

PETITION ON ILLEGAL MINING IN ODISHA: Overview and Implications

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In the context of a public outcry over massive mining scandals in various parts of the country, the Government of India in November 2010 set up the Justice MB Shah Commission of Inquiry for illegal mining of iron ore and manganese. It was asked to inquire into illegal mining, trade and transportation of iron and manganese ores and identify the deficiencies in the systems of management and regulation. The commission was also to assess the overall impact in terms of environmental damage, prejudice to livelihoods, rights of the local populations and the financial losses caused to the central and state governments.

Massive Illegalities Exposed

The commission's reports on mining in Goa, which were submitted during March-April 2012, brought to light massive illegalities in the extraction of iron and manganese ores. The revelations had a huge impact and led to a ban on mining in the state and a slew of other punitive measures. A five-volume report on the mining sector in Odisha submitted by the commission in July 2013, sought a further extension of one-year to complete its inquiry in other major mining areas. The government, however, refused to extend its term beyond October 2013.

Before it was wound up, the commission submitted its mining reports on Jharkhand, Odisha (3 volumes) and Goa. For want of time, it could not investigate the illegalities in other important mining areas, such as Chhattisgarh, Andhra Pradesh and Karnataka.

The commission's first report on Odisha, two volumes of which was accessed by the media, documents the reckless plunder of the nation's mineral wealth, flagrant violation of the laws relating to mining and environment protection besides the fundamental rights of the local populations.

The government had resisted the demands for placing the Odisha report in the public domain. It also failed to take any action on the findings of the report, or to lay it in Parliament along with an Action Taken Report (ATR) within six-months of its submission as per the prescribed procedure. On an application moved by Prashant Bhushan on behalf of Goa Foundation and Others, the Green Bench of the Supreme Court issued directions to the Union of India (UoI) on January 13, 2014 to submit the Shah Commission's reports on Odisha and Jharkhand in the court. The UoI contested the order on the ground that under the constitutional scheme, the reports have to be laid in the Parliament along with the Action Taken Report.

Common Cause Petition

In order to force the hands of the UoI, Common Cause filed a public interest petition before the Supreme Court, seeking a detailed enquiry into illegal mining in Odisha and termination of the leases of the mining companies involved in the scam. The petition also stressed the need for a macro-environmental impact assessment. The Ministry of Mines finally tabled the interim reports in the Parliament on February 10, 2014.

Our petition was taken up by the SC on April 21, 2014. The court issued notice to the UoI, the state of Odisha and others, and directed the Central Empowered Committee (CEC) to submit a report in the matter and identify the mines engaged in illegal mining. After considering the report submitted by the CEC and hearing the interested parties, the court issued a significant interim order on May 16, 2014. It held that the 26 mines which had applied for renewal of the second or subsequent leases and had been operating without the

express approval of the state government shall cease their operations forthwith. The court also directed the state government to dispose of the pending renewal applications within six months, giving priority to applications for renewal of mining leases for captive consumption.

Landmark Odisha Judgment

The Supreme Court gave its judgment on August 2, 2017. The important features of the judgment are discussed below:

Illegal Mining

Refusing to accept the narrow interpretation of “illegal mining” given by the counsels for the mining companies, the court said “Illegal mining takes within its fold excess extraction of a mineral over the permissible limit even within the mining lease area which is held under lawful authority, if that excess extraction is contrary to the mining scheme, the mining plan, the mining lease or a statutory requirement”. Reinforcing the Environment Impact Assessment (EIA) notifications of 1994 and 2006, which provide for mandatory environmental clearance (EC) in case of expansion in mining activities and cases where the mining leased area is five hectares or more, respectively, the court said “The concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including EIA 1994 and EIA 2006. We make it clear that an EC will come into force not earlier than the date of its grant.”

Amount of Compensation

The court specified that mining companies and leaseholders having engaged in illegal mining will have to pay compensation equivalent to 100 per cent value of illegally extracted minerals. Though the Union of India (UoI) in its affidavit had stated that illegal miners should pay 100 per cent compensation, the Attorney General had submitted that the recommendation of the CEC to recover only 30 per cent of the value of the illegally mined ore should be accepted. The court declined this and said “In our opinion, there can be no compromise on the quantum of compensation that should be recovered from any defaulting lessee – it should be 100 per cent. If there has been illegal mining, the defaulting lessee must bear the consequences of the illegality and not be benefited by pocketing 70 per cent of the illegally mined ore. It simply does not stand to reason why the state should be compelled to forego what is its due from the exploitation of a natural resource and on the contrary be a party in filling the coffers of defaulting lessees in an ill gotten manner”.

CBI Probe

Although the MB Shah Commission had strongly favoured a CBI probe, the court was not inclined to pass any direction on this, as it deemed fit to first ensure that illegal mining operations were not repeated in any other part of the country. The court said that “This can be achieved through the identification of lapses and finding solutions to the problems that are faced. Undoubtedly, there have been very serious lapses that have enabled large scale mining activities to be carried out without forest clearance or environment clearance and eventually the persons responsible for this will need to be booked but as mentioned above, the violation of the laws and policy need to be prevented in other parts of the country. The rule of law needs to be established.”

Apex Committee Under a Retired Supreme Court Judge

The apex court was of the view that an expert committee should be set up under the guidance of a retired judge of the SC to identify the lapses that had occurred over the years enabling rampant illegal mining in Odisha and also for recommending measures to prevent this from happening again.

New National Mineral Policy

Common Cause counsel Prashant Bhushan impressed upon the court, the need to put a limit on the extent of mining in Odisha in the light of intergenerational equity. Mr. Bhushan explained the principles of 'conservation of options', 'conservation of quality' and 'conservation of access' as the three principles that form the basis of intergenerational equity.

Agreeing that there was considerable substance in the submission of our counsel, the court refrained from laying down limits on the extent of mining activities to be permitted by the state of Odisha or by the UoI. However, emphasising that this aspect needed serious consideration by the policy and decision makers in our country, the court directed the UoI to announce a fresh and more effective, meaningful and implementable policy within the next few months and in any event before December 31, 2017. The court said "At present, keeping in mind the indiscriminate mining operations in Odisha, it does appear that there is no effective check on mining operations nor is there any effective mining policy. The National Mineral Policy, 2008 (effective from March 2008) 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. We are of the opinion that the National Mineral Policy, 2008 is almost a decade old and a variety of changes have taken place since then, including (unfortunately) the advent of rapacious mining in several parts of the country. Therefore, it is high time that the Union of India revisits the National Mineral Policy, 2008... We are constrained to pass this direction in view of the facts disclosed in these petitions and in judgments delivered by this court with regard to mining in Goa and Karnataka."

Special Purpose Vehicle for Tribal Welfare

In its order of 2014, the court had directed the CEC for setting up a Special Purpose Vehicle (SPV) for tribal welfare and area development works. The SPV was to undertake specific tribal welfare and area development works including works/projects related to livelihood intervention, health, water supply and sanitation, education, special programmes for development of women and children through identified agencies/government departments.

The scheme had since been implemented, but the court had no further information regarding its implementation. During the course of hearing, some of the mining lease holders had deposited huge sums of money to be utilised by the SPV. The court also expected that as a result of the final judgment large amounts would again be made available to the state of Odisha. Directing that all such amounts should also be kept with the SPV, the court said, "To ensure that the amounts are utilised for the benefit of tribals in the affected districts and for area development works, we would like the Chief Secretary of Odisha to file an affidavit stating the work done as well as providing the audited accounts of the receipt and expenditure of the SPV from its inception."

Conclusion

Though the deadline set by the apex court for all the above steps is the end of this year, it seems rather improbable for such quick fix to happen in such a short time. However, the court's role in trying to awaken the government machinery from its deep slumber may yield some positive response. Had the systems in place been attentive, this plunder would not have taken place in the first instance. We the citizens, also have a big role to play in the scheme of things. If all of us are vigilant and take active interest on the follow up of the measures suggested by the court, it may eventually be a success.

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