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

In a mining lease, the consideration usually moving from the lessee to the lessor is the rent for the area leased (often called

surface rent), dead rent along with Royalty. Since the mining lease confers upon the lessee the right not merely to enjoy the property as under an ordinary lease but also to extract minerals from the land and to appropriate them for his own use or benefit, in addition to the usual rent for the area demised, the lessee is required to pay a certain amount in respect of the minerals extracted proportionate to the quantity so extracted. Such payment is called "royalty". It may, however, be that the mine is not worked properly so as not to yield enough return to the lessor in the shape of royalty. In order to ensure for the lessor a regular income, whether the mine is worked or not, a fixed amount is provided to be paid to him by the lessee. This is called "dead rent".

"Dead rent" is calculated on the basis of the area leased while royalty is calculated on the quantity of minerals extracted or removed. Thus, while dead rent is a fixed return to the lessor, royalty is a return which varies with the quantity of minerals extracted or removed. Since dead rent and royalty are both a return to the lessor in respect of the area leased, looked at from one point of view dead rent can be described at the minimum guaranteed amount of royalty payable to the lessor but calculated on the basis of the area leased and not on the quantity of minerals extracted or removed. Stipulations providing for the lessee's liability to pay surface rent, dead rent and royalty to the lessor are the usual covenants to be found in a mining lease.

C. RIGHT ON MINERALS EXERCISED BY THE BRITISH IN INDIA:

i) ‘SHARE IN THE PRODUCE’ IS PREROGATIVE RIGHT – [TAX- CESS ETC:]

Right exercised by the British in making an assessment under ryotwari settlements namely ‘share in the produce’ has been misinterpreted in

many Courts. However various Government Orders pronounced at that time makes things more clear.

RESOLUTION – dated 19th March 1888, No. 277.

In supersession of the existing Standing Order, the following is issued as Standing Order No. 10 :-

1. **The State lays no claim to minerals** -

|G.O. 26th May, 1882, |(a) In estates held on sanads of permanent| |No. 511 (Notification,|settlement | |paragraph 1). | | |G.O. 28th October 1882|(b) In enfranchised inam lands No.1181 | | |G.O. 28th April 1881 |(c) In religious service tenements No.861 |confirmed under the inam rules on perpetual service tenure. (d) In lands held on title – deeds, issued | | |under the waste land rules, prior to 7th | | |October, 1870, in which no reservation of | | |the right of the State to minerals is | | |made. |

2. The right of the State in minerals is limited in the following cases to a share in the produce of the minerals worked, commuted into a money payment, if thought necessary, by Government, in like manner with and in addition to the land assessment :-

(a) In lands occupied for agricultural purposes under ryotwari pattas
[G.O. 23rd January 1881]

(b) In janmom lands in Malabar:
[G.O. 16th December1881 No.1384]

Persons intending to work minerals in those lands should give notice of their intention to the Collector of the district, specifying the lands in which they intend to carry on mining operation and should pay in two half- yearly instalments a special assessment for minerals in addition to the land assessment at the following rates:-

Per acre (Rs.) ……

3. For mining for diamonds and other precious stones 15

4. For mining for coal, lime-stone or quarrying for building stone … (Such rates as may be fixed by the Board from time to time The rates will be doubled if mining operations are carried on without giving notice to the Collector.

The special assessment will be entered in the patta granted for the land and collected under the provisions of Act II of 1834 Madras. No charge will be made for merely prospecting for minerals in patta lands if mines are not regularly worked. No remission will be granted in respect of

any land rendered unfit for surface cultivation by the carrying on of mining operations. This rule does not of course afeet in any way the right which all holders of lands on patta possess of digging wells in their lands and of disposing of the gravel and stones which may be thrown up in the course of such excavation.

The following observations assumes importance:

"….should pay in two half- yearly instalments a special assessment for minerals in addition to the land assessment at the following rates:-

Per acre *(Rs.) ……*

'Royalty' as already explained, is paid in accordance with the quantity of the mineral extracted and not as payment as a unit. It isalways the claim of the proprietor /owner of the mineral and not a prerogative right to assess it as revenue. This shows that the British never claimed the ownership on minerals. 'Share in the produce' found in all these govt. orders of pre-independent era was not rent/royalty but only 'revenue/tax on minerals. In Madathappu Ramaya vs The Secretary Of State For India reported in (1904) 14 MLJ 37 privy council clarified this aspect in so many words in para 30 as follows:

"*30. The right of Government to assess land to land-revenue and to vary such assessment from time to time is not a right created or conferred by any statute, but, as stated in my judgment in Bell's Case I.L.R. 25 M. 482 is a prerogative of the Crown according to the ancient and common law of India. The prerogative right consists in this, that the Crown can by an executive act determine and fix the ' Rajabhagam' or King's share in the produce of land and vary such share from time to time. This necessarilv implies and pre-supposes that the occupant of the land has an interest in the land and is entitled to the occupant's or ryot's share of the produce as distinguished from the King's share. The same idea is often expressed in the words that the Crown is entitled to the Melvaram in the land and the ryot to the Kudivaram. It therefore necessarily follows that the Crown cannot impose land-revenue upon lands in*

which, according to its own case, the person in occupancy has no title of interest or Kudivaram right. That such is the nature and extent of the prerogative right of the Crown is fully borne out by Regulation XXVI of 1802 and the provisions of (Madras) Act II of 1864. The definition of the term ' landholder' in Section 1 of the Act (II of 1864) would be inapplicable to persons in possession of land merely as trespassers and to cases in which the land is not subject to the payment of revenue to Government. Section 2 which declares that the land, the buildings upon it and its products shall be regarded as the security for payment of the public revenue, necessarily implies that the occupant of the land who has to pay the revenue has a right in the land and its products. Section 3 imposes upon the land-holder the obligation to pay the revenue due upon the land and Section 42--which provides for the sale of the defaulting ryot's, land free of encumbrances created by him and for payment to him of the balance of the sale-proceeds after deducting the arrears of revenue--clearly shows that he has a substantial interest in the land."

In N.R. Reddy -Vs- State of A P reported in (1965) 2 Andh. LT 297 this has been highlighted by AP High Court and the same was approved by 7 judges bench in India cement's case -Vs- State of Tamilnadu reported in 1990(1) SCC 12 . In India Cements case (supra)7 judges bench had appreciated this well-established principles of common law followed in India from time immemorial and held in para 20 as follows:

"20 ……..in the earlier days, sovereign had in exercise of their prerogative right claimed a ***share in the produce*** *of all cultivated land known as 'Rajabhagam' or by any of the various other names, and had fixed their share or its commuted money value from time to time, according to their will and pleasure…….. The right of the sovereign to a share in the produce as observed by the Government of Madras*

in 1856 ***is not rent*** *which consists of all surplus produce after paying the cost of cultivation and the profits of agricultural stock but* ***revenue only*** *which ought if possible to be so lightly assessed as to leave a surplus or rent to the occupier, when he in fact lets the land to others or retains it in his own hands….."*

In fact from time immemorial till the passing of Section 2 of the MMDR Act 1957, every State used to make an additional assessment on 'minerals excavated as 'Rajabhagam' if found necessary as stated in the G.O. 16th December 1881 No.1384 and not Royalty which is claimed in proportion to the quantity of the mineral excavated. This practice was abandoned once the MMDR Act 1957 was enacted and the entire field of legislation was taken over by the Central government under Section 2.

D. MINES AND MINERALS DEVLOPMENT AND REGULATION ACT 1957 :

MMRD Act 1957 was enacted by replacing the earlier enactments in order to bring the entire field of mineral development under the control of the Central Government. Section of the Act enable the Central Government to make such a declaration and all entries in Part -II of the 7th Schedule was incorporated in such a manner so as to enable the Central Government to exercise its supremacy. Central Government made a declaration and now the entire filed of mineral development and regulation is under the control of the Central Government and the State can only make rules under Section 15 of the MMRD Act 1957. In this scenario one question always remained as a perineal issue , i.e

"Whether Section 2 declaration denude the right to exercise its prerogative right by the State Governments otherwise provided under Entry 50 of Part II of the 7th Schedule of the Constitution?"

The controversy as to whether Section 2 declaration takes over the field of assessment of revenue as well, is an unresolved questionstill in limbo because even 7 judges in India Cements case reported in 1990 (1) SCC 12could not resolve the controversy. The argument that imposition of 'Cess' on Royalty shall distend the Royalty and therefore is beyond the legislative

competence of the State of Tamil Nadu in view of Section 9 of the MMRD Act 1957 was accepted in that case and it was held that the State cannot bring in a 'cess' on Royalty. Under Section 9 of the Actonly the Central govt can enhance the Royalty and therefore the cess imposed by State of TN was beyond their competence; it was declared. However the question whether an imposition of prerogative right can balloon the proprietary right is still staring at our face. In para 34 Hon'ble Court held that Cess on Royalty cannot be justified under Entry 23 of List II and also that Cess cannot fall under Entry 49 of List II because it is not a tax 'on land' but 'on the Royalty' which is a payment for the user of land. Whether the above conclusion is correct or not is now under the consideration of 9 judges.

E. <u>CONFLICT OF JUDGMENTS DEALING WITH THE QUESTION AS TO WHETHER ROYALTY IS TAX</u>:

a) One after another, various constitution benches of the Hon'ble Supreme Court deliberated upon this subtle issue but still the same has not been resolved yet. After a 7 judges bench of the Hon'ble Supreme Court headed by Chief Justice Gajengragadkar in HRS Murthy (1964) 6 SCR 666 =AIR 1965 SC 177 considered as to what is the impact of statutory declaration under Section 2 of Mines and Minerals (Development and Regulation) Act 1957 whereby the entire field of development and regulation of mines and minerals were occupied by Central Government, another 7 judges bench in India cements case reported in 1990 (1) SCC 12 headed by Chief Justice E. S. Venkataramaiah again considered the issue. India cements case (supra) refused to accept various conclusions in HRS Murthy (supra) [para 28] but the matter did not go before larger bench. In fact a passing reference to the judgment of Karnataka High Court in Laxminarayana Mining Co. reported in AIR 1972 Mysore 299 is made there in para 27, even though in so many words the said judgment was not approved anywhere in the judgment. This created lot of confusion during the post 'India Cements' (supra) judgement. In Laxminnarayana (supra) Karanataka High Court states in para 15 of the said judgment that 'Royalty is tax' and also that Entry 50 of Part-II of the

Constitution covers ‘Royalty’ as well. The following observation in para 15 assumes importance :

> “15. .....*To us it appears the expression* ***'tax on mineral rights' includes within its scope the royalty*** *payable on minerals extracted. Mineral rights and mining activity carried on in exercise of those mineral rights appear to us to be indistinguishable in the above context.* ***That appears to be the true intendment of the declaration contained in Section 2 of the Central Act*** *and that it is so enacted in order to see that throughout the Indian Union, the rents, royalties and other taxes payable in respect of mining and minerals are uniform……”*

The above conclusion in Laxminarayana (supra) is per-incuriam because the said declaration was made in ignorance of Section 17-A (3) of the MMDR Act 1957.In India Cements case (supra) at the end of the para 27it appears that judgment in Laxminarayana (supra) is deemed to been approved, because the last sentence in para 27 of India cements case (supra) states :

> *“27……..At page 306 0f the said report, it was held that Royalty under Section 9 of the Mines and Minerals Act was really a tax”*

The above observation had definitely influenced the decision making and final conclusion at para 34 where it stated that royalty is tax. However when we look at the ratio in India cements case (supra) it could be seen that the levy of Tamil Nadu govt was set aside by the 7 judge bench, not because it declared that ‘royalty is a tax’ but on two other grounds;i.e (i) Section 9 stands violated because by imposing Cess on Royalty, Royalty got distended and that power is vested only with the Central govt and not with the State govt and (ii) Cess on Royalty cannot be justified under Entry 49 because it is not a levy directly on land as a unit. Thejudgment remained so fluid and during the periods to comethat hadcreated enough turbulence causing trouble to the respective governments in exercising its prerogative right covered by Entry 50 of the Part -II of the Constitution.

Therefater in KESORAM reported in 2004 (10) SCC 201 a 5 judges Constitution Bench headed by Chief Justice Lahoti (As he then was) on a majority of 4 :1, tried to salvage the situation by holding that the error in India cements case (supra) was only a typographical error.

b) 'India cements case' reported in 1990 (1) SCC 12 [7 judges bench] is a Classic example of an omission in dealing with the issue regarding legislative competence of the State Government to impose tax/cess on minerals.The said judgment failed to independently reproduce and interpret Section 2 of the Mines and Minerals Development and Regulation Act 1957 untrammelled by the view of various earlier judgments and also failed to refer the matter to a larger bench having more than 7 judges as soon as it found that they do not agree with the previous 7 judges Bench judgment in HRS Murthy (Supra). On the other hand it tried to travel through a different path altogether and deliberated upon the issue on a novel point so as to hold that 'Cess' on Royalty imposed by State of Tamil Nadu shall enhance the Royalty and hence is beyond the scope of delegated power under Section 15 of the 1957 Act. No doubt enhancement of royalty under Section 9 of the 1958 Act, is the prerogative of theCentral Government alone and State cannot trench upon this filed at any cost.Still a reasonable doubt arises as to whether by exercising a prerogative right (provided Entry -54 of List-I R/W Entry 50 of List- II permits), can an incident of proprietary right (Royalty) get inflated? Most importantly, it is most important to remember that the conclusion was not that 'Royalty is tax' and therefore cess on royalty will amount to 'tax on tax' as that could be seen propounded in various discussions in social media emanating from the judgment in India cements case (supra). It is respectfully submitted that, in that case India cements case (supra) itself may have to be considered as a judgment rendered sub-silentio of Section 17 -A(3) of MMDR Act 1957. The author do not subscribe to the opinion that India Cements case (supra) declared that 'Royalty is Tax'. The enactment made by the State of Tamil Nadu imposing cess on Royalty was held to be beyond legislative competence, in that case only because it shall result in violation of Section 9(3) of MMDR Act 1957[para 34]. The major pondering in the

judgment revolved around Section 9(3) of the MMDR Act 1957 and Entry 49 of List II so as tojustify the impost of 'cess on royalty' by State of Tamil Nadu. Even though Entry 49, Entry 50 as well as Entry 23 of List II of Seventh Schedule were superficially recalibrated in the light of 'Federal checks and balances' in the Constitution of India so as to find out whether the Tamil Nadu legislature exercised its wisdom wisely butfinally, the whole judgment went in to a no-man's territory where by Section 9 was brought in as a sheet anchor to lay its foundation in para 30 and 34 of the judgment. In paragraph 34 it is observed as follows:

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

From the above discussion it is clear that the usage 'Royalty is tax' appearing in paragraph 34 of the judgment is not a typographical error but an inadvertent error by omitting to contain the statutory scheme in incorporating Section 17-A(3) of the MMDR Act 1957 and also evident that the judgment has thoroughly influenced by the per-incuriam judgment of the Karnataka High court in Laxminarayana (supra).

c) No doubt in Kesoram's case(supra) Constitution Bench of 5 judges, held that the error in the earlier 7 judges bench judgment was the outcome of a 'typographical error'. However Hon'ble Mr. Justice Sinha (as he then was) descended with a word of caution that a 5 judges bench cannot read down a 7 judges bench judgment. In fact in Paragraph 71 of the majority judgment in Kesoram (supra) held as follows:

> *"71 We have clearly pointed out the said error, as we are fully convinced in that regard and feel ourselves obliged constitutionally, legally and morally to do so, lest the said error should cause any further harm to the trend of jurisprudential thought centering around the meaning of 'royalty'. We hold that*

royalty is not tax. Royalty is paid to the owner of land who may be a private person and may not necessarily be State. A private person owning the land is entitled to charge royalty but not tax. The lessor receives royalty as his income and for the lessee the royalty paid is an expenditure incurred. Royalty cannot be tax. We declare that even in India Cement it was not the finding of the Court that royalty is a tax. A statement caused by an ***apparent typographical or inadvertent error*** *in a judgment of the Court should not be misunderstood as declaration of such law by the Court. We also record, our express dissent with that part of the judgment in Mahalaxmi Fabric Mills Ltd. and Ors. which says (vide para 12 of SCC report) that there was no 'typographical error' in India Cement and that the said conclusion that royalty is a tax logically flew from the earlier paragraphs of the judgment."*

c) In fact the word of caution raised by Hon'ble Mr Justice Sinha was not merely an aspect of judicial discipline. A thorough investigation in to the ratio of the judgment in India Cement Case (supra) will reveal that the 7 judge Bench decision in India Cements (supra) definitely needed a post-mortem because it had ignored to settle its descend from the conclusions arrived at by the earlier bench of even number in HRS Murthy(supra) by referring the issue to a larger bench [para 28 of India cements case].

d) Most importantly Section 17A(3) of the MMDR Act 1957 dealing with private ownership of minerals was omitted to be looked in to in India Cements case (supar) and as a result the meaning of 'Royalty' got mis-interpreted at least in para 27 due to the influence of the Karnataka High Court view in Laxminarayana (supra). It is seen written 'Royalty is a tax'. No doubt the next constitution Bench in Kesoram (supra) tried to explain it by stating that the error was a '***apparent typographical or inadvertent error***'.It had also held that even a private person can claim Royalty and therefore it can never be a tax. It had rightly held that 'Royalty' is the proprietary right of the

owner and that owner need not be the State. Section 17A(3) of the MMDR Act 1957, provides that if the State requires Minerals belonging to a private person, the State will have to pay Royalty to the lessor (private person) like any other lessee. Section 17-A(3) Reads as follows:

> "17-A (3)-
>
> Where in exercise of the powers conferred by sub-section (1A) or sub-section (2) the Central Government or the State Government, as the case may be, undertakes prospecting or mining operations in any **area in which the minerals vest in a private person**, it shall be **liable, to pay** prospecting fee, **royalty, surface rent or dead rent**, as the case may be, from time to time at the same rate at which it would have been payable under this Act if such prospecting or mining operations had been undertaken by a private person under prospecting licence or mining lease."

Private Citizen cannot exercise 'prerogative right' to impose tax; means 'Royalty' under the MMDR Act 1957 is not a 'prerogative right' but a 'proprietary right'enabling even a private person to claim royalty. Supreme Court inadvertently declared that 'cess' on Royalty being a 'prerogative impost' shall enhance the 'Royalty', without appreciating the fact that 'Royalty', is a 'proprietary right' and not a 'prerogative right'. Under Section 9, fixing maximum rate of Royalty no doubt is a prerogative vested in the Central Government as a statutory requirement aiming at development and regulation of mines and minerals. Therefore the finding in India Cements case (supra) that due to the impost of cess on Royalty, 'Royalty' got distended /enhanced,requiredto be revisited again by making an introspection so as to find out whether Section 2 of the MMDR Act 1957 was correctly appreciated.Whether legislative field under Entry 50 of List -II which enabled the State to impose tax on mineral rights, rightly held to be denuded by a declaration under Section 2 of the MMDR Act 1957. Thatexercise may not even need a declaration about the nature of Royalty so as to find out as to whether Royalty is tax or not.

e) In 2011, 3 judges Bench headed by Chief Justice Kapadia in 'Mineral Area Development Authority Vs- Steel Authority of India' reported in 2011(4) SCC 450 apparently referred the matter to 9 judge bench so as to iron out the creases in the previous pronouncements on this scorching issue. Most disappointing fact is that when the matter was referred to 9 judges Bench, the question "Whether Royalty is tax' also stands referred to 9 judges, despite the fact that Section 17A(3) is loud and clear that 'Royalty can never be a Tax'. Section 17 A (3) of the MMDR Act 1957 specifically provides, that if the State or Central Government needs minerals belonging to a private person, State/ Central Government shall pay Royalty to the said private person. As already stated a private person cannot exercise prerogative right to impose tax. Therefore Royalty can only be a 'proprietary right' and can never be a 'prerogative right' as held in Satyanaranyana's case (supra). Most importantly, Section 17-A(3) of MMDR Act 1957 is not under challenge in any of these proceedings. Consequence is that there are various cases pending in the Supreme Court pertaining to various imposts including service tax,an impost by the Central Government itself, thinking that if Royalty is declared as Tax then service tax cannot be levied.All these cases are pending before the Hon'ble Supreme Court waiting for the 9 judge bench decision which requires urgent attention. In fact hundreds of cases can be disposed off with a single stroke and delay may not hamper justice delivery system. Justice in that case is done not only to private persons but also to the State as well.

f) However the question whether the Royalty can be collected by the State as a prerogative right was left open to be decided until the controversy referred to 9 judge bench in 2011(4) SCC 450 is finally resolved. In Thressiamma Jacob(supra), the State was claiming the 'Royalty' not as a tax in exercise of it's prerogative right but as the owner of the minerals but the larger bench turned down the plea of the State. In fact the order in Mineral Area Development Authority Vs- Steel Authority of India' [2011(4) SCC 450] is delaying dispensation of justice, because 9 learned judges are yet to deliberate upon a point

directly covered by the statutory provision i.e Section 17-A(3) of the MMDR Act 1957 and all cases touching upon this issue has to wait until a declaration comes from 9 judges bench. The constitutional right of the petitioners in those cases for property under Article 300-A stands suspended sine die, despite the fact that due process of law demands a decision based on Section 17-A(3) at the earliest. The author strongly suggest that all those matters touching on the point as to whether 'Royalty is tax ' can be disposed ofon the basis of the statutory provision Section 17-A(3) of the MMDR Act 1957.

CONCLUSION :

The finding in India Cements case (supra) that 'CESS ON ROYALTY ENHACE THE ROYALTY' is a declaration made in sub-silentio of Section 17A(3) of the MMRD Act 1957. Royalty being a proprietary right [section 17A(3)] can be claimed by an owner of the Minerals alone (can be a private person or the State),where as cess/taxcan be imposed only by the Statein exercise of the prerogative rightvested in it.

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