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MINING CASES IN INDIA, WITH A SPECIAL FOCUS ON VEDANTA

Prof. (Dr.) Armin Rosencranz and Manan Shishodia

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INTRODUCTION

The Supreme Court of India has been actively involved in the protection of the environment in the last decade, especially on issues pertaining to mining.[1] It seems valuable to study the litigation pertaining to mining as it is a chief revenue-generating activity that contributes substantially to the nation's economy.

In this article, we will analyze five landmark mining cases:

a) *Kudremukh Iron Ore Company Ltd. (KIOCL)* v. *Legal Action for Wildlife and Environment* (2002) referred to as the"Kudremukh Mining Case"; b) *Samaj Parivartana Samudaya & Ors.* v. *State of Karnataka & Ors.*(2011) referred to as the "Bellary Mining Case"; c) *Lafarge Umiam Mining Pvt. Ltd.* v. *Union of India (UOI) and Others (2011); d) Orissa Mining Corporation Ltd.* v. *Ministry of Environment and Forest and Ors.*(2013) referred to as the "Vedanta Cases"; and e) the POSCO case (2015).

Of all the five mining cases discussed below, the Vedanta case seems to have broken important new ground. The usual pattern is for the government, in league with the

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1 The mining activities in India are regulated and managed by the Central Pollution Control Board (mainly for air and water pollution), Ministry for Environment and Forests, State Mines and Geology Department and Indian Bureau of Mines. The mining companies are often found in non-compliance with the environmental regulations due to poor monitoring and rent-seeking activities by these bodies.

private sector, to use its power of eminent domain to take over tribal lands and make them available for developers – in this case the Vedanta/Sterlite aluminum company. Vedanta wanted to mine the bauxite-laden Niyamgiri Hills, whose lands are occupied by tribal people.

In this case, unexpectedly, the Supreme Court in 2013 turned down Vedanta on the basis of the Forest Rights Act, 2006, and that Act's provision for a referendum among project-affected-people to consent to any takeover of land occupied by them. Such a referendum was held in 2013 in 12 Gram Sabhas. All 12 unanimously rejected the Vedanta project. The Supreme Court obviously took this into account in its decision, and the MoEF supported this development.

While this change seems almost unprecedented, and may not indicate a conscious policy choice by the Supreme Court, it seems the most noteworthy development among all the mining cases discussed below.

KUDREMUKH

In the Kudremukh Case[2], it was stated that the Supreme Court of India brought down the mining operation that was causing havoc in the Western Ghats of Karnataka.

Kudremukh Iron Ore Company Limited ("KIOCL") had been carrying out mining operations for more than three decades on a 30-year lease granted by the Government of Karnataka in 1969.[3] When the KIOCL mining lease was first granted there were no legislations such as the Wildlife Protection Act, 1972, the Forest Conservation Act, 1980 and the Environmental Protection Act, 1986 in force to stop the mining operation.

By way of temporary extensions, the company continued its mining operations after the expiry of the lease. In 2002, the company wanted to exploit the adjoining mining area called Nellibeedu. This region fell under the jurisdiction of a national park[4] and became a contentious issue for the company. The people living in Tunga and Bhadra area[5] vehemently protested against the extension of mining activity. Protesters gathered

2 ILR 2005 Kar 4500.

3 VK Sridhar, Supreme Court: Mining, Forest Encroachments and Rehabilitation from Kudremukh National Park, Social Change and Development, Vol. XII No.1, 2015.

4 KN Murthy and DVR Seshadri, Kudremukh Iron Ore Company Limited (KIOCL): The Death Knell and Beyond, Vikalpa Vol. 36, No. 2 April - June 2011.

5 http://india.indymedia.org/en/2002/08/1972.shtml.

on river Bhadra which was polluted by the iron slurry and silt from Kudremukh's open casting mining. The river pollution was just one of the many adverse effects of the mining operations at Kudremukh.

On considering the geographical location of this mine, the following observations were made by the Court: a) Open Cast Mining is a highly destructive activity and Kudremukh is one of the worst places to have situated such an operation; b) the hill slopes are steep, and the region receives a mind boggling 6500 mm of rain a year.[6] It was declared that the mining activity had many long-term ecological impacts, including environmental degradation and a spoiled ecosystem for future generations.

BELLARY

In the Bellary Mines Case[7], the Supreme Court heard a Public Interest Litigation [PIL] filed by the Karnataka-based non-profit, Samaj Parivartana Samudaya, led by activist S.R.Hiremath. The NGO was assisted by the Central Empowered Committee (CEC).

Bellary is a poor district but endowed with a huge iron ore reserve. India changed its mining policy in 1993 which encouraged mining by private entities.[8] This shift in the policy led to a surge in demand for iron ores. In 2008 the demand was further increased for iron ore from China to prepare for its 2008 Olympic Games.[9]

The potential to make profits from this demand for iron ore may have induced people to indulge in illegal means as well. The mining activities blatantly violated various provisions of law, including the Environment Protection Act, 1986, Mines and Minerals Development and Regulation Act, 1957 and Forest Conservation Act 1980.[10] The Karnataka Minister of Tourism, Janardhan Reddy, served more than three years in prison for his illegal mining activities.[11]

6 The Kudremukh Saga—A Triumph for Conservation, http://www.conservationindia.org/case-studies/the-kudremukh-saga-a-triumph-for-conservation-2, last accessed 03-03-2016.

7 *Samaj Parivartana Samudaya & Ors.* v. *State of Karnataka & Ors.*, WRIT PETITION (CIVIL) NO. 562 OF 2009.

8 http://www.mines.nic.in/UserView?mid=1319.

9 Kumar Sambhav Shrivatsava, How Bellary was Laid Waste, Down to Earth, 31 August 2011.

10 *Id.*

11 See Rosencranz and James, "State Minister Jailed: Illegal Mining in Bellary," Env. Policy and Law, 45/1 (2015).

The Lokayukta prepared its report in 2008 to take immediate actions to stop the illegal mining. This report was completely ignored by the state government. Then in 2011, the second report of the Lokayukta was submitted which created an uproar and got the attention that was required from the state government.

The Supreme Court held, "the recommendations of the CEC contained in the Report dated 15.2.2013 for reopening of remaining Category "A" mines and Category "B" mines (63 in number) and sale of sub-grade iron ore subject to the conditions mentioned in the said report are approved."[12]

The Supreme Court of India seems to find it difficult to reach a consensus on issues of environmental law. This is due, in part, to the frequent change in the benches and rosters which make it difficult to have consistency in deciding the mining issues the country is grappling with.

LAFARGE

In the Lafarge Case[13], the Supreme Court dealt with the proposal of Lafarge Ltd. for setting up a limestone mine in the forests of Meghalaya. The Supreme Court, on the basis of the due diligence exercise undertaken by the MoEF in the matter of forest diversion, permitted the operation of the limestone mine.

It stated, "Limestone mining has been going on for centuries in the area: it is an activity which is intertwined with the culture and the unique land holding and tenure system of the Nongtrai Village."[14]

In the preliminary submissions, Lafarge had pleaded that the project was a cross-border project and that it had put in ten years of efforts for obtaining approvals. The CEC report stated that the total clearing includes felling of 9345 trees out of which 1200 trees have already been felled. CEC said the tree-felling impact can be minimized if the Bio-Diversity Management Plan as well as the Catchment Area Treatment Plan is prepared and executed in a time bound manner. Presumably this involves extensive planting of trees.

12 SC eases mining ban, big relief for Bellary steel maker, http://www.businesstoday.in/current/policy/supreme-court-karnataka-mining-bellary-steel-makers/story/194222.html, last accessed on 03-03-2016.

13 *Lafarge Umiam Mining Pvt. Ltd.* v. *Union of India (UOI) and Others*, 2011 (7) SCC 338.

14 Supreme Court allows mining by Lafarge, http://www.thehindu.com/news/national/other-states/supreme-court-allows-mining-by-lafarge/article2164106.ece, last accessed 02-03-2016.

The Court declared that the MoEF, EIA and Stage-I forest clearances must be granted. For the future generations, it was held."Thus, we are of the view that under Section 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and imposing penalties on polluters." The executive has thus far refused to appoint a National Regulator.

In Lafarge, the Supreme Court seemed to rely heavily on the submissions of the MoEF. The project had not been granted MoEF clearance initially, but in the second due–diligence adopted by the Ministry, the project received its green signal.

Apropos the judgment, MoEF recently further streamlined environmental clearance norms for projects requiring forest land. By an order dated September 9, 2011, projects will now be eligible to be considered for site clearance even as their application for forest diversion is under consideration.

In order to safeguard against misuse, the order requires the project developer to submit certain supporting documents from the forest authorities at the state or central level stating that an application for forest clearance is in place. Once the environmental appraisal committee makes a recommendation and the ministry takes a final decision on the environmental clearance for the project, the project developers would be informed of the decision. This reverses the earlier decision of MoEF to tighten guidelines in an effort to reduce the diversion of forests by making it a last resort option.

VEDANTA

In the Vedanta Case[15], Vedanta Resources Plc, a UK mining company, proposed in 2005 to develop a bauxite mine in the Niyamgiri hills in Odisha that is sacred to many scheduled tribes.

The case was filed initially in 2004 and the CEC on 21st September 2005 filed its report to the Supreme Court. It specifically recommended for the revocation of the Environmental clearance to the Refinery. The CEC made strong observation on the functioning of the State and pointed to the casual, lackadaisical approach and the haste of the MoEF.[16]

15 *Orissa Mining Corporation Ltd.* v. *Ministry of Environment and Forest and Ors,* 2013 (6) SCC 476.
16 Rajshree Chandra: "Understanding change with (in) law: The Niyamgiri case", Contributions to Indian Sociology 50, (2), pp. 1–26. 2016 SAGE Publications.

The MoEF accepted the fact that the studies were not complete and informed the court that the Wildlife Institute of India and CMPDI will be entrusted with the task of ascertaining the impact due to the proposed mining.[17]

The Central Empowered Committee [CEC] set up by the directions of the Supreme Court concluded in 2005 that mining in the Niyamgiri Hills would cause immense harm to the biodiversity of the area and the lives of the Dongria Kondh tribal whose lives, culture and very existence are deeply linked with the Niyamgiri Hills.[18] Furthermore, the CEC highlighted that the area targeted by the company forms part of "Schedule V" area as specified by the Constitution. Schedule V provides protection to the adivasi people living in these areas.[19]

On 23 November 2007, the Supreme Court barred Vedanta and its subsidiary Sterlite from undertaking the project. However, the court invited Vedanta to resubmit its proposal in line with certain safeguards.[20]

The safeguards included: a special purpose company with the state of Orissa and Vedanta as shareholders owning the project, Vedanta setting aside 5% of its profits before tax for reinvestment into the local community; and the submission of a report on the effects of the project and particularly the number of people likely to be employed by the project.[21] The Supreme Court gave the green signal to the project on 8 August 2008.[22]

When it reconsidered the case in 2013, the Apex Court left to the Gram Sabhas the power to veto the project. The Vedanta proposal was unanimously rejected by 12 village Gram Sabhas in the Niyamgiri hills in August 2013. On January 2014, the MOEF decided not to allow the continuation of the mining project.

17 Open Letter to the Chief Justice of India by Dr. Flavio Valente, Secretary General FIAN International, Link: http://www.fian.org/library/publication/india_orissa_indigenous_people_appeal_for_justice/, last accessed 09-06-2016.

18 Sahu, Geetanjoy, 'Mining in the Niyamgiri Hills and Tribal Rights', Economic and Political Weekly, Vol. 43 (15), 12 April 2008.

19 Central Empowered Committee Report in IA NO. 1324 Regarding the Alumina Refinery Plant being set up by M/s Vedanta Alumina Limited at Lanjigarh in Kalahandi District, Orissa (2005).

20 Vedanta Resources lawsuit (Re: DongriaKondh in Orissa), http://business-humanrights.org/en/vedanta-resources-lawsuit-re-dongria-kondh-in-orissa, last accessed 13-05-2016.

21 *Id.*

22 *Id.*

The Supreme Court acknowledged that many of the Scheduled Tribes [STs] are unaware of their rights. In addition, they experience difficulties in obtaining effective access to justice because of their distinct culture and limited contact with mainstream society.

The apex court stated, "[Gram]Sabha functioning under the Forest Rights Act read with Section 4(d) of Panchayats (Extension of Scheduled Areas Act) have an obligation to safeguard and preserve the traditions and customs of the STs which they have to discharge following the guidelines issued by the Ministry of Tribal Affairs in its letter dated 12.7.2012."[23]

The Court recognized that the Forest Rights Act (2006) gave Gram Sabhas the authority to decide whether a proposal for mining in their territory should be granted. The Gram Sabha heard all the individuals as well as cultural and religious claims before making such a decision.

The right which gave legitimacy to such claim is under Article 244(1), Article 243-B, Article 25 and Article 26 of the Constitution of India.[24]

The company (Vedanta Resources Plc.) strategically delinked the refinery from the mining process to try to convince the Court that the bauxite was not being extracted from the Niyamgiri Hills.[25]

The Vedanta case is an interesting case as it gave rise to the first "environmental referendum"[26] in India through the active participation of the local tribes. It contrasts the usual disregard for the interests of tribals with the focus on the rights of indigenous people under the Forest Rights Act, 2006.

However, the Ministry of Environment and Forests ["MoEF"] issued an executive memorandum on 30th May 2014[27] which stated, "No public consultation would

23 Ministry of Tribal Affairs, http://tribal.nic.in/Contents.aspx?mo=7&li=27, last accessed 14-04-2016.

24 Article 244: Administration of Scheduled Areas and Tribal Areas.
Article 243B: Constitution of Panchayats.
Article 25: Freedom of conscience and free profession, practice and propagation of religion.
Article 26: Freedom to manage religious affairs.

25 Kanchi Kohli: "Return to the Niyamgiri", Civil Society (April 2016).

26 Jo Woodman, "India's rejection of Vedanta's bauxite mine is a victory for tribal rights", available at:http://www.theguardian.com/global-development/poverty-matters/2014/jan/14/india-rejection-vedanta-mine-victory-tribal-rights(last accessed on 31.03.2016).

27 "Guidelines for granting Environment Clearance for extension of Coal Mining Projects involving one time Production Capacity Expansion in the existing operation", available at: http://www.moef.nic.in/circulars, Circular No 17.

be required for coal mining projects with a production capacity of upto 16 million tonnes per annum ("mtpa")."[28] Subsequent to this, the exemption extended for the production of an additional capacity by up to 5 mtpa, i.e., a total of 21 mtps.

These actions of the government imply that the right to public consultation is considered a road block, which is why the MOEF has taken steps to undermine the process of environmental impact appraisal. This has two main problems: a) it does not wholly consider the environmental impact of the project; and b) the rights of indigenous people are suppressed and ignored.

The massive reverse in the decision of the Supreme Court must be noted. The Vedanta case is an example of the variability in judgement arising from the same institutional establishment. In the course of two decisions, the composition of the two benches of the Supreme Court had completely changed, and the more recent Court had no regard for the Court's own earlier precedent.

As the average tenure of Supreme Court judges is four years, such a massive shift in decision making is not unexpected. The Supreme Court themselves acknowledged this by saying, "Our interim orders in favour of big corporate groups such as Adani, Essar and Vedanta may have blocked thousands of crores that could have been used by governments for public welfare."[29]

The Vedanta case illustrates the Supreme Court's undue reliance on both CEC and MoEF, rather than relying on its own application of mind and an effort to achieve consistency among its judgments. Most recently, the Supreme Court dismissed a petition by state government-owned Odisha Mining Corporation (OMC) that challenged the decision of 12 Gram Sabhas to refuse permission to mine bauxite in the Niyamgiri hills. The bench told OMC to approach appropriate forums against the decision of the Gram Sabhas.[30] Since the 12 gram Sabhas were unanimous in

28 Changes to environment, land acquisition laws jeopardize human rights https://www.amnesty.org.in/show/news/changes-to-environment-land-acquisition-laws-jeopardize-human-rights (last accessed on 2nd March 2016).

29 Utkarsh Anand: "Our stays deprive Govt. of dues, help Adani, Essar and Vedanta: Supreme Court" – Available at: http://indianexpress.com/article/india/india-news-india/our-stays-deprive-govt-of-dues-help-adani-essar-and-vedanta-supreme-court/#sthash.yWCOC0Zo.dpuf, last accessed 14-05-2016.

30 Priyanka Mitall, Supreme Court refuses to hear fresh plea on Niyamgiri mining: http://www.livemint.com/Politics/j6VbxqCtcUl69WRHvKIZ4M/SC-dismisses-petition-against-local-mining-refusal-consensus.html, last accessed 16-05-2016.

their 2013 rejection of the project, it seems highly unlikely that they would now change their minds.

POSCO

Lastly, in the POSCO case, the Supreme Court intervened in the question pertaining to large land and port facilities to the giant South Korean steel maker POSCO in Khandadhar hills in Sundergarh district for its proposed Rs 51,000 crore steel plant[31] and collateral mining operations.

On June 22, 2005, POSCO had signed a Memorandum of Understanding (MoU) with the Odisha government to set up a 12 million tonne Greenfield steel plant near Para dip at a cost of $12 billion. This was soon opposed by POSCO Pratirodh Sangram Samiti (PPSS), formed to resist the project. On December 29, 2009, MoEF had granted final clearance for diversion of forest land for POSCO.

The Odisha High Court cancelled the grant of a Prospecting License (PL) to POSCO for Khandadhar iron ore mines. Subsequently, MoEF lifted the stop work order on POSCO, but soon afterward the National Green Tribunal suspended the environment clearance granted to POSCO. The POSCO project seems now to have been abandoned.

CONCLUSION

Extraction of any resource at the stake of indigenous peoples' rights is a problematic situation. The unity and conviction with which small communities have protested against big companies and the state seems admirable.

The victory against Vedanta by the Dongria Kondh tribe reflects several struggles that the tribe had to go through. For many, the tribe may just appear as a group of people who are vulnerable and not well aware of their fundamental rights. Such victories of tribes should compel big companies and industrialists to take a cautious approach towards their expansion plans.

In most of these cases, the Supreme Court seems to have routinely acceded to the recommendations made by independent bodies such as the Saxena Committee and the CEC. The Court seems unable to firmly decide on the prospective harm that can

31 *Id.*

be done by mining activities, as clearances are likely to be obtained through MOEF, which eventually and almost invariably clears the project.

In Vedanta, the Forest Rights Act, 2006 and the Gram Sabha referendum clearly weighed in the resulting decision. The Court members may not be aware that they departed from their usual practice of enabling the government's use of eminent domain to convert local and tribal lands to benefit corporations like Vedanta. It will take one or more additional cases where local/tribal interests oppose corporate interests to demonstrate whether Vedanta is sui generis or the beginning of a new trend in Supreme Court decisions.

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