

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5360 OF 2005

TATA IRON AND STEEL CO. LTD. & ANOTHER ... Appellants

Versus

STATE OF BIHAR & OTHERS ... Respondents

WITH

CIVIL APPEAL No.5359 OF 2005

STATE OF JHARKHAND & OTHERS ... Appellants

Versus

TATA IRON & STEEL CO. LTD. & ANOTHER ... Respondents

J U D G M E N T

Chelameswar, J.

CIVIL APPEAL NO.5360/2005

1. This appeal arises out of the judgment dated 20.8.2004 in CWJC No.3819 of 1993 of the High Court of Jharkhand at Ranchi.
2. The appellants herein are the unsuccessful petitioners before the High Court.
3. A brief factual background of the matter is as follows:

The first appellant-Tata Iron & Steel Company Ltd. (for short “TISCO”) is a company registered under the Companies Act having an industrial unit at Jamshedpur in the district of Singhbhum, East Bihar (Now the State of Jharkhand). The industrial unit is primarily engaged in the business of manufacture and sale of iron and steel products. For the purpose of establishing the industry TISCO required considerable extent of land. A huge extent of land admeasuring 15,725 acres was acquired by the Government and conveyed to TISCO by the then Secretary of State of India in Council by two conveyances dated 19.1.1912 and 23.9.1929.

4. The industrial unit and township connected with TISCO came into existence over a period of time on the said parcel of land.¹ It is an admitted fact that a river ‘Subarnrekha’ flows past the said parcel of land. It is also an admitted fact that from time to time, TISCO has been drawing water from Subarnrekha River for various purposes connected with the industry and its employees. It is also an admitted fact that the necessary infrastructure for the use and distribution of water for the above mentioned purposes was established by TISCO. By virtue of an enactment known as Bihar Land Holdings Act, as amended by another Act of 1972, the above mentioned lands came to be vested in the State of

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Over a period of time a city came into existence around the industrial unit.

Bihar. However, the land was once again conveyed to TISCO by two documents dated 4.8.1984 and 1.8.1985, the details of which may not be necessary for the purposes of this judgment.

5. The State of Bihar undertook the construction of a multipurpose project on Subarnrekha River of which a dam known as Chandil Dam was a part. It enables impounding the water of Subarnrekha River. Chandil Dam is located upstream of Subarnrekha River above the township of TISCO.

6. Respondents issued a demand notice dated 30.9.1993 calling upon TISCO to pay an amount of Rs.31.351 millions towards bill of water drawn from the river.²

7. On receipt of the said notice, the appellants filed a writ petition with prayers:

“(a) to issue a Writ or Order or direction under Article 226 of the Constitution against the Respondent authorities to desist from interference with the (sic) petitioners right in any manner whatsoever and more particularly by obstructing the free flow of water in the River Subarnarekha;

b) to issue a writ, order or direction that the respondents be restrained from interfering with or obstructing in any manner the free flow of water from the River Subarnarekha for the needs of the petitioners and Jamshedpur Township and its inhabitants;

2 “As per the direction given by Water Resources Department and communicated to undersigned by administrator Subarnarekha Project. I am enclosing bill of water drawn by Tisco iron Mango river site in duplicate amounting to Rs. 31.351 million for early payment to Executive Engineer Dam Division No. 2, Chandil.

- c) to declare that the impugned demand notice dated 30.9.1993 and “Bill” is illegal and void and/or issue a writ or order or direction quashing the “Bill of water drawn by Tisco” of Respondent no. 3 vide letter no. Su/Prasha/M/1595 dated 30.9.1993 issued with the approval of respondent nos. 1 & 2 as illegal, ultra-vires of the Indian Constitution and is contrary to law;
- d) to declare that the petitioners have absolute and indisputable rights to water from the River Subarnarekha that flows on their own land and to utilize such water for their own use without payment to any State or authority whatsoever;
- e) to declare that the petitioners have an easementary right by prescription to the waters of the river Subarnarekha;
- f) to declare that the petitioners have right to the water of the river Subarnarekha as riparian owner;
- g) to declare that the impugned actions and threats are contrary to the petitioners' fundamental rights granted under Articles 14, 19(1)(g) and 21;”

8. During the pendency of the said writ petition, various notices at different points of time demanding the payments of the amounts specified therein were received by TISCO. Such demands pertained to various periods during which water was drawn by TISCO commencing from November, 1992 to June, 1998. A summary of the same is Annexed to the Additional Affidavit dated 19.2.2005 filed in the instant appeal. In substance, TISCO was called upon to make a further payment of 55.43 crores. It may be mentioned here that such additional demands were made during the pendency of the writ petition No.3819/1993 before the High Court.

9. It appears from the writ petition and the prayers (a), (b), (c) and (d) thereof, TISCO's case is that it has a 'riparian right' over the waters of the Subarnarekha river apart from an “easementary right”. Though the

High Court took note of the arguments based on the above claims, it declined to examine those claims holding;

“3. ... We find that the claim of right by Tisco in this writ petition is essentially based on what it calls a riparian right and its prescriptive right. The existence of such a right, either natural or prescriptive, can be decided only in a properly instituted suit in a competent civil court based on proper pleadings and evidence to be adduced by the parties and those are not questions that we should venture to decide in this proceeding under Article 226 of the Constitution of India.”

10. Before the High Court, it was the specific case of TISCO that the impugned demand (be it either a tax or a fee) is without any authority of law and therefore unconstitutional. It appears from the copy of the writ petition that it was the specific case of the petitioner that the impugned demand is without the authority of law and violative of Article 265³ of the Constitution of India apart from Articles 14 and 19(1)(g).

11. It appears to be the case of the respondent-State that (i) under Entry 17⁴ of List II of the Seventh Schedule of the Constitution, the State has power to legislate on water and under Entry 66⁵ of the List II the State could collect a fee in connection with any one of the matters in the list and was therefore competent to make the impugned demands; (ii) necessary statutory support for the impugned demands could be

3 The petitioners respectfully submit that the impugned demand notice for a compulsory exaction from the petitioners without the authority of law directly infringes the petitioner’s fundamental rights under Article 14 and 19(1)(g) and also violates Article 265 of the Constitution.

4 17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

5 66. Fees in respect of any of the matters in this List, but not including fees taken in any court.

found in the provisions of Bihar Irrigation Act, 1876; and (iii) the State had spent considerable amount for the construction of “Subarnarekha River Multi Purpose Project” of which TISCO is one of the “direct beneficiaries” and therefore, the State is entitled to collect the money for the water consumed by TISCO.

12. The respondents also submitted that there was some dialogue between the State and TISCO for the purpose of creating a contractual obligation on TISCO to make payments for water drawn by it. Therefore, TISCO was obliged by a contract to pay monies due under the impugned demands.

13. The High Court did not examine the questions - Whether the impugned demand is a Tax or a Fee or a liability arising under a contract?, and, Whether the prohibition contained in Article 265 is confined only to levy and collection of tax or it would also extend to levy or collection of a fee?

14. No clear finding is recorded by the High Court that there exists any law authorizing the levy and collection of the impugned demand. Though the High Court made references to the Bihar Irrigation Act, 1876, it did not record any conclusion whether the said Act provides the necessary statutory authority for the levy and collection of the impugned

demands. However, by the judgment under appeal, High Court opined that:

“Under Entry 17 of List II of the Seventh Schedule to the Constitution of India, the State has power to legislate on water, subject to Entry 56 of List I.

**** **** ****

..the State of Bihar must be found to be competent to enact laws in terms of Entry 17 of List II of the Seventh Schedule.

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Under Entry 66 of List II to the Seventh schedule, the State has power to collect a fee in respect of any of the matters in the list but excluding the fees taken in any Court. Once we consider that the State has the right to legislate on water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power, there must necessarily be a right to impose a fee on the water supplied by the State to Tisco after the same is impounded at Chandil Dam built across the Subarnrekha River at State's expense or the water flowing down stream of Subarnrekha River from any water source. The expenditure incurred by the State for construction of the claim would be the quid pro quo for the fee to be imposed by the State. We are therefore of the view that the State is in a position to demand payment for the water used by Tisco from the Subarnrekha River during the relevant period.”

In substance, the High Court held that in view of the Entry 66 of the List II of the Seventh Schedule the State is legally justified in making the impugned demands! High Court appears to be of the view that the mere existence of an entry (Entry 66 of List-II) in the Seventh Schedule is sufficient to justify the impugned demand.

However, High Court granted a limited relief to TISCO directing the respondent-State to collect the fee for water consumed for domestic purposes at a rate lower than the rate applicable for the water consumed for the industrial purposes.

“Para 9. ...Therefore, as far as the bill issued to Tisco prior to the coming into force of the Bihar Irrigation Act is concerned, the matter requires to be reconsidered by the State Government. The Government has to verify the figures and determine the quantum of water used by Tisco for its industrial purposes as distinct from other purposes and impose a liability on Tisco for water used for industrial purposes all the present rate, and impose a rate for water used for other purposes at a lesser rate consistent with the rate charged for other domestic consumers. We do not find anything irrational or arbitrary in the rate of Rs. 3/- per thousand gallons adopted by the State. But that rate can be justified only for the water used by Tisco for industrial purposes. Water used for purposes other than industrial purposes has to be charged at a lesser rate as indicated above.”

15. Hence the instant appeal.

16. Before this Court also it is categorically pleaded⁶ and argued by Shri Dushyant Dave on behalf of TISCO that the impugned demand is without any authority of law and therefore violative of Article 265 of the Constitution of India.

17. On behalf of the respondent-State, it is submitted that the impugned demand is a ‘fee’ but not a ‘tax’, the expression ‘tax’ occurring in Article 265 cannot take within its sweep – “fee”. Therefore, there is no need for a legislative sanction for the impugned demand.

18. The expressions “taxes” and “duties” are to be found in many provisions⁷ of the Constitution. The expression “fee” finds a place in Article 110(2)⁸ and 199(2), which are in *pari materia*. Both the Articles

⁶ That the High Court failed to appreciate that the impugned demand notice for a compulsory exaction from the petitioner without authority of law directly infringes the petitioner’s fundamental rights under Article 14 and 19 (1) (g) and also violates Article 265 of the Constitution – ground No. XIV of SLP

⁷ See Articles 265, 266, 268, 269, 270, 271, Entries 82 to 91 of List I and Entries 46 to 63 of List II of the Seventh Schedule to the Constitution

recognise the existence of two kinds of fees. Fees for licences and fees for services. Each one of the three lists contained in the Seventh Schedule have entries which employ the expression “fees” (Entry 96 of List I, 66 of List II and 47 of List III). Article 366 contains definitions of various expressions employed in the Constitution. Article 366(28) defines the expression “taxation”-

“(28) taxation includes the imposition of any tax or impost, whether general or local or special, **and tax shall be construed accordingly;**”

19. The expressions “fee” and “duty” are not defined under the Constitution. Article 366(28) employs another expression “impost”. What are the legal contours of each one of these expressions i.e. “tax”, “impost”, “duty” and “fee” fell for the consideration of this Court from time to time.

20. This Court in ***Commissioner of Income Tax, Udaipur, Rajasthan v. McDowell And Company Limited***, (2009) 10 SCC 755 held:

“21. “Tax”, “duty”, “cess” or “fee” constituting a class denotes to various kinds of imposts by State in its sovereign power of taxation to raise revenue for the State. Within the expression of each specie each expression denotes different kind of impost depending on the purpose for which they are levied. This power can be exercised in any of its manifestation only under any law authorizing levy and collection of tax as envisaged under Article 265 which uses only the expression that no “tax” shall be levied and collected except authorised by law. It in its elementary meaning conveys that to support a tax legislative action is essential, it cannot be levied and collected in the absence of any legislative sanction by exercise of executive power of State under Article 73 by the Union or Article 162 by the State.

22. Under Article 366(28) “Taxation” has been defined to include the imposition of any tax or impost whether general or local or special and tax shall be construed accordingly. “Impost” means compulsory levy. The well-known and well-settled characteristic of “tax” in its wider sense includes all imposts. Imposts in the context have following characteristics:

- (i) The power to tax is an incident of sovereignty.

- (ii) **“Law” in the context of Article 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority.**
- (iii) **The term “tax” under Article 265 read with Article 366(28) includes imposts of every kind viz. tax, duty, cess or fees.**
- (iv) As an incident of sovereignty and in the nature of compulsory exaction, a liability founded on principle of contract cannot be a “tax” in its technical sense as an impost, general, local or special.”

21. A nine-judge Constitution Bench of this Court in ***Jindal Stainless Ltd. & Another v. State of Haryana & Others***, 2016 (11) Scale 1, quoted the abovementioned statement of law with approval. Therefore, it is now well settled that the expression “fee” is also comprehended in the expression “tax” for the purpose of Article 265 and even for the collection of a “fee”, authority of law (i.e. legislative support) is mandatorily required under the Constitution.

22. In view of the abovementioned authoritative pronouncement, we need not examine the various ancillary submissions made on behalf of the respondent State relying upon various judgments⁹ of this Court rendered prior to judgment in ***Jindal Stainless case*** (supra) that the expression “tax” occurring in Article 265 does not take within its sweep the expression “fee”.

23. The next question that is required to be examined is whether the impugned demand could be justified as a demand made pursuant to the

authority of law conferred either under the Bengal Irrigation Act 1876 or Bihar Public Irrigation and Drainage Works Act, 1947.

24. The High Court took note of the rival submission in this context.

“..... It is also submitted on behalf of the State that the Bengal Irrigation Act, 1876 had application to the districts of Hazaribagh and Ranchi, though it was not applicable to the Santhal Parganas and that it really applied to Jamshedpur in which the Works of the writ petitioner are located. Counsel for Tisco submitted that the Bengal Irrigation Act, 1876 did not cover the use of water for non-irrigation purposes and the said Act did not confer any power on the Government to recover any rate for the water used for non irrigation purposes, like the one involved in this case. This is yet another question that requires to be considered and decided.”

But there is neither any discussion by the High Court nor any conclusive finding on the submissions.

25. Insofar as the alternative submission made before this Court that the impugned demand could be justified under the Bihar Irrigation Act 1997 (Act 11 of 1998) there was neither any clear pleading before the High Court nor a submission.

26. In the circumstances, we would not like to examine the abovementioned two submissions as the court of first instance. We must place it on record that the learned counsel appearing for the respondent-State submitted that since they are pure questions of law, this Court is obliged to examine the same.

We reject the submission. No doubt that it has been repeatedly held by this court that this court would not be averse to examine a pure

question of law, (but not argued in the High Court) raised for the first time before this Court. This court only asserted its jurisdiction to resort to such an examination but did not declare that this Court is bound to examine in every case where a question of law is raised. We are sorry to place it on record that all sorts of questions of both fact as well as law are sought to be raised for the first time in this Court though no effort was made to raise such arguments either in the High Court (or the subordinate court, as the case may be). There appears to be some magic in Bhagwan Das Road!

Questions of law arising out of the application and interpretation of a local law, in our opinion, ought not to be normally entertained by this court unless such questions are intertwined with substantial questions of interpretation of the Constitution. At any rate, such questions, in our opinion, ought not to be examined by this court as a court of first instance when such questions were not either raised or argued properly before the High Court. Even in those cases where the parties raised such questions but the High Court failed to examine such questions, this Court cannot become a substitute for the High Court.

27. We are left with one more question in this matter. From the tenor of the counter affidavit filed before the High Court, it appears that the entire thrust of the case of the respondent -State appears to be that the

State while making the impugned demands is only trying to recover some portions of the expenditure incurred in constructing the Chandil Dam of which TISCO is one of the direct beneficiaries. A reading of the counter affidavit filed on behalf of the State by Dwarka Nath Srivastava, Superintending Engineer gives a vague impression that the State was suggesting that the impugned demands arise out of an agreement¹⁰ between the State and TISCO.

28. First of all, as a matter of fact, there appears to be some dispute regarding the existence of a concluded agreement by TISCO which obligates TISCO to make the payment of the impugned demand. It can be seen from the abovementioned counter affidavit that the respondent State itself admits¹¹ absence of a concluded agreement.

29. None of the abovementioned aspects have been examined by the High Court in the judgment under appeal.

30. In the circumstances, we are of the opinion that the judgment under appeal cannot be sustained and needs to be set aside. It is, accordingly, set aside. However, having regard to the fact that the State asserts that the two enactments referred to earlier provide the necessary

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authority of law for sustaining the impugned demand, the matter is re-mitted to the High Court for an examination of the abovementioned questions after giving an appropriate opportunity to the parties to file proper further pleadings in the matter and argue the same.

CIVIL APPEAL NO.5359 OF 2005

31. The State of Jharkhand has filed this cross appeal challenging the impugned judgment insofar as it directed the State Government to re-consider the levy regarding supply of water at a uniform rate both for the industrial use as well as the use of water for domestic purposes.

32. In view of the judgment in Civil Appeal No.5360 of 2005, we leave it open to the parties to argue the issue involved in this appeal also before the High Court.

33. Both the appeals stand disposed of accordingly. During the pendency of the matter before the High Court, the impugned demand shall remain stayed.

.....J.
(J. CHELAMESWAR)

.....J.
(S. ABDUL NAZEER)

New Delhi
December 15, 2017

ITEM NO.1501
(For judgment)

COURT NO.2

SECTION XVII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s).5360/2005

TATA IRON AND STEEL CO. LTD. & ANR.

Appellant(s)

VERSUS

STATE OF BIHAR & ORS.

Respondent(s)

WITH

C.A. No. 5359/2005 (XVII)

Date : 15-12-2017 These matters were called on for pronouncement of judgment today.

For parties:

Mr. Krishnanand Pandeya, AOR

Mr. Jayesh Gaurav,Adv.

Mrs. Manik Karanjawala,Adv.

Hon'ble Mr. Justice J. Chelameswar pronounced the judgment of the Bench comprising of His Lordship and Hon'ble Mr. Justice S. Abdul Nazeer.

The appeals are disposed of, in terms of the signed reportable judgment. During the pendency of the matter before the High Court, the impugned demand shall remain stayed.

Pending application(s), if any, stand disposed of.

(OM PARKASH SHARMA)
AR CUM PS

(RAJINDER KAUR)
BRANCH OFFICER

(Signed reportable judgment is placed on the file)