

Mining and Jurisprudence: Observations for India's mining sector to improve environmental and social performance

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Introduction

Over the past decade, India's mining sector, including the non-fuel mineral sector, has been marred by countless controversies. From violation and poor implementation of regulatory requirements pertaining to environmental protection and community rights, to over-extraction and illegal sale of ores, issues have brought the sector into the limelight of policy debate.

The matters have also necessitated intervention of the judiciary, particularly the Supreme Court of India, directing mining companies to set the course right. Besides imposition of compensation charges on mining companies or suspension of mining and related activities, the decisions of the judiciary have also prompted some major policy reforms such as amendment of the Mines and Minerals (Development and Regulation) Act in 2015, successive amendments to Environmental Impact Assessment Notification under the Environment (Protection) Act (1986) and formulation of a new National Mineral Policy in 2019.

This paper analyses some of the flagship judgements and directions pronounced by the Supreme Court of India with respect to non-fuel minerals over the past decade, particularly concerning environmental and community issues as these are key factors concerning the sustainability of the mining sector. The paper also highlights some of the major policy developments that followed the court's observations and directions. Finally, the paper discusses what the non-fuel mining sector must consider for adhering to the principles of sustainable development and natural justice, as it remains a critical sector in the country's economic fabric.

Judiciary deliberations on environmental and social aspects of the mining sector: review of flagship judgements by the Supreme Court

India has been one of the first countries to recognize healthy environment as a right to life. In 1991, the Supreme Court of India (here after referred to as the Court) while deliberating on a matter of pollution discharges from coal washeries and industrial units in Bokaro (then under the state of Bihar) observed that the right to a clean environment is a fundamental right of Indian citizens under the Constitution of India. Interpreting Article 21, the Court underscored that the "*right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse*".¹

Pronouncements by the Court thereafter has repeatedly upheld such rights of a citizen. Such observations have also come into light pertaining to cases on mining adjudicated by the Court. Alongside the right to clean environment, the Court's observations have also upheld the right of citizen liberty and scope of engagement in decisions of developmental projects.

¹ Supreme Court of India, 1991, *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420

This section analyses some of the flagship judgements, related orders and directions pronounced by the Court with respect to non-fuel minerals that upheld such fundamental rights along with underscoring other environmental and social obligations. The case laws as discussed in this section have primarily been discussed in a time-series manner to sequentially understand the developments over the years and subsequent actions.

A. Iron ore mining in Karnataka

Samaj Parivartana Samudaya and Ors. Vs. State of Karnataka and Ors.

The matter of *Samaj Parivartana Samudaya and Ors. Vs. State of Karnataka and Ors.*, generally referred to as the Bellary iron ore mining case, is one of the flagship cases concerning mining disputes in India. The case involved instances of poor governance of mining activities and rampant iron ore mining in the state of Karnataka by several mining companies, that resulted in huge environmental and social costs.

In March 2007, the Karnataka government asked the Lokayukta to probe allegations of illegal mining in the state. It was asked to initiate action against all public servants, including ministers, whether in office or otherwise, beginning from 2000, if they were found guilty of illegality. The report of Karnataka's Lokayukta, first submitted in 2008 and finally in July 2011, brought out a host of issues with mining irregularities in Bellary.²

The impetus for such irregularities has been the illegal mining and export of iron ore from Karnataka due to global demands. As noted in the Lokayukta report, "*...The spurt in the international prices of steel and iron ore during last 3 to 4 years has made the mining and export of high quality iron ore from the mining in Bellary, Tumkur and Chitradurga districts very lucrative. With the average cost of production of iron ore at around Rs.150 per ton, and the royalties to be paid to the Government being abysmally low at Rs.16.25 per ton for different grades there have been serious systemic distortions due to the high profit margins. This has led to allegations of large-scale corruption and complaints of profiteering through illegal mining with the complicity of the authorities in all levels of Government*".³

The findings of the Lokayukta report showed mining irregularities of unimaginable scale in Karnataka. This also involved various aspects of illegal mining ranging from encroachments, mining without necessary permits and clearances, mining outside the permitted areas, mining beyond permitted quantities, illegal transportation of minerals etc.

More than 700 officials and 400 companies engaged in mining, iron ore trade and steel manufacture figured in the report. The corruption in the government departments was reported to be pervasive, prevailing in all departments, whether connected directly or remotely to mining. Fake permits were issued by public officials to help illegal mining in return for bribes. Mining giants such as JSW Steel Ltd owned by the Jindal Group, Adani Enterprises Ltd, Sesa

² Karnataka Lokayukta, 2011, *Report on the reference made by the Government of Karnataka under Section 7(2-a) of the Karnataka Lokayukta Act, 1984*, Reference number No. COMPT/LOK/BCD/89/2007

³ *ibid*

Goa Ltd and MSPL Ltd owned by the Baltoda Group were accused, besides the National Minerals Development Corporation (NMDC), India's largest public sector iron ore producer⁴.

Based on the first report of the Lokayukta, a petition was filed in the Supreme Court by the civil society organisation Samaj Parivartana Samudaya in 2009. Following this, the Court ordered an investigation by the Central Empowered Committee (CEC). The CEC report, like the Lokayukta, found a host of mining irregularity going on in Karnataka for a decade.⁵ In the Court's own words. "*what followed thereafter is unprecedented in the history of Indian environmental jurisprudence. It is neither necessary nor feasible to set out the series of Reports of the CEC and the various orders of the Court passed from time to time*".⁶

The upshot of all these, in July 2011 a ban on mining in Bellary was imposed.⁷ The ban was extended to the Tumkur and Chitradurga districts in August 2011.⁸ While imposing the mining ban the Court in its order of July 2011 noted that "*...on account of over-exploitation, considerable damage has been done to the environment. We are taking a holistic view of the matter. We have suspended these operations keeping in mind the precautionary principle, which is the essence of Article 21 of the Constitution*".⁹

The ban on mining in the state was lifted by the Supreme Court in April 2013. While allowing resumption of mining, mines were classified into three categories, taking encroachment as the criterion for determining whether their operations were legal or illegal. The mines (numbering 45) which did not encroach or encroached in small ways outside their sanctioned area were placed under Category A. Those that encroached an area up to 10% outside their lease area through mining pits and up to 15% by way of waste dumping were categorised as B (72 mines). Category C mines were those where encroachment was found to be more than 10% of the lease area through mining pits and over 15% by dumping waste. The court allowed all Category A and 63 out of 72 Category B mines to resume operations, while cancelling all category C mines.¹⁰

However, in 2013, the Court made some strong observations on the questions of protecting environment and ecology when it comes to mining activities, "*in the past when mining leases were granted, requisite clearances for carrying out mining operations were not obtained which have resulted in land and environmental degradation. Despite such breaches, approvals had been granted for subsequent slots because in the past the authorities have not taken into*

⁴ *ibid*

⁵ Central Empowered Committee, 2011, *Report (interim) of the CEC in Writ Petition (Civil) No. 562 of 2009 filed by Samaj Parivartana Samudaya and others regarding illegal mining and other related activities in forest areas of Karnataka*

⁶ Supreme Court of India, Judgement dated April 18, 2013, in the matter of *Samaj Parivartana Samudaya and Ors v State of Karnataka and Ors.*, Writ Petition (Civil) No. 562 of 2009

⁷ Supreme Court of India, Order dated July 29, 2011, in the matter of *Govt. of A.P. & Ors. versus M/S Obulapuram Mining Co.P.Ltd. & Ors. etc.*, Special Leave to Appeal (Civil) Nos.7366-7367/2010 (From the judgement and order dated 26/02/2010 in WP No.25910/2009 and WP No.26083/2009 of The High Court of A.P. at Hyderabad)

⁸ Supreme Court of India, Order dated August 5, 2011, in the matter of *Govt. of A.P. & Ors. versus M/S Obulapuram Mining Co.P.Ltd. & Ors. etc.*, Special Leave to Appeal (Civil) Nos.7366-7367/2010 (From the judgement and order dated 26/02/2010 in WP No.25910/2009 and WP No.26083/2009 of The High Court of A.P. at Hyderabad)

⁹ *ibid*

¹⁰ *ibid*

account the macro effect of such wide-scale land and environmental degradation caused by the absence of remedial measures (including rehabilitation plan)”.

Further, invoking principles of the Constitution of India the Court underscored that “...*Environment and ecology are national assets. They are subject to intergenerational equity. Time has now come to suspend all mining in the above area on sustainable development principle which is part of Articles 21, 48–A and 51–A(g) of the Constitution of India.* The Court also suggested that the principles of these articles also “keeps the option of imposing a ban in future open”.¹¹

B. Iron and manganese ore mining in Goa

(a) *Goa Foundation Vs. Union of India (UOI) and Ors.*

The Goa mining case is one of the key matters of mining irregularities with respect to iron and manganese ore mining in India, that initially followed the investigation and revelations by a special commission appointed by the central government, famously known as the Shah Commission.

On November 22, 2010, the central government through a notification appointed a commission of inquiry, headed by Justice M.B Shah, retired judge of the Supreme Court, to enquire into iron and manganese ore mining irregularities happening in contravention of the provisions of the central mining law- the Mines and Minerals (Development and Regulation) Act (MMDR), 1957, key environmental legislations- the Forest (Conservation) Act (FC Act), 1980, the Environment (Protection) Act (EP Act), 1986, and other rules and guidelines issued thereunder. The Government referred to the inquiry issue as a matter of “public importance”.¹²

The centre specified four key terms of reference for the Commission for looking into such regulatory non-compliance and administrative lax.¹³ These included-

- i. Determining issues of unlawful transportation and trade of iron and manganese ore;
- ii. Determining lapses in regulatory, management, and monitoring systems;
- iii. Determining tampering of official records such as related to land records, lease boundaries etc., to undertake illegal mining;
- iv. Inquiring into the overall impact of such mining, trade, transportation and export, done illegally or without lawful authority, in terms of destruction of forest wealth, damage to the environment, prejudice to the livelihood and other rights of tribal people, forest dwellers, and other persons in the mined areas.

The Shah Commission report on Goa mining was tabled in Parliament on September 7, 2012, following which the Government had temporarily suspended mining activities in the state. In the same month, the Union Ministry of Environment and Forests (MoEF) directed suspension of environmental clearances of all 139 mines in Goa. In October that year, the Supreme Court declared illegal those leases in which violations were detected by the Shah Commission. The Court asked its central empowered committee (CEC) to investigate the matter. As a result of these orders, mining activities came to a halt.¹⁴

¹¹ *ibid*

¹² Ministry of Mines, 2010, Notification No. S.O.2817(E), Government of India

¹³ *ibid*

¹⁴ Srestha Banerjee, 2014, *License to Mine, Down to Earth*, as available from <https://www.downtoearth.org.in/coverage/licence-to-mine-44366>, last accessed on May 2020

The Shah Commission report on Goa mining,¹⁵ the CEC report, and the deliberation by the Supreme Court, highlighted countless issues of mining irregularities. These included, mining without a valid permit, mining outside the lease area, production of ore beyond permitted capacity and illegal transportation of ore.¹⁶ The CEC report showed that owing to several irregularities, the state government also suffered loss. For example, between 2006 and 2011, iron ore exports from the state was 194.93 MT, while production during the period was 155.37 MT, a mismatch of 39.56 MT. Such illegalities cost the state exchequer Rs 35,000 crore. This enhanced level of production also contributed to adverse impacts on the ecological systems, and health of people of Goa.¹⁷

Several factors contributed to the large-scale mining irregularities in Goa, from exploitation of loopholes in mining regulations to lack of official oversight. As observed through inquiry reports, significant part of this illegal iron ore came from the extraction and selling of iron ore remains from overburdens dumped outside the lease areas. Such extraction had been going on without any permission or payment of royalty to the state, in contravention of the Mineral Concession (MC) Rules, 1960. The Rules require a levy to be paid only for sale or consumption and not for dumping rejects. The state mining department as well as the State Pollution Control Board remained at fault for oversight in this regard.¹⁸ As observed by the Court, “*though conferred with immense statutory powers, has failed to discharge its statutory functions and duties*”.¹⁹

It was also found out that a significant portion of mining in the state was without even a valid permit. Such activity was being carried out under the pretext of the clause “deemed extension”, under the MC Rules, 1960. Broadly, deemed extension allows mines to operate even without a permit as long as the lease holder files a timely application with the state government for the first renewal of the lease and until further orders are given by the state. However, the deemed extension status would not mean that a mine can be allowed to run indefinitely without a decision on the renewal application. In Goa, the Government’s inaction on the renewal applications of the lease holders led to exploitation of this loophole and continued mining without a valid permit in hand.²⁰

In April 2014, the Supreme Court pronounced its judgment on Goa mining which dealt with various issues of mining irregularities in the state. These included aspects of illegal mining, regulatory loopholes, environmental impacts, concerns of intergenerational equity of mining benefits etc. The petition on mining irregularities in Goa was filed by the petitioners Goa Foundation, following the observations of the Justice Shah Commission report.²¹

While the Court observed many irregularities, yet it allowed conditional resumption of iron ore mining in the state. A key reason for the Court’s decision on lifting the ban was the effect of

¹⁵ Reports of the Shah Commission on illegal mining in the State of Goa, as accessed from Shah Commission Inquiry Archives of the Ministry of Mines, Government of India

¹⁶ Supreme Court of India, Judgement dated April 21, 2014, in the matter of *Goa Foundation Vs. Union of India (UOI) and Ors.*, Writ Petition (Civil) No. 435 of 2012

¹⁷ *ibid*

¹⁸ Chandra Bhushan and Srestha Banerjee, 2015, *Losing Solid Ground: MMDR Amendment Act, 2015 and the State of the Mining Sector in India*, New Delhi: Centre for Science and Environment

¹⁹ *ibid*

²⁰ *ibid*

²¹ Supreme Court of India, Judgement dated April 21, 2014, in the matter of *Goa Foundation Vs. Union of India (UOI) and Ors.*, Writ Petition (Civil) No. 435 of 2012

suspension of mining activities on the local people who were dependent on such activities. For example, in Para 63 of the judgement the Court made the following observation-

*“We find from the report of the Expert Committee that the State of Goa heavily depends on iron ore mining for revenue as well as employment. The legislative policy behind the MMDR Act made by Parliament is mineral development through mining. The State Government of Goa has also adopted the executive policy to encourage mining of minerals in Goa. Moreover, as Mr. Ravi Shankar Prasad, learned senior Counsel appearing for 33 Panchayats, has submitted about 1.5 lakh people are directly employed in mining in Goa and large number of persons have taken bank loans and purchased trucks for transportation of iron ore. Hence, people who earn their livelihood through work in connection with mining will be seriously affected if mining is totally banned to protect the environment. We cannot, therefore, prohibit mining altogether, but if mining has to continue, the lessees who benefit the most from mining, must contribute from their sale proceeds to the Goan Iron Ore Permanent Fund for sustainable mining”.*²²

At the same time, the Court had also tried to balance out the considerations of environmental and ecological security and the questions of equity and justice, which have been underscored through the principles of ‘sustainable development and intergenerational equity’. The Court had thus directed that mine leaseholders pay 10% of their ‘sale proceeds’ of iron ore mined towards a public fund—the Goan Iron Ore Permanent Fund—for this purpose.

At the same time a macro-level environmental impact assessment (EIA) study was also directed to and propose ceiling of the annual excavation of iron ore from the State of Goa. This was considering for mining to happen in a sustainable way, the carrying capacity of the region must be considered as well as the overall ecological impacts. At the time of the judgement, based on an interim carrying capacity study and assessment experts, the Court thus directed that *“the State Government will, in the interests of sustainable development and intergenerational equity, permit a maximum annual excavation of 20 million MT from the mining leases in the State of Goa”*.²³

(b) Goa Foundation Versus M/s Sesa Sterlite Ltd. & Ors

The judgement on Goa mining by the Supreme Court did not put an end to the mining controversies and regulatory lax in Goa. In this respect, the Court’s judgement of 2018 merits discussion.

In February 2018, the Supreme Court came down heavily on the Government of Goa, as well as the Ministry of Environment, Forest and Climate Change (MoEF&CC), for allowing regulatory lax with respect with resumption of mining activities in the state following the Court’s directions of April 2014. Through the deliberations the Court precisely noted that, mining in Goa was allowed based on fulfillment of certain conditions for leases which were considered to being functioning illegally at that time. It was noted that the leases which were operating under the presumption of “deemed extension” in the state from 2007 to 2012 considering it to be a second renewal, have been doing so without the necessary permits. The leases had, in fact, expired in 2007, and therefore the Court at that time had directed the Goa Government to grant fresh leases to the miners after proper evaluation. At the same time the

²² *ibid*

²³ *ibid*

union Environment Ministry was also directed to grant environmental clearances (EC) considering the cases afresh.

However, Goa Government stood in contravention to the Court's directions. Instead of granting leases afresh as directed, it renewed the mine leases (considering them as second renewals). Between November 2014 to January 2015, the state government renewed 88 such mine leases. The Court considered this to be unlawful, and directed that mine leases, which are operating after being renewed by the state government, will cease to operate after March 15, 2018, until fresh leases are granted following proper evaluation and fresh ECs are obtained.²⁴

Strictly criticizing the state's action, the Court noted "*the State is unable to firmly stop violations of the law and other illegalities, perhaps with a view to maximise revenue, but without appreciating the long-term impact of this indifference. Another excuse generally put forth by the State is that of development, conveniently forgetting that development must be sustainable and equitable development and not otherwise*".²⁵

The Court also criticized the MoEF&CC on account of granting ECs. Earlier, in September 2012, the ministry had put all the ECs of the mining leases in abeyance observing irregularities. The SC while pronouncement of the 2014 judgement had said that alongside obtaining mine leases afresh, these miners must also procure fresh ECs.

However, following the renewal of 88 mining leases, the Goa government had requested the environment ministry in January and February 2015 to lift the abeyance order of September 2012 on ECs. Subsequently, in March 20, 2015, the environment ministry lifted the abeyance order for 72 cases out of the 139 as imposed earlier. This is despite the fact that a special report of the Expert Appraisal Committee (EAC) of the ministry itself, chaired by Vishwanath Anand, former Secretary in the MoEF (report submitted in March 2013) noted several environmental violations by the old lease holders, such as, no approval from the National Board of Wildlife, excess mining, poor management of mine dumps, concerns about groundwater levels, no clearance from the Central Ground Water Board to draw ground water, and no forest clearance. The SC noted that the EAC, at that time, had also recommended revocation of ECs granted to several mining lease holders. Given this, the SC observed the environment ministry's decision to lift the abeyance order as "cryptic".²⁶

This case of Goa mining still remains sub-judice at the time of this research at the Supreme Court.

C. Mining in Odisha

(a) *Common Cause and Ors. Vs. Union of India (UOI) and Ors.*

The observations of the Supreme Court in the matter of Odisha mining and its judgement dated August 2017, has been one of the most expansive ones with respect to observations on impacts of unscientific and poorly regulated mining activities on environment and local communities and directing policy revisions thereafter. The first paragraph of the judgement crystalizes observations of the Court on this matter-

²⁴ Supreme Court of India, Judgement dated February 7, 2018, in the matter of *The Goa Foundation Versus M/s Sesa Sterlite Ltd. & Ors.*, Special Leave to Appeal (Civil) No. 32138 of 2015

²⁵ *ibid*

²⁶ *ibid*

*“The facts revealed during the hearing of these writ petitions filed Under Article 32 of the Constitution suggest a mining scandal of enormous proportions and one involving megabucks. Lessees in the districts of Keonjhar, Sundargarh and Mayurbhanj in Odisha have rapaciously mined iron ore and manganese ore, apparently destroyed the environment and forests and perhaps caused untold misery to the tribals in the area. However, to be fair to the lessees, they did the detail steps taken to ameliorate the hardships of the tribals, but it appears to us that their contribution is perhaps not more than a drop in the ocean-also too little, too late”.*²⁷

The Supreme Court had taken up the matter of illegal mining in Odisha in early 2012, following a petition filed by the non-profit, Common Cause. The petitioner had sought judicial intervention to terminate all mining leases that are involved in illegal mining activities in Odisha, highlighting the observations of the report of the Justice M B Shah Commission. As mentioned earlier, the Shah Commission was set up by the central government in November 2010, to look into the illegal mining of iron ore and manganese in the country and had pointed to large-scale illegal mining, especially in Odisha. The commission’s report in case of Odisha mining has been one of the most expansive ones.

In 2014, the Court had asked its Central Empowered Committee (CEC) to investigate the matter and identify the lessees who were operating the leases in violation of the law. The Odisha government and the MoEF&CC were asked to cooperate with the investigation. The CEC report of April 2014 had observed that at that time, out of the 187 mine leases granted in the three districts in Odisha- Kendujhar, Sundargarh and Mayurbhanj, a total of 102 leases were in violation of various statutory clearances and permits. The Court during the deliberations on May 2014 noted that the “102 mining leases do not have requisite environmental clearances, approvals under the Forest (Conservation) Act, 1980, approved Mining Plan and/or Consent to Operate”.²⁸ Given this, the mining operations in these leases had been suspended and they had been noted by the state government as ‘non-working’ leases.

The Court, at that time through an ‘interim order’, directed that the 102 leases will continue to remain suspended and the lease holders may approach the concerned authorities for the necessary environmental approvals and permits, upon which, they may move the Court for modification of this interim order in relation to their cases.²⁹ Restraints were also put on additional 29 leases, whose lease applications were rejected or had lapsed. Among the remaining 56 operational mines, the Court noted that 26 iron ore mine leases were operating on the pretext of having obtained “second and subsequent renewals” without any such order being actually passed by the state government. The leases were functioning based on the pretext of the “deemed extension” clause under the Mineral Concession (MC) Rules, 1960, which is a violation, noted the Court.³⁰ The bench clarified that the deemed extension clause the MC Rules is not available for the second and subsequent renewals of a mining lease. Provisions for such renewals should be read along with the provisions of Section 8 (3) of the MMDR Act, 1957, which says that the approval for second or subsequent renewal of a mining lease will be given

²⁷ Supreme Court of India, Judgement dated August 2, 2017, in the matter of *Common Cause and Ors. Vs. Union of India (UOI) and Ors.*, Writ Petition (Civil) Nos. 114 and 194 of 2014

²⁸ Supreme Court of India, Order dated May 16, 2014, in the matter of *Common Cause v. Union of India*, (2014), Writ Petition (Civil) No. 114 of 2014

²⁹ *ibid*

³⁰ Section Rule 24A of Mineral Concession Rules, 1960, prior to the amendment in 2016, dealt with the renewal of mining lease. Sub rule 24A(6) specified that if an application for renewal of a mining lease is made to the State Government, at least twelve months before the date on which the lease is due to expire, and is not disposed of by the State Government before the date of expiry of the lease, the period of that lease shall be deemed to have been extended by a further period till the State Government passes order thereon

by the state government only if it is of the opinion that in the ‘interest of mineral development’ it is necessary to do so, and only if reasons are recorded appropriately by the state government. Thus, in absence of any such opinion or reasoning, the operation of the 26 leases under second or subsequent renewal is not legal. The Court thus said these leases will not be allowed to operate until express orders are passed by the Odisha government, and asked the state government to consider all renewal applications at the earliest and dispose them of within six months.³¹

Following the interim order of the Court in 2014, in due course a number of applications were filed before the Supreme Court seeking revocation of the suspension order on leases. The applicants submitted that they had obtained all necessary clearances, approvals, and consents, and were now legally eligible to recommence mining operations.³²

The decision on such applications were pronounced by the Supreme Court through the judgement dated April 4, 2016. The key matter of deliberation in this judgement remained what constitutes a subsisting mining lease. It was noted that “the question of granting permission to the leaseholders to recommence mining operations would arise, only if the leaseholders have a subsisting mining lease”.³³

The Court explained that in general, a leaseholder will be considered to have a subsisting mining lease, “if the period of the original grant is in currency”. Also, in cases where “a leaseholder whose original lease has since expired, would have a subsisting lease, if the original lease has been renewed and the renewal period is in currency”.³⁴

To assess the “subsistence” status of the suspended leases in question, the Court drew upon the amendments introduced to the MMDR Act in 2015 (after the passage of the last interim order). The Court referred to the new Section 8A that was incorporated in the MMDR Act in 2015, to address the various irregularities and contentions arising during the second and subsequent renewal of mine leases. The MMDR Amendment Act 2015 came into effect from January 12, 2015, the date when the MMDR Amendment ordinance was promulgated by the central government.

Section 8(A) of the MMDR Amendment Act (2015) now allows mining leases to be granted for a straight 50-year period (except coal, lignite, and atomic minerals). On the expiry of the lease period, the leases will be re-auctioned. It further notes that leases granted before the commencement of the MMDR Amendment Act, shall be deemed to have been granted for a period of 50 years.³⁵ Drawing on this provision, the Court adjudicated that leaseholders who had moved a valid application for renewal to the state government in a timely manner, and was yet to be considered and disposed of, prior to January 12, 2015, would be deemed to be extended from the date of their last renewal to March 31, 2030 (in the case of captive mines) and till March 31, 2020 (for the merchant miners)”, as per provisions of Sub-sections (5) or (6) of Section 8A of the amended MMDR Act. However, the Court clarified that if “a leaseholder does not satisfy any of the required conditions of the lease, as for instance, in the postulated

³¹ *ibid*

³² Supreme Court of India, Judgement dated April 4, 2016, in the matter of *Common Cause and Ors. Vs. Union of India (UOI) and Ors.*, Writ Petition (Civil) No. 114 of 2014

³³ *ibid*

³⁴ *ibid*

³⁵ The Mines and Mineral (Development and Regulation) Amendment Act, 2015, No.10 of 2015, Government of India

clearances/approvals/consent”, then the leases will not be entitled to the benefits given under Sub-sections (5) or (6) of Section 8A.

The final major judgement of the Supreme Court in matters of Odisha mining irregularities came in August 2017. This judgement dealt with two key matters of mining irregularities that had serious consequences for environment, ecology, and the state exchequer. This included issues of illegal mining in forest lands³⁶ and iron ore produced without or in excess of the EC stipulated amount³⁷.

The Court referred to the iron and manganese ore mined in excess of that stipulated under EC by various mining companies, as amounting to “frightening figures”. As per the submissions of the CEC and the Court observations, the excess mining amounted to 2130.988 lakh MT of iron ore and 24.129 lakh MT of manganese ore making a total of 2155.117 lakh MT of iron and manganese ore. The total notional value of minerals produced without an EC or in excess of the EC was estimated to be about Rs. 17,576.16 crores. The Court strongly observed that “*it is for this reason that we have referred to the megabucks and rapacious mining*”. The Court added that the figures still do not include mining without forest clearance.³⁸

In the 2017 judgement, the Supreme Court thus came down heavily on the mining companies that have been illegally extracting iron and manganese ore in Odisha. The Court directed the Odisha Government to recover 100% compensation from the companies. The compensation will be payable “from 2000-2001 onwards at 100% of the price of the mineral”, noted the judgement. The compensation was levied as per provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (as amended in 2015). Section 21(5) of the Act, empowers the state government to recover the price of the illegally-mined ore from each defaulting lessee. It was noted that the government can also recover any rent, royalty or tax, for the period during which such illegal mining activity was being carried out outside the mining lease area. The Court directed that the compensation amount thus recovered should be used for “benefit of tribals in the affected districts”.³⁹

Finally, the SC had directed the centre to revise the National Mineral Policy by December 2017, as it is outdated to deal with present day challenges. Speaking of the ineffectiveness of it, the bench said that the policy “seems to be only on paper and is not being enforced perhaps due to the involvement of very powerful vested interests or a failure of nerve.” The Court directed that the new policy should be “fresh and more effective, meaningful and implementable”.

(b) Orissa Mining Corporation vs. Ministry of Environment & Forest and others

The judgement pronounced by the Supreme Court in April 2013 remains one of the most significant ones regarding observations on the importance of *gram sabha* consent for forest land diversion and settlement of forest rights, for any mining project to get a statutory approval. The Court deliberations on this matter had re-enforced the power of local communities as

³⁶ This involved 20 mine leases in the three districts- Keonjhar, Sundargarh and Mayurbhanj

³⁷ This review involved each of the operating iron ore mine leases

³⁸ *ibid*

³⁹ *ibid*

recognized under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, in short referred to as the Forest Rights Act (FRA).⁴⁰

The case pertains to a petition filed by the Odisha Mining Corporation (OMC) Limited, that approached the Court for quashing the order passed by the then Ministry of Environment and Forests (MoEF), dated August 24, 2010, through which the Ministry rejected the Stage-II (or final) forest clearance (FC) for diversion of 660.7 hectares of forest land in Niyamgiri hills, in Kalahandi and Rayagada districts of Orissa. The proposal for bauxite mining was for supply to Vedanta's alumina refinery in nearby Lanjigarh areas.

Though MoEF accorded Stage I (or in principle) forest clearance to the project in December 2008, but the final forest clearance was rejected in 2010. It was observed that the project violated provisions of the Forest Conservation Act (1980), the Environment Protection (EP) Act (1986) and the FRA (2006). The decision of the MoEF particularly followed the submissions made by the government appointed N C Saxena Committee as well as the observations made by the MoEF expert advisory committee- the Forest Advisory Committee. With respect to FRA and rights of tribal communities, it was specifically observed that the Primitive Tribal Groups (PTG) were not consulted in the process of seeking project clearance. This violated the provisions of FRA, 2006. The diversion of forest land would have significant impact on the ecological and biodiversity attributes of the Niyamgiri hills upon which the Dongaria Kondh and Kutia Kondh depend. Therefore, their opinion and consent were of immense importance.

The Court asked *gram sabhas* of the affected villages in Rayagada and Kalahandi districts to decide whether the tribes living in and around Niyamgiri hills have religious rights over it. Their "rights have to be preserved and protected", the judgement noted. Based on the *gram sabha* observations the decision on according final forest clearance was to be made by the Ministry. The Court also suggested that during this process the *gram sabhas* can also consider fresh claims under FRA which have not been addressed.

Besides the FRA issues, the Court also directed Vedanta's alumina refinery project to correct the alleged violations in terms of environment clearance (EC). It was noted that during the submissions for EC, it was not divulged that the project area of the refinery involves forest land. Also, expansion work for the refinery's production capacity (by six-fold from one to six million tonnes per annum) was started without obtaining the necessary approvals from the ministry. It was thus noted that the ministry will also consider the corrected measures while deciding on the mining project.⁴¹

What is of most importance in the Niyamgiri bauxite mining case, are the observations made by the Supreme Court about the rights of forest dwellers and forest dependent communities on their land and resources of subsistence. The Court noted that "*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*".⁴²

⁴⁰ The Supreme Court of India, Judgement dated April 18, 2013, *in the matter of Orissa Mining Corporation Ltd. Vs. Ministry of Environment and Forest and Ors.*, Writ Petition (Civil) No. 180 of 2011

⁴¹ *ibid*

⁴² *ibid*

The FRA (2006), therefore confers three kinds of rights to these communities- individual rights (for occupation and cultivation), community rights (for grazing, fuel wood collection, fishing, ownership, and disposal of non-timber forest produce), and the rights to protect, regenerate, conserve, and manage community forest resource (CFR) areas. Section 4(5) of the FRA therefore specifically mentions that no member of a forest dwelling ST 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. The Court noted this clause to be “absolute” and protective in nature against any eviction.

Besides observing their legal rights, the Court went further in interpreting the role of tribal and traditional forest dwelling communities in the management of natural resources and forwarding the agenda of sustainable development. However, their engagement has often been hampered by their poor knowledge of legal rights and access to justice. The state therefore has a key role in ensuring so. To note the salient observations of the Supreme Court- *“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”*.⁴³

To emphasize the importance of the rights of such communities and the obligation to engage with them in a fair manner in decisions on developmental projects, the Court also referred to the spirit of the Constitution of India. It was underscored that the Panchayats (Extension to the Scheduled Areas) Act of 1996 (PESA), that recognizes the power of local level institutions- (*gram sabhas*) in matters of governance, *“has been enacted 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, Gram 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.”*

The regulatory prerogative to engage with local communities on sustainable use of resources and ensuring their rights, also extends from international conventions such as, the International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (of which India is also a signatory), and the United Nations Declaration on the rights of Indigenous Peoples (UNDRIP), 2007. The Convention on the Biological Diversity (CBA) adopted at the Earth Summit (1992), have also emphasized on necessity to preserve and maintain knowledge, innovation, and practices of the local communities relevant for conservation and sustainable use.⁴⁴

⁴³ *ibid*

⁴⁴ *ibid*

D. Mining irregularities in small scale leases in Haryana and across the country

Deepak Kumar etc. vs State of Haryana & Ors

On 27 February 2012, the Supreme Court gave a decisive order for regulating mining activities in small-scale leases (below five hectares), that involve mining of minor minerals. The Court directed all state governments and union territories to integrate environmental considerations within their respective rules concerning regulation of minor mineral. This was particularly considering the cumulative environmental impact of such mining.⁴⁵

The order came in response to a petition filed in 2009 by Deepak Kumar, challenging auction notices given by Haryana's Department of Mines and Geology for extraction of minor minerals in small leases in various districts of the state. These leases were below five hectares and were mostly at the foothills of fragile Himalayan ranges, the Shivalik hills, and riverbeds. The petitioner had contended that no environmental impact assessment (EIA) has ever taken place for mining in these areas, thereby causing serious environmental and ecological degradation. The reason for this, however, has also been that until then, under the EIA Notification of 2006, mining leases less than five hectares were not required to take an EC and thus, no impact assessment was done.

While deliberating on this case, the Court also considered complaints about mining violations in small scale leases in Rajasthan and Uttar Pradesh, thus causing environmental and ecological destruction. Among these, a key activity has been riverbed sand mining.

The Court referred to scientific reports and observations made over the years and noted the serious environmental impacts of riverbed mining. As noted, "*over the years, India's rivers and riparian ecology have been badly affected by the alarming rate of unrestricted sand mining which damages the ecosystem of rivers and the safety of bridges, weakens riverbeds, destroys natural habitats of organisms living on riverbeds, affects fish breeding and migration, spells disaster for the conservation of many bird species, increases saline water in the rivers etc. Extraction of alluvial material from within or near a stream-bed has a direct impact on the stream's physical habitat characteristics... Altering these habitat characteristics can have deleterious impact on both in-stream biota and the associated riparian habitat.*"⁴⁶

In light of these observations, the Court agreed with the contention of the petitioner that the auction notices of the Haryana mining department had been issued without conducting any study on the possible environmental impacts. Though this was done under the pretext of the leases being small, the Court observed that this cannot be an excuse anymore as their collective impact may be significant.⁴⁷

It was also noted that the matter is not an isolated issue for Haryana. For other states of the country these issues had come up for deliberations before the Government of India on various occasions. Observing so, the Court directed that operation of mines of minor minerals, including small-scale leases, needed to be strictly regulated.⁴⁸ The SC directed all state

⁴⁵ Supreme Court of India, Order dated February 27, 2012, in the matter of *Deepak Kumar etc. Versus State of Haryana and Others etc.*, I.A. Nos.12-13 of 2011 in Special Leave Petition (C) No. 19628-19629 OF 2009

⁴⁶ *ibid*

⁴⁷ *ibid*

⁴⁸ Srestha Banerjee, 2016, *Regulating small-scale mining of minor minerals: A comprehensive framework beyond environmental clearances*, Centre for Science and Environment, New Delhi

governments to make necessary changes in their minor mineral regulatory framework in order to address the environmental impacts of such mining.⁴⁹ During the time of the order, the states were given a 6-month period for this. The Court further directed that till the time such revisions happen, “*leases of minor minerals including their renewal for an area of less than five hectares be granted by the states or union territories only after getting environmental clearance from the MoEF*”.⁵⁰

Following the Supreme Court directions, the National Green Tribunal (NGT) issued directions on similar lines in August 2013. The NGT pronounced a restraint order on sand and riverbed mining without an EC anywhere in the country.⁵¹

Following the observations and directions by the judiciary, in January 2016, the MoEF&CC introduced amendments to the EIA Notification, 2006. The amendments mandated EC for all mining projects, irrespective of their lease size, detailing out mechanisms of awarding an EC to such projects and also assessing their impacts.⁵²

Observations and conclusion

The review of flagship mining cases adjudicated by the Supreme Court underscores some fundamental principles that have been repeatedly invoked to ensure responsible mining practices and effective mining governance. The Court has applied four key principles that serves the interests of local communities, the environment, while also taking into account economic considerations that must serve the public by large, and not just certain groups. These include the international principles of sustainable development, the precautionary principle, the polluter pays principle and the intergenerational equity.

Also, in almost all matters, the Supreme Court has expansively invoked Article 21 of the Constitution of India. The Court has interpreted ‘environment’ as “one of the facets of the right to life guaranteed under Article 21 of the Constitution”. Therefore, as clearly noted by the Court, “*if the Court perceives any project or activity as harmful or injurious to the environment it would feel obliged to step in*”.⁵³

What is clear from this is, while the Court has responded to specific petitions or applications as it appeared before the bench, in the process the judiciary has tried to address the fundamental philosophies of resource management and exploitation, and has dealt with the complexities of balancing the interests of environment, the local community, as well as the economy. This is clear in the Court’s pronouncements from all the judgements.

⁴⁹ The states were referred particularly to two documents—a report of the then MoEF on Environmental Aspects of Quarrying of Minor Minerals (2010) and a model Mining Framework for Minor Minerals (2010), which were prepared by the Indian Bureau of Mines, directed by the Ministry of Mines. Both the documents contain guidelines on aspects such as size and period of mining lease, mining mechanisms, requirement of a mining plan, mine closure and reclamation and rehabilitation etc. The MoEF recommendations also provided specific guidelines for riverbed mining. All state governments and Union territories were asked to give effect to the recommendations made by the then MoEF and the mines ministry in their model documents.

⁵⁰ Supreme Court of India, Order dated February 27, 2012, in the matter of *Deepak Kumar etc. Versus State of Haryana and Others etc.*, I.A. Nos.12-13 of 2011 in Special Leave Petition (C) No. 19628-19629 OF 2009

⁵¹ National Green Tribunal, Order dated August 5, 2013, in the matter of *National Green Tribunal Bar Association vs Ministry of Environment and Forests and Ors.*, Original Application No. 171 of 2013

⁵² Ministry of Environment, Forest and Climate Change, Notification dated 15 January 2016, S.O. 141(E)

⁵³ Supreme Court of India, April 2014, *Goa Foundation Vs. Union of India (UOI) and Ors.*, Writ Petition (Civil) No. 435 of 2012 along with Writ Petition (C) No. 99 and 184 of 2013.

For example, in both the Karnataka and the Goa mining matters while the Supreme Court suspended the mining activities observing large scale violations, it later revoked the ban considering the hardship that people dependent on mining related activities for an income were facing. At the same time, observing the need to allow exploitation only as per the carrying capacity of a region, the Court had asked for scientific studies and assessments and at instances had suggested an interim cap on extraction.

The Court has also at all instances put first the rights of local communities and has emphasized on a fair and free approach for community engagement on matters of mineral resource use. This has most clearly emerged in the matters of Odisha mining.

It is also important to note that in almost all of these matters the judiciary has collectively considered the scope of various mining and environmental laws, to actually decide on what constituted mining irregularities, or more precisely illegal mining. As it has been noted, the holder of a mining lease is required to adhere to the terms of the mining scheme, the mining plan, as well as the statutes such as the Environment Protection Act (1986), the Forest Conservation Act (1980), the Water (Prevention and Control of Pollution) Act (1974) and the Air (Prevention and Control of Pollution) Act (1981). If any mining operation is conducted in violation of any of these requirements, then that mining operation is illegal or unlawful. The Court emphasized that it is not possible for the Court to accept any other narrow interpretation.⁵⁴

The Court's emphasis on constitutional obligations, vital principles of natural justice, and the collective consideration of regulatory provisions, has also prompted the judiciary to direct some fundamental policy and administrative reforms. These include, direction on developing a new National Mineral Policy, improving accountability in awarding of mining leases, removing of loopholes to prevent mining irregularities (prompted the enactment of the MMDR Amendment Act 2015), considerations for macro level EIA to evaluate the cumulative impacts of mining projects, considerations of intergenerational equity for mineral resource extraction, revision of the EIA Notification to regulate the mining sector in a sustainable manner irrespective of the size of mine lease,⁵⁵ and paying utmost importance to community engagement and ensuring their rights for resource exploitation.

While the Court interventions have certainly led to some positive outcomes, from a governance perspective it also equally important to realize that Courts cannot be the only recourse to ensure regulatory compliance and proper implementation of regulatory provisions related to mining. Also, post-facto compensatory charges or a ban does not really off-set for the environmental and community distress, or loss to the state exchequer. At the same time, it also does not make economic sense to exploit regulatory loopholes as this only increases the chances of legal disputes and might lead to far-reaching outcomes which can be detrimental to the mining sector in economic terms.

The Court's deliberations make it clear that the intended purpose of these key judgements is to prompt deep-seated reforms. Therefore, the Court cases and the directions should constitute a basis for improving mining practices and regulatory compliance, strengthening of regulatory provisions, and the functioning of authorities.

⁵⁴ Common Cause judgement 2017

⁵⁵ This prompted the enactment of the Mines and Minerals (Development and Regulation) Amendment Act

QUALITY.

INDEPENDENCE.

IMPACT.

BROOKINGS INDIA