

## **THE FIFTH SCHEDULE OF THE CONSTITUTION AND THE SAMATHA JUDGEMENT**

The Fifth Schedule of the Indian Constitution provides protection to the adivasi (tribal) people living in the Scheduled Areas of nine states in the country from alienation of their lands and natural resources to non tribals. This constitutional safeguard is now under imminent threat of being amended to effect transfer of tribal lands to non-tribals and to corporates. This move has serious implications to the *eighty million* tribal population of the country, their very survival and culture.

Samata, an advocacy and social action group working in the southern state of Andhra Pradesh, has been fighting for the rights of tribal communities and for the protection of the environment in the Eastern Ghats region.

In 1992, Samata was involved in an apparently local dispute over tribal lands being leased out to private mining industries while the government denied the people grant of title deeds. Little did we understand at that point of time that the issue had global implications and was a direct impact of the liberalization process under the new economic policy. The people were forced to work as wage labourers in their own lands where small private companies were extracting minerals like mica and limestone. The tribal community approached Samata for regaining control over their lands. The state of A.P has well laid out laws under the Fifth Schedule where there are clear directions that no tribal land can be transferred to non tribals. Samata, while mobilizing a people's movement locally, took up a legal battle questioning the legality of the leases as per the land transfer regulations.

### **The Supreme Court Judgement of 1997 and its aftermath:**

Samata first filed a case in the local courts and later in the High Court in 1993 against the Government of A.P for leasing tribal lands to private mining companies in the scheduled areas. The High Court dismissed the case after which Samata filed a Special Leave Petition in the Supreme Court of India. A four- year battle led to a historic judgement<sup>1</sup> in July 1997 by a three judge-bench. The Court in its final verdict, declared that 'person' would include both natural persons as well as juristic person and constitutional government and that all lands leased by the government or its agencies to private mining companies apart from its instrumentalities in the scheduled areas are null and void. In addition it also held that transfer of land to the government or its instrumentalities is entrustment of public property as the aim of public corporations is in public interest and hence such transfers stand upheld.

*The salient features of this judgement are:*

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<sup>1</sup> Samatha v.State of Andhra Pradesh, 1997 8 SCC 191

1. As per the 73rd Amendment Act, 1992, ...."every Gram Sabha shall be competent to safeguard.....Under clause (m) (ii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawful alienation of land of a scheduled tribe".

2. Minerals to be exploited by tribals themselves either individually or through cooperative societies with financial assistance of the State

3. In the absence of total prohibition, the court laid down certain duties and obligations to the lessee, as part of the project expenditure

4. At least 20% of net profits as permanent fund for development needs apart from reforestation and maintenance of ecology.

5. Transfer of land in Scheduled Area by way of lease to non tribals, corporation aggregate, etc stands prohibited to prevent their exploitation in any form.

6. Transfer of mining lease to non tribals, company, corporation aggregate or partnership firm, etc is unconstitutional, void and inoperative. State instrumentalities like APMDC stand excluded from prohibition.

7. Renewal of lease is fresh grant of lease and therefore, any such renewal stands prohibited.

8. In States where there are no acts which provide for total prohibition of mining leases of land in Scheduled Areas, Committee of Secretaries and State Cabinet Sub Committees should be constituted and decision taken thereafter.

9. Conference of all Chief Ministers, Ministers holding the Ministry concerned and Prime Minister, and Central Ministers concerned should take a policy decision for a consistent scheme throughout the country in respect of tribal lands.

#### **Events after the Judgement:**

#### **Moves of the State Government of A.P and the Central Government:**

March 6th 2000                      The Supreme Court dismissed the petitions of State & Central governments for modification of the Samata order.

May 2000                              The Govt of A.P moved the Tribes Advisory Council for amendment to the Andhra Pradesh Land Transfer Regulation Act of 1959

July 10th 2000                      The Ministry of Mines drafts & circulates a Secret note

	(Ref: 16/48/97-MVI) To the committee of Secretaries proposing an amendment of the V Schedule to overcome the Samata judgement to facilitate the leasing of land in tribal areas
August 2000	On popular protest and opposition the Chief Minister of AP issued a statement indicating withdrawal of the proposed amendment
September 21st 2000	Indian Express carried an article in the edit page exposing secret note of Ministry of Mines titled “ displacement not an issue” by <i>Manoj Mitta (the journalist who wrote )</i>
September 24th 2000	Again widespread protests against the proposed Bauxite mine in Tribal Areas of Visakhapatnam district forced the CM to come out with a statement differing the project which would come up in Scheduled area
September 30th 2000	An Action Alert was put out for starting a campaign to Protect the rights of tribal people under the banner of CPCNR (Campaign for peoples control over natural resources) and the secret note was widely circulated.
December 2000	A national consultation was called for at ISI Delhi on Land Acquisition Act, V Schedule and R &R Policy, in which many Political parties also sent their representatives.
January 26th 2001	The president in his Republic Day speech issued a veiled Warning against plotting to amend the V schedule of the constitution (TOI, Feb 24th 2001)
February 2001	The BALCO divestment process was in progress and Raised a controversy on the V schedule & Samata judgement. <i>The Chattisgarh Government issued notices to Sterlite industries &amp; the Central Government as it was in a hurry to settle the BALCO divestment process.</i>
March 15th 2001	The controversy on the tribal land being leased to private company dogged the Central Govt and finally on March 15th the PM to a question by Arjun Singh replied in the Rajya Sabha that the Govt had no intentions of amending The V schedule to overcome the Samata judgement.
May 11th 2001	Mr. Arun Shouire minister for disinvestment issues a statement that they want to review the Samata judgement.

(Hindu Businessline May 11th 2001 New Delhi bureau)

The government, instead of implementing the orders of the Supreme Court which gives strength and clarity to the Fifth Schedule, has been undemocratic and unconstitutional in trying to not only ignore the directions, but also in its continued efforts to reverse the judgement.

In view of future mining activities, the Supreme Court had given certain clear directions on the course of action that could be taken by the government. It directed that the Prime Minister should convene a conference of all Chief Ministers and other concerned Central Ministers, to take a policy decision so as to bring about a suitable enactment in the light of the guidelines, so that a consistent scheme throughout the country is emerged.

However, if the Constitution is amended for the sake of mining today, there will be many sectors which would justify acquisition of tribal lands for other 'development' objectives. This would only lead to tribals being completely destroyed and dislocated. The government has not taken any of these serious issues into consideration when it started its sale of the first public sector mining company in the scheduled area.

The opinion of the government is again blatant in its recommendations through the Attorney General Shri. Soli Sorabjee who had, ironically, appeared on behalf of the tribals in the Samatha Case. He clearly stated to the Ministry of Mines in the above mentioned Secret Document that

“ the Fifth Schedule to the Constitution of India can be amended to counter the adverse effect of the Samatha judgement”.

The Supreme Court can reconsider its previous judgement (Samatha case) if another pending case on a similar issue is brought before it. (In this situation, the Balco case which is pending for hearing at the Supreme Court, is being used by the government to amend the Fifth Schedule)

“The other course open to parliament is to effect necessary amendments so as to overcome the said Supreme Court Judgement by removing the legal basis of the said Judgement. Such a course of action is legally permissible.

The paranoia of the government in reacting to the judgement is uncalled for, as the Supreme Court has not imposed a blanket ban on mining activity in the scheduled areas. It permitted the mining activity to go on if mining is to be taken up by the government, or instrumentality of state or a cooperative society of the tribals. The instrumentality of the state has been defined by the Court as organizations which are completely owned by the government or where the government or its agencies are the majority shareholders.

The underlying theme of the judgement and the concern of the groups like ours fighting on behalf of the environment and the tribals, is the concept of sustainable development and precautionary principle, well accepted by the Supreme Court of India. When the activity is controlled, regulated, supervised by the local tribal community or instruments of the state (assuming the social welfare mandate of the state), there is less chance of environmental degradation and social destruction. Only when these two are balanced together will the judgement be operational in its philosophy.

The multinational industrial lobbies are invading countries like India as stringent environment standards in their own countries are preventing acquisition of lands and plunder of natural resources with wanton abandon as they would desire. The judgement comes as a serious hindrance to industries as these whose motive is private profit and not majority public benefit. It is these powerful lobbies who will continue to pressurize nation states like ours to shrink the social responsibilities of governments and pander to commercial interests.

With India's economic policies leaning more and more towards market forces and liberalization ideologies, the rights of people over their resources, livelihoods and democratic ways of life will continue to stand threatened. Like one tribal elder from Nimmalpadu, the village which fought the Indian giant Birlas, stated, "companies are like monkeys and will keep attacking our lands again and again and it is a lifelong battle to protect our lands and our crops".

And thus, the people's struggle goes on.....

Samata,  
Hyderabad  
15.11.01