Important judgments on Scheduled Areas: brief summaries

Samatha vs. State of Andhra Pradesh, Supreme Court (1997)
Union of India v. Rakesh Kumar, Supreme Court (2010)
Nandini Sundar v. State of Chhattisgarh, Supreme Court (2011)
Orissa Mineral Corporation Limited v. MoEF, Supreme Court (2013)
Action Research in Community Health & Development (ARCH) v. State of Gujarat, Gujarat High Court (2013)
Paryavaran Sangharsh Samiti, Lippa vs. Union of India, NGT (**2013)**
Divya Pharmacy v. Union of India and ors, Nainital HC (2018)

Samatha vs. State of Andhra Pradesh, AIR 1997 SC 3297

The issue before the Supreme Court was the validity of mining leases granted to private corporations over the Borra Reserve Forest lying within Fifth Schedule Areas, as the Andhra Pradesh Scheduled Areas Land Transfer Regulation prohibits alienation of land to non-tribals.

The Supreme Court struck down the mining leases so granted, and held:

1) Government lands, forest lands and tribal lands in the scheduled area cannot be leased out to non tribals or to private industries. Government cannot lease out lands in scheduled areas for mining operations to non tribals as it is in contravention of the Fifth Schedule of the constitution:
2) The Court recognised the 73rd Constitution Amendment Act and the Andhra Pradesh Panchayati Raj (Extension to Scheduled Areas) Act by stating that the Gram Sabhas shall be competent to safeguard and preserve community resources and thereby reiterated the need to give the right of self governance to tribals;
3) Mining activity in scheduled area can be taken up only by Andhra Pradesh State Mineral Development Corporation or cooperative of tribals, and then only if they are in compliance with the *Forest Conservation Act, 1980* and the *Environment Protection Act, 1986*;

4) The Court directed the State government to immediately issue title deeds to tribals in occupation of these lands. The Court stated that government has no right to grant mining leases in these enclosure lands belonging to tribal people;
5) The court felt that, if necessary the Chief Secretary of Andhra Pradesh should constitute a committee consisting of himself, Secretary (Industry), Secretary (Forest), Secretary (Social Welfare) to have the factual information collected, and consider whether it is feasible to permit the industry to carry on mining operations. If the committee so opines, the matter may be placed before a Cabinet Sub – Committee consisting of Minster for Industries, Forest and Tribal Welfare to examine the issue whether licences could be allowed to continue, or whether expedient to prohibit further mining operations;
6) In case there are similar Acts in other States which do not totally prohibit grant of mining leases on the lands in scheduled areas, similar committee of Secretaries and State Cabinet Sub Committees should be constituted, and decision taken thereafter. Before granting leases, it would be obligatory for the State government to obtain concurrence of the Central government by constituting a subcommittee headed by the Prime Minister, and other union ministers.
7) The Court also felt that it would be appropriate to constitute a conference of chief ministers and concerned union ministers to take a policy decision so as to bring about a suitable enactment for a consistent scheme, throughout the country in respect of tribal lands and exploitation of mineral wealth;
8) The State government was, therefore, directed to stop all industries from mining operations in Scheduled Areas;
9) The Court directed that at least 20% of the net profits should be set apart as a permanent fund, as part of industrial / business activity, for establishment and maintenance of water resources, schools, hospitals, sanitation, and transport facilities by laying roads, etc. This 20% allocation would not include the expenditure for reforestation and maintenance of the ecology.
10) As the Executive is enjoined to protect social, economic and educational interests of the tribals, when the state leases out lands in scheduled areas, to non tribals or industries, for exploitation of mineral resources, it transmits the above correlative constitutional duties, and obligation to those who undertake to exploit the natural resources.

Union of India v. Rakesh Kumar, AIR 2010 SC 3244

Numerous provisions of PESA 1996 and the Jharkhand Panchayati Raj Act, providing that the Chairperson of the Panchayat in a Scheduled Area may only be a person belonging to Scheduled Tribe, were challenged. These provisions were struck down by the High Court on the grounds that they violated Arts.15(4) and 16(4) of the Constitution by providing for 100% reservation in a seat of public employment, whereas the upper limit is 50% as per the Supreme Court decision in *Indira Sawhney*. The Union of India appealed to the Supreme Court.

The Supreme Court upheld the constitutional validity of these provisions on the following grounds:

1. Schedule V provides for special provisions for the administration of tribal areas to protect the autonomy of Scheduled Tribes.The V Schedule creates the 'Tribes Advisory Council', to advise on the welfare and advancement of STs, which is then translated to law through public notifications by the Governor.
2. The policy to reserve the seat of Chairperson for ST emerges from the Bhuria Committee Report on extending Part IX to Scheduled Areas, which recommended that (i) Panchayats in SAs must comprise a majority of ST members, (ii) Chairperson and Vice-Chairperson of the panchayati should be ST, (iii) one-third of the seats be reserved for women.
3. The Bhuria Committee recommendations were accepted by the Parliament in enactment of the impugned legislations, as Art.243M expressly empowers the Parliament to make necessary "exceptions and modifications" to effectuate the application of Part IX to Schedule Areas.
4. The scheme and objective of Schedule V being the protection of autonomy, rights, culture and resources of STs in Scheduled Areas, is different from the provisions under Arts.15(4) and 16(4), which applies generally to provide reservations in favour of marginalized groups in public employment and education. These principles cannot be applied to Scheduled Areas*per se*. Rights and special protection granted to STs under the Scheduled Areas cannot be less than that which is guaranteed under the general law applicable to non-Scheduled Areas as well.

5. Reserving seat of Chairperson for STs in Scheduled Areas does not violate Art.14 of the Constitution, as the guarantee of equality is animated by substantive equality and distributive justice, in light of Arts.14, 39(b) and 39(c), as per which the State is empowered to treat unequals unequally, in order to attain a level-playing field in social, economic and political life. In this case, STs are identified as a different class under Part IX in order to ensure democratic decentralization of authority so that traditionally marginalized groups are able to participate in local self-government.
6. The judgment distinguished between three models of affirmative action:
    a. Proportionate representation
    b. Adequate representation
    c. Compensatory representation
7. The Supreme Court judgment in *Indira Sawhney*, which laid down the upper limit of 50% in reservation, also laid down that this may be exceeded in exceptional circumstances.The case of SA is such an exceptional circumstance on account of the special constitutional arrangements for administration of tribal areas, high population but under-representation of tribal peoples in administrative and government bodies.

Nandini Sundar v. State of Chhattisgarh, AIR 2011 SC 2839

This PIL challenged the recruitment of 'Special Police Officers' (SPOs) by the Chhattisgarh government, with funding from the central government for anti-insurgency operations. SPOs are cadres of local ST youth, with low levels of literacy, and without proper military training, recruited by the state government pursuant to the *salwa judum* operations.

The Supreme Court struck down the practice of recruiting SPOs, and held, *inter alia*:

1) Effectiveness is not the sole basis for determining strategies for counter-insurgency operations, as these must be within the bounds of legality and constitutionality. Human rights of local population and human rights activists cannot be violated on the pretext of counter-insurgency.

2) The root cause for the conflict in Chhattisgarh lies in the socio-economic policies of the state, which has enabled certain sections of the elite to grab land and resources of the poor and to violate their dignity.
3) Addressing the conflict on the ground requires a two-pronged approach:
    a. Undertaking all necessary social, economic and political remedial measures to address the disaffection of the people, which is leading to the rise of extremism
    b. Developing well-trained and professional law enforcement, which operates within the bounds of the constitution of India.

Orissa Mineral Corporation Limited v. Ministry of Environment and Forests, 2013 (6) SCC 476

This writ petition was filed by OMC Ltd. against the order of the MoEF quashing the Stage-I forest clearance granted to them for bauxite mining in Kalahandi and Rayagarh districts of Orissa. For Stage-II clearance, the MoEF had constituted a committee of experts to ascertain whether there had been any violations of FRA, which recommended the withdrawal of Stage-I clearance on finding violations of rights of worship of Dongria Kondhs, PVTGs residing in the Niyamgiri hills.

The Supreme Court upheld the decision of the MoEF and held:

1) Arts.244, 366, 342, along with Schedules V and VI, protect tribal autonomy, cultures and economic empowerment, to attain social, political and economic justice, and good governance for all. Under Arts.25-26 of the Constitution, tribals have a right to enjoy a distinctive spiritual relationship with the lands and resources in their use and occupation.
2) In pursuance of these constitutional and international provisions, PESA was enacted to extend democratic decentralization to schedule areas, and empower Gram Sabhas to take decisions over their land, forests, resources, cultures and customs. The FRA further recognizes the religious and customary rights of worship of STs and OTFDs under Ss.3(1)(j) and (l), 3(2), 4, 5 and 6.
3) The State has an obligation to protect tribal autonomy, and their religious and cultural rights, under as well as international human rights covenants. This obligation is emphasised, as STs and OTFDs face extreme hurdles in

accessing justice on account of illiteracy, lack of legal awareness of their rights, or the financial and other resources to challenge development projects set up on their customary lands and forests. The ILO, CBD, FRA and PESA oblige the State to recognize and support the identity, culture and interests of tribal communities.

4) Under the FRA, the gram sabhas have the authority to protect their community resources, individual rights, as well as religion and customs. Accordingly, the Gram Sabha is the rightful authority to determine whether any religious/ customary rights of worship are affected by the proposed project over the Niyamgiri Hills. MoEF shall take a final decision on the grant of Stage-II clearance in light of the decision of the Gram Sabha.
5) Gram Sabha directed to examine if the mining project affects their religious and customary rights in any way. These proceedings to be attended by a judicial officer to ensure that the gram sabha is able to take an independent decision, free from the influence of the project proponents, or the state and central governments.

Action Research in Community Health & Development (ARCH) v. State of Gujarat, Gujarat High Court (2013)

This PIL was filed before the Gujarat High Court by Van Kanun Bachau Samiti, comprising STs of four talukas, and an NGO working on forest rights and tribal development. After SDLCs and DLCs in Gujarat rejected more than 1,13,000 IFR claims pursuant to circulars and guidelines issued by the state government in violation of FRA, the PIL sought directions to state authorities for proper implementation of FRA in compliance with statutory provisions. The SDLC and DLC had rejected these claims on the grounds that the evidence produced by claimants was insufficient, and they were unable to produce precise records in support of their claim. Furthermore, the SDLC and DLC had relied heavily on BISAG, a software for satellite imagery to disprove occupation and claims of rightsholders

The Gujarat High Court held in favour of the petitioners, and held:

1) Rule 13 provides a list of evidence that may be adduced in support of the forest rights of claimants. This list is illustrative, and not exhaustive, and lists a wide

range of evidence that may be produced in support, ranging from government/ judicial records, testimonies of elders, geneology, physical markers of occupation, etc.

2) Demanding strict proof of rights would frustrate the purpose for which FRA has been enacted, and to uphold the objective of FRA, a constructive approach is to be followed. As the rightsholders as not literate, and unlikely to possess cogent and convincing evidence demanded by the authorities. Deciding claims on the basis of BISAG (satellite imagery), collected through unscientific methods, does not serve the object of FRA.
3) The authorities are directed to comply with Rule 13 and Rule 12-A in deciding claims, and the following evidence may be accounted for:
    a. Field verification panchnamas
    b. Records of civil and criminal cases
    c. Receipts of purchase agreements from erstwhile Princely states
    d. Government records, eg receipts by forest department
    e. Satellite imagery and/ or maps prepared from imageries other than BISAG

Paryavaran Sangharsh Samiti, Lippa v. Union of India, **National Green Tribunal- Principal Bench, Appeal No.28 of 2013**

The present appeal challenged the approval for forest clearance by Forest Department, and Stage I and II approval by the MoEF, for the diversion of approx. 17 ha of forest land in Kinnaur region of Himachal Pradesh for phases 2&3 of a 4-phase integrated dam of total capacity 243MW over a cumulative area of 61.89 ha. The petitioners submitted that the MoEF granted final approval to the project without ensuring due compliance with conditions imposed under Stage-1. These conditions included permission from National Board of Wild Life, environmental impact assessment accounting for destruction to flora, fauna and livelihoods, compliance with Forest Rights Act, among others.

Without going into merits, the NGT accepted the Respondents' plea that the appeal be disposed of after stipulating necessary conditions requiring compliance. The NGT ordered that the matter be placed before the Gram Sabhas of affected villages under the FRA for their approval, and settlement of FRA claims, impact on

environment and cultural rights, as well as necessary mitigation measures. The Tribunal also noted that:

- The government holds natural resources in 'public trust' for the people, and as per the doctrine of public trust, it is enjoined to use these resources for the benefit of the people and not private interests, and to ensure inter-generational equity under the sustainable development model. This also requires the government to ensure that a balance is struck between developmental needs and environmental damage.
- The relentless and unchecked construction of dams, over 150 in number presently, has caused large-scale environmental damage to the water sources, endangered plant species, and livelihoods of local communities. The environmental impact of a particular project, the hydro-electric dam in this case, must be evaluated cumulatively in light of the other existing and proposed projects in the state/ region, and not separately.

Divya Pharmacy v. Union of India and ors, Uttarakhand High Court (2018) WP (M/S) No. 3437 of 2016

At issue was whether the Biological Diversity Act 2002 and 2014 Regulations require Indian entities, and not only those with a 'foreign element', to pay a fee for 'fair and equitable benefit sharing' (FEBS) with tribal communities for the use and development of bio-products constituting their traditional knowledge.

Here, the State Biodiversity Board had imposed a fee on the petitioners for FEBS. The petitioners argued that S.3 makes clear that only entities who require prior approval from the National Biodiversity Authority, are obligated to pay FEBS under S.21. Entities that require prior permission are those with a foreign element in their citizenship, ownership or management, and as the petitioners are a wholly Indian entity, no such obligation arises.

The Uttarakhand High Court held in favour of the respondents, and held:

1) Although a literal interpretation of the relevant provisions of BDA suggest that the obligation for FBES is cast only on entities with a foreign element,

and not on wholly Indian entities, such an interpretation defeat the purpose of the legislation.

2) Purposive interpretation of a statute to be adopted when the literal interpretation leads to absurdity or defeats the objective for which the statute is enacted, as definitions under S.2 of the Act are placed subject to their context. In this case, the purpose of enacting BDA can be determined from international treaties, as BDA was passed in fulfilment of India's obligations under these treaties.
3) These treaties include the Rio de Janeiro Convention on Biodiversity (1992), Johannesburg Declaration on Biopiracy, Biodiversity and Community Rights (2010), Nagoya Protocol to the CBD on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010). The evolution of norms and obligations under these treaties reflect the legislative history of CBA, and these identify three main objectivesof conservation of biodiversity:
    a. Biodiversity conservation
    b. Sustainable use of its components
    c. Fair and equitable sharing of benefits arising from its utilization
4) The Nagoya Protocol identifies local and indigenous communities as the primary claimants of FBES, as the use of genetic resources emerges from their traditional knowledge and protection mechanisms.
5) Interpreted purposively, the BDA does not make a distinction between Indian and foreign entities for the purpose of payment of FDES. Whereas S.3 mandates prior approval and compliance with certain conditions for foreign entities, the SBB is empowered to impose such fee under S.24 on Indian entities upon receiving 'prior intimation' from them under S.7.