REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.9845-9846 OF 2016

M/S. INDSIL HYDRO POWER AND MANGANESE LIMITED …APPELLANT

VERSUS

STATE OF KERALA AND OTHERS …RESPONDENTS

WITH

CIVIL APPEAL NOS.9847-9850 OF 2016

J U D G M E N T

Uday Umesh Lalit, J.

1. Civil Appeal Nos.9845-9846 of 2016 preferred by M/s Indsil Hydro Power and Manganese Limited (hereinafter referred to as "INDSIL") and Civil Appeal Nos.9847-9850 of 2016 preferred by Carborundum Universal Limited (hereinafter referred to as "CUMI") are directed against the common judgement and order dated 03.04.2014 passed by the Division Bench of the High Court[1]

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Date: 2021.09.06 18:14:00 IST
Reason:

[1] The High Court of Kerala at Ernakulam.

allowing Writ Appeal Nos.1345 and 1355 of 2013 preferred by State of Kerala against INDSIL and CUMI respectively.

2. On 07.12.1990, the Government[2] framed a policy vide G.O.(MS)No.23/90/PD (the Policy, for short) allowing private agencies and public undertakings to set up hydel schemes for generation of electricity at their own cost. As per the Policy, the matters concerning the construction, operation and maintenance of the hydel scheme were to be managed as per the stipulations made by the Government/Board[3]. Clauses 2, 14 and 15 of the Policy were as under: -

> "**2**. Private agencies/ public undertakings shall be allowed the setting up of sanctioned hydel schemes of the category small/ mini/ micro at their own cost, the construction, operation and maintenance being managed by them as per the stipulations insisted upon by Government/ Board. (The stipulated conditions as per Indian Electricity Act, 1910. Electricity (Supply) Act, 1948, other related rules and orders from Central and State Governments).
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> **14**. Royalty for the use of water together with the tax and duties on generation of power as fixed by Government/Board from time to time have to be paid by the agency.
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> Normally generation of power from schemes of the category small/mini/micro utilizing the storage benefits of existing reservoirs and tailrace benefit of existing power stations will

[2] The Government of Kerala
[3] Kerala State Electricity Board

> not be entrusted with private agencies. But, Government may under special circumstances allow such schemes to be set up by private parties. In such cases, in order to account for the additional advantage gained by the agency by way of getting the Controlled releases, the agency will have to pay to Government or the Board, as the case may be, in tariff equivalent to the cost component for the controlled release utilized by the agency for the energy generated from the scheme. This will be in addition to the royalty of water if any, to be paid. The tariff storage/controlled release as above are to be worked out in respect of each scheme separately taking into account the above factors.
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> **15**. For assessment of water quantity used, the application of the formula BH-Power in KW where Q is in NI/Sec and H is the net head in meter for which the machines are designed by the manufacturers, will be made use of."

3. CUMI has three factories in State of Kerala and is in the business of manufacturing electro minerals using electric arc furnaces, which process requires continuous supply of electricity. CUMI filed an application with the State for allotment of "Maniyar Hydel Scheme" in the River Kakkad Basin. After the Scheme was allotted vide order dated 18.01.1991, CUMI undertook to establish the Maniyar Hydro Electric Project with 12 MW capacity on River Kakkad, as a Captive Generating Station for its industrial units. An Agreement was entered into between CUMI and the Board on 18.05.1991 (CUMI Agreement for short), which specifically referred to the Policy and stated that

the terms and conditions of the Policy "shall form part of this agreement as if incorporated herein". Clauses 8 and 14 of CUMI Agreement were as under:-

> "**8**. The energy from Maniyar Hydro Electric Project fed into the K.S.E.B. Grid will be metered at a location as detailed above (using meter duly calibrated by K.S.E.B.) and this quantum of energy less twelve percent towards wheeling charges and T & D Lesses will be delivered free of cost to CUMI at their E.B.T. Terminate at the point of supply in their installations. In the case of supply or receipt made in LT Lines the allowance for lessee and wheeling charges will be more and will be as stipulated by the KSEB.
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> In case energy in excess of the requirement of CUMI is generated from the projects during one accounting year such excess energy shall be fed into the KSEB grid itself at rates to mutually agreed upon. Under no circumstances shall CUMI be entitled for the sale or transfer of any excess energy or any energy produced from the project to any party other than the KSEB. The accounting of the energy fed into the grid and supplied by KESB to CUMI or operating their factories in Kerala at Palakkad, Koratty and Kalamaooery will be settled on an annual basis, the year being reckoned from lot of July to 30th June.
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> … … …
>
> **14**. Royalty for the use of water together with the tax and duties on generation of power as fixed by govt/KESB from time to time have to be paid by CUMI, to K.S.E.B.
>
> Maniyar Hydro Electric Projects will utilize the existing head works benefit of the Maniyar Irrigation Dam of P.W.D. which is fed mainly by the controlled release of water from existing Moozhiar Power House of KSEB. In order to account for the additional advantage gained by way of getting such controlled released, CUMI will have to pay to KSEB the cost components for the energy generated from the scheme. This will be in addition to the royalty on water to be paid. The charges for controlled release as above as well as royalty on water, will be

> reckoned on the quantum of energy generated and shall be ten percent of energy tariff rate for E.H.T. consumer current from time to time for every unit of energy generated and shall be paid to the K.S.E.B."

4. By 1994 the Project was commissioned by CUMI at a cost of Rs.22 crores and since then CUMI has been generating electricity which is used for self consumption in terms of CUMI Agreement.

5. INDSIL has a factory in the State for the manufacture of Ferro Alloys and was availing supply of electric energy from the Board.

6. INDSIL having expressed interest in setting up a small hydel scheme, due negotiations and meetings were held. In a meeting held with the Board on 08.04.1994, one of the decisions was :-

> "i) Royalty to be charged on water – It was decided that Irrigation Dept. will be requested not to charge the cess or royalty especially where water is being retained in the same basin and there is no consumptive use."

7. An Agreement (INDSIL Agreement, for short) was thereafter entered into between INDSIL and the Board on 30.12.1994 for setting up "Kuthungal Phase I and II Project" in Idukki district of the State with 21 MW installed capacity for generation of electricity. INDSIL Agreement referred *inter alia* to

the terms and conditions set out in the Policy and stated that said terms and conditions "shall form part of this Agreement as if incorporated herein." Clauses 10 and 19 of INDSIL Agreement were to the following effect: -

> "**10**. The energy from KUTHUNGAL PHASE I AND PHASE II project fed into the KSEB grid will be metered, at a location as detailed above (using meter duly calibrated by KSEB) and this quantum of energy less 12% (Twelve percent) towards wheeling charges and T & D losses will be delivered free of cost to the company and their associate M/s. Sun Metals & Alloys Pvt. Ltd., Kanjikode, Palaghat at the EHT Terminals at the point of supply in their installations if any, or it will be banked by the KSEB if the company so desires. The KSEB will collect 1% (One percent) of the energy so banked as its commission. This will be in addition to wheeling and loss towards transmission and distribution charges.
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> … … …
>
> **19**. Cess/ Royalties for use of water, if decided by the Government together with tax/ duties as fixed by the Government from time to time shall be paid by the company to Government."

8. Since the setting up of the project by June, 2001 at a cost of Rs.50 crores, INDSIL has been generating electricity which is essentially used by it and its associates as stated in Clause 10 of INDSIL Agreement.

9. The respective projects were thus set up by CUMI and INDSIL for Captive Power Consumption and such producers of electricity for own consumption are called Captive Power Producers (CPP) as against Independent

Power Producers (IPP) who generate electricity not for self consumption but for supply in its entirety to the Board.

10. On 11.10.2002, Guidelines were issued by the Government after noting the Policy and the recommendations of the Empowered Committee set up vide G.O. dated 5.9.2002. These Guidelines dealt with transmission and distribution losses in wheeling the energy to CPPs but did not deal with royalty for the use of water. The relevant portion of these Guidelines was: -

> "The Empowered Committee constituted as per the GO read as 3rd paper above, to oversee the implementation of the reforms of the KSEB and to examine the details for the erection of Small and Mini Hydel Projects, in its meeting held on 5.9.02 and 12.09.02 considered the scope for taking small hydel projects and recommended to Government that the small hydel projects excluding dam toe and tail race projects should be opened up for captive consumers and Independent Power Producers including public sector undertakings and also made the following recommendations:-
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> **1.** The Public Sector undertakings and the power intensive industries within the State may be given preference in allotment of the small hydro projects.
>
> **2.** The allowance to KSEB to compensate the T & D loss in wheeling the energy from generating station to the consumption point of Captive Power Producers (CPPs) which has been fixed at 10% as per clause (9) of the G.O. (MS) No.23/90/PD dt.7.12.90 may continue to be allowed to KSEB.
>
> **3.** Wheeling charges to KSEB which has been fixed at 2% as per clause (9) of G.O. (MS No.23/90/PD. dt. 7.12.90 may be increased to 5%."

11. The Guidelines were revised vide G.O. dated 16.1.2003 which dealt with CPPs and IPPs. As regards CPPs the revised Guidelines stated: -

> "…… As per G.O. (MS) 23/90/PD dt.7.12.1990, Government laid down terms and conditions for allotment of small hydel projects. Since the Government proposes to invite more private participation in this sector, it has become necessary to prescribe revised guidelines for allotment. Power schemes utilizing controlled releases form the existing reservoirs and tailrace are reserved for KSE Board."

Nothing was specified with regard to the royalty for the use of water by CPPs but while dealing with IPPs, it was stipulated: -

> "…**15**. Water Cess: Water Cess not required since, it will reflect on tariff and hence not investor friendly."

12. Both CUMI and INDSIL have been paying wheeling charges for consumption of electricity. Right from 1994 till April 2003, CUMI had also paid charges for the use of controlled supply of water at the rate specified in Clause 14 of the CUMI Agreement. In May 2003, CUMI however made a representation that it be exempted, like other projects from payment of such charges. Attempts on part of the Board to charge royalty/cost component for controlled release of water from CUMI and INDSIL in terms of clause 14 of the Policy has led to the disputes in the instant matters which are subject matter

of these appeals. Before we set out the pleadings pertaining to such disputes, the locations of the respective Projects and what kind of flow of water is used, must be noted:-

CUMI: The water flowing down from Moozhiyar Power House of the Board is diverted to the Kakkad Power House (50 MW) of the Board for generation of electricity using "tail race" benefit of Moozhiyar Power House. After power generation at the Kakkad Power House, the water is allowed to flow back into the river and is then utilized for irrigation and for the Maniyar Hydro Electric Project of CUMI.

INDSIL: Anayirankal Dam, one of the largest earthen dams in State of Kerala was built in the 1960s and soon thereafter, the Paniyar Power House having capacity of generating 32 MW electricity was built by the Board. Kuthungal is situated in between Anayirankal Dam (at the higher altitude) and Paniyar Power Station of the Board (at the lower level). Thus the water released from Anayirankal Dam for generation of electricity at Paniyar Power Station passes through the area where the project of INDSIL is situated.

13. CUMI filed O.P. No.6880 of 2003 praying, *inter alia,* that the Board had no authority to levy, demand or collect any charges for controlled release

of water or royalty from CUMI in respect of electricity generated by it at its Maniyar Hydel Project. The necessary pleadings from the writ petition were:

> "**2**. … … The 2nd respondent Board had set up its 2nd largest Hydro-Electric project of Sabirigiri on River Pamba. The waters of the said river were utilized by the 2nd respondent Board for generating electricity at Moozhiyar Generating Station and part of the water flowing down from Moozhiyar Generating Station after generation of electricity was being utilized for irrigation purpose and rest of it is flown down to Arabian Sea. Part of the water flowing from the Generating Station at Moozhiyar is utilized also for generating electricity at Maniyar Hydro Electric Project which was taken up by the petitioner as a captive generating station for the petitioner's industrial units at Kalamassery and Koratti to meet part of its requirements. …… Petitioner had no option but to sign the agreement stipulated by the respondents and was compelled to sign the same.
>
> **3.** … … Apart from unconstitutional impost the method of imposition and rate of royalty and alleged controlled release of water is totally irrational, arbitrary and unfair. The royalty can only be based on the quantity of material or benefit consumed by a person from the facility.
>
> **4.** … … It is submitted that water required for generating electricity at the Mooziyar Power House is a fixed quantity based on the capacity of the turbine and whatever water is required for such generation has to flow down from the turbine. There is absolutely no controlled release of such water to the petitioner's Hydro-Electric Project at Maniyar in Kakkad river. The water flowing down from Moozhiyar Power House supplemented by water from the catchman area of river banks below the Moozhiyar Power Station was partly utilized for irrigation purpose and the remaining water flows down earlier, it was only part of such water from Moozhiyar Power Station and from catchman areas that is utilized for generation of electricity by the petitioner at its Maniyar Hydel Project. However, from the year 1998 the

water flowing down from Moozhiyar Power House was diverted to the Kakkad Power House of the 2nd respondent and after generation of electricity at Kakkad Power House the water flowing down flows back to the same river at a lower stage and utilized for irrigation and partly for the petitioner's Maniyar Project. It is submitted that the water released from Moozhiyar Power House is thus diverted to Kakkad Power House and utilized for power generation there. The alleged controlled release of water from Moozhiyar Power House to the petitioner's hydel project at Maniyar is no longer there and has ceased to be available to the petitioner after commissioning of the Kakkad Power Station by the 2nd respondent. It is therefore submitted that the 2nd respondent cannot in any manner charge or collect the so-called cost component for controlled release of water from Moozhiyar Power House since there is no such release, much less controlled release of water from Moozhiyar Power House to the petitioner after 1998. Petitioner submits that in any event the charge and collection of cost component from the petitioner after 1998 is totally without authority of law, arbitrary, illegal and unfair.

5. … … There is no provision in the Electricity Supply Act conferring any power on the 2nd respondent to impose royalty or any charges on generating company which have the same powers, duties and functions for the flow of water in river Pamba or its tributaries.

6. Petitioner submits that the respondents have granted permission and rights to several other generating companies like the petitioner to set up small hydel projects. Thus private industrial generating companies like INDSIL Limited, Silcal Metallurgic Limited TECIL Hydro Power Limited had all set up private hydro-electric stations in which the respondents have not subjected them to any royalty or alleged cost component of released water form the Hydro-electric projects upstream on the respective rivers. Petitioner submits that the respondents have singled out the petitioner and subjected the petitioner to discriminatory charges."

14. In the counter affidavit filed on behalf of the Board, the assertions made by CUMI in the writ petition were denied. It was submitted:

> "**2**…… In the Ext.P1 Government Order dated 07.12.1990, it is clearly stated in Clause 21 that before implementation of the scheme, an agreement setting forth all the aspects in the Government Order and such conditions as found necessary will be entered into between the agency on the one part and the KSE Board/Government on the other. Hence the allegation of the petitioner that the 2nd respondent has no authority of law or competency to stipulate or impose any conditions or agreement is not true. Moreover, the respondents have not compelled the petitioner to sign the agreement and hence the allegation in this regard are not true and hence denied. The petitioner has applied for the captive generation station in pursuance of the Ext.P1 Government Order dated 07.12.1990 and the Government have granted permission strictly in accordance with stipulation in the above said Government Order. Having executed the agreement and setting up the plant the petitioner cannot now turn around and say that the conditions were thrust upon him.
>
> **3**……. The KSE Board had to construct and maintain dams and reservoir for collection of water by investing crores of rupees. The water stored in the dam is released periodically and controlled release of water is effected by the Board to the petitioner licensee. So the petitioner is getting sufficient water for generating power regularly as per their requirement without any capital investment for storage of water. …….. It is further stated that normally generation of power from schemes of the category small/mini/micro utilizing the storage benefit of the existing reservoir and tailrace benefit of existing power stations will not be entrusted with private agencies. But Government under special circumstances allowed such schemes to be set up by private parties. In such case, in order to account for the additional advantage gained by the agency by way of getting the controlled release, the agency will have to pay to

government or the Board, as the case may be, in tariff equivalent to the cost component for energy generated from the scheme. This will be in addition to the royalty of water if any, to be paid. The tariff storage/controlled release as above are to be worked out in respect of each scheme separately taking into account the above factors.

5. It is submitted that from the year 1998, the water flowing down from Moozhiyar Power House is collected in the reservoir of Kakkad Power House of the 2nd respondent and after generation of electricity at Kakkad Power House the water flowing down to the same river and to the reservoir of the petitioner's Maniyar Project. Thus, the water released from the Moozhiyar Power is further controlled at Kakkad Power House. Maniyar Project thus runs with the controlled release of water from the Kakkad Power House which was commissioned after setting up of the Maniyar Hydro Electric Project. Water utilized for generation in their project is from absolute controlled release if it was either from Moozhiyar Power House or later on form Kakkad Power House and hence the allegation that charge and collection of cost compound from the petitioner after 1998 is totally without authority of law, arbitrary, illegal and unfair is baseless and untenable."

15. In its rejoinder to the aforestated counter affidavit, CUMI submitted:

6. … … Whatever quality of water used at the Kakkad Power House can only flow down and cannot be prevented by the 2nd respondent from flowing down. There is no question of controlling the water that has to flow down from the power house to the river. In addition to the water flowing down that Kakkad Power Station large quantity of water flows into the river from the river banks flooding the river during heavy rains and there is no control on the flow of water to the petitioner's Maniyar generating station, which is about 6 kms. downstream from Kakkad generating station."

16. On 03.07.2004 an order was issued by the Government that in terms of Clause 19 of INDSIL Agreement, INDSIL would be liable to pay royalty and cost of controlled release of water. The order stated:

> "The Kuthungal HEP (21 MW) is a CPP implemented by M/s INDSIL. The project utilizes the water available from the free catchment between Anayirankal Dam and Kuthungal weir as well as the controlled releases from Anayirankal Dam.
>
> The Maniyar HEP (12 MW) the first CPP owned by M/s. Carbourandum Universal utilizes the controlled releases from Sabarigiri and Kakkad Hydro Electric Project of KSEB. The royalty for this project is being charged at the rate of 10% of the energy tariff rate for EHT Consumers and is paid to KSEB.
>
> Government after detailed examination hereby order that the royalty and cost of controlled release of water to the Kuthungal HEP shall be reckoned on the quantum of energy generated and shall be 10% of the energy tariff rate for EHT Consumers current from time to time for every unit of energy generated and in addition, the Company is liable to pay 1.2 paise per unit as electricity duty for each unit of electricity generated in accordance with the provision of the Kerala Electricity Duty Act.
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> The Chief Electrical Inspector shall collect the royalty from the company and remit it to the State revenue."

17. INDSIL challenged the order dated 03.07.2004 by filing Writ Petition (C) No.22187 of 2004 in the High Court. The Writ Petition was however

withdrawn with liberty to make an appropriate representation to the Government. This led to some correspondence and representations from INDSIL. The Government, however, refused to recall its decision to recover royalty and cost of controlled release of water, which was communicated vide order dated 23.01.2008. The action on part of the Government was challenged by INDSIL by filing Writ Petition (C) No.4596 of 2008 in the High Court.

18. With regard to the use of controlled water INDSIL submitted:-

> "**11**. Kuthungal is situated between Anayriankal at the higher end and Ponmudi at the lower end. Paniyar power station at Vellathooval has a capacity to generate 30 MW of power. The said power station funcitons on water flowing across Paniyar river. There are two storages maintained by the KSEB for its Paniyar Power Station. One is at Ponmudi and other is at Anayirankal which is situated at a height of 1850 Meters above the sea level. As submitted above, there is a reservoir at Anayirankal where the water is stored. Water stored in the Anayirankal reservoir is released by the KSEB during the peak summer months between January and April for the generation of power at Paniyar Power Station. This is done normally for a period of about 45 days out of the afore mentioned three/four months from January to April such release of water by the KSEB from Anayirankal is dictated by the requirement in Paniyar Power Station at Vellathooval; commencement of the releases is decided by the KSEB; quantum of water is controlled by the KSEB and determined by the rquirements in Paniyar Power Station. Cessation of release is also decided by the KSEB to sit the requirement of Paniyar Power Station. As submitted above, Kuthungal Hydro Electric Project is situated at Kuthungal which is at a lower level than Anayirankal but higher than Paniyar Power Station.

… … …

> When there is a release of water from the Anayirankal Reservoir to enable generation of power at Paniyal Hydro Electric Station at Vellathooval, petitioner company is also enabled to utilize the said water for diversion into Kuthungal Hydro Electric facility for generation of power there from. This is done only for a period of about 45 days during the peak summer months and controlled release of water from Anayirankal is effected by the KSEB only in accordance with its own schedule to suit its own requirement of generation of power at Paniyar Hydro Electric Station and such release of water is not simply done to suit the requirement of petitioner or to bring about any advantage to the petitioner as such."

Seeking to draw distinction between the project of CUMI and that of INDSIL, it was stated:-

> "….the agency under Exhibit-P2 agreement is dependent on the controlled release of water from Sabarigiri and Kakkad Hydro Electric Project. Such controlled release, quantum of release and cessation of same are all made suited to the requirement of the project in question. Release of water was utilized by Messrs Carboradum Universal Limited for the purpose of generating power in the Maniyar Hydro Electric Project. Water released from Sabarigiri and Kakkad Power Project are controlled releases. This is totally unlike in the case of the petitioner where the actual release of water from Anayrankil is in the manner mentioned above."

19. The reply given on behalf of the Government to the petition by INDSIL was:-

> "**9**. … … In fact, the scheme envisages utilization of controlled release from Anayirankal reservoir in addition to water from 114 sq.km., free catchment downstream of the

dam as per the detailed project report prepared by KSEB in August, 1991. The petitioner had also made their own assessment as per the techno economic feasibility report submitted by them. As already mentioned, the scheme envisages utilization of water from 114 sq.km. of free catchment downstream of existing Anayirankal reservoir drained from a catchment of 65 sq. Km for power generation as per the detailed report mentioned above. The averment and allegations in paragraphs 10 and 11 of the writ petition are not fully correct and hence denied. The description of the project of the petitioner given in the said paragraph explaining that is designed as a "run of the river" scheme does not deny the fact that it is using the water released from Anayirankal reservoir for the months from January to April. It is true that the release of water from Anayirankal reservoir is mainly decided based on the generation requirements at the Panniyar Power Station. However, this water when released is being utilized at Kuthunnal for power generation. The entire water after power generation flows down to Ponmudi reservoir without any depletion of quantity of water which is the case in every hydro electric project. The petitioner's contention that the release of water from Anayirankal reservoir is not done in order to suit the requirement of the petitioner but in accordance with the requirement of Panniyar Power Station is in correct. In fact, the petitioner Company is getting the full advantage of power generation from the release of water from Anayirankal reservoir in the peak summer months.

… … …

12. … … Even though the controlled release of water from Anayirankal reservoir is made to suit the requirement of power generation at Panniyar, it is also utilized for power generation at Kuthungal Hydro Electric Project. It is to be noted that the power generation from the Kuthungal Project was comparatively high when there is water releases from the Anayirankal reservoir, which would otherwise have been negligible if water from Anayirankal reservoir is not

released. During this period a total generation was 266.69 MU and generation from controlled released is 60.12 MU, which is about 22.54% of the total generation. During the drought year of 2002-03, 50% of the total generation from the project was during summer months utilizing water release from Anayirankal. The above facts clearly establishes that the petitioner is a beneficiary of the controlled release of water from Anayirankal."

20. Writ Petition (C) No. 4596 of 2008 preferred by INDSIL was allowed by the Single Judge of the High Court by his judgment and order dated 15.02.2013. It was observed that the action on the part of the Government was discriminatory, as all CPPs with the exception of CUMI were not subjected to such royalty. The explanation offered that CPPs and IPPs stood on different footings was not accepted. It was concluded that there was no jurisdiction to recover any royalty or cess and accordingly the order dated 03.07.2004 was quashed.

21. O.P. No.6880 of 2003 preferred by CUMI was allowed by the Single Judge of the High Court by his judgment and order dated 03.04.2013 with following observations:

"Even though in W.P.(C) No.4596/2008, I have given some findings against the petitioner, in view of my findings in Paragraphs 36 to 41 and 51 to 53 of the said judgment, I allow this writ petition and set aside the impugned order, Annexure P-3 holding that the Government is devoid of

> jurisdiction to realize any amount from the petitioner by way of Royalty or other charges on the water used for the Maniyar Hydel Project. In the circumstances, there will be no order as to costs."

22. The decisions of the Single Judge in the matters of INDSIL and CUMI were called in question by the Board by filing Writ Appeal Nos.1345 of 2013 and 1355 of 2013 respectively before the Division Bench, which appeals were allowed by the Division Bench vide its common judgment and order dated 03.04.2014.

The judgment of the Division Bench comprises of two parts: the first part dealt with the case of INDSIL; while the second part considered the case of CUMI.

22.1 After considering some of the decisions of this Court, it was held that after entering into an agreement, a party would be estopped from disputing its liability in terms of the agreement. With regard to the submission based on discrimination, the Division Bench observed:-

> "**24**. The first ground on which the learned single Judge has interfered with Ext.P11 is that it violated Article 14 of the Constitution of India which prohibits discrimination. The judgment shows that according to the learned single judge, the distinction between 1st respondent's Hydro Electric plant and others on the basis that the former is a CPP and the latter is an IPP, is an artificial one and has no object that is sought

to be achieved by it. In our view, this conclusion of the learned single Judge has no basis. As we have already seen the Hydro Electric Project of the 1st respondent is a Captive Power Plant, which is meant only to cater to their own requirement of electrical energy at their factory in Palalkkad. Therefore, generation at CPP does not involve any sale either to the Electricity Board or to anybody else. On the other hand, the remaining power plants, except the one established by M/s Carborandum Universal Limited, are Independent Power Plants which have entered into power purchase agreements with the KSB on the basis of which the entire power generated is purchased by the Electricity Board on terms and conditions which are mutually agreed between the parties. In respect of the power thus generated by the IPP's, if the Board or the State levys royalty, cess or other charges, that will necessarily be added to the price at which the energy generated is sold to the Board. Such increased price paid by the Board to the generating company, necessarily will have to be passed on to the Board's consumers, who are the end users of the energy generated. This necessarily will lead to a situation where the energy generated and sold to consumers would become costlier. According to the Board and the Government, this was the reason why the IPP's were relieved of the obligation to pay royalties or cess or other charges on the energy generated by them.

25. Learned single Judge has held that both IPP and CPP are established for the same purpose of augmenting energy generation. But the learned single Judge has lost sight of the distinguishing factor that the energy generated by the CPP of the 1st respondent is not available for distribution to consumers and that it is only for self consumption unlike the other IPP's. Therefore, in our view, the justification that if royalty or cess or other charges are levied, the energy generated at IPP's would be more expensive to the consumer and that it was therefore that the IPP's were relieved of that obligation, is a valid reason for classification of IPP's and CPP's under Article 14 of the Constitution of India.

> **26**. Secondly, IPP's that are complained of by the 1st respondent were established to Exts.P8 and P9 orders issued by the Government of Kerala in 2002 and 2003. These orders show that the terms and conditions that are incorporated in these orders are totally different from what are contained in Ext.P1, pursuant to which sanction was accorded, agreement was executed and the project was established by the 1st respondent. Therefore, the obligations undertaken by the 1st respondent in Ext.P3 agreement and the obligations that are fastened on the beneficiaries of Ext.p8 and Ext.P9 are incomparable and different. That itself shows that the 1st respondent and the owners of the independent power plants fall in separate classes and therefore also there cannot be any discrimination to be complained of.
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> **27**. Yet another reason, in our view, a valid one, urged by the Electricity Board was that unlike the case of the 1st respondent, the 59 IPP's are not beneficiaries of controlled release of water. The pleading show that according to the State, 22.54% of the power generated by the 1st respondent at its CPP is attributable to controlled release of water. On the other hand, IPP's are not beneficiaries of such controlled release. That also is a sound reason to hold that the CPP's and IPP's are not similarly situate.
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> **28**. In sum and substance, we are unable to endorse the conclusion of the learned single Judge that by issuing Ext.P11, the 1st respondent was treated in a discriminatory manner or the Ext.P11 is arbitrary or unreasonable offending Article 14 of the Constitution of India."

22.2 Considering the nature of obligation undertaken in terms of INDSIL Agreement, the Division Bench observed:-

> "**38**. Since royalty in these cases is only a contractual payment reserved by the granter and is not a levy in the nature of tax, the question of the State being legislatively

competent or incompetent to levy royalty on the water consumed at the hydel plant of the first respondent does not arise. Even if the words royalty and cess are interchangeably used, that is inconsequential, in so far as the nature of the levy of royalty is concerned. Therefore, this conclusion of the learned single Judge also cannot be sustained.

39. The learned single Judge also held that even if the levy is payable, such levy cannot have retrospective effect. This view also cannot be endorsed because once the 1st respondent has undertaken the liability to pay royalty as and when levied by the Government, Government is always at liberty to levy royalty from the time the benefit of the agreement was derived by the 1st respondent. Therefore, this contention also cannot be accepted.

40. Learned senior counsel for the 1st respondent argued that the controlled release of water from Anayirankal Dam was made by the Board through Panniyar river depending upon the requirements of the Panniyar Power Project of the Board. According to him, this water is diverted by the weir across Panniyar river at Mukkudi to the Kuthungal Project and made use of these only because of the situs of the Kuthungal Project. This, according to the counsel, is only an incidental benefit and that to make them liable for controlled release, water should be released solely at their instance and for generation at their project and not otherwise. In our view, this argument has no substance. Parties are governed by a mutually agreed contract evidence by Ext.P3. Agreement provides that for the additional advantage of controlled release derived by them, the agency is liable to pay charges as provided in the agreement. Agreement does not state that such controlled release should be at the instance of the 1st respondent and that it should be for their sole benefit. Instead, if the agency is a beneficiary of the controlled release of water, they are liable to pay for it. Admittedly, the 1st respondent is generating energy utilizing the controlled release of water from Anayirankal and so long as it is so, in view of Clause 14 of the Ext.P1, the 1st respondent cannot

> get itself absolved of that liability. Therefore, this contention is only to be rejected and we do so."

22.3 The Division Bench thus found that the Single Judge of the High Court had erred in allowing the Writ Petition preferred by INDSIL. It, however, concluded that the demand raised by the Government vide order dated 03.07.2004 was on the quantum of energy generated rather than being linked to the quantity of water used or the utilization of controlled release of water. It, therefore, directed the Government to pass fresh orders after due notice to the appellant as under:-

> "**42.** Therefore, royalty under clause 14 of Ext.P1 Government Order should be levied assessing the quantity of water used applying Clause 15 of Ext.P1. However, in Ext. P11 royalty is levied on the quantum of energy generated. This, in our view, is inconsistent with Ext.P1 Government Order and Ext. P3 agreement which permits levy of royalty only for the use of water, which also should be based on the quantity of water as assessed by applying the formula specified in Clause 15 thereof and not on the quantity of energy generated.
>
> **43.** Similarly, for the benefit of getting the controlled release of water, Government is free to levy on the agency, in tariff equivalent to the cost component for energy generated from the scheme. For this purpose, as is evident from clause 14 of Ext.P1 Government Order, what is payable by the 1st respondent is tariff equivalent to the cost component for the controlled release utilized by the grantee for the energy generated. Though at one stage, it was contended that 35% of the energy generated was utilizing controlled release, in the counter affidavit filed, it is stated

that it was 22.54%. While we agree that this figure cannot be a constant one, it is a fact that entire energy is not generated utilizing controlled release of water. But, since the charges for controlled release as ordered in Ext.P11, and which was confirmed by the Government in Exts.P15 and P28, is on the entire energy generated, the demand is inconsistent with Exts. P1 and P3, we are unable to sustain the orders."

22.4 With regard to the matter concerning CUMI, it was observed:

"**57**. In our view, the provisions of the Electricity (Supply) Act, 1948 dealt with generation of electricity and the provisions of the Act did not prevent a Government or Board from entering into an agreement, agreeing to provide natural resources of water to a generating company for the generation of energy by setting up a hydel generation station against royalty or other charges payable by the grantee. Therefore, if under the contract, the Government agree to a private party like the 1st respondent that it shall make available water to a Hydro Electric Project for generation of energy and in consideration, royalty is required to be paid to the Government and that contractual right of the Government or the obligation of the generating company to pay are not affected by any of the provisions of the Electricity (Supply) Act, 1948. Therefore, the 1st respondent who has willingly entered into an agreement undertaking to pay royalty and other charges to the Government and after having enjoyed the benefit thereof, cannot now rely on the provisions of the Electricity (Supply) Act and contend that the Government or the Board have no power under the Electricity (Supply) Act to realise the charges that are contractually payable by them. Therefore, this contention of the learned senior counsel is unacceptable and is rejected.

58. The second contention raised by the learned senior counsel for the 1st respondent was that there was no controlled release to the Maniyar Hydro Electric Project and that therefore the charges levied on them for controlled release of water is unsustainable. We have already rejected

> such a contention raised by the 1st respondent in WA Nos.1345/13 and 18/14 and the reasons assigned by us should apply to this case also. Morever, we are unable accept this contention of the learned senior counsel for the reason that Clause 14 of Ext.P2 agreement provides for controlled release of water and the 1st respondent shall pay charges to the Board. If there was no controlled release of water, there was no reason why the 1st respondent should have entered into such an agreement taking over the liability to pay charges for the controlled release of water also. That apart, both in Exts. P5 and P6, the representations made by them objecting to the levy, they had no case that there was no controlled release of water. Therefore, by the above agreement and correspondence, the first respondent themselves have admitted that there is controlled release of water and therefore it is too late in the day for them to turn around and contend that there is no controlled release of water absolving them from the contractual obligations in Clause 14 of the agreement."

22.5 The Writ Appeal preferred against CUMI was thus allowed and the decision of the Single Judge was set aside.

23. INDSIL being aggrieved, filed Civil Appeals Nos.9845-9846 of 2016 reiterating its submissions advanced in the High Court.

In the response filed on behalf of the Government, it was submitted *inter alia*:-

> "D. … …the Petitioner is a Captive Power Plant which generates power from the water course along with the controlled release of water from the Anayirankal reservoir to Ponmudi for self-consumptioin and thereby collection of royalty by Government cannot reflect in the tariff, because

the energy so generated is not sold to KSEB for distribution. Further, 22.54% of the power generated by the Petitioner at its Captive Power Plant is attributable to controlled release of water. Unlike the case of the Petitioner, the 59 IPP's are not beneficiaries of such controlled release. Royalty was demanded by Government as consideration for granting the right to usage of water from the natural resource vested in the Government, for generation of electricity, which does not fall within the purview of the powers of the Regulatory Commission constituted between the Petitioner and KSEB is conclusive and is absolutely binding on the Petitioner.

… … …

I. … … The project utilizes the water from the free catchment between Anayirankal dam and Kuthunkal weir alongwith the controlled release of water. The controlled release of water from Anayirankal dam was done by the Board through the Panniyar River depending upon the requirements of the Panniyar Power Project of the Board. This water, when released, is being utilized at Kuthungal for power generation. This controlled release of water is diverted by a weir across Panniyar River at Mukkudi to the Kuthungal project and used for generation of power. In the absence of Anayirankal reservoir, the water would have flown to Ponmudi during monsoon months and the weir would be overflowing most of the time. And during summer months there would be substantial shortfall in the generation of power at the Kuthungal project in the absence of water release from Anayirankal dam. The release of water at Anayirankal is made in the months of January, February, March and April every year and the scheme generates mostly during these months in a year and primarily generates power out of the water released from Anayirankal. The total generation of power during this period was 266.69 MU and generation from controlled release was 60.12 MU, which is about 22.54% of the total generation. The Petitioner is getting the full advantage of power generation from the release of water from Anayirankal reservoir in the peak summer months. In the drought year of 2002-03, 50% of the

> total generation from the project was during summer months by utilizing the water from Anayirankal dam."

23.1 In the affidavit in rejoinder, it was submitted by the INDSIL:-

> "That Respondent no.1 & 2 have further drawn distinction on the fact that the petitioner's project is based on controlled release of water from the Anayirankal dam while the other 59 projects are not based on any controlled release. It is submitted that the petitioner's project is not based on controlled release of water and therefore there is no question of the petitioner utilizing the State's natural resources with controlled release of water from Anayirankal dam for our exclusive benefits. It is submitted that wherever the State Government has entered into a contract with a party like M/s Carborandum's project, involving controlled release of water, it has provided a specific clause to this effect since it would involve incurring of cost for providing the services. It is submitted that in the case of the petitioner's, no such clause is provided and it is for this reason that the State Government specifically agreed in the meeting dated 8th April, 1994 that water cess for the use of water would not be charged. It is thus submitted that the petitioner is being discriminated against by respondent no.1 & 2 in the facts of the instant case in grave violation of its fundamental rights guaranteed under Article 14 of the Constitution of India.
>
> 7. it is pertinent to mention here that respondent no.1 & 2 have imposed the same rate of royalty on Carborundum's project and that of the petitioner's. It is submitted that it is an admitted fact that Carborundum's Project is based on controlled release. In the Petitioner's case, there is no such controlled release. Further, on an average, only 22.54% of the petitioner's generation comes from the alleged controlled release. It is submitted that on this ground alone, the levy put on the petitioner is unreasonable and arbitrary."

24. In Civil Appeal Nos.9847-9850 of 2016, the grounds of appeal raised by CUMI have reiterated its submissions before the High Court. The assertions

with respect to the location of the project and use of controlled release of water were:-

> "The alleged controlled release of water must be directly to the petitioners' Maniyar Hydroelectric project from the water releasing point at Moozhiyar Power House of KSEB and not to Irrigation Dam of PWD or to its own Hydroelectric project at Moozhiar. After the year 1998, KSEB has set up its own Hydro Electric Project at Kakkad upstream of the river and two more Private Hydel Power Project had been approved and set up on the same river upstream, i.e. in between the Moozhiyar Power House of KSEB and the Petitioner's Maniyar Power Plant. It is pertinent to note that the alleged controlled release of water being used by the Board's Hydro Electric Project at Kakkad at the first instance and then flows further down to two other private Hydro Electric Projects at Ullunkal & Karikkayam before it reaches the irrigation dam owned by PWD from where the Petitioner draws water for its Maniyar Hydro Electric Project. It is further to be noticed that when the flow of the controlled release of water further strengthened by two more minor rivers and forms confluence on its way of flowing further down along with the other source of water from the catchment area of 237 square kilometers as evidence by the map on record."

24.1 In the affidavit in reply filed by the Board, it was stated:-

> "8. … …the Hydro Electric Project are generally classified into two categories based on the storage capacity namely (a) Hydro projects with reservoir of large capacity and (b) Hydro projects having small capacity reservoir /run of river projects.
>
> … … …
>
> **11**. The Sabarigiri Power Project comprises of two dams, one across the river Pamba (Pamba reservoir) and the other across its tributary Kakki (Kakki reservoir) with a flanking dam also at Anathode. These two reservoirs are connected through a interconnecting tunnel of 105241 feet long

(3209.82m). The water from the Kakki reservoir is drawn through 18209 ft (5553.73m) long power tunnel and a set of three penstocks leading the waters to the power house with an original installed capacity of 300 MW consisting of 6 units of 50 MW. After Renovation and Modernisation of the station, the installed capacity is increased to 340 MW. The total storage capacity of Kakki and Pamba reservoirs is 477.67 MCM (Million Cubic Metre). In addition to the above, augmentation schemes like Upper Moozhiyar (0.035 MCM, Meenar 1 (0.028 MCM), Meenar – II (0.057 MCM) and Kullar – Gaviar (2.78 MCM) agument the Pamba and Kakki reservoirs. Thus, the total storage capacity of Kakki and Pamba reservoirs is 480.54 MCM.

12. The Maniyar Power House operated by M/s Carborandum Universal Ltd. the petitioner herein belongs to the second category where the gross storage is only 8 MCM (Million Cubic Metre), which is not even sufficient for two days full load operation of the Power House. However, the Maniyar Power Station is operated throughout the year only due to the large storage of the Pamba-Kakki storage reservoir (about 60 times larger than Maniyar storage) and controlled release of water from Sabarigiri Power House. When M/s Carborandum Universal Ltd., executed the agreement with KSEB on 18.05.1991, the construction of Kakkad Power Station on the down stream of Sabarigiri Power Station was going on. It is to be noted that the Kakkad Power Station also has a very small storage capacity. The Moozhiyar reservoir with storage capacity of 1.16 MCM and Veluthodu reservoir with storage capacity of 0.607 MCM are the reservoirs of Kakkad Power Station. Thus, the storage capacities of the three power stations are as shown below:

Sabarigiri Power House – 480.54 MCM (Effective)
Kakkad Power House – 1.767 MCM (Effective)
Maniyar Power House – 8.0 MCM (Gross)

…. …. ….

14. … … The Pamba Dam across Pamba river, Kakki Dam across Kakki river and a flanking dam at Anathode are the main three dams of Sabarigiri Project. These Dams are at an

> elevation of about 900 M from the sea level. Water from the Kakki reservoir is brought to Sabarigiri Power House, the water is again stored at Moozhiyar by a concrete Gravity Dam. Water from other small streams like Saippinkuzhy stream also reaches this reservoir. This water is brought to Kakkad Power Station through under ground tunnel and utilized it for power generation. Water from another stream called Veluthode is also brought to Kakkad Power Station by constructing a small Dam across the stream. Before the commissioning of the Kakkad Power Station, the controlled release of water from Sabarigiri Power House directly reached the maniyar barrage (owned by Kerala Irrigation Department) and this was utilized by M/s. Caborandum Universal Ltd., for power generation at maniyar Power House. The only difference after the commissioning of Kakkad Power Station is that the same water is once again utilized for power generation at Kakkad Power Station. There is an added advantage that some more control/regulation can be done at Kakkad Power House also. It is to be noted that there are no major sources of water (rivers) between Kakkad and Maniyar which can substantially contribute for the supply of water to Maniyar Power House. Now, two more small power stations at Ullumkal (7MW) and karikayam (10.5 MW) are established between Kakkad and Maniyar Power Stations. All these power stations at Kakkad, Ullumkal, Karikayam and Maniyar have small reservoirs and utilize the huge storage and controlled release of water from the Sabarigiri Power Station for power generation throughout the year. Had there been no Sabarigiri Power Project, the water from Pamba and Kakki rivers would have flown though the natural flow path of these rivers and would reached much below the Maniyar Power House as it can be seen from the sketch attached."

24.2 In its rejoinder to the aforestated reply, it was submitted by CUMI:-

> "**19**. That the contents of para (8) of the counter affidavit need no reply as the said contents are not relevant for the adjudication of the instant SLP.

> **20**. That the contents of para (9) to (18) of the counter affidavit are denied as wrong and baseless. It is submitted that the averments contained in the aforesaid paragraphs are new pleas taken by respondent no.2 for the first time before this Hon'ble Court and as such the same cannot be allowed to be raised for the first time at special leave petition state…."

25. Mr. V. Giri, learned Senior Advocate for INDSIL submitted:-

a) Clause 14 of CUMI Agreement was distinct and different from Clause 19 of INDSIL Agreement. Further, the matter was required to be seen in the light of the decision dated 08.04.1994 and imposition of royalty on the use of water would be in contravention of the decision dated 08.04.1994.

b) No explanation was forthcoming as to why, as against specific inclusion of Clause 14 in CUMI Agreement, no such provision was made in INDSIL Agreement.

c) Being at a lower level than the Anayirankal Reservoir but higher than the Paniyar Power Station, the project of INDSIL was conceived as a "run of the river scheme". The release of water from Annayirankal Reservoir would be only for 45 days in a year, and the regulation of release of water would be completely at the discretion of the Board and meant to facilitate the generation of power at the Paniyar Power Station. The release of water would be determined by the requirements of the Board at the Paniyar Power Station and

that utilization of such controlled release constituted only 22.54% of the generation by the INDSIL.

d) The controlled release of water in the case of CUMI would be meant to suit the requirements of its project. On the other hand, such controlled release of water would not be exclusively for the benefit of INDSIL but for the benefit of the Plant at Paniyar. It would therefore be illegal to draw similarity between the case of CUMI and that of INDSIL.

e) The imposition of royalty on the use of water would be unconstitutional as INDSIL was discriminated against other similarly situated hydroelectric plants.

f) Imposition of royalty in terms of Clause 19 of INDSIL Agreement would partake the nature and character of a "Tax". Assuming that the royalty imposed on INDSIL had genesis in a contract, no decision was taken by the Government as contemplated under said Clause 19.

g) Assuming that the terms of the Policy were incorporated into INDSIL Agreement, the tariff for storage/controlled release was required to be worked out in respect of each scheme separately.

26. Appearing for CUMI, Mr. C.A. Sundaram, learned Senior Advocate submitted:-

a) When its Agreement was entered into, CUMI was the only Power Project in private sector and as such, there was no question of any discrimination. However, the discrimination arose when other Power Projects were given the benefit of controlled release of water without any charge.

b) There could be no distinction between CPPs and IPPs. Guidelines of 2002 as revised did not make any such distinction. The basis for levy was the advantage gained from controlled release of water. Therefore, the differentia could be between those having the benefit of controlled release of water on one hand and those not having such advantage on the other. Any other distinction such as CPPs as against IPPs would be unnatural and irrational.

c) Even if, the relevant Clause in the Agreement was a negotiated Clause, said Clause being arbitrary or discriminatory was liable to be struck down. Reliance was placed on the decision of this Court in *Central Inland Water Transport Corporation vs. Brojo Nath Ganguly*[4], *ICOMM Tele Limited v. Punjab State Water Supply and Sewerage Board and Anr.*[5] and *Pioneer Urban Land and Infrastructure Ltd. v. Govindan Raghavan*[6].

d) The Power Plant of CUMI had been receiving water not just from Sabarigiri and Moozhiyar reservoirs but also from the streams in the catchment

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[4] (1986) 3 SCC 156.
[5] (2019) 4 SCC 401.
[6] (2019) 5 SCC 725.

area. Thus, the entirety of the supply of water to CUMI could not be treated as controlled water from Moozhiyar Power House of the Board.

e) The relevant Clause in CUMI Agreement would, at best, attract levy of charges for controlled release of water on the cost component thereof. Therefore, the stipulation in Clause 14 of CUMI Agreement providing 10% of tariff for the electricity generated was *ultra vires* the Policy.

f) Further, the levy in question had to be commensurate with the service rendered, otherwise, it would cease to be a fee and would be wholly beyond the competence of the Board. Reliance was placed upon the decision of this Court in the *State of Maharashtra & Ors. vs. Salvation Army, Western India Territory*[7].

g) Considering the facts of the case, the calculations were required to be revisited where all relevant aspects had to be properly accounted for and the levy had to be linked to the cost of advantage gained from controlled release of water and not from other sources from catchment area.

[7] (1975) 1 SCC 509.

27. Mr. Jaideep Gupta and Mr. P.V. Surendranath, learned Senior Advocates appearing for the Board and the State respectively, in both the appeals, submitted: -

(a) Terms and conditions of the Policy including Clause 14 of the Policy stood specifically incorporated in INDSIL and CUMI Agreements. Said Clause 14 of the Policy dealt with the additional advantage gained by an agency/ project by way of controlled release of water and stipulated that the cost component for such controlled release would be required to be paid. Clause 15 of the Policy then set out the formula to be used for ascertainment of the relevant indicia. The Agreements having accepted the liability to pay such controlled release of water, the matter was purely in the realm of contract.

(b) There was no unequal or unnatural bargaining so as to invoke the principles laid down in some of the decisions of this Court. Both CUMI and INDSIL had willingly accepted the liability to pay for the use of controlled release of water. It was a commercial contract which was entered into after due negotiations.

(c) The location of the projects of CUMI and INDSIL as well as the facts on record would show that both the projects were enjoying the benefit of controlled supply of water. CUMI had been enjoying the benefit of “tail race”

water discharge flowing down from Moozhiyar Power House of the Board while INDSIL Project had been enjoying the advantage of controlled supply of water discharge from Anayirankal Dam.

(d) Clause 14 of the Policy had stipulated that normally such benefits of existing reservoirs and "tail race" benefit of existing power stations would not be entrusted with private agencies but in case under special circumstances such schemes were allowed to the private parties, they would have to pay charges for controlled release of water.

(e) Unlike the projects which would depend upon irregular and intermittent supply of water, the assured and controlled supply of water enabled smooth running of the turbines for generation of electricity. Such assured supply was the element based on which the terms of the Policy were incorporated in the Agreements and liability was accepted.

(f) Having agreed to abide by the terms of the Policy including Clause 14 of the Policy, it would not be open to CUMI and INDSIL to submit that imposition of charges for controlled supply of water would be discriminatory and irrational.

(g) Even if there was no specific clause in INDSIL Agreement similar to Clause 14 in CUMI Agreement, Clause 19 of INDSIL Agreement read with the

terms of the Policy made the situation quite clear and there would be no escape from the liability to pay the charges for controlled release of water.

(h) There was no *inter se* distinction between INDSIL on one hand and CUMI on the other. Both had been enjoying benefits of controlled release of water and their cases came within the ambit of Clause 14 of the Policy.

(i) The charges payable for controlled release of water had their genesis in the Policy and the terms of the Agreements. The submissions on the part of CUMI and INDSIL that it would amount to compulsory exaction was therefore without any merit.

28. Before we deal with the principal submissions, an aspect of the matter highlighted on behalf of the Appellants needs to be dealt with.

It was submitted that a decision was taken on 08.04.1994 that no charges for benefit of controlled water would be imposed if the water was being retained in the same basin. The decision in said meeting was only to make a recommendation but the final call had to be taken by the Irrigation Department of the State. It cannot therefore be said that no liability could be imposed after 08.04.1994. Pertinently, INDSIL Agreement was entered into on 30.12.1994. Though no specific Clause comparable to Clause 14 of CUMI Agreement was included in INDSIL Agreement a specific reference to the terms and conditions

of the policy was made and such terms and conditions were incorporated in INDSIL Agreement. Thus the decision dated 08.04.1994 had no bearing on the matter in question.

29. The first question that arises for consideration is whether the projects of CUMI and INDSIL are located at places where the advantage of controlled supply of water is assured and can be derived.

30. Hydro-Electric Projects rely on the force of fall of water from a height to enable the turbines to generate electricity. Normally, the water is supplied through penstocks from a reservoir. The stored water from a reservoir assures consistent and regular supply of water for the smooth functioning of the generating units.

The supply of water from a large reservoir is one way of ensuring consistent and controlled supply of water. However, because of topography, large reservoirs are not always close to a generating unit. In such cases, the water from a large reservoir located at a greater height is steadily released and collected in a smaller reservoir or a weir from which the water is thereafter supplied to the generating units; and depletion in the stock of water is regularly

replenished from the large reservoir. This is another way of ensuring consistent and controlled supply of water for generation of electricity.

After the force of the water is used for propelling the turbines, the water is discharged from the generating unit or powerhouse. Such discharge of water or “tail race” benefit will also be consistent, depending upon the supply of water that such generating unit or powerhouse receives. If another generating unit is at a lower level than such powerhouse, the discharge from the powerhouse at a higher attitude may itself assume and ensure consistent supply of water to the generating unit at a lower level or altitude.

31. The location of the project of CUMI is at a place where the discharge of water from Moozhiyar Power House of the Board is diverted to Kakkad Power House of the Board, which gets steady supply of water in the form of “tail race” benefit of the Moozhiyar Power House. After generation of electricity at the Kakkad Power House, the water is allowed to flow back into the river. The capacity of Kakkad Power House is 50 MW while that of CUMI is 12 MW.

The supply of water even if meant for a powerhouse situated at a height and with larger capacity thus definitely ensures consistent and controlled supply of water to the project of CUMI located at a lower altitude.

32. Similarly, the water from a larger reservoir namely, Anayirankal Dam is allowed to flow so as to reach Paniyar Power House having a capacity of 32 MW electricity. Before reaching Paniyar Power House, the water passes through the area where the project of INDSIL is situated, which has a capacity of 21 MW. The location of the project of INDSIL would thus have natural advantage of consistent and controlled supply of water.

33. The facts on record thus show that both the projects have certainly derived advantage of controlled supply of water as contemplated in Clause 14 of the Policy. How much benefit of controlled supply of water each of the projects has received or will receive in future would be a matter of computation and calculation.

34. The Agreements entered into by CUMI and INDSIL show that the terms and conditions of the Policy including Clause 14 thereof were consciously incorporated in the Agreements. Both CUMI and INDSIL were alive to the fact that because of peculiar location, their units would certainly have the advantage of controlled supply of water.

Thus, the absence of a specific clause, akin to Clause 14 of CUMI Agreement, in INDSIL Agreement, would be of no consequence. The

relationship between the parties would be governed by Clause 14 of the Policy, as incorporated in the respective Agreements.

35. The next questions to be considered are whether Clause 14 of CUMI Agreement and Clause 14 of the Policy which stood incorporated into the respective Agreements could be termed to be unconscionable and/or manifestly arbitrary.

36. The decision of this Court in *Central Inland Water Transport Corporation*[4] which was pressed in service, was in relation to terms in a Contract of Employment. This Court found that such term would get included in the contract only at the instance of the employer where because of lack of bargaining power the employee would have no other option but to accept such term. It was in this context that the relevant term contained in the Contract of Employement was found to be unconscionable. At the same time, the principles which weighed with the Court for holding such terms unconscionable were specifically stated to be inapplicable in cases of commercial contracts. The relevant discussion in paragraph 89 of the decision was:-

> "**89**. … …The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article

14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

(Emphasis added)

37. In *S.K. Jain* v. *State of Haryana and another*[8] a Bench of three Judges of this Court summed up as under:-

> "It is to be noted that the plea relating to unequal bargaining power was made with great emphasis based on certain observations made by this Court in *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly*[4]. The said decision does not in any way assist the appellant, because at para 89 it has been clearly stated that the concept of unequal bargaining power has no application in case of commercial contracts.

38. To similar effect, were the observations by this Court in *ICOMM Tele Limited*[5], where this Court held:-

> "**11.** As has correctly been argued by learned counsel appearing on behalf of the respondents, this Court's judgment in *Central Inland Water Transport Corpn.*[4], which lays down that contracts of adhesion i.e. contracts in which there is unequal bargaining power, between private persons and the State, are liable to be set aside on the ground that they are unconscionable, does not apply where both parties are businessmen and the contract is a commercial transaction (see para 89 of the said judgment). In this view of the matter, the argument of the appellant based on this judgment must fail."

39. In *Pioneer Urban Land and Infrastructure Ltd*[6], certain terms in the agreements entered into between the flat purchasers and the builder were *ex*

[8] (2009) 4 SCC 357

facie found to be one sided, unfair and unreasonable. Relying on the decision of this Court in *Central Inland Water Transport Corporation*[4] , it was held that the terms of the agreements would not bind the flat purchasers.

40. The law is thus clear that in cases where a term of contract or agreement entered into between the parties is completely one sided, unfair and unreasonable, where the other party having less bargaining power had to accept such term by force of circumstances, the relief in terms of the decision of this Court in *Central Inland Water Transport Corporation*[4] can be extended. It may be stated that the Agreements were entered into after long deliberations where both CUMI and INDSIL had the advantage of legal counsel.

It cannot be said that CUMI and INDSIL were in a position with lesser bargaining power or were so vulnerable that by force of circumstances they were forced to accept such term. Therefore, the concerned Clause in CUMI Agreement as well as the terms of the Policy that stood incorporated in the respective Agreements, cannot be termed unconscionable.

41. In *ICOMM Tele Limited*[5], this Court found Clause 25 (viii) of the Notice Inviting Tender to be arbitrary as said clause deterred a party to an arbitration agreement from invoking the alternative dispute resolution process

unless it complied with requirements of pre-deposit. Though this Court did not accept the submission, based on *Central Inland Water Transport Corporation*[4], that the clause in question was unconscionable, the matter was considered from the stand point whether said clause could be said to be manifestly arbitrary. The clause was found to be contrary to the object of de-clogging the Court process and rendering the arbitral process ineffective. Relying upon the decision of this Court *A.L. Kalra v. Project and Equipment Corporation of India*[9] it was found in paragraph 23 that the clause had no nexus to the filing of frivolous claims. The discussion in paragraph 23 was:

> "**23.** The important principle established by this case is that unless it is first found that the litigation that has been embarked upon is frivolous, exemplary costs or punitive damages do not follow. Clearly, therefore, a "deposit-at-call" of 10 per cent of the amount claimed, which can amount to large sums of money, is obviously without any direct nexus to the filing of frivolous claims, as it applies to all claims (frivolous or otherwise) made at the very threshold. A 10 per cent deposit has to be made *before* any determination that a claim made by the party invoking arbitration is frivolous. This is also one important aspect of the matter to be kept in mind in deciding that such a clause would be arbitrary in the sense of being something which would be unfair and unjust and which no reasonable man would agree to. Indeed, a claim may be dismissed but need not be frivolous, as is obvious from the fact that where three arbitrators are appointed, there have been known to be majority and minority awards, making it clear that there may be two possible or even plausible views which would indicate that the claim is dismissed or allowed on merits and not because it is

[9] (1984) 3 SCC 316

> frivolous. Further, even where a claim is found to be justified and correct, the amount that is deposited need not be refunded to the successful claimant. Take for example a claim based on a termination of a contract being illegal and consequent damages thereto. If the claim succeeds and the termination is set aside as being illegal and a damages claim of Rupees One crore is finally granted by the learned arbitrator at only ten lakhs, only one-tenth of the deposit made will be liable to be returned to the successful party. The party who has lost in the arbitration proceedings will be entitled to forfeit nine-tenths of the deposit made despite the fact that the aforesaid party has an award against it. This would render the entire clause wholly arbitrary, being not only excessive or disproportionate but leading to the wholly unjust result of a party who has lost an arbitration being entitled to forfeit such part of the deposit as falls proportionately short of the amount awarded as compared to what is claimed."

42. On the touchstone of these principles, it needs to be seen whether Clause 14 of the Policy can be termed to be manifestly arbitrary. The Policy had made it quite clear that the benefit of controlled supply of water would normally be confined to the electricity generating units or power houses in public sector.

The reason for such Policy statement would clearly be that considerable amount of insfrastructure and development had been and would be made by the State in erecting and maintaining dams and reservoirs and as such the incremental advantage or benefit of such investment must go back to the public through units in public sector. If the advantage was, however, allowed to be

given to a private entity or agency, the Policy contemplated impostion of charges for the use of such controlled supply of water.

There is nothing arbitrary or unreasonable in having such term in the Policy. Since the private entity or agency would stand to gain from and out of the capital outlay and infrastructure put in place by the State, some reasonable charges for such benefit would naturally be imposed. It was only under such Policy that both CUMI and INDSIL were given permissions to set up their electricity generating units and such term was consciously accepted by them.

The submission that the relevant Clause would be manifestly arbitrary, therefore, does not merit acceptance.

43. Though we have considered the submissions that Clause 14 of the Policy would be unconscionable or arbitrary on merits, reference may also be made to the following statement of law culled out in *Rajasthan State Industrial Development and Investment Corporation and Another vs. Diamond and Gem Development Corporation Limited and Another*[10]:-

> "**15.** A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of,

[10] (2013) 5 SCC 470

> or the binding effect of such contract, or conveyance, or order upon himself……"

44. Moving further, even if the relevant term in the Policy is not found to be unconscionable or arbitrary and is found to be perfectly justified, the question still remains whether in the application of said term to CPPs alone and not to IPPs, was any discriminatory treatment meted out to CPPs.

Qualitatively, the CPPs and IPPs have a basic distinction. CPPs produce electricity for self consumption. In the present case both CUMI and INDSIL generate electricity to be consumed in their factories or industrial units. Under the terms of their Agreements, if anything is produced in excess of their requirements, the surplus or excess electricity would be accepted by the Board. However, the principal purpose and end use would be self consumption. As against that, IPPs produce electricity not for self consumption but for the use of the Board. The electricity generated by IPPs becomes part of the grid of the Board to be supplied by the Board to its consumers like electricity produced by the generating units or power houses of the Board. If the charges towards controlled supply of water were to be imposed uniformly for CPPs and IPPs, the effect would be that the electricity supplied through IPPs to common consumers and general public would

necessarily have an additional burden or load towards proportionate element of water charges. In these circumstances, if the Board decided not to apply Clause 14 of the Policy in case of all IPPs, such decision would not be termed as discriminatory.

The distinction or classification brought out was based on a clear rationale with the object of reducing the additional burden on the consumers. Since the electricity generated by CPPs would be self consumed, there would be no such question of putting any ultimate or resultant burden on the common consumers. The basis for such distinction or classification was quite correct and as such this question was rightly answered by the Division Bench of the High Court against CUMI and INDSIL. Rather than being unnatural or irrational, the classification had a clear nexus or relationship with the object of reducing resultant burden on the common consumers.

This submission therefore, is, meritless and rejected.

45. This takes us to the last set of submissions challenging the imposition of royalty or charges on controlled supply of water on the ground of absence or lack of jurisdiction and some ancilliary issues.

The matter in that behalf was considered by the Division Bench of the High Court in paragraphs 38, 39 and 57 as quoted hereinabove. As rightly

observed, the basis or genesis of such imposition was Clause 14 of the Policy which, as agreed between the parties, stood incorporated in the respective Agreements.

46. The submission on behalf of the appellants was that the royality or charges for controlled supply of water in the instant case would be nothing but compulsory exaction and in the absence of any statutory sanction behind such imposition, the actions on part of the Board would be without jurisdiction. The counter submission on behalf of the State and the Board was that such royalty or charges had the genesis in respective contracts and as such the action on part of the Board was fully justified.

47. The distinction between tax and fee was brought out by the Constitution Bench of this Court in *Hingir-Rampur Coal Co. Ltd. and Others vs. State of Orissa and Others*[11] as under:-

> "The first question which falls for consideration is whether the levy imposed by the impugned Act amounts to a fee relatable to Entry 23 read with Entry 66 in List II. Before we deal with this question it is necessary to consider the difference between the concept of tax and that of a fee. The neat and terse definition of tax which has been given by Latham, C.J., in *Matthews v. Chicory Marketing Board*[12] is often cited as a classic on this subject. "A tax", said Latham, C.J., "is a compulsory exaction of money by

[11] (1961) 2 SCR 537
[12] (1938) 60 C.L.R. 263, 276

public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied. There is, however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exempted from the payment of the cess. Though there is an element of quid pro quo between the tax payer and the public authority there is no option to the tax-payer in the matter of receiving the service determined by public authority. In regard to fees there is, and must always be, co-relation between the fee collected and the service intended to be rendered. Cases may arise where under the guise of levying a fee Legislature may attempt to impose a tax; and in the case of such a colourable exercise of legislative power courts would have to scrutinise the scheme of the levy very carefully and determine whether in fact there is a co-relation between the service and the levy, or whether the

levy is either not corelated with service or is levied to such an excessive extent as to be a pretence of a fee and not a fee in reality. In other words, whether or not a particular cess levied by a statute amounts to a fee or tax would always be a question of fact to be determined in the circumstances of each case. The distinction between a tax and a fee is, however, important, and it is recognised by the Constitution. Several Entries in the Three Lists empower the appropriate Legislatures to levy taxes; but apart from the power to levy taxes thus conferred each List specifically refers to the power to levy fees in respect of any of the matters covered in the said List excluding of course the fees taken in any Court.

The question about the distinction between a tax and a fee has been considered by this Court in three decisions in 1954. In *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[13] the vires of the Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act 19 of 1951), came to be examined. Amongst the sections challenged was Section 76(1). Under this section every religious institution had to pay to the Government annual contribution not exceeding 5% of its income for the services rendered to it by the said Government; and the argument was that the contribution thus exacted was not a fee but a tax and as such outside the competence of the State Legislature. In dealing with this argument Mukherjee, J., as he then was, cited the definition of tax given by Latham, C.J., in the case of *Matthews*[14] and has elaborately considered the distinction between a tax and a fee. The learned Judge examined the scheme of the Act and observed that "the material fact which negatives the theory of fees in the present case is that the money raised by the levy of the contribution is not earmarked or specified for defraying the expense that the Government has to incur in performing the services. All the collections go to the consolidated fund of the State and all the expenses have to

[13] (1954) S.C.R. 1005
[14] (1938) 60 C.L.R. 263

be met not out of those collections but out of the general revenues by a proper method of appropriation as is done in the case of other Government expenses". The learned Judge no doubt added that the said circumstance was not conclusive and pointed out that in fact there was a total absence of any co-relation between the expenses incurred by the Government and the amount raised by contribution. That is why Section 76(1) was struck down as ultra vires.

The same point arose before this Court in respect of the Orissa Hindu Religious Endowments Act, 1939, as amended by amending Act 2 of 1952 in *Mahant Sri Jagannath Ramanuj Das v. State of Orissa*[15] . Mukherjea, J., who again spoke for the Court, upheld the validity of Section 49 which imposed the liability to pay the specified contribution on every Mutt or temple having an annual income exceeding Rs 250 for services rendered by the State Government. The scheme of the impugned Act was examined and it was noticed that the collections made under it are not merged in the general public revenue and are not appropriated in the manner laid down for appropriation of expenses for other public purposes. They go to constitute a fund which is contemplated by Section 50 of the Act, and this fund to which the Provincial Government contributes both by way of loan and grant is specifically set apart for the rendering of services involved in carrying out the provisions of the Act. 12. The same view was taken by this Court in regard to Section 58 of the Bombay Public Trust Act, 1950 (Act 29 of 1950) which imposed a similar contribution for a similar purpose in *Ratilal Panachand Gandhi v. State of Bombay*[16] . It would thus be seen that the tests which have to be applied in determining the character of any impugned levy have been laid down by this Court in these three decisions; and it is in the light of these tests that we have to consider the merits of the rival contentions raised before us in the present petition."

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[15] (1954) S.C.R. 1046
[16] (1954) S.C.R. 1055

48. In *State of West Bengal vs. Kesoram Industries Limited and Ors.*[17], another Constitution Bench of this Court explained certain observations in *India Cement Limited vs. State of Tamil Nadu*[18], and stated as under:-

> "**59.** First we will refer to certain dictionaries oft-cited in courts of law:
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> *Words and Phrases*, *Permanent Edn.* (Vol. 37-A, p. 597):
>
> > " 'Royalty' is the share of the produce reserved to owner for permitting another to exploit and use property. The word 'royalty' means compensation paid to landlord by occupier of land for species of occupation allowed by contract between them. 'Royalty' is a share of the product or profit (as of a mine, forest etc.) reserved by the owner for permitting another to use his property."
>
> *Stroud's Judicial Dictionary of Words and Phrases* (6th Edn., 2000, Vol. 3, p. 2341):
>
> > "The word 'royalties' signifies, in mining leases, that part of the reddendum which is variable, and depends upon the quantity of minerals gotten or the agreed payment to a patentee on every article made according to the patent. Rights or privileges for which remuneration is payable in the form of a royalty."
>
> *Words and Phrases, Legally Defined* (3rd Edn., 1990, Vol. 4, p. 112):
>
> > "A royalty, in the sense in which the word is used in connection with mining leases, is a payment to the lessor

[17] (2004) 10 SCC 201
[18] (1990) 1 SCC 12

> proportionate to the amount of the demised mineral worked within a specified period."

Wharton's Law Lexicon (14th Edn., p. 893):

> "*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."

Mozley & Whiteley's Law Dictionary (11th Edn., 1993, p. 243):

> "A pro rata payment to a grantor or lessor, on the working of the property leased, or otherwise on the profits of the grant or lease. The word is especially used in reference to mines, patents and copyrights."

Prem's Judicial Dictionary (1992, Vol. 2, p. 1458):

> "Royalties are payments which the Government may demand for the appropriation of minerals, timber or other property belonging to the Government. Two important features of royalty have to be noticed, they are, that the payment made for the privilege of removing the articles is in proportion to the quantity removed, and the basis of the payment is an agreement."

Black's Law Dictionary (7th Edn., p. 1330):

> "*Royalty*.—A share of the product or profit from real property, reserved by the grantor of a mineral lease, in exchange for the lessee's right to mine or drill on the land.

Mineral royalty.—A right to a share of income from mineral production."

60. In *D.K. Trivedi & Sons* v. *State of Gujarat*[19] a Bench of two learned Judges of this Court dealt with "rent", "royalty" and "dead rent" and held as follows: (SCC pp. 53-54, paras 38-39)

> "*38*. 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.
>
> … … …
>
> *39*. 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 and 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, regardless of 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 as 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."

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[19] (1986) Supp SCC 20

In *H.R.S. Murthy* v. *Collector of Chittoor*[20] too the Constitution Bench of this Court had defined royalty to mean "the payment made for the materials or minerals won from the land".

61. The judicial opinion as prevailing amongst the High Courts may be noticed. A Full Bench of the High Court of Orissa held in *Laxmi Narayan Agarwalla* v. *State of Orissa*[21]: (AIR p. 224, para 12) "[R]oyalty is the payment made for the minerals extracted. It is not tax." In *Surajdin Laxmanlal* v. *State of M.P., Nagpur*[22] a Division Bench of the High Court of Madhya Pradesh referred to *Wharton's Law Lexicon* and *Mozley & Whiteley's Law Dictionary* and said (at AIR p. 130, para 7) "royalties are payments which the Government may demand for the appropriation of minerals, timber or other property belonging to the Government". The High Court opined that there are two important features of royalty: (*i*) the payment is in proportion to the quantity removed; and (*ii*) the basis of the payment is an agreement.

… … …

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 centring 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 a 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*[23] it was not the finding of the Court that royalty is a tax. A statement caused by an apparent

[20] AIR 1965 SC 177 : (1964) 6 SCR 666
[21] AIR 1983 Ori 210 : (1983) 55 Cut LT 364 (FB)
[22] AIR 1960 MP 129 : 1960 MPLJ 39
[23] (1990) 1 SCC 12

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.*[24] which says (vide para 12 of SCC report) that there was no "typographical error" in *India Cement*[23] and that the said conclusion that royalty is a tax logically flew from the earlier paragraphs of the judgment."

49. In State of *Himachal Pradesh and Others vs. Gujarat Ambuja Cement Ltd. and Another*[25], a Bench of three Judges of this Court observed:-

"44. "Royalty" is not a term used in legal parlance for the price of the goods sold. It is 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 as held in *Titaghur Paper Mills Co. Ltd. case*[26].

45. In its primary and natural sense "royalty" in the legal world, is known as the equivalent or translation of "jura regalia" or "jura regia". Royal rights and prerogatives of a sovereign are covered thereunder. In its secondary sense, the word "royalty" would signify, as in mining leases, that part of the reddendum, variable though, payable in cash or kind, for rights and privileges obtained. (See *Inderjeet Singh Sial* v. *Karam Chand Thapar*[27].)

46. "Royalty" is not a tax. Simply because the royalty is levied by reference to the quantity of the minerals produced and the impugned cess too is quantified by taking into consideration the same quantity of the mineral produced, the latter does not become royalty. The former is the rent of the

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[24] 1995 Supp (1) SCC 642
[25] (2005) 6 SCC 499
[26] 1985 Spp SCC 280 : 1985 SCC (Tax) 538
[27] (1995) 6 SCC 166

> land on which the mine is situated or the price of the privilege of winning the minerals from the land parted with by the Government in favour of the mining lessee. The cess is a levy on mineral rights with impact on the land and quantified by reference to the quantum of mineral produced. The distinction, though fine, yet exists and is perceptible. (See *State of W.B.* v. *Kesoram Industries Ltd.* [16]).

50. On the essential charcteristics of a tax, following observations of Banumathi, J. in the concurring opinion in *Jindal Stainless Limited and another vs. State of Haryana and others*[28] cull out the essence:-

> "**334.** The essential characteristics of a tax are that: (*i*) it is imposed under a statutory power without the taxpayer's consent and the payment is enforced by law; (*ii*) it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax; and (*iii*) it is part of the common burden. In *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[13], the Constitution Bench has laid down the characteristics of a tax which has since been consistently followed and it is as under: (AIR p. 284, para 43)
>
> > "*43.* … "A tax" … 'is a compulsory exaction of money by a public authority for public purposes enforceable by law and is not payment "for services rendered".'
> >
> > This definition brings out, in all opinion, the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without

[28] (2017) 12 SCC 1

> reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is, not to confer any special benefit upon any particular individual there is as it is said, no element of "quid pro quo" between the taxpayer and the public authority.… Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay."

51. It is true that as a result of order passed by this Court in *Mineral Area Development Authority and Others vs. Steel Authority of India and Others*[29], certain questions concerning "royalty" as determined under the provisions of Mines and Minerals (Development and Regulation) Act, 1957 now stand referred to a Bench of nine Judges, which reference is still pending consideration. However, none of those issues arise in the present matter.

52. On the use of the expression "royalty" in a contract, we may note following observations in *Inderjeet Singh Sial and another vs. Karam Chand Thapar and others*[27]:-

> "**12.** … … The word 'royalty' thus, in the deed was used in a loose sense so as to convey liability to make periodic payments to the assignor for the period during which the lease would subsist; payments dependent on the coal gotten and extracted in quantities or on despatch. We have therefore to construe document Ex. D-5 on its own terms and

[29] (2011) 4 SCC 450

> not barely on the label or description given to the stipulated payments. Conceivably this arrangement could well have been given a shape by using another word. The word 'royalty' was perhaps more handy for the authors to be employed for an arrangement like this, so as to ensure periodic payments. In no event could the parties be put to blame for using the word 'royalty' as if arrogating to themselves the royal or sovereign right of the State and then make redundant the rights and obligations created by the deed.
>
> **13.** The commodity goes by its value; not by the wrapper in which it is packed. A man is known for his worth; not for the clothes he wears. Royal robes worn by a beggar would not make him a king. The document is weighed by its content, not the title. One needs to go to the value, not the glitter. All the same, we do not wish to minimise the importance of the right words to be used in documents. What we mean to express is that if the thought is clear, its translation in words, spoken or written, may, more often than not, tend to be faulty. More so in a language which is not the mother tongue. Those faulted words cannot bounce back to alter the thought. Thus in sum and substance when the contracting parties and the draftsman are assumed to have known that the word 'royalty' is meant to be employed to secure for the State something out of what the State conveys, their employment of that word for private ensuring was not intended to confer on the assignor the status of the sovereign or the State, and on that basis have the document voided. … … ".

53. We may also note the following observations from the decision of a Bench of three Judges of this Court in *Union of India and others vs. Motion*

Picture Association and others[30], where the payment of fee was under the terms of a contract between the parties.

> "**31.** The exhibitors also contend that the charge of one per cent on the net recoveries is a compulsory exaction in the form of a tax. Neither the Act nor the provisions of the licence stipulate payment of any such tax. Hence imposition of this amount is in violation of Article 265 of the Constitution. It is true that neither the relevant Act nor the notification nor the rules nor the terms and conditions of the licence stipulate the payment of any rental. This amount is required to be paid under an agreement which the exhibitors individually enter into with the Films Division for the supply of these films. It is a payment under the terms of a contract between the two parties. It cannot, therefore, be viewed as a tax at all. The exhibitors contend that because they are required to enter into these agreements, any payment under the agreement is a compulsory exaction and is, therefore, tax. We do not agree. Under the terms of the agreement, the Films Division has to supply certain prints to the theatre owners at stated intervals. The Films Division is required to maintain a distribution network for this purpose. It is required to pack these films and is required to allow the exhibitors to retain these films in their possession for a certain period. The films are to be returned to the Films Division thereafter. The charge is termed in the agreement as rental for the films. It covers charges for preparing the prints of the films for distribution, and for packing them for delivery. These are clearly services rendered by the Films Division for which it is paid one per cent of the net collection as a rental. As stated earlier, the total cost of preparing prints, packing them and distributing them is much higher than the total recovery made by the Films Division by way of rental from all the exhibitors. There is a clear nexus between the services rendered and the payment to be made. The payment, therefore, is in the nature of a fee rather than a tax though there may not be an exact quid pro quo.

[30] (1999) 6 SCC 150

Nevertheless the element of quid pro quo is very much present.

32. The exhibitors relied upon a number of cases which distinguish a tax from a fee. We will only refer to some of them. In the case of *District Council of the Jowai Autonomous Distt.* v. *Dwet Singh Rymbai*[31] this Court held that a compulsory exaction for public purposes would amount to a tax while a payment for services rendered would amount to a fee. On the facts in that case, the Court said that there was no element of quid pro quo which will justify the imposition of royalty as a fee. In *Commr., H.R.E.* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[13] this Court as far back as in 1954, laid down the distinction between a tax and a fee. This Court has described a tax as a compulsory exaction for public purposes which does not require the taxpayer's consent; while fee is a charge for specific service to some, and it must have some relation to the expenses incurred for the service. In *Ahmedabad Urban Development Authority* v. *Sharadkumar Jayantikumar Pasawalla*[32] this Court has said that an express authorisation for the levy of a fee is necessary. In the present case, however, the rental is charged by the Films Division by virtue of an agreement between the Films Division and the individual exhibitor. This is in consideration of the Films Division supplying films to the exhibitor, packing the film and arranging for its delivery. This is clearly an agreed fee charged for rendering services. It cannot be viewed as a compulsory exaction or as a tax. There is a statutory obligation which is cast on the exhibitors to exhibit certain films. To carry out this statutory obligation, if the exhibitors enter into an agreement with the Films Division and agree to pay a certain amount of rental for procuring the films from the Films Division to comply with the statutory obligation, the levy must, since it is correlated with the Films Division discharging certain obligations under the contract, be viewed, at the highest, as a fee and not as a tax. It is an

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[31] (1984) 4 SCC 38
[32] (1992) 3 SCC 285 : AIR 1992 SC 2038

> agreed payment, and is not unreasonable. The High Court has rightly negatived the contention of the respondent exhibitors."

54. Thus, the expression *'Royalty'* has consistently been construed to be compensation paid for rights and privileges enjoyed by the *grantee* and normally has its genesis in the agreement entered into between the *grantor* and the *grantee*. As against tax which is imposed under a statutory power without reference to any special benefit to be conferred on the payer of the tax, the royalty would be in terms of the agreement between the parties and normally has direct relationship with the benefit or privilege conferred upon the *grantee.*

Whatever be the nomenclature, the charges for use of controlled release of water in the present cases were for the privilege enjoyed by INDSIL and CUMI. Like the case in *Motion Picture Association*[31], the basis for such charges was directly in terms of, and under the arrangement entered into between the parties, though, not referable to any statutory instrument. The controlled release of water made available to INDSIL and CUMI, has always gone a long way in helping them in generation of electricity. For such benefit or privilege conferred upon them, the Agreements arrived at between

the parties contemplated payment of charges for such conferral of advantage. Such charges, in our view, were perfectly justified.

55. The submission that it was compulsory exaction and thus assumed the characteristics of a tax was completely incorrect and untenable. It was a pure and simple contractual relationship between the parties and the Division Bench was right in rejecting the submissions advanced by CUMI and INDSIL.

56. Thus, all the submissions advanced on behalf of CUMI and INDSIL are rejected. The instant appeals are, therefore, dismissed without any order as to costs.

……..……………………..J.
[UDAY UMESH LALIT]

…..……………………….J.
[VINEET SARAN]

NEW DELHI;
September 06, 2021.