

**REPORTABLE**

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

**WRIT PETITION (CIVIL) NO. 180 OF 2011**

Orissa Mining Corporation Ltd.

.. Petitioner

Versus

Ministry of Environment &amp; Forest &amp; Others

.. Respondents

**J U D G M E N T****K. S. RADHAKRISHNAN, J.**

1. Orissa Mining Corporation (OMC), a State of Orissa Undertaking, has approached this Court seeking a *Writ of Certiorari* to quash the order passed by the Ministry of Environment and Forests (MOEF) dated 24.8.2010 rejecting the Stage-II forest clearance for diversion of 660.749 hectares of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in

Kalahandi and Rayagada Districts of Orissa and also for other consequential reliefs.

2. OMC urged that the above order passed by the MOEF has the effect of neutralizing two orders of this Court passed in I.A. Nos. 1324 and 1474 in Writ Petition (C) No. 202 of 1995 with I.A. Nos. 2081-2082 (arising out of Writ Petition No. 549 of 2007) dated 23.11.2007 reported in (2008) 2 SCC 222 [hereinafter referred to as 'Vedanta case'] and the order passed by this Court in I.A. No. 2134 of 2007 in Writ Petition No. 202 of 1995 on 08.08.2008 reported in (2008) 9 SCC 711 [hereinafter referred to as the 'Sterlite case']. In order to examine the issues raised in this writ petition, it is necessary to examine the facts at some length.

### **FACTS:**

3. M/s. Sterlite (parent company of Vedanta) filed an application on 19.3.2003 before MOEF for environmental clearance for the purpose of starting an Alumina Refinery Project (ARP) in Lanjigarh Tehsil of District Kalahandi, stating that no forest land was

involved within an area of 10 kms. The 4<sup>th</sup> respondent – Vedanta, in the meanwhile, had also filed an application on 6.3.2004 before this Court seeking clearance for the proposal for use of 723.343 ha of land (including 58.943 ha of reserve forest land) in Lanjigarh Tehsil of District Kalahandi for setting up an Alumina Refinery. Noticing that forest land was involved, the State of Orissa submitted a proposal dated 16.08.2004 to the MoEF for diversion of 58.90 hectare of forest land which included 26.1234 hectare of forest land for the said ARP and the rest for the conveyor belt and a road to the mining site. The State of Orissa, later, withdrew that proposal. The MoEF, as per the application submitted by M/s Sterlite, granted environmental clearance on 22.9.2004 to ARP on 1 million tonne per annum capacity of refinery along with 75 MW coal based CPP at Lanjigarh on 720 hectare land, by delinking it with the mining project. Later, on 24.11.2004, the State of Orissa informed MOEF about the involvement of 58.943 ha of forest land in the project as against “NIL” mentioned in the environmental clearance and that the Forest Department of Orissa had, on 5.8.2004, issued a show-cause-notice to 4<sup>th</sup> respondent for

encroachment of 10.41 acres of forest land (out of 58.943 ha for which FC clearance proposal was sent) by way of land breaking and leveling.

4. The State of Orissa, on 28.2.2005 forwarded the proposal to MOEF for diversion of 660.749 ha of forest land for mining bauxite ore in favour of OMC in Kalahandi and Rayagada Districts. The Central Empowered Committee (CEC), in the meanwhile, addressed a letter dated 2.3.2005 to MOEF stating that pending the examination of the project by CEC, the proposal for diversion of forest land and/or mining be not decided.

5. Vedanta, however, filed an application I.A. No. 1324 of 2005 before this Court seeking a direction to the MoEF to take a decision on the application for forest clearance for bauxite mining submitted by the state Government on 28.2.2005 for the Refinery project. The question that was posed by this Court while deciding the above-mentioned I.A. was whether Vedanta should be allowed to set up its refinery project, which involved the proposal for diversion of 58.943 ha. of forest land. CEC had,

however, objected to the grant of clearance sought by Vedanta on the ground that the Refinery would be totally dependent on mining of bauxite from Niyamgiri Hills, Lanjigarh, which was the only vital wildlife habitat, part of which constituted elephant corridor and also on the ground that the said project would obstruct the proposed wildlife sanctuary and the residence of tribes like Dongaria Kondha.

6. The Court on 03.06.2006 directed the MoEF to consult the experts/organizations and submit a report. MoEF appointed Central Mining Planning and Design Institute (CMPDI), Ranchi to study the social impact of ground vibration on hydro-geological characteristics, including ground propensity, permeability, flow of natural resources etc. CMPDI submitted its report on 20.10.2006. MoEF appointed the Wildlife Institute of India (WII), Dehradun to study the impact of the Mining Project on the bio-diversity. WII submitted its report dated 14.06.2006 and the supplementary report dated 25.10.2006 before the MOEF. Reports of CMPDI, WII were all considered by the Forest Advisory Committee (FAC) on 27.10.2006 after perusing the above mentioned reports approved

the proposal of OMC, for diversion of 660.749 ha. of forest land for the mining of bauxite in Kalahandi and Rayagada Districts subject to the conditions laid down by WII.

7. The State of Orissa had brought to the notice of this Court about the lack of basic infrastructure facilities in the Tribal areas of both the districts, so also the abject poverty in which the local people were living in Lanjigarh Tehsil, including the tribal people, and also the lack of proper housing, hospitals, schools etc. But this Court was not agreeable to clear the project, at the instance of Vedanta, however, liberty was granted to M/s. Sterlite to move the Court if they would agree to comply with the modalities suggested by the Court. Following were the modalities suggested by the Court, while disposing of the Vedanta case on 23.11.2007:

“(i) State of Orissa shall float a Special Purpose Vehicle (SPV) for scheduled area development of Lanjigarh Project in which the stakeholders shall be State of Orissa, OMC Ltd. and M/s SILL. Such SPV shall be incorporated under the Companies Act, 1956. The accounts of SPV will be prepared by the statutory auditors of OMC Ltd. and they shall be audited by the Auditor General for State of Orissa every year. M/s SILL

will deposit, every year commencing from 1-4-2007, 5% of its annual profits before tax and interest from Lanjigarh Project or Rs 10 crores *whichever is higher* for Scheduled Area Development with the said SPV and it shall be the duty of the said SPV to account for the expenses each year. The annual report of SPV shall be submitted to CEC every year. If CEC finds non-utilisation or misutilisation of funds the same shall be brought to the notice of this Court. While calculating annual profits before tax and interest M/s SILL shall do so on the basis of the market value of the material which is sold by OMC Ltd. to M/s SILL or its nominee.

(ii) In addition to what is stated above, M/s SILL shall pay NPV of Rs 55 crores and Rs 50.53 crores towards Wildlife Management Plan for Conservation and Management of Wildlife around Lanjigarh bauxite mine and Rs 12.20 crores towards tribal development. In addition, M/s SILL shall also bear expenses towards compensatory afforestation.

(iii) A statement shall be filed by M/s SILL with CEC within eight weeks from today stating number of persons who shall be absorbed on permanent basis in M/s SILL including land-losers. They shall give categories in which they would be permanently absorbed. The list would also show particulars of persons who would be employed by the contractors of M/s SILL and the period for which they would be employed.

(iv) The State Government has the following suggestions on this issue:

1. The user agency shall undertake demarcation of the lease area on the ground using four feet high cement concrete pillars with serial

number, forward and back bearings and distance from pillar to pillar.

2. The user agency shall make arrangements for mutation and transfer of equivalent non-forest land identified for compensatory afforestation to the ownership of the State Forest Department.

3. The State Forest Department will take up compensatory afforestation at Project cost with suitable indigenous species and will declare the said area identified for compensatory afforestation as "*protected forest*" under the Orissa Forest Act, 1972 for the purpose of management.

4. The user agency shall undertake *rehabilitation* of Project-affected families, if any, as per the Orissa Rehabilitation and Resettlement Policy, 2006.

5. The user agency shall undertake *phased reclamation* of mined-out area. All overburden should be used for back-filling and reclamation of the mined-out areas.

6. The user agency shall undertake *fencing of the safety zone* area and endeavour for protection as well as regeneration of the said area. It shall deposit funds with the State Forest Department for the protection and regeneration of the safety zone area.

7. Adequate *soil conservation measures* shall be undertaken by the lessee on the overburdened dumps to prevent contamination of stream flow.

8. The user agency should undertake comprehensive *study on hydrogeology* of the area and the impact of mining on the surrounding water quality and stream flow at regular interval and take effective measures so as to maintain the pre-mining water condition as far as possible.



9. The user agency should undertake a comprehensive study of the wildlife available in the area in association with institutes of repute like Wildlife Institute of India, Dehradun, Forest Research Institute, Dehradun, etc. and shall prepare a *site specific comprehensive wildlife management plan* for conservation and management of the wildlife in the Project impact area under the guidance of the Chief Wildlife Warden of the State.

10. The user agency shall *deposit the NPV* of the forest land sought for diversion for undertaking mining operations.

11. The user agency shall prepare a comprehensive plan for the *development of tribals* in the Project impact area taking into consideration their requirements for health, education, communication, recreation, livelihood and cultural lifestyle.

12. As per the policy of the State Government, the user agency shall earmark *5% of the net profit* accrued in the Project to be spent for the development of health, education, communication, irrigation and agriculture of the said scheduled area within a radius of 50 km.

13. *Controlled blasting* may be used only in exigencies wherever needed to minimise the impact of noise on wildlife of the area.

14. The user agency shall undertake *development of greenery* by way of plantation of suitable indigenous species in all vacant areas within the Project.

15. *Trees shall be felled* from the diverted area *only when it is necessary* with the strict supervision of the State Forest Department at the cost of the Project.

16. The forest land diverted shall be *non-transferable*. Whenever the forest land is not required, the same shall be surrendered to the State Forest Department under intimation to Ministry of Environment and Forests, Government of India.

If M/s SILL, State of Orissa and OMC Ltd. jointly agree to comply with the above rehabilitation package, this Court may consider granting of clearance to the Project.

### **Conclusion**

**12.** If M/s SILL is agreeable to the aforesaid rehabilitation package then they shall be at liberty to move this Court by initiating a proper application. This Court is not against the Project in principle. It only seeks safeguards by which we are able to protect nature and subserve development. IAs are disposed of accordingly.

However, we once again reiterate that the applications filed by M/s VAL stand dismissed.”

The Court opined that if Sterlite, State of Orissa and OMC jointly agree to comply with the “Rehabilitation Package”, the Court might consider granting clearance to the project. Stating so, all the applications were disposed of, the order of which is reported in (2008) 2 SCC 222.

8. M/s. Sterlite, 3<sup>rd</sup> respondent herein, then moved an application - being I.A. No. 2134 of 2007 - before this Court, followed by affidavits, wherein it was stated that M/s. Sterlite, State of Orissa and OMC had unconditionally accepted the terms and conditions and modalities suggested by this Court under the caption "Rehabilitation Package" in its earlier order dated 23.12.2007. Siddharth Nayak, who was the petitioner in WP No. 549/07, then filed a Review Petition No. 100/2008 and sought review of the order dated 23.11.2007 passed by this Court stating that this court had posed a wrong question while deciding I.A. No. 2134 of 2007 and pointed out that Alumina Refinery was already set up by Vedanta and production commenced and the principal question which came up before this Court was with regard to the ecological and cultural impact of mining in the Niyamgiri Hills. Further, it was also pointed out that if Sterlite was allowed to mine in the Niyamgiri Hills, it would affect the identity, culture and other customary rights of Dongaria Kondh. Review Petition was, however, dismissed by this Court on 07.05.2008.

9. This Court then passed the final order in Sterlite case on 8.8.2008, the operative portion of which reads as follows:

**“13.** For the above reasons and in the light of the affidavits filed by SIIL, OMCL and the State of Orissa, accepting the rehabilitation package, suggested in our order dated 23-11-2007, we hereby grant clearance to the forest diversion proposal for diversion of 660.749 ha of forest land to undertake bauxite mining on Niyamgiri Hills in Lanjigarh. The next step would be for MoEF to grant its approval in accordance with law.”

10. MOEF, later, considered the request of the State of Orissa dated 28.2.2005 seeking prior approval of MOEF for diversion of 660.749 ha of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in favour of OMC, in accordance with Section 2 of the Forest (Conservation) Act, 1980. MOEF, after considering the proposal of the State Government and referring to the recommendations of FAC dated 27.10.2006, agreed in principle for diversion of the above mentioned forest land, subject to various conditions which are as follows:

- (i) The Compensatory Afforestation shall be raised over non-forest land, equal in extent to the forest land proposed to be diverted, at the project cost. The User Agency shall transfer the cost of

Compensatory Afforestation to the State Forest Department.

- (ii) The non-forest land identified for Compensatory Afforestation shall be declared as Reserved Forests under Indian Forest Act, 1927.
- (iii) The User Agency shall create fence and maintain a safety zone around the mining area. The User Agency will deposit fund with the Forest Department for creation, protection and regeneration of safety zone area and also will have to bear the cost of afforestation over one and a half time of the safety zone area in degraded forest elsewhere.
- (iv) The reclamation of mines shall be carried out concurrently and should be regularly monitored by the State Forest Department.
- (v) RCC pillars of 4 feet height shall be erected by the User Agency at the project cost to demarcate the area and the pillars will be marked with forward and back bearings.
- (vi) The State Government shall charge Net Present Value (NPV) from the User Agency for the entire diverted forest land, as directed by Hon'ble Supreme Court and as per the guidelines issued vide Ministry of Environment and Forests letters No.

5-1/98-FC(Pt.II) dated 18<sup>th</sup> September 2003 and 22<sup>nd</sup> September 2003.

- (vii) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2008, M/s SILL shall pay NPV of Rs.55 crores.
- (viii) An undertaking from the User Agency shall also be obtained stating that in case the rates of NPV are revised upwards, the additional/differential amount shall be paid by the User Agency.
- (ix) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2-008, M/s SILL shall pay Rs.50.53 crores towards Wildlife Management Plan for Conservation and Management of Wildlife around Lanjigarh bauxite mine.
- (x) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2-008, M/s SILL is required to contribute Rs.12.20 crores towards tribal development apart from payment of NPV and apart from contribution to the Management of Wildlife around Lanjigarh Bauxite Mine. Moreover, while allocating CAMPA Funds the said amount of Rs.12.20 crores shall be earmarked specifically for tribal development.
- (xi) The State Government shall deposit all the funds with the Ad-hoc Body of Compensatory Afforestation

Fund Management and Planning Authority (CAMPA) in Account No. CA 1585 of Corporation Bank (A Government of India Enterprise) Block-II, Ground Floor, CGO Complex, Phase-I, Lodhi Road, New Delhi-110 003, as per the instructions communicated vide letter N.5-2/2006-PC dated 20.05.2006.

- (xii) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2-008, M/s SIIL shall deposit 5% of its annual profits before tax and interest from Lanjigarh Project of Rs.10 crores whichever is higher as contribution for Scheduled Area Development. The contribution is to be made every year commencing from 01.04.2007. The State of Orissa shall float a Special Purpose Vehicle (SPV) for scheduled area development of Lanjigarh Project in which the stake-holders shall be State of Orissa, OMC Ltd. and M/s SIIL. Such SPV shall be incorporated under the Companies Act, 1956. The Accounts of SPC shall be prepared by the Statutory auditors of OMC Ltd and they shall be audited by the Auditor General for State of Orissa every year.
- (xiii) The permission granted under FC Act shall be co-terminus with the mining lease granted under MMRD Act or any other relevant Act.

- (xiv) Tree felling shall be done in a phased manner to coincide with the phasing of area to be put to mining with a view to minimizing clear felling. The felling will always be carried out under strict supervision of State Forest Department.
- (xv) All efforts shall be made by the User Agency and the State Government to prevent soil erosion and pollution of rivers/nallas/streams etc.
- (xvi) The Wildlife Management Plan (WMP) shall be modified accordingly as suggested by the Wildlife Institute of India (WII), Dehradun and shall be implemented by the State Government/User Agency at the project cost. The progress of implementation of the WMP shall be regularly monitored by the WILL and Regional Office, Bhubaneswar.
- (xvii) Any other condition that the CCF (Central), Regional Office, Bhubaneswar / the State Forest Department may impose from time to time for protection and improvement of flora and fauna in the forest area, shall also be applicable.
- (xviii) All other provisions under different Acts, rules, and regulations including environmental clearance shall be complied with before transfer of forest land.



- (xix) The lease will remain in the name of Orissa Mining Corporation (OMCL) and if any change has to be done, it will require prior approval of the Central Government as per guidelines.
- (xx) The present forest clearance will be subject to the final outcome of the Writ petition No. 202 of 1995 from the Hon'ble Supreme Court and Court's order dated 23.11.2007 and 08.08.2008.
- (xxi) Other standard conditions as applicable to proposals related to mining shall apply in the instant case also."

MOEF, then, vide its letter dated 11.12.2008 informed the State of Orissa that it had, in principle, agreed for diversion of 660.749 ha. of forest land for mining bauxite in favour of OMC, subject to fulfillment of the above mentioned conditions, and after getting the compliance report from the State Government. Order dated 11.12.2008 was slightly modified on 31.12.2008. It was further ordered that the transfer of forest land to the user agency should not be effected by the State Government till formal orders approving diversion of forest land were issued.

11. MoEF then granted environmental clearance to OMC vide its proceedings dated 28.04.2009 subject to various conditions including the following conditions:

“(iii) Environmental clearance is subject to grant of forestry clearance. Necessary forestry clearance under the Forest (Conservation) Act, 1980 for diversion of 672.018 ha forest land involved in the project shall be obtained before starting mining operation in that area. No mining shall be undertaken in the forest area without obtaining requisite prior forestry clearance.”

The State Government then forwarded the final proposal to the MoEF vide its letter dated 10.08.2009 stating that the user agency had complied with all the conditions stipulated in the letter of MoEF dated 11.12.2008. On the Forest Rights Act, the Government letter stated as follows:

**“Provisions of Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.**

The Govt. of India, MOEF vide their letter dated 28.04.2009 have accorded environmental clearance to Lanjigarh Bauxite Mining Project. This letter of Govt. of India, MOEF puts on record that there is no habitation in the mining lease area on the plateau top and no resettlement and rehabilitation is involved. Public hearing for the project was held on 07.02.2003 for Kalahandi District and on 17.03.2003 for Rayagada District. In both the cases, the project has been recommended. Copies of the public hearing proceedings have already been submitted to Govt. of India, MOEF along with forest diversion proposal. This project was also challenged in the Hon'ble Supreme Court of India on the ground that it violates the provisions of the Scheduled Tribes & Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 WP (C) No. 549 of 2007 was filed in the Hon'ble Supreme Court of India by one Sri Siddharth Nayak challenging the project on the above issue. After examining different aspects of the writ petition in IA No. 2081-2082 in WP (C) No. 549/2007, the Hon'ble Supreme Court of India had cleared the project by way of disposing the Writ Petition vide their order dated 23.11.2007. Subsequently, Hon'ble Supreme Court had finally cleared the project vide their order dated

08.08.2008. In view of the above position and orders of Hon'ble Supreme Court of India, no further action in this regard is proposed."

12. State of Orissa's final proposal was then placed before the FAC on 4.11.2009. FAC recommended that the final clearance would be considered only after ascertaining of the community rights on forest land and after the process for establishing such rights under Forest Rights Act was completed. FAC also decided to constitute an Expert Group to carry out a site inspection. Consequently, on 1.1.2010, a three-member Team composed of Dr. Usha Ramanathan and two others, was constituted to consider and make recommendations to MOEF on the proposal submitted by OMC. The Team carried out the site inspection during the months of January and February, 2010 and submitted three individual reports to MOEF on 25.2.2010 which were not against the project as such, but suggested an in-depth study on the application of the Forest Rights Act. FAC also, on 16.4.2010, considered all the three reports and recommended that a Special Committee, under the Ministry of Tribal Affairs, be constituted to

look into the issues relating to the violation of Tribal rights and the settlement of Forest rights under the Forest Rights Act.

13. MOEF then met on 29.6.2010 and decided to constitute a team composed of specialists to look into the settlement of rights on forest dwellers and the “Primitive Tribal Groups” under the Forest Rights Act and the impact of the Project on wildlife and biodiversity in the surrounding areas. Consequently, a 4-member Committee was constituted headed by Dr. Naresh Saxena to study and assess the impacts of various rights and to make a detailed investigation. The Committee, after conducting several site visits and making detailed enquiries submitted its report to MOEF on 16.8.2010.

## JUDGMENT

14. The State Government then submitted their written objection on 17.08.2010 to the MoEF on the Saxena Committee Report and requested that an opportunity of hearing be given to it before taking any decision on the report. MoEF, however, called a meeting of FAC on 20.8.2010 and placed the Saxena Committee

report before FAC, for consideration. Minutes of the Committee meeting was released on 23.8.2010, stating that the Primitive Tribal Groups were not consulted in the process of seeking project clearance and also noticed the violation of the provisions of Forest Rights Act, the Forest (Conservation) Act, 1980, Environmental Protection Act, 1986 and also the impact on ecological and biodiversity values of the Niyamgiri hills upon which the Dongaria Kondh and Kutia Kondh depend. FAC opined that it was a fit case for applying the precautionary principle to obviate the irreparable damage to the affected people and recommended for the temporary withdrawal of the in-principle/State I approval accorded. FAC recommended that the State Government be heard before a final decision is taken by the MoEF.

15. The recommendations of the FAC dated 23.8.2010 and Saxena Committee report were considered by MOEF and the request for Stage-II Clearance was rejected on 24.8.2010, stating as follows:

## **“VIII. Factors Dictating Decision on Stage-II Clearance**

I have considered three broad factors while arriving at my decision.

### **1. The Violation of the Rights of the Tribal Groups including the Primitive Tribal Groups and the Dalit Population.**

The blatant disregard displayed by the project proponents with regard to rights of the tribals and primitive tribal groups dependant on the area for their livelihood, as they have proceeded to seek clearance is shocking. Primitive Tribal Groups have specifically been provided for in the Forest Rights Act, 2006 and this case should leave no one in doubt that they will enjoy full protection of their rights under the law. The narrow definition of the Project Affected People by the State Government runs contrary to the letter and spirit of the Forest Rights Act, 2006. Simply because they did not live on the hills does not mean that they have no rights there. The Forest Rights Act, 2006 specifically provides for such rights but these were not recognized and were sought to be denied.

Moreover, the fate of the Primitive Tribal Groups need some emphasis, as very few communities in India in general and Orissa in particular come under the ambit of such a category. Their dependence on the forest being almost complete, the violation of the specific protections extended to their “habitat and

habitations” by the Forest Rights Act, 2006 are simply unacceptable.

This ground by itself has to be foremost in terms of consideration when it comes to the grant of forest or environmental clearance. The four-member committee has highlighted repeated instances of violations.

One also cannot ignore the Dalits living in the area. While they may technically be ineligible to receive benefits under the FRA 2006, they are such an inextricable part of the society that exists that it would be impossible to disentitle them as they have been present for over five decades. The Committee has also said on p.40 of their report that *“even if the Dalits have no claims under the FRA the truth of their de facto dependence on the Niyamgiri forests for the past several decades can be ignored by the central and state governments only at the cost of betrayal of the promise of inclusive growth and justice and dignity for all Indians”*. This observation rings true with the MoE&F and underscores the MoE&F’s attempt to ensure that any decision taken is not just true to the law in letter but also in spirit.

## **2. Violations of the Environmental Protection Act 1986:**

### **(i) Observations of the Saxena Committee and MoE&F Records:**

In additional to its findings regarding the settlement of rights under the FRA 2006, the four-member Committee has also observed,



with reference to the environmental clearance granted for the aluminum refinery, on p.7 of its Report dated 16<sup>th</sup> August 2010 that:

*“The company/s Vedanta Alumina Limited has already proceeded with construction activity for its enormous expansion project that would increase its capacity six fold from 1 Mtpa to 6 Mtpa without obtaining environmental clearance as per the provisions of EIA Notification, 2006 under the EPA. This amounts to a serious violation of the provisions of the Environment (Protection) Act. This expansion, its extensive scale and advanced nature, is in complete violation of the EPA and is an expression of the contempt with which this company treats the laws of the land.”*

I have reviewed the records of the MoE&F and have found no documentation which establishes such activity to have been granted clearance. Nor is there any evidence to suggest that such requirement was waived by the Ministry. The TORs for the expansion of the project from 1 million tones to 6 million tones were approved in March 2008. No further right has been granted in any form by the Ministry to the project proponents to proceed with the expansion. While any expansion without prior EC is a violation of the EIA Notification/EPA 1986 this, itself, is not a minor expansion and is therefore a most serious transgression of the EPA 1986.

There also appear to have been other acts of violation that emerge from a careful perusal of the evidence at hand. This is not the first act of violation. On March 19<sup>th</sup>, 2003 M/s Sterlite filed an application for environmental clearance from the MoE&F for the refinery. In the application it was stated that no forest land is involved in the project and that there was no reserve forest within a radius of 10 kms of the project site.

Thereafter on September 22<sup>nd</sup>, 2004, environment clearance was granted by the MoE&F for the refinery project. While granting the environmental clearance, the MoE&F was unaware of the fact that the application for forest clearance was also pending since the environmental clearance letter clearly stated that no forest land was involved in the project.

In March 2005, in proceedings before itself, the Central Empowered Committee (CEC) too questioned the validity of the environmental clearance granted by the MoE&F and requested the Ministry to withhold the forest clearance on the project till the issue is examined by the CEC and report is submitted to the Hon'ble Supreme Court.

**(ii) Case before the MEAA by the Dongaria Kondhs:**

After the grant of Environment Clearance, the local tribals and other concerned persons including the Dongaria Kondhs

challenged the project before the National Environment Appellate Authority (NEAA). [*Kumati Majhi and Ors Vs Ministry of Environment and Forest, Srabhu Sikka and Ors. Vs Ministry of Environment and Forests, R Sreedhar Vs. Ministry of Environment and Forest, Prafulla Samantara Vs. Ministry of Environment and Forests and Ors Appeal No. 18, 19, 20 and 21 of 2009*].

It is brought to my attention that this is the first time that the Dongaria Kondha have directly challenged the project in any Court of law. The Appeals highlighted the several violations in the Environmental Clearance process. Some of the key charges raised were that the full Environmental Impact Assessment Report was not made available to the Public before the public hearing, different EIA reports made available to the public and submitted to the Ministry of Environment and Forests, the EIA conducted was a rapid EIA undertaken during the monsoon months. The matter is reserved for judgment before the NEAA.

**(iii) Monitoring Report of the Eastern Regional Office dated 25<sup>th</sup> May, 2010:**

On 25<sup>th</sup> May 2010, Dr. VP Upadhyay (Director 'S') of the Eastern Regional Office of the Ministry of Environment and Forests submitted his report to the MoE&F which listed various violations in para 2 of the monitoring report. They observed:

- a. "M/s Vedanta Alumina Limited has already proceeded with construction activity for expansion project without obtaining environmental clearance as per provisions of EIA Notification 2006 that amounts to violation of the provisions of the Environment (Protection) Act."
- b. "The project has not established piezometers for monitoring of ground water quality around red mud and ash disposal ponds; thus, the condition no. 5 of Specific Condition of the clearance letter is being violated."
- c. "The condition no. li of General Condition of environmental clearance has been violated by starting expansion activities without prior approval from the Ministry."

Furthermore all bauxite for the refinery was to be sourced from mines which have already obtained environmental clearance. The Report listed 14 mines from which Bauxite was being sourced by the project proponents. However out of these 11 had not been granted a mining license while 2 had only received TORs and only 1 had received clearance.

### **3. Violations under the Forest Conservation Act:**

The Saxena Committee has gone into great detail highlighting the various instances of violations under the Forest (Conservation) Act 1980. All these violations coupled with the resultant impact on the ecology and biodiversity of the surrounding area further condemn the actions of the project proponent. Not only are these violations of a repeating nature but they are instances of willful concealment of information by the project proponent.

#### **IX. The Decision on Stage-II Clearance**

The Saxena Committee's evidence as reviewed by the FAC and read by me as well is compelling. The violations of the various legislations, especially the Forest (Conservation) Act, 1980, the Environment (Protection) Act, 1986, and the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, appear to be too egregious to be glossed over. Furthermore, a mass of new and incriminating evidence has come to light since the Apex court delivered its judgment on August 8<sup>th</sup>, 2008. Therefore, after careful consideration of the facts at hand, due deliberation over all the reports submitted and while upholding the recommendation of the FAC, I have come to the following conclusions:

1. The Stage II forest clearance for the OMC and Sterlite bauxite mining project on the Niyamgiri Hills in Lanjigarh, Kalahandi and Rayagada districts of Orissa cannot be

granted. Stage-II Forest Clearance therefore stands rejected.

2. Since forest clearance is being rejected, the environmental clearance for this mine is inoperable.
3. It appears that the project proponent is sourcing bauxite from a large number of mines in Jharkhand for the one million tonne alumina refinery and are not in possession of valid environmental clearance. This matter is being examined separately.
4. Further, a show-cause notice is being issued by the MOE&F to the project proponent as to why the environmental clearance for the one million tonnes per annum alumina refinery should not be cancelled.
5. A show-cause notice is also being issued to the project proponent as to why the terms of reference (TOR) for the EIA report for the expansion from one million tones to six million tones should not be withdrawn. Meanwhile, the TOR and the appraisal process for the expansion stands suspended.

Separately the MoE&F is in the process of examining what penal action should be initiated against the project proponents for the violations of various laws as documented exhaustively by the Saxena Committee.

On the issues raised by the Orissa State Government, I must point out that while customary rights of the Primitive Tribal Groups are not recognized in the National Forest Policy, 1988 they are an integral part of the Forest Rights Act, 2006. An Act passed by

Parliament has greater sanctity than a Policy Statement. This is apart from the fact that the Forest Rights Act came into force eighteen years after the National Forest Policy. On the other points raised by the State Government officials, on the procedural aspects of the Forest Rights Act, 2006, I expect that the joint Committee set up by the MoE&F and the Ministry of Tribal Affairs would give them due consideration. The State Government officials were upset with the observations made by the Saxena Committee on their role in implementing the Forest Rights Act, 2006. Whether State Government officials have connived with the violations is a separate issue and is not relevant to my decision. I am prepared to believe that the State Government officials were attempting to discharge their obligations to the best of their abilities and with the best of intentions. The State Government could well contest many of the observations made by the Saxena Committee. But this will not fundamentally alter the fact that serious violations of various laws have indeed taken place.

The primary responsibility of any Ministry is to enforce the laws that have been passed by Parliament. For the MoE&F, this means enforcing the Forest (Conservation) Act, 1980, the Environmental (Protection) Act, 1986, the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and other laws. It is in this spirit that this decision has been taken.”

The order dated 24.8.2010 was communicated by MOEF to the State of Orissa vide its letter dated 30.8.2010, the legality of those orders are the subject matter of this writ petition.

16. Shri K.K. Venugopal, learned senior counsel appearing for OMC, referred to the earlier judgments of this Court in **Vedanta** as well as **Sterlite** and submitted that those judgments are binding on the parties with regard to the various questions raised and decided and also to the questions which ought to have been raised and decided. Learned senior counsel also pointed out that MOEF itself, after the above mentioned two judgments, had accorded Stage-I clearance vide its proceeding dated 11.12.2008 and that the State of Orissa vide its letter dated 10.8.2009 had informed MOEF of the compliance of the various conditions stipulated in the Stage-I clearance dated 11.12.2008. Consequently, there is no impediment in the MOEF granting Stage-II clearance for the project. Learned senior counsel also submitted that the reasons stated by the FAC as well as the Saxena Committee are all untenable and have nothing to do with Bauxite Mining Project (BMP) undertaken by OMC. Learned senior counsel also submitted that the constitution of, initially, a 3-Member Committee and, later, a 4-Member Committee, was intended only to cancel the Stage-I clearance granted to the BMP



in compliance with the judgment of this Court. Learned counsel also pointed out that the claim under the Forest Rights Act was also raised by Sidharth Nayak through a review petition, which was also rejected by this Court on 7.5.2008. Consequently, it would not be open to the parties to again raise the issues which fall under the Forest Rights Act.

17. Shri C.A. Sundaram, learned senior counsel appearing for the State of Orissa, submitted that various reasons stated by the MOEF for rejecting the Stage-II clearance are unsustainable in law as well as on facts. Learned senior counsel pointed out that reasons stated by the Saxena Committee as well as MOEF alleging violation of the Environmental Protection Act, 1986, are totally unrelated to the BMP. Learned senior counsel pointed out that Alumina Refinery is an independent project and the violation, if any, in respect of the same ought not to have been relevant criteria for the consideration of the grant of Stage-II clearance to the BMP, being granted to OMC. Referring to the Monitoring Report of Eastern Regional Office dated 25.5.2010, learned senior counsel pointed out that the findings recorded in that report are

referable to 4<sup>th</sup> respondent and not to the mining project granted to OMC. Learned senior counsel also submitted that Saxena Committee as well as MOEF has committed a factual error in taking into account the alleged legal occupation of 26.123 ha of village forest lands enclosed within the factory premises which has no connection with regard to the mining project, a totally independent project. Learned senior counsel also submitted that in the proposed mining area, there is no human habitation and that the individual habitation rights as well as the Community Forest Resource Rights for all villages located on the hill slope of the proposed mining lease area, have already been settled. Learned senior counsel also pointed out that the Gram Sabha has received several individual and community claims from Rayagada and Kalahandi Districts and they have settled by giving alternate lands.

18. Shri Sundaram also submitted that the Forest Rights Act deals with individual and community rights of the Tribals which does not, in any manner, expressly or impliedly, make any

reference to the religious or spiritual rights protected under Articles 25 and 26 of the Constitution of India and does not extend to the property rights. Learned senior counsel also submitted that the State Government continues to maintain and have ownership over the minerals and deposits beneath the forests and such rights have not been taken away by the Forest Rights Act and neither the Gram Sabha nor the Tribals can raise any ownership rights on minerals or deposits beneath the forest land.

19. Shri C.U. Singh, learned senior counsel appearing for the 3<sup>rd</sup> respondent - Sterlite, submitted that various grounds stated in Saxena report as well as in the order of MOEF dated 24.8.2010, were urged before this Court when **Vedanda** and **Sterlite** cases were decided and, it was following those judgments, that MOEF granted Stage-I approval on 11.12.2008 on the basis of the recommendation of FAC. In compliance of the Stage-I clearance accorded by MOEF, SPV (OMC and Sterlite) undertook various works and completed, the details of the same have been furnished along with the written submissions filed on 21.1.2013.

Learned senior counsel submitted that the attempt of the MOEF is to confuse the issue mixing up the Alumina Refinery Project with that of the Bauxite Mining Project undertaken by Sterlite and OMC through a SPV. The issues relating to expansion of refinery and alleged violation of the Environmental Protection Act, 1986, the Forest Conservation Act, 1980 etc. have nothing to do with the mining project undertaken by OMC and Sterlite. Learned senior counsel, therefore, submitted that the rejection of the Stage-II clearance by MOEF is arbitrary and illegal.

20. Shri Mohan Parasaran, Solicitor General of India, at the outset, referred to the judgment of this Court in Sterlite and placed considerable reliance on para 13 of the judgment and submitted that while granting clearance by this Court for the diversion of 660.749 ha of forest land to undertake bauxite mining in Niyamgiri hills, left it to the MOEF to grant its approval in accordance with law. Shri Parasaran submitted that it is in accordance with law that the MOEF had constituted two Committees and the reports of the Committees were placed before the FAC, which is a statutory body constituted under

Section 3 of the Forest Conservation Act. It was submitted that it was on the recommendation of the statutory body that MOEF had passed the impugned order dated 24.8.2010. Further, it was pointed out that, though MOEF had granted the Stage-I clearance on 11.12.2008, it can still examine as to whether the conditions stipulated for the grant of Stage-I clearance had been complied with or not. For the said purpose, two Committees were constituted and the Saxena Committee in its report has noticed the violation of various conditions stipulated in the Stage-I clearance granted by MOEF on 11.12.2008. Shri Parasaran also submitted that the petitioner as well as 3<sup>rd</sup> respondent have also violated the provisions of the Forest Rights Act, the violation of which had been specifically noted by the Saxena Committee and accepted by MOEF. Referring to various provisions of the Forest Rights Act under Section 3.1(i), 3.1(e) and Section 5 of the Act, it was submitted that concerned forest dwellers be treated not merely as right holders as statutory empowered with the authority to protect the Niyamgiri hills. Shri Parasaran also pointed out that Section 3.1(e) recognizes the right to community

tenures of habitat and habitation for “primitive tribal groups” and that Dongaria Kondh have the right to grazing and the collection of mineral forest of the hills and that they have the customary right to worship the mountains in exercise of their traditional rights, which would be robbed of if mining is permitted in Niyamgiri hills.

21. Shri Raj Panjwani, learned senior counsel appearing for the applicants in I.A. Nos. 4 and 6 of 2012, challenged the environmental clearance granted to OMC on 28.4.2009 by MOEF before the National Environment Appellate Authority (NEAA) under Section 4(1) of the NEAA Act, 1997, by filing Appeal Nos. 20 of 2009 and 21 of 2009 before NEAA. NEAA vide its order dated 15.5.2010 allowed the appeals and remitted the matter to MOEF to revisit the grant of environmental clearance to OMC on 28.4.2009. Later, MOEF by its order dated 11.7.2011 has withdrawn the environmental clearance dated 28.4.2009 granted in favour of OMC and that OMC, without availing of the statutory remedy of the appeal, filed I.A. No. 2 of 2011 in the present writ petition.

22. Shri Sanjay Parekh, learned counsel appearing for the applicants in I.A. Nos. 5 and 6 of 2011, referred to the various provisions of the Forest Rights Act and the Rules and submitted that the determination of rights of scheduled tribes (STs)/other traditional forest dwellers (TFDs) have to be done by the Gram Sabha in accordance with the machinery provided under Section 6 of the Act. Learned counsel also submitted that the forest wealth vests in the STs and other TFDs and can be diverted only for the purpose mentioned in Section 3(3). Learned counsel also referred to the Saxena Committee report and submitted that the report clearly reveals the community rights as well as the various rights and claims of the primitive traditional forest dwellers. Learned counsel also submitted that if the mining is undertaken in Niyamgiri hills, it would destroy more than 7 sq. Km. of undisturbed forest land on the top of the mountain which is the abode of the Dongaria Kondh and their identity depends on the existence of Niyamgiri hills.

### **Judicial Evaluation**

23. We may, at the outset, point out that there cannot be any doubt that this Court in **Vedanta** case had given liberty to Sterlite to move this Court if they were agreeable to the “suggested rehabilitation package” in the order of this Court, in the event of which it was ordered that this Court might consider granting clearance to the project, but not to Vedanta. This Court in **Vedanta** case had opined that this Court was not against the project in principle, but only sought safeguards by which the Court would be able to protect the nature and sub-serve development.

24. The Sterlite, State of Orissa and OMC then unconditionally accepted the terms and conditions and modalities suggested by this Court in Vedanta under the caption “Rehabilitation Package” and they moved this Court by filing I.A. No. 2134 of 2007 and this



Court accepted the affidavits filed by them and granted clearance to the diversion of 660.749 ha of forest land to undertake the bauxite mining in Niyamgiri Hills and ordered that MOEF would grant its approval in accordance with law.

25. MOEF, then considered the proposal of the State Government made under Section 2 of the Forest (Conservation) Act, 1980 and also the recommendations of the FAC and agreed in principle for the diversion of 660.749 ha of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in favour of OMC, subject to 21 conditions vide its order 11.12.2008. One of the conditions was with regard to implementation of the Wildlife Management Plan (WMP) suggested by WII and another was with regard to the implementation of all other provisions of different Acts, including environmental clearance, before the transfer of the forest land. Further, it was also ordered that after receipt of the compliance report on fulfilment of the 21 conditions from the State of Orissa, formal approval would be issued under Section 2 of the Forest (Conservation) Act, 1980.

26. MOEF examined the application of the OMC for environmental clearance under Section 12 of the EIA Notification, 2006 read with para 2.1.1(i) of Circular dated 13.10.2006 and accorded environmental clearance for the “Lanjigarh Bauxite Mining Project” to OMC for an annual production capacity of 3 million tonnes of -bauxite by opencast mechanized method involving total mining lease area of 721.323 ha, subject to the conditions and environmental safeguards, vide its letter dated 28.4.2009. 32 special conditions and 16 general conditions were incorporated in that letter. It was ordered that failure to comply with any of the conditions might result in withdrawal of the clearance and attract action under the provisions of the Environment Protection Act, 1986. It was specifically stated that the environmental clearance would be subject to grant of forestry clearance and that necessary clearance for diversion of 672.018 ha. Of forest land involved in the project be obtained before starting operation in that area and that no mining be undertaken in the forest area without obtaining prior forestry clearance. Condition No. XXX also stipulated that the project proponent shall

take all precautionary measures during mining operation for conservation and protection of flora and fauna spotted in the study area and all safeguards measures brought out by the WMP prepared specific to the project site and considered by WII shall be effectively implemented. Further, it was also ordered that all the recommendations made by WII for Wildlife Management be effectively implemented and that the project proponent would also comply with the standards prescribed by the State and Central Pollution Control Boards. Later, a corrigendum dated 14.7.2009 was also issued by MOEF adding two other conditions - one special condition and another general condition.

27. State of Orissa vide its letter dated 10.8.2009 informed MOEF that the user agency had complied with the stipulations of Stage-I approval. Specific reference was made point by point to all the conditions stipulated in the letters of MOEF dated 11.12.2008 and 30.12.2008 and, in conclusion, the State Government has stated in their letter as follows:

“In view of the above position of compliance by the User Agency to the direction of Hon’ble Supreme Court of India dated 8.8.2008 and stipulations of the Government

of India, MOEF vide their Stage-I approval order dated 30.12.2008, the compliance is forwarded to the Government of India, MOEF to kindly examine the same and take further necessary steps in matters of according final approval for diversion of 660.749 ha of forest land for the project under Section 2 of the Forest Conservation Act, 1980.”

MOEF, it is seen, then placed the letter of the State Government dated 10.8.2008 before the FAC and FAC on 4.11.2009 recommended that the final clearance be considered only after ascertaining the community rights of forest land and after the process for establishing such rights under the Forest Rights Act is completed. Dr. Usha Ramanathan Committee report was placed before the FAC on 16.4.2010 and FAC recommended that a Special Committee under the Ministry of Tribal Affairs be constituted to look into the issue relating to violation of tribal rights and the settlement of various rights under the Forest Rights Act, which led, as already indicated, to the constitution of the Saxena Committee report, based on which the MOEF passed the impugned order dated 24.8.2010.

28. FAC, in its meeting, opined that the final clearance under the Forest (Conservation) Act would be given, only after ascertaining

the “Community Rights” on forest land and after the process of establishing such rights under the Forest Rights Act. After perusing the Usha Ramanathan report, FAC on 16.4.2010 recommended that a Special Committee be constituted to look into the issues relating to the alleged violation of rights under the Forest Rights Act. MOEF, then on 29.6.2010 constituted the Saxena Committee and the Committee after conducting an enquiry submitted its report which was placed before the FAC on 20.8.2010 and FAC noticed *prima facie* violation of the Forest Rights Act and the Forest (Conservation) Act.

29. Petitioner has assailed the order of MoEF dated 24.08.2010 as an attempt to reopen matters that had obtained finality. Further, it is also submitted that the order wrongly cites the violation of certain conditions of environmental clearance by “Alumina Refinery Project” as grounds for denial of Stage II clearance to OMC for its “Bauxite Mining Project”. The contention is based on the premise that the two Projects are totally separate and independent of each other and the violation of any statutory

provision or a condition of environmental clearance by one cannot be a relevant consideration for grant of Stage II clearance to the other.

30. Petitioner's assertion that the Alumina Refinery Project and the Bauxite Mining Project are two separate and independent projects, cannot be accepted as such, since there are sufficient materials on record to show that the two projects make an integrated unit. In the two earlier orders of this Court (in the Vedanta case and the Sterlite case) also the two Projects are seen as comprising a single unit. Quite contrary to the case of the petitioner, it can be strongly argued that the Alumina Refinery Project and Bauxite Mining Project are interdependent and inseparably linked together and, hence, any wrong doing by Alumina Refinery Project may cast a reflection on the Bauxite Mining Project and may be a relevant consideration for denial of Stage II clearance to the Bauxite Mining Project.

In this Judgment, however, we do not propose to make any final pronouncement on that issue but we would keep the focus

mainly on the rights of the Scheduled Tribes and the “Traditional Forest Dwellers” under the Forest Rights Act.

**STs and TFDs:**

31. Scheduled Tribe, as such, is not defined in the Forest Rights Act, but the word “Traditional Forest Dweller” has been defined under Section 2(o) as any member or community who has at least three generations prior to the 13<sup>th</sup> day of December, 2005 primarily resided in and who depend on the forest or forests land for *bona fide* livelihood needs. Article 366(25) of the Constitution states that STs means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are defined under Article 342 to be the Scheduled Tribes. The President of India, in exercise of the powers conferred by Clause (1) of Article 342 of the Constitution, has made the Constitution (Schedule Tribes) Order, 1950. Part XII of the Order refers to the State of Orissa. Serial No. 31 refers to Dongaria Kondh, Kutia Kandha etc.

32. Before we examine the scope of the Forest Rights Act, let us examine, how the rights of indigenous people are generally

viewed under our Constitution and the various International Conventions.

### **Constitutional Rights and Conventions:**

33. Article 244 (1) of the Constitution of India which appears in Part X provides that the administration of the Scheduled Areas and Scheduled Tribes in States (other than Assam, Meghalaya and Tripura) shall be according to the provisions of the Fifth Schedule and Clause (2) states that Sixth Schedule applies to the tribal areas in Assam, Meghalaya, Tripura and Mizoram. Evidently, the object of the Fifth Schedule and the Regulations made thereunder is to preserve tribal autonomy, their cultures and economic empowerment to ensure social, economic and political justice for the preservation of peace and good Governance in the Scheduled Area. This Court in ***Samatha v. Arunachal Pradesh*** (1997) 8 SCC 191 ruled that all relevant clauses in the Schedule and the Regulations should be harmoniously and widely be read as to elongate the Constitutional objectives and dignity of person to the



Scheduled Tribes and ensuring distributive justice as an integral scheme thereof. The Court noticed that agriculture is the only source of livelihood for the Scheduled Tribes apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribal derive their sustenance, social status, economic and social equality, permanent place of abode, work and living. Consequently, tribes have great emotional attachments to their lands.

34. Part B of the Fifth Schedule [Article 244(1)] speaks of the administration and control of Schedules Areas and Scheduled Tribes. Para 4 thereof speaks of Tribes Advisory Council. Tribes Advisory Council used to exercise the powers for those Scheduled Areas where Panchayat Raj system had not been extended. By way of the Constitution (73<sup>rd</sup> Amendment) Act, 1992, Part IX was inserted in the Constitution of India. Article 243-B of Part IX of the Constitution mandated that there shall be panchayats at village, intermediate and district levels in accordance with the provisions

of that Part. Article 243-C of Chapter IX refers to the composition of Panchayats. Article 243-M (4)(b) states that Parliament may, by law, extend the provisions of Part IX to the Scheduled Areas and the Tribal areas and to work out the modalities for the same. The Central Government appointed Bhuria Committee to undertake a detailed study and make recommendations as to whether the Panchayat Raj system could be extended to Scheduled Areas. The Committee submitted its report on 17.01.1995 and favoured democratic, decentralization in Scheduled Areas. Based on the recommendations, the Panchayat (Extension to Scheduled Areas) Act, 1996 (for short 'PESA Act') was enacted by the Parliament in the year 1996, extending the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. The Statement of Objects and Reasons of the Act reads as follows:

“There have been persistent demands from prominent leaders of the Scheduled Areas for extending the provisions of Part IX of the Constitution to these Areas so that Panchayati Raj

Institutions may be established there. Accordingly, it is proposed to introduce a Bill to provide for the extension of the provisions of Part IX of the Constitution to the Scheduled Areas with certain modifications providing that, among other things, the State legislations that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;..... The offices of the Chairpersons in the panchayats at all levels shall be reserved for the Scheduled Tribes; the reservations of seats at every panchayat for the Scheduled Tribes shall not be less than one-third of the total number of seats."

35. This court had occasion to consider the scope of PESA Act when the constitutional validity of the proviso to section 4(g) of the PESA Act and few sections of the Jharkhand Panchayat Raj Act, 2001 were challenged in **Union of India v. Rakesh Kumar**, (2010) 4 SCC 50 and this Court upheld the Constitutional validity.

36. Section 4 of the PESA Act stipulates that the State legislation on Panchayats shall be made in consonance with the customary law, social and religious practices and traditional management practices of community resources. Clause (d) of Section states that every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution. Further it also states in clause (i) of Section 4 that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas and that the actual planning and implementation of the projects in the Scheduled Areas, shall be coordinated at the State level. Sub-clause (k) of Section 4 states that the recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospective licence or mining lease for minor minerals in the Scheduled Areas. Panchayat has also endowed with the powers

and authority necessary to function as institutions of Self-Government.

37. The customary and cultural rights of indigenous people have also been the subject matter of various international conventions. International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (No.107) was the first comprehensive international instrument setting forth the rights of indigenous and tribal populations which emphasized the necessity for the protection of social, political and cultural rights of indigenous people. Following that there were two other conventions ILO Convention (No.169) and Indigenous and Tribal Peoples Convention, 1989 and United Nations Declaration on the rights of Indigenous Peoples (UNDRIP), 2007, India is a signatory only to the ILO Convention (No. 107).

38. Apart from giving legitimacy to the cultural rights by 1957 Convention, the Convention on the Biological Diversity (CBA) adopted at the Earth Summit (1992) highlighted necessity to

preserve and maintain knowledge , innovation and practices of the local communities relevant for conservation and sustainable use of bio-diversity, India is a signatory to CBA. Rio Declaration on Environment and Development Agenda 21 and Forestry principle also encourage the promotion of customary practices conducive to conservation. The necessity to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources have also been recognized by United Nations in the United Nations Declaration on Rights of Indigenous Peoples. STs and other TFDs residing in the Scheduled Areas have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.

39. Many of the STs and other TFDs are totally unaware of their rights. They also experience lot of difficulties in obtaining effective access to justice because of their distinct culture and

limited contact with mainstream society. Many a times, they do not have the financial resources to engage in any legal actions against development projects undertaken in their abode or the forest in which they stay. They have a vital role to play in the environmental management and development because of their knowledge and traditional practices. State has got a duty to recognize and duly support their identity, culture and interest so that they can effectively participate in achieving sustainable development.

40. We notice, bearing in mind the above objects, the Forest Rights Act has been enacted conferring powers on the Gram Sabha constituted under the Act to protect the community resources, individual rights, cultural and religious rights.

### **The Forest Rights Act**

41. The Forest Rights Act was enacted by the Parliament to recognize and vest the forest rights and occupation in forest land

in forest dwelling STs and other TFDs who have been residing in such forests for generations but whose rights could not be recorded and to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land. The Act also states that the recognized rights of the forest dwelling STs and other TFDs include the responsibilities and authority for sustainable use, conservation of bio-diversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling STs and other TFDs. The Act also noticed that the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to them, who are integral to the very survival and sustainability of the forest ecosystem.

42. The Statement of Objects and Reasons of the Act states that forest dwelling tribal people and forests are inseparable and that the simplicity of tribals and their general ignorance of modern



regulatory framework precluded them from asserting their genuine claims to resources in areas where they belong and depended upon and that only recently that forest management regimes have initiated action to recognize the occupation and other right of the forest dwellers. Of late, we have realized that forests have the best chance to survive if communities participate in their conservation and regeneration measures. The Legislature also has addressed the long standing and genuine felt need of granting a secure and inalienable right to those communities whose right to life depends on right to forests and thereby strengthening the entire conservation regime by giving a permanent stake to the STs dwelling in the forests for generations in symbiotic relationship with the entire ecosystem.

43. We, have to bear in mind the above objects and reasons, while interpreting various provisions of the Forest Rights Act, which is a social welfare or remedial statute. The Act protects a wide range of rights of forest dwellers and STs including the customary rights to use forest land as a community forest

resource and not restricted merely to property rights or to areas of habitation.

44. Forest rights of forest dwelling STs and other TFDs are dealt with in Chapter II of the Act. Section 3 of that chapter lists out what are the forest rights for the purpose of the Act. Following are some of the rights which have been recognized under the Act:

- (a) Right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;
- (b) Community rights such as nistar, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes;
- (c) Right of ownership access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;
- (d) Other community rights of uses or entitlement such as fish and other products of

water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;

(e) Rights, including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities

(f)-----

(g) -----

(h) Rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages;

(i) Right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use;

(j) Rights which are recognized under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned tribes of any State;

(k) Right of access to bio-diversity and community right to intellectual property and

traditional knowledge related to bio-diversity and cultural diversity;

- (l) Any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in clauses (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal.

45. The above section has to be read along with a definition clause. Section 2(a) defines “community forest resource”:

“(a) “Community Forest Resource” means customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in the case of pastoral communities, including reserved forests, protected forests and protected areas such Sanctuaries and National Parks to which the community had traditional access.”

“Critical wildlife habitat” is defined under Section 2(b) of the Act, which reads as follows:

“(b) “critical wildlife habitat” means such areas of National Parks and Sanctuaries where it has been specifically and clearly established, case by case, on the basis of scientific and objective criteria, that such areas are required to be kept as inviolate for the purposes of wildlife conservation as may be determined and notified by the Central Government in the Ministry of Environment and Forests after open process of consultation by an Expert Committee, which includes experts from the locality appointed by that Government wherein a representative of the Ministry of Tribal Affairs shall also be included, in determining such areas according to the procedural requirement arising from sub-sections (1) and (2) of Section 4.”

“Forest dwelling Scheduled Tribes” is defined under Section 2(c) of the Act, which reads as follows:

“(c) “Forest dwelling Scheduled Tribes” means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe Pastoralist communities.”

“Forest land” is described under Section 2(d), which reads as follows:

“(d) “forest land” means land of any description falling within any forest area and includes unclassified forests, undemarcated forests, existing or deemed forests, protected forests, reserved forests, sanctuaries and National Parks.”

“Gram Sabha” is defined under Section 2(g), which reads as follows:

“(g) “Gram Sabha” means a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women.”

“Habitat” is defined under Section 2(h), which reads as follows:

“(h) “habitat” includes the area comprising the customary habitat and such other habitats in reserved forests and protected forests of primitive tribal groups

and pre-agricultural communities and other forest dwelling Scheduled Tribes.”

“Scheduled Areas” is described under Section 2(m), which reads as follows:

“(m) “Scheduled Areas” means the Scheduled Areas referred to in clause (1) of Article 244 of the Constitution.”

“Sustainable use” is described under Section 2(n), which reads as follows:

“(n) “sustainable use” shall have the same meaning as assigned to it in clause (o) of Section 2 of Biological Diversity Act, 2002 (18 of 2003).”

## JUDGMENT

46. Chapter III of the Act deals with recognition, restoration and vesting of forest rights and related matters. Section 4 of that chapter deals with recognition of, and vesting of, forest rights in forest dwelling STs and other TFDs. Section 5 lists out duties in whom the forest rights vests and also the holders of forest rights

empowers them to carry out duties. Those duties include preservation of habitat from any form of destructive practices affecting their cultural and natural heritage.

47. The definition clauses read with the above mentioned provisions give emphasis to customary rights, rights to collect, use and dispose of minor forest produce, community rights like grazing cattle, community tenure of habitat and habitation for primitive tribal groups, traditional rights customarily enjoyed etc. Legislative intention is, therefore, clear that the Act intends to protect custom, usage, forms, practices and ceremonies which are appropriate to the traditional practices of forest dwellers.

## JUDGMENT

48. Chapter IV of the Act deals with the authorities and procedure for vesting of forest rights. That chapter has only one section i.e. Section 6, which has to be read along with The Scheduled Tribes and Other Traditional Forest Dwellers



(Recognition of Forest Rights) Amendment Rules, 2007 and the Amendment Rules 2012.

49. Ministry of Tribal Affairs has noticed several problems which are impeding the implementation of the Act in its letter and spirit. For proper and effective implementation of the Act, the Ministry has issued certain guidelines and communicated to all the States and UTs vide their letter dated 12.7.2012. The operative portion of the same reads as follows:

**“GUIDELINES:**

**i) Process of Recognition of Rights:**

- (a) The State Governments should ensure that on receipt of intimation from the Forest Rights Committee, the officials of the Forest and Revenue Departments remain present during the verification of the claims and the evidence on the site.
- b) In the event of modification or rejection of a claim by the Gram Sabha or by the Sub-Divisional Level Committee or the District Level Committee, the decision on the claim should be communicated to the claimant to enable the aggrieved person to prefer a petition to the Sub Divisional Level Committee or the District Level Committee,

as the case may be, within the sixty days period prescribed under the Act and no such petition should be disposed of against the aggrieved person, unless he has been given a reasonable opportunity to present his case.

- c) The Sub-Divisional Level Committee or the District Level Committee should, if deemed necessary, remand the claim to the Gram Sabha for reconsideration instead of rejecting or modifying the same, in case the resolution or the recommendation of the Gram Sabha is found to be incomplete or prima-facie requires additional examination.
- d) In cases where the resolution passed by the Gram Sabha, recommending a claim, is upheld by Sub-Divisional Level committee, but the same is not approved by the District Level Committee, the District Level Committee should record the reasons for not accepting the recommendations of the Gram Sabha and the Sub-Divisional Level Committee, in writing, and a copy of the order should be supplied to the claimant.
- e) On completion of the process of settlement of rights and issue of titles as specified in Annexures II, III & IV of the Rules, the Revenue / Forest Departments shall prepare a final map of the forest land so vested and the concerned authorities shall incorporate the forest rights so vested in the revenue and forest records, as the case may be, within the prescribed cycle of record updation.

- f) All decisions of the Sub-Divisional Level Committee and District Level Committee that involve modification or rejection of a Gram Sabha resolution/ recommendation should be in the form of speaking orders.
- g) The Sub-Divisional Level Committee or the District Level committee should not reject any claim accompanied by any two forms of evidences, specified in Rule 13, and recommended by the Gram Sabha, without giving reasons in writing and should not insist upon any particular form of evidence for consideration of a claim. Fine receipts, encroacher lists, primary offence reports, forest settlement reports, and similar documentation rooted in prior official exercises, or the lack -thereof, would not be the sole basis for rejection of any claim.
- h) Use of any technology, such as, satellite imagery, should be used to supplement evidences tendered by a claimant for consideration of the claim and not to replace other evidences submitted by him in support of his claim as the only form of evidence.
- i) The status of all the claims, namely, the total number of claims filed, the number of claims approved by the District Level Committee for title, the number of titles actually distributed, the number of claims rejected, etc. should be made available at the village and panchayat levels through appropriate forms of communications, including conventional methods, such as, display of notices, beat of drum etc.

- j) A question has been raised whether the four hectare limit specified in Section 4(6) of the Act, which provides for recognition of forest rights in respect of the land mentioned in clause (a) of sub-section (1) of section 3 of the Act, applies to other forest rights mentioned in Section 3(1) of the Act. It is clarified that the four hectare limit specified in Section 4(6) applies to rights under section 3(1)(a) of the Act only and not to any other right under section 3(1), such as conversion of pattas or leases, conversion of forest villages into revenue villages etc.

**ii) Minor Forest Produce:**

- (a) The State Government should ensure that the forest rights relating to MFPs under Section 3(1)(c) of the Act are recognized in respect of all MFPs, as defined under Section 2(i) of the Act, in all forest areas, and state policies are brought in alignment with the provisions of the Act. Section 2(i) of the Act defines the term "minor forest produce" to include "all non-timber produce of plant origin, including bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers, and the like".
- (b) The monopoly of the Forest Corporations in the trade of MFP in many States, especially in case of high value MFP, such as, tendu patta, is against the spirit of the Act and should henceforth be done away with.
- c) The forest right holders or their cooperatives/ federations should be allowed full freedom to

sell such MFPs to anyone or to undertake individual or collective processing, value addition, marketing, for livelihood within and outside forest area by using locally appropriate means of transport.

- d) The State Governments should exempt movement of all MFPs from the purview of the transit rules of the State Government and, for this purpose, the transit rules be amended suitably. Even a transit permit from Gram Sabha should not be required. Imposition of any fee/charges/royalties on the processing, value addition, marketing of MFP collected individually or collectively by the cooperatives/ federations of the rights holders would also be ultra vires of the Act.
- (e) The State Governments need to play the facilitating role in not only transferring unhindered absolute rights over MFP to forest dwelling Scheduled Tribes and other traditional forest dwellers but also in getting them remunerative prices for the MFP, collected and processed by them.

### iii) **Community Rights:**

- (a) The District Level Committee should ensure that the records of prior recorded nistari or other traditional community rights (such as Khatian part II in Jharkhand, and traditional forest produce rights in Himachal and Uttarakhand) are provided to Gram Sabhas, and if claims are filed for recognition of such age-old usufructory rights, such claims are

not rejected except for valid reasons, to be recorded in writing, for denial of such recorded rights;

- (b) The District Level Committee should also facilitate the filing of claims by pastoralists before the concerned Gram Sabha (s) since they would be a floating population for the Gram Sabha(s) of the area used traditionally.
- (c) In view of the differential vulnerability of Particularly Vulnerable Tribal Groups (PTGs) amongst the forest dwellers, District Level Committee should play a pro-active role in ensuring that all PTGs receive habitat rights in consultation with the concerned PTGs' traditional institutions and their claims for habitat rights are filed before the concerned Gram Sabhas.
- (d) The forest villages are very old entities, at times of pre-independent era, duly existing in the forest records. The establishment of these villages was in fact encouraged by the forest authorities in the pre-independent era for availability of labour within the forest areas. The well defined record of each forest village, including the area, number of inhabitants, etc. exists with the State Forest Departments. There are also unrecorded settlements and old habitations that are not in any Government record. Section 3(1)(h) of the Act recognizes the right of forest dwelling Scheduled Tribes and other traditional forest dwellers relating to settlement and conversion on forest villages, old habitation, un-surveyed villages and other villages and

forests, whether recorded, notified or not into revenue villages. The conversion of all forest villages into revenue villages and recognition of the forest rights of the inhabitants thereof should actually have been completed immediately on enactment of the Act. The State Governments may, therefore, convert all such erstwhile forest villages, unrecorded settlements and old habitations into revenue villages with a sense of urgency in a time bound manner. The conversion would include the actual land-use of the village in its entirety, including lands required for current or future community uses, like, schools, health facilities, public spaces etc. Records of the forest villages maintained by the Forest Department may thereafter be suitably updated on recognition of this right.

**iv) Community Forest Resource Rights:**

- (a) The State Government should ensure that the forest rights under Section 3(1)(i) of the Act relating to protection, regeneration or conservation or management of any community forest resource, which forest dwellers might have traditionally been protecting and conserving for sustainable use, are recognized in all villages and the titles are issued as soon as the prescribed Forms for claiming Rights to Community Forest Resource and the Form of Title for Community Forest Resources are incorporated in the Rules. Any restriction, such as, time limit, on use of community forest resources other than what is traditionally imposed would be against the spirit of the Act.

- b) In case no community forest resource rights are recognized in a village, the reasons for the same should be recorded. Reference can be made to existing records of community and joint forest management, van panchayats, etc. for this purpose.
- c) The Gram Sabha would initially demarcate the boundaries of the community forest resource as defined in Section 2(a) of the Act for the purposes of filing claims for recognition of forest right under Section 3(1)(i) of the Act.
- d) The Committees constituted under Rule 4(e) of the Forest Rights Rules, 2008 would work under the control of Gram Sabha. The State Agencies should facilitate this process.
- e) Consequent upon the recognition of forest right in Section 3(i) of the Act to protect, regenerate or conserve or manage any community forest resource, the powers of the Gram Sabha would be in consonance with the duties as defined in Section 5(d), wherein the Gram Sabha is empowered to regulate access to community forest resources and stop any activity which adversely affects the wild animals, forest and the bio-diversity. Any activity that prejudicially affects the wild-life, forest and bio-diversity in forest area would be dealt with under the provisions of the relevant Acts.

**v) Protection Against Eviction, Diversion of Forest Lands and Forced Relocation :**

- (a) Section 4(5) of the Act is very specific and provides that no member of a forest dwelling



Scheduled Tribe or other traditional forest dwellers shall be evicted or removed from the forest land under his occupation till the recognition and verification procedure is complete. This clause is of an absolute nature and excludes all possibilities of eviction of forest dwelling Scheduled Tribes or other traditional forest dwellers without settlement of their forest rights as this Section opens with the words "Save as otherwise provided". The rationale behind this protective clause against eviction is to ensure that in no case a forest dweller should be evicted without recognition of his rights as the same entitles him to a due compensation in case of eventuality of displacement in cases, where even after recognition of rights, a forest area is to be declared as inviolate for wildlife conservation or diverted for any other purpose. In any case, Section 4(1) has the effect of recognizing and vesting forest rights in eligible forest dwellers. Therefore, no eviction should take place till the process of recognition and vesting of forest rights under the Act is complete.

- (b) The Ministry of Environment & Forests, vide their letter No.11-9/1998-FC(pt.) dated 30.07.2009, as modified by their subsequent letter of the same number dated 03.08.2009, has issued directions, requiring the State/ UT Governments to enclose certain evidences relating to completion of the process of settlement of rights under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, while formulating unconditional proposals for

diversion of forest land for non-forest purposes under the Forest (Conservation) Act, 1980. The State Government should ensure that all diversions of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 take place in compliance with the instructions contained in the Ministry of Environment & Forest's letter dated 30.07.2009, as modified on 03.08.2009.

(c) There may be some cases of major diversions of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 after the enactment of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 but before the issue of Ministry of Environment & Forests' letter dated 30.07.2009, referred to above. In case, any evictions of forest dwelling Scheduled Tribes and other traditional forest dwellers have taken place without settlement of their rights due to such major diversions of forest land under the Forest (Conservation) Act, 1980, the District Level Committees may be advised to bring such cases of evictions, if any, to the notice of the State Level Monitoring Committee for appropriate action against violation of the provisions contained in Section 4(5) of the Act.

(d) The Act envisages the recognition and vesting of forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers over all forest lands, including National Parks and Sanctuaries. Under Section 2(b) of the Act, the Ministry of Environment & Forests is responsible for determination and notification of critical wildlife habitats in the National

Parks and Sanctuaries for the purpose of creating inviolate areas for wildlife conservation, as per the procedure laid down. In fact, the rights of the forest dwellers residing in the National Parks and Sanctuaries are required to be recognized without waiting of notification of critical wildlife habitats in these areas. Further, Section 4(2) of the Act provides for certain safeguards for protection of the forest rights of the forest rights holders recognized under the Act in the critical wildlife habitats of National Parks and Sanctuaries, when their rights are either to be modified or resettled for the purposes of creating inviolate areas for wildlife conservation. No exercise for modification of the rights of the forest dwellers or their resettlement from the National Parks and Sanctuaries can be undertaken, unless their rights have been recognized and vested under the Act. In view of the provisions of Section 4(5) of the Act, no eviction and resettlement is permissible from the National Parks and sanctuaries till all the formalities relating to recognition and verification of their claims are completed. The State/ UT Governments may, therefore, ensure that the rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers, residing in National Parks and Sanctuaries are recognized first before any exercise for modification of their rights or their resettlement, if necessary, is undertaken and no member of the forest dwelling Scheduled Tribe or other traditional forest dweller is evicted from such areas without the settlement of their rights and completion of

all other actions required under section 4 (2) of the Act.

- (e) The State Level Monitoring Committee should monitor compliance of the provisions of Section 3(1)(m) of the Act, which recognizes the right to in situ rehabilitation including alternative land in cases where the forest dwelling Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land without receiving their legal entitlement to rehabilitation, and also of the provisions of Section 4(8) of the Act, which recognizes their right to land when they are displaced from their dwelling and cultivation without land compensation due to State development interventions.

**vi) Awareness-Raising, Monitoring and Grievance Redressal:**

- a) Each State should prepare suitable communication and training material in local language for effective implementation of the Act.
- b) The State Nodal Agency should ensure that the Sub Divisional Level Committee and the District Level Committee make district-wise plans for trainings of revenue, forest and tribal welfare departments' field staff, officials, Forest Rights Committees and Panchayat representatives. Public meetings for awareness generation in those villages where process of recognition is not complete need to be held.

- c) In order to generate awareness about the various provisions of the Act and the Rules, especially the process of filing petitions, the State Government should organize public hearings on local bazaar days or at other appropriate locations on a quarterly basis till the process of recognition is complete. It will be helpful if some members of Sub Divisional Level Committee are present in the public hearings. The Gram Sabhas also need to be actively involved in the task of awareness raising.
- d) If any forest dwelling Scheduled Tribe in case of a dispute relating to a resolution of a Gram Sabha or Gram Sabha through a resolution against any higher authority or Committee or officer or member of such authority or Committee gives a notice as per Section 8 of the Act regarding contravention of any provision of the Act or any rule made thereunder concerning recognition of forest rights to the State Level Monitoring Committees, the State Level Monitoring Committee should hold an inquiry on the basis of the said notice within sixty days from the receipt of the notice and take action, if any, that is required. The complainant and the Gram Sabha should be informed about the outcome of the inquiry.”

### **Forest Rights Act and MMRD Act:**

50. State of Orissa has maintained the stand that the State has the ownership over the mines and minerals deposits beneath the forest land and that the STs and other TFDs cannot raise any claim or rights over them, nor the Gram Sabha has any right to adjudicate such claims. This Court in **Amritlal Athubhai Shah and Ors. v. Union Government of India and Another** (1976) 4 SCC 108, while dealing with the scope of Mines and Minerals (Regulation and Development) Act, 1957 held as follows:

“3. ....the State Government is the “owner of minerals” within its territory, and the minerals “vest” in it. There is nothing in the Act or the Rules to detract from this basic fact. That was why the Central Government stated further in its revisional orders that the State Government had the “inherent right to reserve any particular area for exploitation in the public sector”. It is therefore quite clear that, in the absence of any law or contract etc to the contrary, bauxite, as a mineral, and the mines thereof, vest in the State of Gujarat and no person has any right to exploit it otherwise than in accordance with the provisions of the Act and the Rules.....”

The Forest Rights Act, neither expressly nor impliedly, has taken away or interfered with the right of the State over mines or minerals lying underneath the forest land, which stand vested in the State. State holds the natural resources as a trustee for the people. Section 3 of the Forest Rights Act does not vest such rights on the STs or other TFDs. PESA Act speaks only of minor minerals, which says that the recommendation of Gram Sabha shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas. Therefore, as held by this Court in **Amritlal** (supra), the State Government has the power to reserve any particular area for Bauxite mining for a Public Sector Corporation.

### **Gram Sabha and other Authorities:**

51. Under Section 6 of the Act, Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both and that may be given to the forest dwelling STs and other TFDs within the

local limits of the jurisdiction. For the said purpose it receive claims, and after consolidating and verifying them it has to prepare a plan delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights. The Gram Sabha shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the Sub-Divisional Level Committee. Any aggrieved person may move a petition before the Sub-Divisional Level Committee against the resolution of the Gram Sabha. Sub-section (4) of Section 6 confers a right on the aggrieved person to prefer a petition to the District Level Committee against the decision of the Sub-Divisional Level Committee. Sub-section (7) of Section 6 enables the State Government to constitute a State Level Monitoring Committee to monitor the process of recognition and vesting of forest rights and to submit to the nodal agency. Such returns and reports shall be called for by that agency.

52. Functions of the Gram Sabha, Sub-Divisional Level Committee, District Level Committee, State Level Monitoring



Committee and procedure to be followed and the process of verification of claims etc. have been elaborately dealt with in 2007 Rules read with 2012 Amendment Rules. Elaborate procedures have therefore been laid down by Forest Rights Act read with 2007 and 2012 Amendment Rules with regard to the manner in which the nature and extent of individual or customary forest rights or both have to be decided. Reference has already been made to the details of forest rights which have been conferred on the forest dwelling STs as well as TFDs in the earlier part of the Judgment.

### **Individual/Community Rights**

53. Forest Rights Act prescribed various rights to tribals/forest dwellers as per Section 3 of the Act. As per Section 6 of the Act, power is conferred on the Gram Sabha to process for determining the nature and the extent of individual or community forests read with or both that may be given to forest dwelling STs and other TFDs, by receiving claims, consolidate it, and verifying them and preparing a map, delineating area of each recommended claim in

such a manner as may be prescribed. The Gram Sabha has received a large number of individual claims and community claims from the Rayagada District as well as the Kalahandi District. From Rayagada District Gram Sabha received 185 individual claims, of which 145 claims have been considered and settled by granting alternate rights over 263.5 acres of land. 40 Individual claims pending before the Gram Sabha pertain to areas which falls outside the mining lease area. In respect of Kalahandi District 31 individual claims have been considered and settled by granting alternate rights over an area of 61 acres.

54. Gram Sabha has not received any community claim from the District of Rayagada. However, in respect of Kalahandi District 6 community claims had been received by the Gram Sabha of which 3 had been considered and settled by granting an alternate area of 160.55 acres. The balance 3 claims are pending consideration.

### **Customary and Religious Rights (Sacred Rights)**

55. Religious freedom guaranteed to STs and the TFDs under Articles 25 and 26 of the Constitution is intended to be a guide to a community of life and social demands. The above mentioned Articles guarantee them the right to practice and propagate not only matters of faith or belief, but all those rituals and observations which are regarded as integral part of their religion. Their right to worship the deity Niyam-Raja has, therefore, to be protected and preserved.

56. Gram Sabha has a role to play in safeguarding the customary and religious rights of the STs and other TFDs under the Forest Rights Act. Section 6 of the Act confers powers on the Gram Sabha to determine the nature and extent of “individual” or “community rights”. In this connection, reference may also be made to Section 13 of the Act coupled with the provisions of PESA Act, which deal with the powers of Gram Sabha. Section 13 of the Forest Rights Act reads as under:

**“13. Act not in derogation of any other law. -**  
Save as otherwise provided in this Act and the

provisions of the Panchayats (Extension of the Scheduled Areas) Act, 1996 (40 of 1996), the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.”

57. PESA Act has been enacted, as already stated, to provide for the extension of the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. Section 4(d) of the Act says that every Gram Sabha shall be competent to safeguard and preserve the traditions, customs of the people, their cultural identity, community resources and community mode of dispute resolution. Therefore, Grama Sabha functioning under the Forest Rights Act read with Section 4(d) of PESA Act has an obligation to safeguard and preserve the traditions and customs of the STs and other forest dwellers, their cultural identity, community resources etc., which they have to discharge following

the guidelines issued by the Ministry of Tribal Affairs vide its letter dated 12.7.2012.

58. We are, therefore, of the view that the question whether STs and other TFDs, like Dongaria Kondh, Kutia Kandha and others, have got any religious rights i.e. rights of worship over the Niyamgiri hills, known as Nimagiri, near Hundaljali, which is the hill top known as Niyam-Raja, have to be considered by the Gram Sabha. Gram Sabha can also examine whether the proposed mining area Niyama Danger, 10 km away from the peak, would in any way affect the abode of Niyam-Raja. Needless to say, if the BMP, in any way, affects their religious rights, especially their right to worship their deity, known as Niyam Raja, in the hills top of the Niyamgiri range of hills, that right has to be preserved and protected. We find that this aspect of the matter has not been placed before the Gram Sabha for their active consideration, but only the individual claims and community claims received from Rayagada and Kalahandi Districts, most of which the Gram Sabha has dealt with and settled.

59. The Gram Sabha is also free to consider all the community, individual as well as cultural and religious claims, over and above the claims which have already been received from Rayagada and Kalahandi Districts. Any such fresh claims be filed before the Gram Sabha within six weeks from the date of this Judgment. State Government as well as the Ministry of Tribal Affairs, Government of India, would assist the Gram Sabha for settling of individual as well as community claims.

## JUDGMENT

60. We are, therefore, inclined to give a direction to the State of Orissa to place these issues before the Gram Sabha with notice to the Ministry of Tribal Affairs, Government of India and the Gram Sabha would take a decision on them within three months and communicate the same to the MOEF, through the State

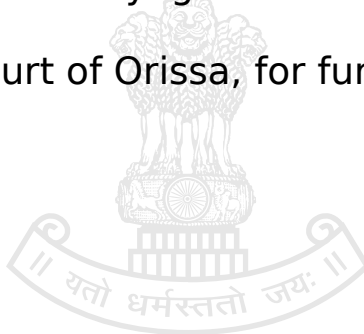
Government. On the conclusion of the proceeding before the Gram Sabha determining the claims submitted before it, the MoEF shall take a final decision on the grant of Stage II clearance for the Bauxite Mining Project in the light of the decisions of the Gram Sabha within two months thereafter.

61. The Alumina Refinery Project is well advised to take steps to correct and rectify the alleged violations by it of the terms of the environmental clearance granted by MoEF. Needless to say that while taking the final decision, the MoEF shall take into consideration any corrective measures that might have been taken by the Alumina Refinery Project for rectifying the alleged violations of the terms of the environmental clearance granted in its favour by the MoEF.

62. The proceedings of the Gram Sabha shall be attended as an observer by a judicial officer of the rank of the District Judge, nominated by the Chief Justice of the High Court of Orissa who

shall sign the minutes of the proceedings, certifying that the proceedings of the Gram Sabha took place independently and completely uninfluenced either by the Project proponents or the Central Government or the State Government.

63. The Writ Petition is disposed of with the above directions. Communicate this order to the Ministry of Tribal Affairs, Gram Sabhas of Kalahandi and Rayagada Districts of Orissa and the Chief Justice of High Court of Orissa, for further follow up action.



.....J.  
(Aftab Alam)

JUDGMENT  
.....J.  
(K.S. Radhakrishnan)

.....J.  
(Ranjan Gogoi)

New Delhi,  
April 18, 2013