

Has government weakened its case against Vedanta?

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Stand taken by environment ministry in Supreme Court affidavit gives opponents chance to press for mining in Niyamgiri hills

Last week the Union Ministry of Environment and Forests (MoEF) filed an affidavit in the Supreme Court in the ongoing Vedanta case, saying the government and not the tribals and forest dwellers will have the final say in diversion of forestland for mining projects. Though the affidavit reiterated that Vedanta would not be allowed to undertake bauxite mining in Niyamgiri hills in Odisha's Kalahandi district, it may have weakened the government's case against global mining and metals giant Vedanta.

When the case was taken up for hearing by the apex court on February 19, counsels of the Orissa Mining Corporation (OMCL) and Sterlite Industries, the Indian arm of Vedanta, used the stand taken by the ministry to press for mining in the hills. They strongly countered MoEF's stance in the affidavit that the mining project cannot be allowed because it will violate the fundamental rights of the Dongria Kondhs, a particularly vulnerable tribe that protects and worships the Niyamgiri hills and its forests. The counsels said that the right to worship does not provide rights over the place of worship and that the state can acquire it in public interest.

The state-run OMCL and Sterlite Industries had proposed to mine bauxite from the Niyamgiri hills for Vedanta's alumina refinery in nearby Lanjigarh. The forest clearance for the project was, however, rejected by the then environment minister Jairam Ramesh more than two years ago, saying it violated provisions of the Forest Conservation Act (FCA), Environment Protection Act (EPA) and the Forest Rights Act.

Vedanta challenged the government's decision in 2011 in Supreme Court, claiming the apex court had already cleared the project in two consecutive judgements in November, 2007 and August, 2008 and had considered all the alleged violations under the EPA and FCA. Since, the implementation of FRA started after the 2008 judgement, OMCL and Sterlite Industries insisted their case be heard with respect to the alleged violations of FRA. The court had then asked the Central government to take a clear stand on what implications will the rights of the forest dwellers under the FRA will have on the projects on forestland.

FRA states that forest dwellers cannot be resettled from forestland unless their traditional rights over such land are recognised, and a 2009 order of MoEF had made it mandatory for all the projects which require forestland diversion to obtain consent of the affected gram sabhas (village

councils). In December last year, the ministry stated in the court that the forest dwellers protected by FRA cannot be displaced except for making forest areas inviolate for wildlife. However, in a change of stance on February 15, the ministry said in the court that consent of the people will be required only in cases where [“displacement of large number of people” is involved and which “affect the quality of life of the people”](#).

While the ministry did not even mention its 2009 order in the affidavit, it said the mining proposal should not be allowed because Dongria Kondh tribals have been protecting and worshipping Niyamgiri hills for centuries as their sacred deity. Mining on that land will undermine the customary rights of Dongria Kondhs to manage their own affairs in the matter of religion and fundamental right to conserve their culture. Counsel of OMCL countered this by saying that right to worship does not necessarily arise from FRA and is a fundamental right provided to every citizen under the constitution. He argued that such rights do not provide right to property over the place of worship for the citizen and the state can acquire such places using its eminent domain.

“FRA mandates that forest dwellers cannot be evicted from the land under their occupation till the recognition and vesting of rights under the Act is complete. This applies to the land under occupation only and not to the undefined territories used by the communities. Recognition of community rights can be a continuous process. Besides, the project is not evicting the tribals from the land under their occupation; the vesting of individual rights is already complete,” claimed the counsel of OMCL. The company thus argued FRA cannot be a ground to reject the project.

“The ministry has reduced the whole issue of compliance with FRA to the violation of sacred rights of PTGs in this case. For now, that is the only thing the company has to counter. The ministry cannot make a strong case by saying FRA cannot be violated here but everywhere else the projects can have a way out,” said environment lawyer Ritwick Dutta. “It seems the ministry went on the back-foot the moment court asked them to take a clear stand on FRA, saying the law will have great impact in future on various projects across the country,” added R Sreedhar of non-profit Mines Minerals and People.

Sanjay Upadhyay, a Supreme Court lawyer and a legal consultant to the ministry of tribal affairs on FRA, however, says the issue of habitat rights of PTGs has still not been considered in the case properly. “The OMCL counsel tried to mix the habitat right with right to habitation. Both are completely different things. A habitat can be much more vast than the habitations of the tribals. I am told at least three community claims in the mining affected region are pending. Let the gram sabha decide how much area is under their habitat right. This should not be ignored,” he added. The MoEF counsel will present his arguments on February 20.