

Mining & Rights Of Indigenous People: In Light Of Samatha Judgement**Anand Maan**

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Introduction: Much is talked, stressed, strived and written about sustainable development. Achieving it though is where the real implementation issues lie. In a country like ours the pressing need of economic growth often misses the social integration of sustainable development. And most often at the receiving end of such imbalance is the most marginalised section of the society – the indigenous people. Who unfortunately dwell in mineral rich and resource intensive forests not only in our country but across the world. The present term paper attempts to understand the effect of one of the development activities – mining on the indigenous people of the area where such activity is undertaken. While stating the general scenario of mining sector the paper illustrates constitutional and legal rights of indigenous people in India. The paper concludes by studying the interface between the two in light of the judgment of Supreme Court in Samatha Case.

Mining and the state of Tribals India:

India is world's major mineral producer with the total value of estimated mineral production to the tune of rupees 2 lakh crores. However, mining of minerals destroys large areas of habitat both human and wildlife, damages soil, causes destruction not only to the vegetation but also to the ecosystem of the area and uproot the local population from their settlements thus having negative environmental and social impacts.

Mining requires large area of land for operations which results in complexities of resettlement, compensation and land rights of the indigenous people inhabiting the mining forest. Mining activities are supposed to bring social and economic benefits to the local communities through creation of jobs, incentivising local business and contributing in development of local infrastructure like schools, hospitals, roads, etc. But mostly mining activities in an area generate social unrest and economic problems due loss of traditional livelihood, forced displacement of people, disruption to the age-old socio-cultural life and

inadequate resettlement of the indigenous people and hardly any infrastructure development.

Constitutional and Legal Rights:

Post-independence a number of measures have been taken to safeguard and protect the title and land ownership rights of the tribals in India which is reflected in the constitutional as well as the legislative schemes.

Fifth & Sixth Schedule Areas: Constitutional scheme to protect Tribals

The constitution specifically deals with “Scheduled Tribes and Tribal Areas”¹ and provides for its administration and control². The President, after consultation with the State Governments, declared certain areas as “Scheduled Areas” under the Constitution. Thereafter these areas are governed by the provisions of fifth and sixth schedule of the constitution. The underlined aim of these schedules is to protect the cultural distinctiveness of the tribals and also to protect them from coercion or exploitation on account of their economic disadvantageous position. The sixth schedule extends the scheduled areas of North Eastern states of Assam, Meghalaya, Mizoram and Tripura and the fifth schedule extends to the rest of the scheduled areas across India.

The fifth schedule accords autonomy to tribals to govern themselves in accordance with their traditions. It provides for formation of Tribes Advisory Council with three fourth of scheduled tribes members and function to advise state government regarding development and welfare of tribals of that particular state. This schedule provides the Governor with wide powers from making rules and regulation to put prohibitions or restrictions on transfer of land from tribals to non-tribals and to adopt measures in order to prevent economic and social exploitation of tribals. The Governor is also empowered to request President (after consultation with Tribal Advisory Council) to repeal any Central or State law in the scheduled area of under his governance.

The sixth schedule provides some tribal areas to be administered as autonomous bodies through Autonomous District Councils and Autonomous Regional Councils. These respective councils are vested with executive, legislative, judicial and financial powers and function as

¹ Chapter VI Part X of Constitution

² Article 244

“mini-parliaments”. They have complete power to preserve the land tribals and to ensure functioning of the tribes in accordance with their respective customary practices³.

The Panchayats (Extension to Scheduled Areas) Act, (PESA) 1996:

The 73rd Amendment made it clear that it will not apply to Scheduled Areas⁴ referred to in Article 244 of the Constitution. The Parliament extended the 73rd Amendment to the Scheduled Areas by enacting the *Provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996* (PESA) with the aim of making Gram Sabha the centre of self-governance thereby enabling prevention of exploitation of the tribes. It pressing need arose of enactment of an act was the rampant use of *Eminent Domain* to exploit the natural resources in the scheduled area. All the fifth schedule states were required to amend their respective panchayat legislations in accordance with the PESA for their application to scheduled areas. The PESA further mandates the states to enact their panchayat legislations in consonance with the customary laws, traditional management practices of community resources. It recognizes the rights of the tribal communities over natural resources including land. The PESA is especially remarkable for the vast and wide-ranging powers that it vests with the Gram Sabhas in Scheduled Areas from approval of developmental projects to acquisition of land belonging to the tribals to rehabilitation of the displaced tribals as well as management of other natural resources.

The act obligates the State to ensure that the Gram Sabhas are empowered to put a restriction on the alienation of tribal land and to adopt measures to restore any unlawfully alienated land, back to the Scheduled Tribes⁵. PESA mandates a prior “consultation” with Gram Sabha to be for acquisition of tribal for any developmental project and also for resettlement and rehabilitation schemes for affected people.

³ Article 244-A

⁴ Scheduled areas are so called because they have been listed under the fifth schedule of Article 244 (1) of the Constitution. Historically these scheduled and tribal areas were excluded from the normal operation of ordinary law to preserve the social customs & to safeguard the traditional vocations of the tribals living in those areas. Nine states in the country today, have Scheduled Areas. These are Andhra Pradesh, Himachal Pradesh, Orissa, Jharkhand, Gujarat, Rajasthan, Maharashtra, M.P. and Chattisgarh.

⁵Section 4m(iii)

It may be noted that PESA uses the term “consultation” and not “consent” coupled with the fact that the act is silent on the recourse available in the event the outcome of consultation is non-approval of a developmental project.

The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006:

In line with the recommendation of the report of the Bhuria Committee (1995) suggesting the Centre to concede to the long-standing demand of the tribals to vest them with the control over forest land and produce and due to literally non-effective implementation of PESA, the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006(FRA). Its' preamble recognises and vests the forest rights and occupation of forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded.

FRA forbids the removal of any forest dwelling tribal, or other traditional forest dweller, from the land under their occupation until the process of recognition of rights under the Act is complete. This means that the full process under section 6 of the Act – the filing of claims before the gram sabha, the verification by the Forest Rights Committee, the gram sabha passing a resolution on the claims, and the Sub-Divisional and District Level Committees deciding on the claims approved by the gram sabha. This also includes the time for people to appeal decisions of the gram sabha and the Sub Divisional Level Committees. As per the law, no one's rights can be violated and no one can be evicted until all people occupying the land have been given a chance to claim, have filed their claims, and a final decision has been taken on these claims (after appeals if any). Further, the process can only be declared complete by a gram sabha resolution⁶.

It may be noted that FRA "vests" (i.e. recognises) rights in other traditional forest dwellers and forest dwelling Scheduled Tribes from the date the Act came into force (January 1, 2008). The process of receiving claims etc. is only a way for the government to record these rights. The people have these rights from January 2008 onwards. Therefore, even if the

⁶ Section 4(5)

government has not implemented the process in the area and people have not got titles for their rights, the forest still cannot be taken away for the project⁷.

Further FRA states that, in any area where there are people with forest rights, the gram sabha has the power to protect forests, biodiversity, water catchment areas and the cultural and natural heritage of forest dwellers. This power does not depend on the government to have recognised the claim or not. It is a general power of any gram sabha⁸.

Despite the special provisions for tribals under the constitution and protective legislations the tribals continue to bear the brunt of developmental projects. According to World Bank Report around 21.3 million persons were displaced in India between 1951 and 1990 due to development projects and 40% of this number constituted the tribals or the indigenous people⁹. The effects of mining projects per-se is more adverse on the tribals as they not only lose their land to the project but also to non-tribal outsiders who hinge on the project areas and grab new economic opportunities in commerce and petty industry¹⁰. According to Prof. Gadgil and Guha due to mining projects the status of tribals reduces from self-sustaining members of their local ecosystem to ecological refugees.¹¹

Mining, Tribals & Supreme Court: The Samanatha Case¹²

In the Samanatha case the applicability of a State regulation prohibiting transfer of all lands in the Scheduled area to a non-tribal was in question the Apex Court held that the word 'Person' in the regulation includes the Government and therefore the prohibition of transfer of the tribal land to a non-tribal person would equally apply to the Government. It was made clear that the competing rights of tribals and the State are required to be adjusted without defeating rights of either. In this context the Court read Right to Development as part of Right to life under art 21 of the Constitution.

⁷Section 4(1)

⁸Section 5

⁹World Bank (1994) Resettlement and Development – The Bank-wide Review of Projects Involving Involuntary Resettlement 1986-93. Washington DC: World Bank, Environment Department.

¹⁰Government of India (2002) Tenth Five Year Plan (2002–2007), Vol. II, Sectoral Policies and Programmes. New Delhi: Planning Commission.

¹¹Gadgil, M. and Guha, R. (1995) Ecology and Equity – The Use and Abuse of Nature in Contemporary India. New Delhi: Routledge and Penguin Books India

¹²Samatha v. State of Andhra Pradesh & Ors. (AIR 1997 SC 3297)

The judgement passed in this case is regarded as landmark for upholding the constitutional scheme of non-transfer of tribal land to non-tribals stating..... *mining leases to non-tribal natural persons or company. Corporation aggregate or partnership firm etc. is unconstitutional, void and inoperative....* Further the court clarified that if government transfers of tribal lands to its *instrumentalities* for *public purpose* which is in greater good of the public and not for private gain would not be considered violate of provisions of fifth schedule¹³. The court stated that when the State being the executive head leases land to non-tribals in scheduled areas for extraction of minerals it transfers the constitutional obligations and duties of the executive to such non-tribals to advance social, economic and educational empowerment in the scheduled areas such as construction of houses, roads, hospitals, schools, providing employment and vocational training, supply of water, maintenance of sanitation, amongst others.¹⁴ The court directed project proponent to set aside 20% of its net profits into a permanent fund to be utilised for said basic facilities¹⁵.

The Court directed all mining activities within the scheduled area to be stopped except by State undertakings provided they were in compliance with the Forest Conservation Act and the Environment Protection Act¹⁶. It categorically prohibited the State Government to lease land in scheduled area to non-tribals except its instrumentality or tribal co-operative societies¹⁷.

The court held that the principle of self-governance based on democratic principles introduced through 73rd Amendment of the Constitution and included in the provisions of PESA indicates that Gram Sabha is entrusted with autonomous management natural resources *and prevention of alienation of land in scheduled areas* along with restoration of illegally alienated land back to tribals¹⁸.

The Court directed the State Governments to constitute Committee of Secretaries and State Cabinet Sub-Committees where the State Acts do not completely prohibit granting of mining lease to non-tribals to evaluate granting of mining leases. The court mandated that the

¹³ Para 117

¹⁴ Para 113

¹⁵ Para 114

¹⁶ Para 132

¹⁷ Para 95

¹⁸ Para 94

decision regarding transfer of tribal lands could be taken only after consulting these committees¹⁹. It was made obligatory for the State Government to take *concurrence* of Central Government, before granting any lease in scheduled area.

Finally, the court concluded the judgment by keeping it open for *appropriate legislature* to take policy decisions in order to implement the guidelines of the said order and for consistent scheme throughout the country with respect to tribal lands²⁰.

Concluding Remarks: Samatha Judgement is much celebrated judicial discourse as it bridled the rampant commercial exploitation of not only natural and but also social systems of our country. However, the minority decision in Samatha itself indicated the problems with the majority judgment. Justice Patnaik disagreeing with the premise of the majority judges strongly asserted that the state responsibility of development should mean that there should be no prohibition to transfer of tribal lands. Later BALCO verdict of 2002 the Supreme Court did express reservations again on the Samatha judgment, although it could not overrule it.²¹ But the minority decision and the BALCO verdict cast strong reservations on the majority decision in Samatha, shows that the Supreme Court of the country seems to be divided on the question of prohibition of transfer of tribal land to 'non tribals', the latter category including the State.

Despite having constitutional mandate and legislations like PESA and FRA tribals still have to fight a long battle before judicial forums against multinational giants like Vednata to get what is rightfully and legally theirs'. Reflection of their constant struggle is the fact that even though the court did not impose a blanket ban on mining, the Central and State Governments being unhappy with Samatha judgement appealed for modification of the order which was dismissed by the Supreme Court.

Mere enactment of law does not suffice the implementation of tribal centric legislations like PESA and FRA is backed by weak political will as is reflected in the twelfth five year plan (2012-2017). The plan states that PESA has been poorly implemented in all the nine states further the report states that functioning of Gram Sabha is *crucial* for success of PESA and

¹⁹ Para 129

²⁰ Para 131

²¹ BALCO Employees Union V. Union of India, AIR 2002 SC 350

accepts that there *is no automaticity* even in tribal areas²². For the FRA the plan records the implementation of community rights *very poor* across states, which reflects that tribals are far from achieving livelihood security. The report even signals improper implementation of alienation of land in scheduled areas and stresses on acquisition of tribal land only after explicit consent from Gram Sabha.

In my view how much we develop is not the sole factor to determine our development but how we develop is equally relevant. So if our development today fails to be socially inclusive it might not be able to sustain itself tomorrow.

²² Para 24.71