

Supreme Court Judgment on Vedanta Case

Court's Construction of the Forest Rights Act

The Supreme Court's judgment on the Vedanta mining project in Orissa was delivered on April 18th, 2013, in the case *Orissa Mining Corporation vs. Union of India and Ors.* In this case the Court has made a number of key observations about forest dwellers and the Forest Rights Act.

- The Court has linked indigenous rights, the constitutional provisions for protection of STs (Article 244) and religious rights (Articles 25 and 26), and the FRA. It reads them as all part of one set of protections, which are intended to protect STs and other forest dwellers. (see e.g. para 38)
- On the FRA's purpose: "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." (para 42)
- The FRA is not only about property: "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." (para 43)
- The gram sabha has both a duty and a power over forest management: (it has a duty which it is "empowered to carry out") under section 5 of the Act, which includes "the preservation of habitat from any form of destructive practices affecting their cultural and natural heritage." (para 46)
- The "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" - and not only individual rights or land ownership (Para 47 and preceding ones)
- The central role of the gram sabha is reinforced by PESA: "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... " (para 56) followed by "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." (Para 58)
 - Notably, the said 12.7.2012 guidelines refer to the 2009 MoEF order that requires consent of the gram sabha prior to diversion of forest land.

These points (along with the general discussion on indigenous rights) constitute the Court's "construction" of the FRA. This construction is now binding on every High Court and every Supreme Court bench of less than three judges, as well as on the government. It is also notable that there is not a single word in these paragraphs, or indeed anywhere in the judgment, about

"the national interest in mining", "development projects" or the "need" to mine. Thus these rights and powers are asserted without any caveats.

Operational Part of the Judgment

Having said this, the Court comes to the operational part:

- In the case of Vedanta, the gram sabha has reached a "decision" (it is notable that the word "decision" is used) about certain claims **but the religious aspect has not been "placed before the Gram Sabha for their active consideration."**
- Notably, if the gram sabha decides that there are religious rights in the area, **"Needless to say, if the BMP [Bauxite Mining Project], 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."** (para 58)
- Hence the gram sabha should consider all additional claims - for anything, not just religious rights - that are filed in the next six weeks. After this it is to reach a "decision" within three months.
- This decision is to be communicated to MoEF, which will take a final decision on the stage II clearance within three months "in light of the decisions of the gram sabha" (para 60).

Note once again that if the gram sabha decides there is a religious right, there can be no mining. In the case of other rights the judgment does not say anything but it would be transparently illegal for MoEF to simply clear the mine in that case, as those are legal rights which cannot be overruled without due process of law.

The Court finally directs that MoEF can also take into account other illegalities in the environmental clearance, and the gram sabha proceedings should be verified by a district judge to ensure there is no interference by the government or by the company.

What Does This Mean?

For the FRA

The Court's construction of the FRA says that the gram sabha can decide on rights, that decision is final, and the gram sabha has the power to decide on protecting forests and natural heritage. In particular, by sending the matter back to the gram sabha because a key matter has "not been placed before it for its active consideration" the court is treating the gram sabha as a statutory, legal authority at the same rank as, say, the FAC or MoEF. In that sense the court has gone well beyond the question of "consent" as such and instead treated the gram sabha as a regulatory authority. Notably the court says nothing about anyone having the power to overrule the gram sabha.

What does this mean?

- The PMO committee position - that gram sabha input is only required because forest dwellers should be treated "humanely" and to ensure public "consultation" - is wrong.
- The 2009 MoEF order only represents a bare minimum to ensure compliance with the way the court has read the FRA; in fact it is not enough, since it only refers to consent in all cases, and does not take into account the fact that some rights cannot be violated even with consent.
- In the case of religious rights in particular, as per this judgment, no clearance can be given for a project that violates them - whether or not the gram sabha consents to the project. For other rights, no explicit ruling is given, so it is open to the government and the gram sabha to

negotiate.

[Some might say that the court does not refer to the 2009 order; but that is because that issue was not before it. No one has directly challenged the 2009 order in this or any other case and hence there was no reason for the court to refer to it.]

For the Vedanta Project

- There will, naturally, now be intense efforts to threaten or coerce the gram sabhas to not recognise religious rights in the area.
- There will probably therefore be conflict on the ground, perhaps including bloodshed.
- This is likely to lead to more court battles as well as each side will go to court accusing the other of violating the terms of the judgment.