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IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A. NOS. 49, 70, 69, 59, 22

IN

WRIT PETITION (CIVIL) NO. 114 OF 2014

IN THE MATTER OF:

COMMON CAUSE ... PETITIONER

VERSUS

UNION OF INDIA & ORS. ... RESPONDENTS

AFFIDAVIT ON BEHALF OF KAMALJEET SINGH AHLUWALIA, RAMESH PRASAD SAO, M/S. GANDHMARDHAN SPONGE INDUSTRIES LIMITED, INDRANI PATNAIK AND GEETARANI MOHANTY

I, Kamaljeet Singh Ahluwalia, aged about 72 years, presently residing at A-7, Maharani Bagh, New Delhi, do hereby solemnly affirm on oath and state as under:-

1. I state that I am the Lessee in respect of Nuagaon Iron Ore Mines in the District of Keonjhar, Odisha. I have been duly authorised to affirm the present common Affidavit on behalf of the following lessees who are

Applicants / Objectors in the captioned Writ Petition before this Hon'ble Court:

(a) Kamaljeet Singh Ahluwalia

(b) Ramesh Prasad Sao

(c) M/s. Gandhamardhan Sponge Industries Pvt. Ltd.

(d) Indrani Patnaik

(e) Geetarani Mohanty

2. That I state that I am competent to affirm the present Affidavit to place on record the common submissions of the aforesaid lessees in respect of the various issues of law that arise in the captioned Writ Petition.

3. That at the very outset, it is stated that it is necessary to clear certain misconceptions about mining. It is submitted that there is a distinction between legal and responsible mining and irresponsible and illegal mining. It is stated that lessees who undertake responsible mining activity must not be viewed in the same light as those who undertake irresponsible and illegal mining.

4. It is therefore necessary to set out the legal regime, the policies of the Government of the India and the State Government, the statutory compliances contemplated under the law, the manner in which such compliances have been obtained by the lessees and the attitude towards society which is maintained by the lessees. It is submitted that if the true facts are placed before this Hon'ble Court, this Hon'ble Court would be assisted in rendering a judgment which would not only aid the enforcement of statutory provisions but would also benefit a large number of people who belong to the mining-affected areas and who need the assistance of this Hon'ble Court.

I. CONSPECTUS OF RELEVANT STATUTES, RULES AND POLICIES

1.1 Preamble & Definitions

5. That it is submitted that the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter, the "**MMDR Act, 1957**") is a law enacted for the

purpose of '*....development and regulation of mines and minerals.....*' which was placed under the control of the Union. I submit that this expression was substituted by Act 38 of 1999 for the expression which existed earlier ' *... regulation of mines and development of minerals ...*'. Thus, the change in the Preamble contemplated development (as opposed to the simply 'regulation') of mines as a fundamental object. It is necessary to bear in mind that under Section 2 of the MMDR Act, 1957, a declaration has been made that:-

> *"Declaration as to the expediency of Union control.*
>
> *2. It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided."*

6. That it is settled position in law that on account of the said declaration, the State Legislature is denuded of its legislative power to enact any law with respect to

regulation of mines and mineral development to the extent provided in the Act. It is no longer *res integra* that the State does not have any power to frame a policy inconsistent with the provisions of the MMDR Act, 1957.

7. That the attention of this Hon'ble Court may be invited to a few definitions which will have a bearing on the issues involved in the present Writ Petition.

a. It is stated that the definition of 'leased area' did not exist until the insertion of such definition by Act 25 of 2016, vide Section 3(a) of the amended MMDR Act, 1957. In any event, it would be appropriate to advert to the said definition which runs as follows:-

> *"Leased areas means the areas specified in the mining lease within which mining operations can be undertaken and includes the non-mineralised area required and approved for the activities falling under the definition of mine as referred to in clause (i)."*

b. Section 3(c) defines 'mining lease' as a lease granted for the purpose of undertaking mining operations, and includes a sublease granted for such purpose. It is stated that the MMDR Act, 1957 does not prohibit the transfer of interest in a lease *per se*. However, I shall advert to this aspect of the matter later in the instant affidavit.

c. Section 3(d) defines 'mining operations' in the following words:-

> *"3(d) "mining operations" means any operations undertaken for the purpose of winning any mineral;"*

d. Section 3(g) defines a 'prospecting licence' in the following terms:-

> *"3(g) "prospecting licence" means a licence granted for the purpose of undertaking prospecting operations;"*

e. Section 3(h) defines 'prospecting operations' as follows:-

"3(h) "prospecting operations" means any operations undertaken for the purpose of exploring, locating or proving mineral deposit;

f. Section 3(ha) defines 'reconnaissance operations' in the following terms:-

"3(ha) "reconnaissance operations" means any operations undertaken for preliminary prospecting of a mineral through regional, aerial, geophysical or geochemical surveys and geological mapping, but does not include pitting, trenching, drilling (except drilling of bore holes on a grid specified from time to time by the Central Government) or sub-surface excavation;"

g. Section 3(i) provides that the expression 'mine' and 'owner' shall have the meanings assigned to them in the Mines Act, 1952.

1.2 Section 4, Section 21(5) and 'Illegal Mining'

8. That it is submitted that Section 4 of the MMDR Act, 1957 clearly provides that no person shall undertake

any reconnaissance, prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a reconnaissance permit or of a prospecting licence or as the case may be of a mining lease *"…..granted under this Act and the Rules made thereunder…"*.

9. It is submitted that it is necessary to bear in mind that the MMDR Act, 1957 was enacted long before the enactment of Forest (Conservation) Act, 1980 as well as the Environment (Protection) Act, 1986. The Forest (Conservation) Act came into effect on 25th October 1980 whereas the Environment (Protection) Act came into effect on 12th November 1986.

10. It is submitted that without minimising the importance of compliance of the provisions of the Forest (Conservation) Act, 1980 as well as the Environment (Protection) Act, 1986 it would not be correct to state that the grant of a lease under the MMDR Act, 1957 necessarily incorporates the terms and conditions of the other laws; since the MMDR Act,

and the Rules and forms thereunder are a self-contained code as would be explained hereinafter. It is also pointed out that in respect of many areas which are covered by the Forest (Conservation) Act as well as the Environment (Protection) Act, 1986, the MMDR Act, 1957 and the Rules as well as the forms do deal with cognate subject matter to the extent described hereinafter.

11. Section 4(1A) of the MMDR Act, 1957 on which reliance has been placed by the Petitioner is extracted hereinbelow:-

> *"4(1A) No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder."*

12. It is further submitted that there is no allegation against any of the present lessees either that they have transported or stored or caused to be transported or stored any mineral in violation of Section 4(1A) of the MMDR Act, 1957. It is therefore submitted that Section 4(1A) needs to be read alongside with Section

23C of the MMDR Act, 1957 as inserted by Act 38 of 1999. In fact, the purpose of inserting Section 23C by Act 38 of 1999 was to empower the State Government to frame Rules which were efficacious in preventing any form of illegal mining, transportation or storage of minerals. Section 23C may be referred to at this juncture:

> *"23C. Power of State Government to make rules for preventing illegal mining, transportation and storage of minerals.*
>
> *(1) The State Government may, by notification in the Official Gazette, make rules for preventing illegal mining, transportation and storage of minerals and for the purposes connected therewith.*
>
> *(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-*
>
> *(a) establishment of check-posts for checking of minerals under transit;*
>
> *(b) establishment of weigh-bridges to measure the quantity of mineral being transported;*

(c) regulation of mineral being transported from the area granted under a prospecting licence or a mining lease or a quarrying licence or a permit, in whatever name the permission to excavate minerals, has been given;

(d) inspection, checking and search of minerals at the place of excavation or storage or during transit;

(e) maintenance of registers and forms for the purposes of these rules;

(f) the period within which and the authority to which applications for revision of any order passed by any authority be preferred under any rule made under this section and the fees to be paid therefor and powers of such authority for disposing of such applications; and

(g) any other matter which is required to be, or may be, prescribed for the purpose of prevention of illegal mining, transportation and storage of minerals.

(3) Notwithstanding anything contained in section 30, the Central Government shall have no power to revise any order passed by a State Government or any of its authorised officers or any authority under the rules made under sub-sections (1) and (2).”

13. The State of Odisha has framed the Odisha Minerals (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage and Trading and Transportation) Rules, 2007 (hereinafter, the "**OMPTS Rules**").

    Copy of the OMPTS Rules, 2007 is annexed herewith and marked as **ANNEXURE-1**.

14. It is submitted that Rule 2(h) of the OMPTS Rules clearly defines 'illegal mining' as any mining undertaken in violation of sub-section (1) of Section 4 of the MMDR Act, 1957. It is further submitted that Rule 2(i) defines 'illegal transportation' as transportation which is caused otherwise than in accordance with the provisions of the Act and the Rules. It is also submitted that Rule 2(j) defines 'illegal storage' as the storing of any mineral other than in accordance with the provisions of the Act and the Rules made thereunder.

15. It is submitted that under the scheme of the OMPTS Rules, a lessee first sends the samples of the stack of minerals proposed to be dispatched to the Govt. approved laboratory for chemical analysis. The Govt. approved lab then sends the chemical analysis report in Form-K to the leseee. The lessee thereafter submits an application in Form-J to the Deputy Director of Mines who is the competent authority for issue of a transit permit. The Deputy Director of Mines upon the receipt of such an application causes a Senior Inspector of Mines to undertake an inspection of the material proposed to be dispatched. If the Senior Inspector of Mines is satisfied with the quantity and quality of the material, then he forwards the said application to Mining Officer. The Mining Officer upon verification of the records, if satisfied, asks the lessee to pay royalty and other charges (NMET and DMF). Once these amounts are paid, the Deputy Director of Mines verifies the payment, and issues the permission in Form-L to the lessee.

16. After the lessee obtains the permission in Form-L, the proposed buyer applies for permission in Form-H, and the same is granted by the Deputy Director of Mines in Form-I after verification of the buyer's authenticated documents. After obtaining the aforesaid permissions in Form-L and Form-I, the material is authorised for dispatch. Based on the availability of railway wagons/trucks, the material moves from the mines site to the railway siding through Govt. authorised weighbridge situated at the mines premises. Every trip of the dispatch is duly verified by the Govt. staff present at the Govt. authorised weighbridge, and the corresponding Transit Permit is counter-signed by the Govt. staff.

17. It is submitted that with effect from 01.04.2013, the State of Odisha has adopted an online system to ensure that there is a computerised database on the basis of which such transit passes are recorded, issued and there is a track of the exact quantity on which royalty has to be paid.

Specimen copies of Forms H, I, J, K and L and I are annexed herewith as **ANNEXURE-2**.

18. It must also be stated that a transporter needs to be a registered transporter with the Department of Mines, State of Odisha to undertake such transport. In fact, on the website of the State of Odisha (Mines Department), the numbers and the owners of the trucks are available.

    A sample of such certification issued by the State of Odisha in favour of a transporter is also enclosed herewith as **ANNEXURE-3**.

19. It may also be noted that under Rule 10(3), it is stipulated that:-

> *"The applicant shall disclose and satisfy the competent authority regarding the legality of the source from which the minerals are procured..... The permit holder shall maintain a correct and intelligible account of the mineral transported by him every day in Form E..... Shall furnish copies of the account for every calendar month within seven days of the succeeding month to the competent authority....."*

20. It is submitted that the CEC has not found any violation of Section 4(1A) read with Section 23C or the OMTPS Rules, 2007. It is therefore submitted that all mineral which has been lawfully excavated within the area of mining lease and transported in accordance with the OMPTS Rules, 2007 cannot be said to have been illegally mined.

21. At this juncture, it is submitted that Section 4(1) is qualified by the expression "... in any area ...". It is submitted that the concept of illegal mining is in the context of an area covered by a lease. It is further submitted that the concept of illegal mining is mining beyond the leasehold area. It is submitted that there is no allegation that the lessees have mined outside the leasehold area.

22. It is submitted that in order to clarify that illegal mining was necessarily in respect of mining outside the leasehold area, the Central Government inserted Rule 2(ii-a) in the Mineral Concession Rules, 1960

(hereinafter, the "**MCR, 1960**") vide notification No.GSR 593(E) dated 26th July 2012 with effect from 27th July 2012. The said Rule provides as follows:-

> *"2. In these Rules unless the context otherwise requires--*
>
> *(iia) "illegal mining" means any reconnaissance or prospecting or mining operation undertaken by any person or a company in any area without holding a reconnaissance permit or a prospecting licence or as the case may be, a mining lease as required under sub-section(1) of section 4 of the Act."*
>
> (Emphasis supplied)

23. The Explanation contained to the Rule 2(ii-a) reads as follows:-

> *"Explanation – For the purpose of this clause, -*
>
> *(a) Violation of any rules, other than the rules made under section 23C of the Act, within the mining lease area by a holder of a mining lease shall not include illegal mining.*
>
> *(b) Any area granted under a reconnaissance permit or a prospecting licence or a mining lease,*

as the case may be shall be considered as an area held with lawful authority by the holder of such permit of licence or a lease, while determining the extension of illegal mining."

(Emphasis supplied)

24. It is submitted that the Explanation to Rule 2(ii-a) has to be construed as clarificatory of the correct import of the expression "illegal mining".

25. It is submitted that a perusal of the above would clearly indicate that the Central Government was completely conscious of the definition of illegal mining. Thus, illegal mining necessarily was stated to be of two kinds –

a) Mining without a mining lease;

b) Mining beyond the area covered by the lease.

26. It is submitted that since the *Explanation* to Rule 2(ii-a) is a part of the delegated legislation and would be deemed to have been incorporated into the Act for all purposes, it must be assumed that the expression 'lawful authority' as occurring in the Act, including

Section 21(5), would necessarily have to be construed with reference to Rule 2(iia).

27. It is therefore submitted that the submission advanced on behalf of the Petitioner that the expression "*without any lawful authority*" occurring in Section 21(5) will be attracted to the present case is refuted by the application of Rule 2(ii-a) of the Rules.

28. It is further stated that it is not the finding of the CEC that the cases of any of the lessees are in any manner outside the province of Rule 2(ii-a) insofar as excavation of mineral is concerned. Therefore, it is submitted that under these circumstances, the mining which has been undertaken by the lessees must be deemed to be with lawful authority since they are mining operations conducted within the leasehold area. Insofar as the contentions urged by the Petitioner with reference to the Forest (Conservation) Act as well as the Environment (Protection) Act, 1986 they shall be dealt with separately.

29. Section 4A of the MMDR Act, 1957 provides for termination of prospecting licences or mining leases. Sub-section (1) of Section 4A was relied upon by the Petitioner to submit that if the Central Government could form an opinion that in the interest of *".....mineral development, preservation of natural environment....."* that it could request the State Government to make a premature termination of a mining lease. It is submitted that such a request has not been made by the Central Government at any point of time. Insofar as the belated affidavit of the Central Government filed before this Hon'ble Court on 18th January 2017 is concerned, the same will be adverted to a little later at an appropriate juncture.

30. It is submitted that there is no finding by the Central Empowered Committee (hereinafter, the "**CEC**") that the leases are liable for termination under Section 4A of the MMDR Act, 1957. It is also relevant to bear in mind that the CEC has not recommended any action under Section 4A of the MMDR Act, 1957. It is

submitted that the CEC was conscious of the provisions of Section 4A and in fact has rightly proceeded keeping in view the fact that the same is not applicable to lessees in the State of Odisha. Incidentally, it may be pointed out that Section 4A(3) contemplates that no order can be passed for premature termination of a mining lease except after giving the holder of the licence or lease a reasonable opportunity of being heard. Section 4A(4) which fell for consideration of this Hon'ble Court provides as follows:-

> *"4A (4). Where the holder of a mining lease fails to undertake mining operations for a period of two years after the date of execution of the lease or having commenced mining operations, has discontinued the same for a period of two years, the lease shall lapse on the expiry of the period of two years from the date of execution of the lease or, as the case may be, discontinuance of the mining operations:*
>
> *Provided that the State Government may, on an application made by the holder of such lease before it lapses and on being satisfied that it will*

not be possible for the holder of the lease to undertake mining operations or to continue such operations for reasons beyond his control, make an order, within a period of three months from the date of receiving of such application, subject to such conditions as may be prescribed, to the effect that such lease shall not lapse:

Provided further that such lease shall lapse on failure to undertake mining operations or inability to continue the same before the end of a period of six months from the date of the order of the State Government:

Provided also that the State Government may, on an application made by the holder of a lease submitted within a period of six months from the date of its lapse and on being satisfied that such non-commencement or discontinuance was due to reasons beyond the control of the holder of the lease, revive the lease within a period of three months from the date of receiving the application from such prospective or retrospective date as it thinks fit but not earlier than the date of lapse of the lease:

Provided also that no lease shall be revived under the third proviso for more than twice during the entire period of the lease."

31. The Union of India had on 12.12.2011 clarified by way of a letter to the State Government that provisions of S. 21(5) can be invoked by the State Government only in the case of production of mineral on any land occupied by a person without lawful authority, i.e., any land outside the lease area. Violation of provisions of other laws including the Environment Protection Act, Forest Conservation Act and Mines Act, etc. should be dealt with as per the provisions contained in the respective enactments.

    Copy of the letter of the Union of India dated 12.12.2011 is annexed herewith and marked as **ANNEXURE-4**.

32. The Union of India reiterated its stand vide another letter dated 05.09.2012, wherein it stated:

> *"S. 21(5) of MMDR Act is clearly applicable on such land which is occupied without* lawful *authority. It is clarified that in the context of MMDR Act, 1957 violations pertaining to mining operations within mining lease area are to be dealt with only in terms of provisions of*

the Mineral Conservation and Development Rules, 1988. The State Govt. have clear powers to check the offences relating to mining outside the mining lease area in terms of S. 23C of the MMDR Act, 1957. However, the interpretation that a land granted under a mining lease by the State Govt. can be held to be occupied without lawful authority on the grounds of violation of provisions of any other law of the land is not appropriate and such interpretation may not stand in a court of law. Such Act or Rules, including E.P. Act, 1986 or the F.C. Act, 1980, etc. clearly provides penalties for violations under those laws. This aspect may be clarified to the State Accountant General also."

Copy of the letter of the Union of India dated 05.09.2012 is annexed herewith and marked as **ANNEXURE-5**.

33. Further, it was the Central Government, which as the rule-making authority under S. 13 of the MMDR Act, 1957 introduced the definition of 'illegal mining' in Rule 2(ii-a) of the MCR, 1960, as set out above, and clearly stated that an area held under a valid mining

lease would an area held with lawful authority while determining the extent of illegal mining.

34. That further, the Revisional Authority of the Central Government under S. 30 of the MMDR Act, 1957 has consistently granted a stay on the S. 21(5) demand notices issued by the State Government upon due consideration of all the facts and circumstances of all lessees in the various revision applications filed before it. It may be noted that the present Revisional Authority, being Shri Sudhaker Shukla, Economic Adviser to the Ministry of Mines has also granted a stay order on S. 21(5) demands in certain cases in exercise of the power under Section 30 of the MMDR Act, 1957. Copy of certain stay orders passed by the Revisional Authority is annexed herewith and marked as **ANNEXURE-6**.

35. That surprisingly, in the recent Affidavit dated 18.01.2017 filed by the Ministry of Mines, Government of India and duly sworn by Shri Sudhaker Shukla, Economic Adviser to the Ministry of Mines

(also the current Revisional Authority), the Union of India has adopted a completely new interpretation of S. 21(5). Therefore, the Union of India appears to be taking a prevaricating stand on the issue for reasons best known to it. It may therefore be asked to clearly and correctly state its position on the matter.

36. That the Deponent also craves leave to rely on the following decisions to assist the Court in the interpretation of Section 21(5):

(a) *Karnataka Rare Earth and Anr. V. Sr. Geologists, Deptt. Of Mines & Geology & Anr.,(2004) 2 SCC 783*

(b) *Bharat Bhushan v. State of Rajasthan and Ors. [W.P No.1131 of 1976]*

(c) *Esmyil v. Dy. Tehsildar, Sub-Inspector of Police and State of Kerala, (2011) 2 KLJ 414*

(d) *Union of India v. State of Orissa, AIR 1995 Orissa 190*

(e) *District Collector and State of Tamil Nadu v. Union of India in W.P. No. 7742 and 7743 of 1999*

(f) *Promoters & Builders Assn. of Pune v. State of Maharashtra, 2011 (1) Bom. CR 51*

(g) *Chandeswar Prasad Singh v. Sub-Divisional Land Reforms Officer, AIR 1986 Calcutta 1*

1.3 Concept of Renewal under the erstwhile Section 8; the new regime under Section 8A and the Judgment dated 04.04.2016 reported as (2016) 11 SCC 455

37. Section 8 of the unamended MMDR Act, 1957 (pre-2015 Amendment) provided as follows:-

> *"8. Periods for which mining leases may be granted or renewed.*
>
> *(1) The provisions of this section shall apply to minerals specified in Part A of the First Schedule.*
>
> *(2) The maximum period for which a mining lease may be granted shall not exceed thirty years:*

Provided that the minimum period for which any such mining lease may be granted shall not be less than twenty years.

(3) A mining lease may be renewed for a period not exceeding twenty years with the previous approval of the Central Government."

38. A perusal of the aforesaid provisions of Section 8 of the Act would clearly indicate that the initial grant of a lease was for a period of 30 years. However, a first renewal could be granted for a period of 20 years under sub-section (2) of Section 8. Sub-section (3) of Section 8 provided that a second renewal could be granted only upon the formation of the requisite opinion by the State Government that a second renewal was necessitated in the *'....interests of mineral development....."* and that the same had to be supported *"...for reasons to be recorded..."*.

39. Rule 24A(6)of MCR, 1960, as it then stood, provided as follows:-

"(6) If an application for renewal of a mining lease made within the time referred to in sub-rule (1) is not disposed of by the State Government before the date of expiry of the lease, the period of that lease shall be deemed to have been extended by a further period till the State Government passes order thereon."

40. It is a fact that many of the lessees were deriving an advantage conferred by Rule 24A(6) and in the absence of an express order of renewal under Section 8(3) of the Act, were proceeding to undertake mining operations. This aspect of the matter fell for consideration before this Hon'ble Court in the matter of *Goa Foundation v. Union of India,* (2014) 6 SCC 590. In a carefully considered judgment, this Hon'ble Court held that Section 8(2) only permitted a one-time renewal option not exceeding 20 years. It was also held that Section 8(3) permitted a second renewal for specified minerals but the condition in Section 8(3) had necessarily to be complied with. This condition was that the State Government had necessarily to form an opinion that the second renewal was in the interest

of mineral development, and pass 'express orders' thereon. It is respectfully submitted that consequent to the interpretation by this Hon'ble Court on Rule 24A(6) as well as Section 8(3) of the Act, Rule 24A was amended on 18thJuly 2014 by which, the amended Rule was brought in conformity with the judgment of this Hon'ble Court.

41. Under the amended Rule 24A(6), the facility of a deemed extension was available only in respect of an application of a first renewal but would not be available for a second renewal. Incidentally, even the period of extension of the first renewal was only for a period of two (2) years or till the time the State Government passed an order thereon whichever was earlier.

42. It is submitted at this juncture that the amending Act of 2015 namely, Act 10 of 2015, was enacted in order to enable continued mining and that there should be assured tenure in respect of mining. While open auction was encouraged, in respect of existing leases,

there was an outer extension granted by the statute. Section 8A provides as follows:-

> *"8A. Period of grant of a mining lease for minerals other than coal, lignite and atomic minerals*
>
> *(1) The provisions of this section shall apply to minerals other than those specified in Part A and Part B of the First Schedule*
>
> *(2) On and from the date of the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, all mining leases shall be granted for the period of fifty years.*
>
> *(3) All mining leases granted before the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015 shall be deemed to have been granted for a period of fifty years.*
>
> *(4) On the expiry of the lease period, the lease shall be put up for auction as per the procedure specified in this Act.*
>
> *(5) Notwithstanding anything contained in sub-sections (2), (3) and sub-section (4), the period*

of lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, where mineral is used for captive purpose, shall be extended and be deemed to have been extended up to a period ending on the 31st March, 2030 with effect from the date of expiry of the period of renewal last made or till the completion of renewal period, if any, or a period of fifty years from the date of grant of such lease, whichever is later, subject to the condition that all the terms and conditions of the lease have been complied with.

(6) Notwithstanding anything contained in sub-sections (2), (3) and sub-section (4), the period of lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, where mineral is used for other than captive purpose, shall be extended and be deemed to have been extended up to a period ending on the 31st March, 2020 with effect from the date of expiry of the period of renewal last made or till the completion of renewal period, if any, or a period of fifty years from the date of grant of such lease, whichever is later, subject to the condition that

all the terms and conditions of the lease have been complied with.

(7) Any holder of a lease granted, where mineral is used for captive purpose, shall have the right of first refusal at the time of auction held for such lease after the expiry of the lease period.

(8) Notwithstanding anything contained in this section, the period of mining leases, including existing mining leases, of Government companies or corporations shall be such as may be prescribed by the Central Government.

(9) The provisions of this section, notwithstanding anything contained therein, shall not apply to a mining lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, for which renewal has been rejected, or which has been determined, or lapsed".

43. A perusal of the above would indicate that in respect of mining leases which were required for captive purposes, the period was 31st March 2030 while in respect of minerals which were not required for

captive purposes, the lease was extended upto 31st March 2020.

44. It is submitted that this Hon'ble Court in *Common Cause v. Union of India & Ors.,* (2016) 11 SCC 455, (decided on 4th April 2016) held that unless and until there was a valid order as contemplated by law under Section 4A(4) of the Act, the rights which are accrued rights in favour of the lessees under Section 8A (introduced by Act 10 of 2015) cannot be abrogated.

45. That it is submitted that the present proceedings have to be construed in continuum of the order passed by this Hon'ble Court in *Common Cause v. Union of India*, (2016) 11 SCC 455. It is respectfully submitted that the report of the CEC dated 16th October 2014 could not have been in anticipation of the amending Act. In any event, the amending Act came into effect on 12th January 2015. It is submitted that the submission of the Petitioner that the rights which accrued under Section 8A have been negated by the report of the CEC is plainly untenable because the

report of the CEC is dated 16th October 2014 whereas the amending Act came into force on 12th January 2015 and the order of this Hon'ble Court in *Common Cause v. Union of India* was delivered on 4th April 2016. It is submitted that effect must be given to the benefits which arise out of the order dated 4th April 2016 subject to the condition that substantial compliance with statute has taken place in respect of the lessees who seek the benefit of Section 8A of the said Act.

46. At this juncture, it may be noted that the judgment of this Hon'ble Court is also supported by a previous precedent on the subject in *State of Haryana v. Ram Kishan & Ors.*, (1988) 3 SCC 416, wherein it was held that Section 4A contemplated that the decision must be taken after effective consultation between the Central and the State Governments having regard to relevant factors in consonance with the object of the Act. It was also held that the opportunity of hearing

was necessary since any adverse decision involved civil consequences.

1.4 Permissibility of 'Contractors' under the MMDR Act, 1957

47. It is pertinent to note that the provisions of the MMDR Act, 1957 do expressly permit the engagement of agents/contractors. Reference in this regard may be had to Section 24-A of the MMDR Act, 1957which expressly recognizes that agents or servants or workmen can enter lands which are the subject-matter of a reconnaissance permit, prospecting licence or mining lease:

> *"24-A. Rights and liabilities of a holder of prospecting licence or mining lease.—(1) On the issue of a reconnaissance permit, prospecting licence or mining lease under this Act and the rules made thereunder, it shall be lawful for the holder of such permit, licence or lease, his agents or his servants or workmen to enter the lands over which such permit, lease or licence had been granted at all times during its currency and carry*

out all such reconnaissance, prospecting or mining operations as may be prescribed"

48. It is also pertinent to note that Section 9(2) of the MMDR Act, 1957 also expressly recognises the term contractor:

"(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any [mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee] from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.

49. It is also pertinent to note that Section 3(i) of the MMDR Act, 1957 states that the expressions "mine" and "owner" have the meanings assigned to them in the Mines Act, 1952. Section 2(1)(l) of the Mines Act, 1952 defines the expression "owner" as inclusive of contractors and sub-lessees.

50. It is, therefore, submitted that from a perusal of the aforesaid provisions, the role of a contractor is not excluded from the scheme of the MMDR Act, 1957. On

the contrary, the Act itself permits that a contractor can be engaged in the matter of mining operations.

1.5 Terms & Conditions of a Mining Lease Deed

51. That it is pertinent to note that under the statutory scheme of the MMDR Act, 1957 and the MCR, 1960, the terms and conditions of the lease are specified in Rule 27 of the MCR, 1960 and the statutory form for execution of the lease deed (Form – K) appended to the MCR, 1960.

52. That Rule 27(1) of the MCR, 1960 contains the general conditions to which a mining lease shall be subject. Rule 27(2) stipulates additional conditions that the State Government may deem necessary. Further, Rule 27(3) provides that the State Government may either with the previous approval of the Central Government or at the instance of the Central Government, impose such further conditions as may be necessary in the interests of mineral development.

53. That Rule 27(5) of the MCR, 1960 is most relevant inasmuch as it prescribes the procedure to be followed upon breach of any of the conditions prescribed in sub-rules (1), (2) or (3) of Rule 27:

> *"If the lessee makes any default in the payment of royalty as required under section 9 or payment of dead rent as required under section 9A or commits a breach of any of the conditions specified in sub-rules (1), (2) and (3), except the condition referred to in clause (f) of sub-rule (1), the State Government shall give notice to the lessee requiring him to pay the royalty or dead rent or remedy the breach, as the case may be, within sixty days from the date of the receipt of the notice and if the royalty or dead rent is not paid or the breach is not remedied within the said period, the State Government may, without prejudice to any other proceedings that may be taken against him, determine the lease and forfeit the whole or part of the security deposit."*

54. That at this juncture, it is also necessary to advert to some of the relevant conditions found in the statutory Form – K appended to the MCR, 1960:

> ***"PART III***

Restrictions and Conditions as to the exercise of the Liberties, Powers and
Privileges in Part-II.

....

To cut trees in unreserved lands: -

3. The lessee/lessees shall not without the express sanction of the Deputy Commissioner/Collector cut down or injure any timber or trees on the said lands but may without such sanction clear away any brushwood or undergrowth which interferes with any operations authorised by these presents. The Deputy Commissioner/Collector or the State Government may require the lessee/lessees to pay for any trees or timber felled and utilised by him/them at the rates specified by the Deputy Commissioner/Collector of the District.

To enter upon reserved forests:-

4. Notwithstanding anything in this Schedule contained the lessee/lessees shall not enter upon any reserved forest included in the said lands without previous sanction in writing of the District Forest Officer nor fell, cut and use any timber or trees without obtaining the sanction in writing of that Officer nor otherwise than in accordance with such conditions as the State Government may prescribe.

PART VII

The Covenants of the Lessee/Lessees

Lessee to pay rents and royalties, taxes, etc.:-

....

11B. The lessee shall comply with provisions of the Mines Act, 1952 and the rules made thereunder.

11C. The lessee shall take measures for the protection of environment like planting of trees, reclamation of land, use of pollution control devices; and such other measures as may be prescribed by the Central or State Government, from time to time, at his own expense.

12. The lessee/lessees shall be bound by such rules as may be issued from time to time by the Government of India under section 18 of the Mines and Minerals (Development and Regulation) Act, 1957 (Act 67 of 1957) and shall not carry on mining or other operations under the said lease in any way other than as prescribed under these rules.

Transfer of lease:-

17. (1) The lessee/lessees shall not, without the previous consent in writing of the State Government,

(a) assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or interest therein, or

(b) enter into or make any arrangement, contract or understanding whereby the lessee/lessees will or may be directly or indirectly financed to a substantial extent by, or under which the lessee's operations or undertakings will or may be substantially controlled by, any person or body of persons other than the lessee/lessees:

Provided that the State Government shall not give its written consent unless-

(a) the lessee has furnished an affidavit along with his application for transfer of the mining lease specifying therein the amount that he has already taken or proposes to take as consideration from the transferee;

(b) the transfer of the mining lease is to be made to a person or body directly undertaking mining operations.

(2) Without prejudice to the above provisions the lessee/lessees may, subject to the conditions specified in the proviso to Rule 35 of said Rules, transfer this lease or any right, title or interest therein, to a person who has filed an affidavit

stating that he has filed up-to-date income tax returns, paid income tax assessed on him and paid the income tax on the basis of self assessment as provided in the Income Tax Act, 1961 (43 of 1961), on payment of five hundred rupees to the State Government:

Provided that the lessee/lessees shall make available to the transferee the original or certified copies of all plans of abandoned workings in the area and in a belt 65 metres wide surrounding it.

Provided further that where the mortgagee is an Institution or a Bank or a Corporation specified in Schedule V, it shall not be necessary for any such Institution or Bank or Corporation to meet with the requirement relating to income tax and the said valid clearance certificate.

(3) The State Government, may by order in writing, determine the lease at any time if the lessee/lessees has/have in the opinion of the State Government, committed a breach of any of the above provisions or has/have transferred the lease or any right, title or interest therein otherwise than in accordance with clause (2) :

Provided that no such order shall be made without giving the lessee/lessees a reasonable opportunity of stating his/their case.

PART IX

General Provisions

Penalty in case of default in payment of royalty and breach of covenants:-

2. If the lessee/lessees or his / their transferee or assignee makes/make any default in payment of rent or water rate or royalty as required by section 9 of the Act or commits a breach of any of the conditions and convenants other than those referred to in covenant 1 above, the State Government shall give notice to the lessee/lessees requiring him/them to pay the rent, water rate, royalty or remedy the breach, as the case may be, within sixty days from the date of receipt of the notice and if the rent, water rate and royalty are not paid or the breach is not remedied within such period, the State Government without prejudice to any proceedings that may be taken against him/them, determine the lease and forfeit the whole or part of the security deposit.

Penalty for repeated breaches of covenants:-

3. In cases of repeated breaches of covenants and agreements by the lessee/ lessees for which notice has been given by the State Government in accordance with clauses (1) and (2) aforementioned on earlier occasion, the State Government without giving any further notice,

may impose such penalty not exceeding twice the amount of annual dead rent specified in clause 2, Part V.

55. It is respectfully submitted that the aforesaid terms and conditions specified in Form – K do not contain any stipulation either with regards to the Environmental Clearance under the Environment (Protection) Act, 1986 or the Forest Clearance under the FC Act, 1980.

II. ORDERS PASSED BY THIS HON'BLE COURT REMITTING THE MATTER TO THE CEC, AND ESCHEWAL OF THE REPORT OF THE JUSTICE SHAH COMMISSION

56. Before adverting to the orders passed by this Hon'ble Court in the captioned Writ Petition, the remit of the Central Empowered Committee (CEC) may first be looked at.

57. The CEC had been initially constituted by the Hon'ble Supreme Court by order dated 09.05.2002 [reported as (2013) 8 SCC 198] as an interim measure till the constitution of a statutory agency under Section 3 of

the Environment (Protection) Act, 1986. The purpose behind the constitution of CEC was to monitor implementation of the Court's orders including in respect of encroachment removals, implementations of working plans, compensatory afforestation, plantations and other conservation issues.

58. The constitution of CEC was thereafter notified by the MoEF vide notification dated 17.09.2002.

59. Thereafter, the Central Government had contended before this Hon'ble Court that the powers which were to be to be exercised by CEC were under Section 3(3) of the EP Act. It was contended that some powers which were to be exercised under sub-sections (4) and (5) had been given to CEC which were beyond intended delegation. The said contentions were recorded in the order dated 07.09.2007, and it was directed, as an interim measure, that the CEC would continue until further orders [reported as (2013) 8 SCC 200].

60. Thereafter, an order dated 14.12.2007 was passed by the Hon'ble Supreme Court in supersession of all previous orders [(2013) 8 SCC 204]. It was stated in the said order that the CEC was constituted for the purpose of monitoring and ensuring compliance with orders of the Court covering the subject matter of forest and wildlife and related issues arising out of the said orders. It was also directed that the MoEF would provide suitable and adequate office accommodation for CEC and would bear all expenses of the working of CEC. It was also directed that the jurisdiction of CEC would extend to the whole of India.

61. At this juncture, it may be necessary to point out that the captioned Writ Petition No. 114 of 2014 (*Common Cause v. Union of India*), was filed by the Petitioner on 5th February 2014. The said petition was listed for hearing in the first instance on 17th February 2014. On 17th February 2014, this Hon'ble Court passed the following order:

"List along with IA Nos.3706-3707 in WP (C) No. 202 of 1995"

62. On 21st April, 2014, this Hon'ble Court was pleased to pass the following order [(2014) 14 SCC 160]:-

"We have heard the preliminary objections with regard to the writ petition and we are not convinced that the writ petition is not maintainable.

Issue notice.

As the State of Odisha, Union of India and the CEC have already been served with the notices, no further notices be issued to them.

Notice, however, be issued to respondent nos. 4 and 5 returnable within four weeks.

It appears from the averments in paragraph 14 of the writ petition that several lessees are operating without clearances under the Environment (Protection) Act, 1986 and the Forest (Conservation) Act, 1980, and without renewal by the Government. Hence, an interim order needs to be passed in respect of these lessees who are operating the leases in violation of the law.

For consideration of the interim order that should be passed, only this writ petition be listed next Monday, the 28th of April, 2014, as first item. It will be open for all parties and intervenors / proposed intervenors to file their respective affidavits.

CEC, in the meanwhile, will make out a list of such lessees who are operating the leases in violation of the law.

This list be prepared by the CEC without reference to the Shah Commission's Report.

Liberty is given to the parties to produce their papers before the CEC.

The State of Odisha and the Union of India will cooperate with the CEC to prepare the list."

(Emphasis supplied)

63. It is respectfully submitted that the above order was passed on two premises:-

(a) That certain lessees were operating without clearances under the Environment (Protection) Act, 1986 and Forest (Conservation) Act, 1980.

(b) Certain lessees were operating without an express order of renewal under Section 8(3) of the Act.

64. However, this Hon'ble Court was conscious of the Justice Shah Commission's report. It may be noted that there is an express reference to the Justice Shah Commission's report in paragraph 4 of the said order, whereby CEC was directed to prepare the list of lessees operating in violation of law *without reference to the Shah Commission's Report.*

65. At this juncture, a few submissions regarding the Justice Shah Commission of Inquiry are required to be made. The Commission was constituted by the Central Government *vide* Notification dated 22.11.2010 under Section 3 of the Commissions of Inquiry Act, 1952. The terms of reference of the Commission were as follows:

> *"2. It is stated in the said Notification that there are reports that mining, raising, transportation and exporting of iron ore and manganese ore illegally or without lawful authority in the*

various States are being done in one or more of the following forms, namely:

(a) mining without a licence;

(b) mining outside the lease area;

(c) undertaking mining in a lease area without taking approval of the concerned State Government for transfer of concession;

(d) raising of minerals without lawful authority;

(e) raising of minerals without paying royalty in accordance with the quantities and grade;

(f) mining in contravention of a mining plan;

(g) transportation of raised mineral without lawful authority;

(h) mining and transportation of raised mineral in contravention of applicable Central and State Acts and rules thereunder;

(i) conducting of multiple trade transactions to obfuscate the origin and source of minerals in order to facilitate their disposal;

(j) tampering with land records and obliteration of inter–State boundaries with a view to conceal mining outside lease areas;

(k) forging or misusing valid transportation permits and using forged transport permits and other documents to raise, transport, trade and export minerals;

...

2. The terms of reference of the Commission shall be–

(i) to inquire into and determine the nature and extent of mining and trade and transportation, done illegally or without lawful authority, of iron ore and manganese ore, and the losses therefrom; and to identify, as far as possible, the persons, firms, companies and others that are

engaged in such mining, trade and transportation of iron ore and manganese ore, done illegally or without lawful authority;

(ii) to inquire into and determine the extent to which the management, regulatory and monitoring systems have failed to deter, prevent, detect and punish offences relating to mining, storage, transportation, trade and export of such ore, done illegally or without lawful authority, and the persons responsible for the same;

(iii) to inquire into the tampering of official records, including records relating to land and boundaries, to facilitate illegal mining and identify, as far as possible, the persons responsible for such tampering; and

(iv) to inquire into the overall impact of such mining, trade, transportation and export, done illegally or without lawful authority, in terms of destruction of forest wealth, damage to the environment, prejudice to the livelihood and other rights of tribal people, forest dwellers and other persons in the mined areas, and the financial losses caused to the Central and State Governments.

3. The Commission shall also recommend remedial measures to prevent such mining, trade, transportation and export done illegally or without lawful authority;

4. The Commission shall have all the powers under the Commissions of Inquiry Act, 1952 (60 of 1952) and shall follow its own procedure subject to the provisions of the said Act and the rules made thereunder

relating to the procedure of the Commission.

5. *The headquarter of the Commission shall be at Mumbai (subsequently amended at Ahmedabad).*
6. *The Commission shall submit its report to the Central Government as soon as possible but not later than eighteen months from the date of its first sitting.*
7. *The Commission may, if it deems fit, submit interim reports to the Central Government before the expiry of the said period on any of the matters specified in the notification and shall also recommend specific steps that may be required to be taken to urgently curb the menace of such illegal mining, trade and transportation*
8. *The Commission may take the services of any investigating agency of the Central Government in order to effectively address its terms of reference.*
9. *The Commission may also engage Consultants or specialized agencies for survey, data collection and analysis."*

A copy of the Notification constituting the Justice Shah Commission of Inquiry dated 22.11.2010 is annexed herewith and marked as **ANNEXURE-7**.

66. That it was specifically provided in the aforesaid Notification that the commission was a Commission of

Inquiry under the Commissions of Inquiry Act, 1952.

Accordingly, Sections 8B and 8C of the Commissions of Inquiry Act, 1952 are relevant, which run as follows:

> "*8-B. Persons likely to be prejudicially affected to be heard.—If, at any stage of the inquiry, the Commission,—*
>
> *(a) considers it necessary to inquire into the conduct of any person; or*
>
> *(b) is of opinion that the reputation of any person is likely to be prejudicially affected by the inquiry,the Commission shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence:*
>
> *Provided that nothing in this section shall apply where the credit of a witness is being impeached.*"
>
> *"8-C. Right of cross-examination and representation by legal practitioner.—The appropriate Government, every person referred to in Section 8-B and, with the permission of the Commission, any other person whose evidence is recorded by the Commission,—*
>
> *(a) may cross-examine a witness other than a witness produced by it or him;*
> *(b) may address the Commission; and*
> *(c) may be represented before the Commission by a legal practitioner or, with the permission of the Commission, by any other person.*"

67. It is settled law that the findings contained in a report rendered under the Commissions of Inquiry Act, 1952 cannot be acted upon in the event Sections 8B and 8C of the Act have not been complied with. Reference in this regard may be had to the following judgments of this Hon'ble Court:

(a) *Sri Ram Krishna Dalmia v. Shri Justice S.R. Tendulkar &Ors.*, 1959 SCR 79;

(b) *State of J&K v. Bakshi Ghulam Mohammad*, AIR 1967 SC 122;1966 Supp SCR 401, 410-11;

(c) *Union of India v. Tulsiram Patel*, (1985) 3 SCC 389

(d) *Kiran Bedi v. Committee of Inquiry*, (1989) 1 SCC 494, para 17;

(e) *Guruvayoor Devaswom Managing Committee v. C.K. Rajan*, (2003) 7 SCC 546, 577;

(f) *State of Bihar v. Lal Krishna Advani & Ors.*, (2003) 8 SCC 361 (paras 8,9 and 11)

68. It is relevant to note in this regard this Hon'ble Court's observations regarding the Shah Commission's report for the State of Goa. In the matter of *Goa Foundation v. Union of India,* (2014) 6 SCC 590, this Hon'ble Court took note of Sections 8B and 8C of the Commissions of Inquiry Act, 1952 and the contention raised by various lessees that the Justice Shah Commission had failed to follow the procedure laid in the aforesaid Sections 8B and 8C. Therefore, this Hon'ble Court declined to direct any prosecution of the mining lessees on the basis of the findings in the report of the Justice Shah Commission:

> *"14. We find that Section 8B of the Commissions of Inquiry Act, 1952 provides that if a person is likely to be prejudicially affected by the inquiry, the Commission shall give to that person a reasonable opportunity of being heard and to produce evidence in his defence and Section 8C of the Commissions of Inquiry Act, 1952 provides that every such person will have a right to cross-examine and the right to be represented by a legal practitioner before the Commission. As the State Government of Goa has taken a stand before us that no action will be taken against the mining*

lessees only on the basis of the findings in the report of the Justice Shah Commission without making its own assessment of facts and without first giving the mining lessees the opportunity of hearing and the opportunity to produce evidence in their defence, we are not inclined to quash the report of the Justice Shah Commission on the ground that the provisions of Sections 8B and 8C of the Commissions of Inquiry Act, 1952 and the principles of natural justice have not been complied with. At the same time, we cannot also direct prosecution of the mining lessees on the basis of the findings in the report of the Justice Shah Commission, if they have not been given the opportunity of being heard and to produce evidence in their defence and not allowed the right to cross-examine and the right to be represented by a legal practitioner before the Commission as provided in Sections 8B and 8C respectively of the Commissions of Inquiry Act, 1952. We will, however, examine the legal and environmental issues raised in the report of the Justice Shah Commission and on the basis of our findings on these issues consider granting the reliefs prayed for in the writ petition filed by Goa Foundation and the reliefs prayed for in the writ petitions filed by the mining lessees, which have been transferred to this Court.

Therefore, the judgment in the Goa Foundation was based upon the finding on issues of law arrived at by the Court, independent of the Shah Commission's observations.

69. It is respectfully submitted that while the lessees have great respect for Hon'ble Mr. Justice M.B. Shah, the said Commission of Inquiry did not follow the procedure contained in Sections 8B and 8C of the Commission of Inquiry Act, 1956. Thus, findings relating to collusion and corruption are completely unwarranted and cannot be acted upon.

70. It is respectfully submitted that this Hon'ble Court has refrained from acting upon the said report in *Goa Foundation v. Union of India*, (2014) 6 SCC 590, in view of the failure to comply with the provisions of Sections 8B and 8C of the Act. Insofar as the report by the Shah Commission for mining lessees in the State of Odisha is concerned, it is submitted that giving notice to lessees to produce data is entirely distinct from

making allegations of collusion and corruption. There is no detail, specificity or particulars with which any of the Lessees was actually asked to show cause relating to any act of corruption, collusion or excess production. Under these circumstances, the findings of the Shah Commission are incapable of being relied upon in support of the writ petition.

71. In fact, the Shah Commission's report for the State of Odisha has expressly recorded that:

> *"At that time, apart from the information which was submitted earlier by the noticees, Learned Senior Counsel including Ram Jethmalani and Diwan raised the contention that there was not a specific notice for the violation of Rule 37, 1960 i.e. for the transfer of the lease without permission."*

It may be noted that thereafter the Commission proceeded as follows:-

> *"The function of the Commission, at this stage, is only to inquire, assess the data collected and to submit the report on the said basis. On that basis, some remedial measures are suggested by the Commission for controlling illegal mining*

and violation of the Acts and/or Rules. For that, there is no question of issuing notices to the lessees.

For collecting the data and assessing it, the Principles of Natural Justice are fully complied with, as stated above. On the basis of the data submitted by the lessees and the submissions made by Ld. Counsel for them, the report is submitted"

72. It is, however, respectfully submitted that the Commission did not engage any counsel. The Commission had a Secretary, Shri U.V. Singh, whose presence was objected to by the Lessees, who was posing questions instead of the Commission itself. The conduct of Shri U.V. Singh was in fact objected to by the Lessees persistently as he was not a part of the Commission and was not authorised to address questions to the Counsel appearing for the Lessees. It is respectfully submitted that there was no Counsel who was appointed to the assist the Commission as is the normal procedure undertaken while a Commission of Inquiry is conducted under the Commissions of

Inquiry Act, 1952. In fact, the provisions of the Commissions of Inquiry Act, 1952 not only contemplate full compliance with Rules 8B and 8C but also contemplate an anterior notice which must be issued in the form of Rules 5(2)(a) and (b) of the Commissions of Inquiry (Central) Rules, 1972 with reference to general and specific matters. The said procedure was, however, not adopted by the Shah Commission.

73. At this juncture, it is submitted that it is only fair to the Hon'ble Justice Shah Commission of Inquiry that the Commission itself treated this as a purely preliminary inquiry. It is submitted that the lessees were never given the requisite opportunity under Sections 8B and 8C Act of the Commissions of Inquiry Act, 1952 or for that matter even informed of the specific allegations being looked into. In fact, the Shah Commission has itself observed in its Final Report that:

> *"In any case the report would be tentative which may or may not be accepted and if accepted, the*

concerned authority is required to adopt the procedure prescribed under the MM (DR) Act, 1957; Forest (Conservation) Act, 1980 and the Environment (Protection) Act, 1986 and others for taking appropriate action….."

74. It is submitted therefore that there is no occasion or warrant for the Petitioner to expand the scope of the inquiry and take into account the findings of the Justice Shah Commission. Thus, it is respectfully submitted that the findings of the Commission contained at page 112 of the Report are general and are not based upon any evidence but are inferential in character.

75. At this juncture, it may also be relevant to point out that the Federation of Indian Mineral Industries (FIMI) had preferred a writ petition, being W.P. (C) No. 2942 of 2014 before the Hon'ble Delhi High Court, seeking quashing of the reports of the Justice Shah Commission. By order dated 09.05.2014, the Hon'ble Delhi High Court had issued notice on the writ petition, and recorded that any action taken by the

Respondents would be subject to further orders of the Court. The said writ petition is still pending adjudication before the Hon'ble Delhi High Court, with the next date of listing being 14.08.2017.

A copy of the order of the Hon'ble Delhi High Court dated 09.05.2014 in W.P. (C) No. 2942 of 2014 is annexed herewith and marked as **ANNEXURE-8**.

76. It is on account of the abovesaid circumstances that this Hon'ble Court while issuing notice vide order dated 21.04.2014 directed CEC to conduct its exercise without reference to Shah Commission's report.

77. The CEC submitted its Final Report on 16.10.2014. Further, vide order dated 16.01.2015, this Hon'ble Court directed the concerned parties to file objections to the CEC Report. Therefore, it may also be relevant to point out that there has been no occasion for the lessees to file objections to the observations and findings in the Shah Commission Report.

78. It may be noted that the CEC Report dated 16.10.2014 commences with a discussion of its earlier report dated 26.04.2010 submitted in I.A. No.2746-2748 (filed by Rabi Das) in Writ Petition (C) No. 202 of 1995.

A copy of the said Report of the CEC dated 26.04.2010 submitted in I.A. No.2746-2748 (filed by Rabi Das) in Writ Petition (C) No. 202 of 1995 is annexed herewith and marked as **ANNEXURE-9**.

79. That the said Report of the CEC dated 26.04.2010 was accepted by the order of this Hon'ble Court dated 07.05.2010, which reads as under:

> *"The CEC has filed its Report. The State would like to file its response. Six weeks' time is granted for the same. The recommendations of the CEC which are acceptable to the State Government can be complied with."*

A copy of the order of this Hon'ble Court's order dated 07.05.2010 passed in I.A. No. 2746-2748 in W.P. (C) No. 202 of 1995 is annexed herewith and marked as **ANNEXURE-10**.

80. The CEC has in this context in its Final Report dated 16.10.2014 complimented the efforts of the State Government of Odisha in dealing with matters relating to mining subsequent to the passing of the order dated 7th May 2010 by this Hon'ble Court. It is in fact common ground between the CEC, the Writ Petitioner and the lessees that on, and with effect from 7th May 2010, no mining operations have been undertaken in Odisha in violation of law.

81. It may be noted further that the CEC has not alleged any corruption or collusion. Therefore, it is submitted that there is variance between the findings of the CEC as well as the Shah Commission. In view of the fact that the CEC Final Report dated 16.10.2014 records that no illegal mining has taken place on or after 7th May 2010 in the State of Odisha, to suggest that officers of the State Government are responsible for corruption is erroneous.

III. SUSPENSION OF OPERATIONS IN 102 MINING LEASES BY THIS HON'BLE COURT'S ORDER DATED 16.05.2014 (REPORTED AS (2014) 14 SCC 155)

82. Pursuant to the order dated 21.04.2014 as referred to above, the CEC prepared and submitted an interim report dated 25.04.2014. Thereafter, this Hon'ble Court heard the matter on the issue of interim relief and vide order dated 28.04.2014, reserved for interim orders. The interim orders were pronounced on 16.05.2014.

83. The interim order dated 16th May 2014 was based upon the preliminary report of the CEC dated 25th April 2014. The said report catalogued 102 mining leases out of total of 187 iron and manganese ore mining leases in State of Odisha, which (according to the State Government) did not have requisite environmental clearances and approvals under the Forest (Conservation) Act, 1980, approved Mining Plan, and/or Consent to Operate were listed. The said 102 mines these were called non-working mines. A tabular representation of leases is given hereinbelow:-

S. No.	Category	Number
1.	Total number of leases *(across all minerals)*.	601
2.	Total number of leases for Iron & Manganese.	187
	A. Mining leases which did not have requisite statutory clearances as on 25.04.2014 (***Annexure R-2 to Interim Report dt. 25.04.2014)***	102
	B. Number of mining leases which stood determined / rejected / lapsed as on 25.04.2014 (***Annexure R-3 to Interim Report dt. 25.04.2014)***	29
	C. Number of mining leases which that were operational as on 25.04.2014 having all statutory clearances (***Annexure R-4 to Interim Report dt. 25.04.2014)***	56
	i. Original Grant Cases	16
	ii. 1st Renewal Cases	14
	iii. 2nd Renewal Cases	26

84. It is necessary to point out the reason for 102 mines being classified as non-working mines. Subsequent to the submission of report dated 26.04.2010 by CEC in

I.A. No.2746-2748 (filed by Rabi Das) in Writ Petition (C) No. 202 of 1995, which report was accepted by this Hon'ble Court vide order dated 7th May 2010, the State of Odisha had very firmly and strictly insisted that no mining operations can continue until all statutory approvals were in place. It is thus common ground between the CEC, the Writ Petitioner and the Lessees that on, and with effect from 7th May 2010, no Lessee can undertake, and has undertaken, any mining operations unless the requisite approvals existed under the provisions of the Environment (Protection) Act, 1986, the FC Act, 1980, approved Mining Plan and Consent to Operate.

85. In fact, the CEC has observed as follows in its Final Report dated 16.10.2014 in the present matter (para 4, pgs. 8-9):

> "*This Hon'ble Court by order dated 7.5.2010 inter alia directed that the recommendations of the CEC which are acceptable to the State Government can be complied with. Thereafter the mining leases which were operating without*

having all the requisite statutory approvals have been suspended by the State Government."

86. Thus, the subject matter of inquiry is for the period anterior to 7th May 2010. It is, therefore, necessary for this Hon'ble Court to bear in mind that the issues which arise out of the CEC are in respect of *'past violations'*, if any. It is respectfully submitted that post 7th May 2010, the CEC is conscious that there has been no violation of any of the provisions of law in relation to various statutory clearances.

87. The order of this Court dated 16th May 2014 expressly observed that non-working 102 mining Lessees, could approach this Hon'ble Court if they secured requisite approvals for modification of the injunction [(2014) 14 SCC 155, at 157]:

"4. We have considered the report dated 25.4.2014 of the CEC, and the submissions made by learned counsel appearing for different parties, and we find that 102 mining leases do not have requisite environmental clearances, approvals under the Forest (Conservation) Act,

1980, approved Mining Plan and/or Consent to Operate. A list of these 102 mining leases is annexed to the report of the CEC as Annexure R-2. The CEC has, however, stated in the report that mining operations in these 102 mining leases have been suspended and these 102 mining leases have been classified as non-working leases. We direct that mining operations in these 102 mining leases listed in Annexure R-2 of the report of the CEC shall remain suspended, but it will be open to such lessees to move the concerned authorities for environmental clearances, approval under the Forest (Conservation) Act, 1980, approval of Mining Plan or Consent to Operate and as and when the mining lessees are able to obtain all the clearances/approval/consent, they may move this Court for modification of this interim order in relation to their cases.

5. We further find that 29 mining leases listed in Annexure R-3 to the report of the CEC have been determined or have been rejected or have lapsed. We direct that mining operations in these 29 mining leases will also remain suspended, but it will be open for the lessees of these 29 mining leases to move the concerned authorities or the Court or the Tribunal for necessary relief and as

and when they get appropriate relief from the concerned authorities or the Court or the Tribunal, they may move this Court for modification of this interim order in relation to their cases."

88. Certain lessees have approached this Hon'ble Court by way of Interlocutory Applications seeking modification of this Hon'ble Court's order dated 16.05.2014, whereby they are seeking resumption of mining operations on account of having obtained requisite statutory clearances.

89. In this context, it is necessary to point out the true purport of the order dated 16th May 2014. It is submitted that the orders which are being invited to be passed by this Hon'ble Court, by such Lessees, should be read in continuum with the order dated 16th May 2014 as well as the order dated 4th April 2016. Obviously those Lessees who satisfy the requirements of the orders dated 16th May 2014 as well as the order dated 4th April 2016 ought to be permitted to

undertake mining operations since such rights accrue in their favour in accordance with law.

90. Therefore, in so far as it concerns those applicants / Lessees, who have applied for modification of this Hon'ble Court's order dated 16.05.2014, after obtaining requisite statutory clearances, it is submitted that said applications may be allowed and the fact that there are certain '*past violations*' should not come in the way of their resumption of mining operations for the time being.

IV. SCIENTIFIC MINING AND PRINCIPLES OF INTER-GENERATIONAL EQUITY

4.1 Scientific Mining

91. That before adverting to the concerns raised by the Petitioner in respect of exhaustion of mineral resources, the Deponent and other lessees herein would like to make a few submissions regarding the concept of scientific mining vis-à-vis mineral development and conservation, which is the real

undercurrent of the MMDR Act, 1957 and its allied Rules and schemes.

92. Modern mining in a broad sense encompasses the following activities – exploration / reconnaissance, prospecting, drilling, blasting, extraction, processing, and finally sale. The focus of scientific mining is to optimize the aforesaid activities both from an economic perspective and a ecological perspective. It is submitted that the same is ensured by increasing efficiencies and economies of scale, and most importantly, ensuring that there is zero-wastage mining.

93. Therefore, it is submitted that the contention urged by the Petitioner that responsible mining necessarily means lower extraction is misconceived and erroneous. There are two important aspects here:

(a) Mining operations involve removal of Run of Mines (ROM) and Over Burden (OB). Together, they constitute a volumetric excavation carried out by a miner. The ROM constitutes the actual

commercially exploitable ore. The OB on the other hand comprises of rock, soil and sub-grade ore that is not commercially exploitable.

(b) In the understanding of the Petitioner and the CEC, a lessee's production is linked to his dispatch of marketable ore, and not to his total volumetric excavation. This may again be misconceived. A lessee may have carry out the same volumetric excavation, but because of superior technology and beneficiation may actually be able to beneficiate and make part of his OB marketable. In such a case, the lessee will have been shown to have carried out 'excess production' because the marketable ore dispatched by him will be higher than his ROM excavation. In reality, however, the lessee in such a case has adhered to the principles of scientific mining by ensuring zero-wastage of resources.

94. That an important facet in optimizing the activities involved in mining is using state-of-the-art technology

for the purposes of mapping the mineral resources. This generally involves the following broad processes:

(a) Finding a resource through surface geology methods

(b) Going below the surface and converting the said resource into a 'mineable reserve' in the form of a 3D model

95. The first aspect involves use of airborne geophysics, satellite data, and collection of geochemical samples from the ground. Over the years, the technologies available for the same have advanced significantly. The second aspect involves actual drilling, and creation of a 3D model of the reserve. This second exercise is what ultimately culminates in the creation of a Mining Plan.

96. That despite the advances made in technology, it is submitted that both the aforesaid aspects are still fraught with uncertainties. That is indeed the nature of geology. It may be noted that iron ore is not a mineral which has come into being in the recent past. It has gone through different phases over billions of

years. Volcanic sedimentary deposition of iron oxide (ferric oxide - Fe_2O_3) and silica (silicon dioxide – SiO_2) occurred about 2.7 billion years ago. These went down deep by high pressure and morphed into minerals. About 2.2 billion years ago these were leached. Material was removed and this silica leached out iron oxide. Leached out iron oxide now forms the mineral deposits. These geological processes differ spatially and temporally, and therefore, there can be never 100% accuracy in both surface geology and actual preparation of a 3D model of a mineable reserve.

97. For example, it can generally be said that iron ore deposits are in the form of a slice below the surface of the earth. However, there could cases where the ore deposits cease to be a slice and occur instead in the form of an undulating pattern. These uncertainties are often discovered during actual mining. In such circumstances, it is incumbent on a miner to actually improvise i.e. ask for modification of his mining plan. Therefore, the contention of the Petitioner in this

context would be incorrect. A layman's understanding of conservation in such a context would be to mine only that as has already been permitted in the Mining Plan. However, the scientific method of mining necessarily demands that the Mining Plan be modified. Only that will ensure conservation and systematic exploitation of mineral.

98. It is respectfully submitted that sophisticated technology enables control of pollution, maximisation and optimisation of mining, lack of wastage which amounts to true conservation of minerals. It is submitted that it is not the lessening of quantity of mineral which is the test of mineral development. It is, in fact, the optimisation of mineral which is extracted and the manner in which it is extracted which is the test of mineral development. It is, therefore, submitted that on account of advanced technologies in comparison to antiquated technologies more mineral can be excavated with lesser damage to the surroundings and in a manner which causes

benefit to the local community including payment of royalties to the State exchequer.

99. Insofar as the geophysical impact of mining is concerned, a few submissions are necessary in respect of the scale of mining to put things in the correct perspective. It is submitted that the scale of mining world over is miniscule compared to the size of this planet. The diameter of Earth is about 12,742 kms. Distance to the centre of Earth from its surface is 6,371 kms. Centre of Earth comprises of liquid metal core. Scientists have used seismic waves to determine the said distance to the centre of Earth. The extent of drilling for the purposes of mining in this context is actually nanoscopic. The deepest drilling to have ever been carried out on Earth was in the year 1989 at the Kola Superdeep Borehole (a depth of 12.26 Kms) undertaken by Soviet Union as a scientific drilling project in the Kola Peninsula. At this point the drilling was stopped because of very high temperature of upto 180°C which would have been a hindrance in the

efficient working of drill bit. This remained the deepest drilling point for about 20 years till Al-Shaheen Oil Well in Qatar was dug upto the depth of 12.28 Kms. In India, the deepest drilling has occurred at Bombay High, where offshore drilling has gone to a maximum depth of 6 kms.

100. However, insofar as open cast mining is concerned, the deepest drilled mine is at 1.2 Kms at a copper mine in Salt Lake City, Utah (U.S.A.). However, insofar as iron ore mining is concerned, the drilling is in the range of 100-200 metres from the hilltop level, and is in the range of 0-50 metres from the ground level. Therefore, from a geophysical standpoint, the actual impact of iron ore mining operations is extremely insignificant.

4.2 Importance of Proper Exploration, and Estimation of present Iron Ore reserves in India and Odisha

101. With the aforesaid general background to scientific mining, it is submitted that *status quo* is not

consistent with mineral development. While minerals may be removed and may appear to be, *prima facie*, non-renewable; exploration of deeper reserves also takes place concurrently.

102. In this context, it is also necessary to distinguish metallic ores like iron ore and manganese ore from hydrocarbons like coal and lignite. Hydrocarbons like coal and lignite are fossil fuels are non-renewable in nature. Once consumed, there are lost forever. However, metallic minerals like iron and manganese are different. Once consumed, they are converted to end-product like sponge iron or steel. Such end-products are liable to be recycled and re-used. For instance, today in the West, steel is primarily produced from existing scrap, and not from raw iron ore. Therefore, at the very outset, the contention of the Petitioner that iron ore is a perishable resource is completely fallacious. In fact, it is stated with great respect that iron ore reserves are so plentiful in Odisha alone, that the same would suffice for several

generations to come. This is without taking into account further exploration or changes in technology which would allow steel to be made through existing scrap.

103. An appropriate illustration in this context would be of copper reserves in India. About 40 years ago, in India copper deposits mined were 4-5% of the world production. However, today we mine 0.2% of total copper production in the world. Trillions of tonnes of copper are available. Further, the mining of such copper is also much cheaper since 40 years ago.

104. It is submitted that despite continuous mining over the years, there has been a substantial increase in iron ore reserves in India, on account of greater and better exploration of reserves. In 1990, the total iron ore resources available in country were estimated to 22.78 billion tons, which have been estimated to be 28.52 billion tons in 2010. Similarly, in Odisha the resources estimated in 1990 as 2.66 billion tons are estimated to be 5.93 billion tons in 2010.

A copy of chart of National Mineral Inventory Report of Indian Bureau of Mines (IBM) showing the resources estimated in India and Odisha is annexed herewith and marked as **ANNEXURE-11**.

105. Thus, it must be borne in mind that unless and until mineral is excavated further exploration does not take place. This is clear from the above Table produced by IBM which indicates (in Odisha) increase in resources from 2.66 billion tons to the present estimated reserves of 7.315 billion tons.

106. Similar figures are found in the CSIR-NEERI Report which states that the IBM for 187 leases in Odisha has indicated 5.09 billion tonnes. Similarly, the Director, Department of Geology, Government of Odisha has also indicated 5.894 billion tonnes. GSI has proved additional reserve of 0.104 billion tonnes in Ghorabhurani and Sagasahi areas of Sundargarh District. In fact as per IBM data, in leases in Odisha, only 55% of leasehold area has been explored. The rest 45% of leasehold area is yet to be explored. Therefore,

estimated reserves could be doubled merely by complete exploration of existing leasehold areas. This does not even account for the rest of non-lease unexplored areas.

107. Further, actual exploration in India is minimal. As per the Ministry of Mines document **Vision 2030,** out of the country's total map-able area of 3.146 million sq km, an area of 5.71 lakh sq km was identified as Obvious Geological Potential (OGP) area, where geological potential for occurrence of mineral deposit as studied is highest. Out of India's entire Obvious Geological Potential (OGP) area, identified by GSI, only around 10% has been explored and mining is undertaken in around 1.5-2% of this area.

Copy of Vision 2030 as published by the Ministry of Mines, Government of India is annexed herewith and marked as **ANNEXURE-12**.

108. Thus, as per the Vision document published by the Ministry of Mines, there is vast potential for mineral exploration and enhancement of reserves of Iron Ore

and other minerals. In fact, India lags behind other mineral rich countries in carrying out systematic exploration of mineral reserves so as to arrive at accurate estimates. The following table shows the exploration performance of India vis-à-vis Australia having similar geological conditions:

Comparative exploration performance in India and Australia				
Commodity	India 1980	India 2013	Australia 1980	Australia 2013
Iron ore reserves	**11,470 mt**	**13,968 mt**	**15,000 mt**	**52,578 mt**
Gold Reserves	56.1 tons	568 tons	400 tons	9,808 tons
Bauxite Reserves	2,489 tons	2,886 tons	3,000 dry tons	6,464 tons

109. In fact it may be pointed out that estimation made in earlier reports / studies were limited to lumpy ores and friable ores. It is submitted that now the threshold for estimation has changed, whereby different kinds of sub-grade ore which were previously discarded as unmarketable are also taken into consideration. Further, it may be noted that earlier drilling for the purpose of exploration was happening

upto a depth of 50 metres, whereas now it is happening upto 100 metres. As an example, in Serajuddin mines, because of exploration, reserves have increased from 88 million MT to 260 million MT, and this is only in the broken-up area.

A copy of case-study comparing reserves, between 2007-08 & 2012-13, at Balda Block Iron Ore Mine of M/s. Serajuddin & Co., is annexed herewith and marked as **ANNEXURE-13**.

110. At this juncture, it is relevant to submit that the Central Government (Planning Commission) on 14th September 2005 constituted a High Level Committee under the Chairmanship of a Member of the Planning Commission ("Hoda Committee"). The terms of reference of the said Committee which were formulated are relevant:

> *"1. To review the National Mineral Policy, 1993 and the Mines and Minerals (Development and Regulation) (MMDR) Act, 1957 and suggest the changes needed for encouraging investment in public and private sector in exploration and exploitation of minerals;*

2. To review the existing procedures for granting Reconnaissance Permits (RPs), Prospecting Licences(PLs), and Mining Leases (MLs) and suggest ways for their streamlining and simplification;

3. To review the procedures for according clearance to mineral exploration and mining projects under the Forest (Conservation) Act, 1980 and Environment (Protection) Act, 1986, and suggest ways for speeding them up;

4. To prioritise the critical infrastructure needs of the Indian mining sector and make recommendations on ways to facilitate investment to meet these needs;

5. To examine the implications of the policy of mineral-rich states to make value addition within the state a condition for grant of mineral concession and make appropriate recommendations in this regard;

6. To examine ways of augmenting state revenues from the mineral sector; and

7. To examine any other issue relevant for stimulating investment flow sand inducting state-of-the-art technology into the sector."

111. In fact, the concerns regarding poor exploration of mineral reserves in India were highlighted in the

Report submitted by the Hoda Committee. The concerns expressed by the Hoda Committee in relation to regressive exploration of mining ore are clear from the above chart.

Copy of the Report submitted by the Hoda Committee to the Government of India is annexed herewith and marked as **ANNEXURE-14**.

112. It is necessary to bear in mind, as noted in Hoda Committee report, that Australia spends about US$ 500 million per annum on survey and exploration, while India spends only US$ 5 million on promotional exploration. It may be noted that till now GSI has been mainly involved in the task of regional exploration and there has been no other agency doing this work in a substantive way. It must also be pointed out that the Hoda Committee noted that the Central PSU, namely, Mineral Exploration Corporation had done very negligible work. India accounts for less than 1% of the global exploration expenditure.

4.3 Role of Indian Bureau of Mines (IBM) and the Geological Survey of India (GSI)

113. In order to analyse the role of the IBM and GSI, some historical facts require to be first stated. The National Mineral Policy Conference was held in January 1947 and the first law which was enacted thereafter was the Mines and Minerals (Regulation and Development) Act, 1948. In March 1948, the IBM was established as the main regulatory agency to monitor and supervise mining activity in the country. The Industrial Policy Resolution of 1956 put major minerals such as coal, lignite, mineral oils, iron ore, copper, zinc, atomic minerals in Schedule A which was reserved exclusively for the public sector while minor minerals in Schedule B were permitted for the private sector. It is at that stage that Parliament enacted the MMDR Act, 1957.

114. The MMDR Act, 1957 was amended in 1972. This amendment enabled such measures like premature termination of the mining leases as well as a lowering of ceiling on individual holdings. It also empowered

modification of mining leases and to enable the Central Government itself to undertake prospecting and mining operations in certain areas. In 1986, further amendments were made and first schedule minerals for which the prior approval of the Central Government had to be obtained under the MMDR Act, 1957 were increased to 38. By virtue of the 1986 amendment, the Central Government was authorised to reserve mining areas for public sector undertakings. The 1986 amending Act also made mining plan approval compulsory. As a consequence of the 1986 amendments, the Conservation and Development Rules were framed to enable the IBM to monitor and regulate mining activity. It is submitted that this severe regulatory regime continued till the early 1990s.

115. It is well known that the Central Government introduced economic liberalisation in 1991. The first time a comprehensive National Mineral Policy was framed was in March 1993. This policy enabled

private investment in exploration and mining. Under this policy, 13 major minerals such as iron ore, manganese ore, chrome ore, sulphur, gold, diamond, copper, lead, zinc, molybdenum, tungsten, nickel and platinum which were hitherto reserve for the public sector were opened up to the private sector. Induction of foreign technology and foreign participation in exploration and mining was also encouraged. The Central Government enabled a 50% participation by way of foreign equity. It also expressed the intention that foreign equity participation could be permitted even beyond 50% on a case-to-case basis. In January 1994, further amendments were carried out to the MMDR Act, 1957 and the Rules thereunder. These amendments attempted to simplify the procedure for grant of mineral concessions to attract large through private sector participation including foreign direct investment.

116. It may be noted that GSI was supposed to undertake reconnaissance operations. Government was aware

that even reconnaissance operations for exploration will require massive private investment. Accordingly, for the first time the MMDR Act, 1957 introduced the concept of large area prospecting license and guidelines were issued in October 1996 whereby the area of prospecting was enhanced from 25 sq.km. to 5000 sq.km. Simultaneously, a gradual relinquishment was introduced by which the search for detailed exploration was to be narrowed down to 25 sq.km. at the end of the third year of exploration and prospecting.

117. It may be noted that despite the abovementioned administrative measures, prospecting and mining activity was sluggish. Hence, a Committee was set up by the Ministry of Mines in February 1997 which submitted its report in January 1998 suggesting further amendments to the provisions of the MMDR Act, 1957. The said Committee suggested – (a) a concept of reconnaissance operations to be introduced prior to prospecting; (b) reconnaissance permit

holders to get priority in the matter of grant of prospecting licenses; (c) minerals listed in the First Schedule of the MMDR Act, 1957, which required the prior approval of the Centre to be reduced to 10; (d) delegation of powers to State Governments such as to renew lapsed leases, to grant mining leases for areas which were not compact or contiguous and also the power to transfer mining leases in respect of minerals under Part C of the First Schedule of the MMDR Act, 1957; and (e) to permit amalgamation of two or more adjoining mining leases.

118. It may also be noted that certain changes were undertaken in the MCR, 1960 as well as the MCDR, 1988. Incidentally, one of the important amendments contained in MCR, 1960 was that if a mining plan was approved, the same would be valid for the entire duration of the mining lease. Rule 22(6) of MCR, 1960 as introduced on 18th January, 2000, thus provided:-

> *"The mining plan once approved shall be valid for the entire duration of the lease....."*

119. It may also be noted that Mineral Conservation and Development Rules, 1988 (hereinafter, the "**MCDR, 1988**") permitted modifications such as mining plan, mine closure plan and could take into account the qualitatively different impact on environment due to prospecting operations. The tentative scheme of mining plan was for block of five years.

120. In this context, tt is respectfully submitted that the Petitioners have not taken into consideration the expertise of the IBM and GSI. The manner in which the Mining Plans have to be prepared, scrutinised and overseen by the Indian Bureau of Mines has been discounted by the Petitioner. It is respectfully submitted that the Indian Bureau of Mines consists of purely technically qualified experts who are experts in mining, geology and survey. The Mining Plan ensures mining in accordance with scientific principles and conservation safeguards.

121. It may be relevant to point out that consequent to the enactment of the Environment (Protection) Act, it

became necessary for the Indian Bureau of Mines to control the mining activity consistent with the provisions of the Environment Act. Therefore, relevant Rules were devised in the form of the MCDR, 1988 Act to enable the IBM to be a watchdog even in respect of certain matters associated with environment.

122. The IBM has now prepared a strategic plan for the Ministry of Mines. The objective is –

(a) To promote scientific exploration for expanding mineral reserves (This must be co-related to the expression 'systematic development'.)

(b) To ensure globally best, fair, transparent and efficient process for the mineral concession system.

(c) To enable sustainable mining.

(d) To address the needs of key stakeholders including local communities.

(e) To define the mandate for key agencies like the IBM.

123. Therefore, the IBM must be treated with respect as the premier regulator for the mining industry in India. The important of having such a scientific regulator for this sector cannot be overlooked. The importance of mining is two-fold – (a) minerals have to be exploited because if they are not exploited, the opportunity of economic growth is lost; (b) it also leads to employment generation. Indeed, it is submitted that according to the IBM, the demand for various metals and minerals will grow 4-5 times over the next 15 years (9-11% growth per annum against a backdrop of globally dwindling and increasingly scarce resources). According to the IBM, in the event the mining sector is carefully organised it could contribute to 7-8% of the nation's GDP in the next 20 years as against the present 2.3%. It may be noted that in China 4% of the GDP is on account of the mining, while in Australia 8% of the GDP is contributed by the mining industry, while in South Africa it is 9%.

124. Mining, if properly enforced, and with adequate social participation by the lessee will bring advantages to the local communities which will include tribal communities. Mineral deposits, which are invariably found in interior tribal areas, can be developed and can provide development to tribals.

4.4 Requirement of iron ore for steel production

125. The iron and steel sector is the backbone of any economy. It is one of the primary vehicles of economic development of a country, as the use of iron and steel leads to infrastructural development and rapid industrialization, on account of its usage as a basic material for manufacturing all types of machinery, electrical and metal products, transport equipment, agricultural equipment, capital goods, house building etc. Strong economic growth of any nation is possible only on the shoulders of a strong, modern and robust infrastructure. Because of its diverse usage, steel is the single most critical requirement in any infrastructure, industrial or manufacturing project. Further, steel

also has found widespread usage in almost every modern day lifestyle which is why it is considered as the prime driver of economy in any devel8oping nation including India. It is in this context that availability of steel as a metal and iron ore as a raw material, to produce steel, becomes extremely crucial for economic development and social upliftment in India.

126. It is submitted that ever since the economic liberalisation in 1991, the iron and steel industry in India has been growing at a very high speed with quantum growth in production and production capacities adding value to the abundant natural resources in this country, contributing immensely to the growth of country's GDP and infrastructure; and in the process providing livelihood to millions of families directly or indirectly dependent on it.

127. On account of rapid industrial development, from a small capacity of 22 Million MT in FY 1991-92 prior to liberalization, India has become the third-largest steel

producer in the world with a production of 91 Million MT and a capacity of 122 Million MT in FY 2015-16.

128. The Indian steel industry is still at a developing stage and has significant potential for growth, underscored by the fact that the per-capita steel consumption in the country is 61 kg (incl. rural consumption at 10 kg) i.e. much lower than the global average of 208 kg.

129. It is expected that at the current rate of GDP growth, the steel demand will grow threefold in next 15 years to reach a demand of 212 - 247 Million MT by 2030-31 as illustrated in **Table 1**. The Government of India envisages through its new National Steel Policy, 2017 to increase the capacity of steel in the country by more than 2-fold from 122 Million MT per annum (mtpa) to 300 Million MT per annum by 2030. This kind of capacity expansion will require investment to the tune of Rs. 10 lakh crore and generate significant employment in the range of 36 lakhs by 2030-31. This will not only meet the domestic demands of high grade steel of the country by 2030-31 but also enable us to

be net exporter of steel by 2025-26. Such scenario would encourage industry in India to be a world leader on energy, raw material and efficient steel production by 2030-31, in a safe and sustainable manner. However, even with this demand of finished steel by 2030-31, India's per-capita consumption would reach only upto 160 kg, lower than the current global average of 208 kg.

Table 1: Forecast of iron and steel demand and production by 2030-31

S. No.	Parameters	Projections Scenario - I	Projections Scenario - II	Projections (Average)
1	Total crude steel capacity	300	300	300
2	**Total crude steel demand/production**	**274**	**235**	**255**
3	Total finished steel demand/production	247	212	230
4	Domestic finished steel	222	190	206

	demand			
5	Exports of finished steel	25	22	24
6	Sponge iron demand/production	Under Discussion	Under Discussion	Under Discussion
7	Pig iron demand	25	21	23
8	Per Capita Finished Steel Consumption	169	145	158

Source*: Ministry of Steel, MECON.*

130. Currently around 40% of the steel consumption is from construction & infrastructure sectors which is expected to increase to 59% by 2030-31 as illustrated in the table 2 below:

Table 2: Sector wise steel consumption in India in MT (unless stated)

Sr. No.	Item	Current demand 2015-16	Projected demand 2030-31
1	**Infrastructure** (Steel Projects, Oil refinery, Highways & Bridges, Airports, Seaports, Urban Infrastructure, Water transportation & sanitation, Industrial sheds, Pre-fabricated buildings).	9.5	90
2	**Construction** (Real Estate – residential, institutional, commercial & Industrial)	23.5	45
3	**Engineering & Fabrication** (Capital goods, Consumer durables, Yellow goods, Electrical goods, Industrial boilers & Pressure vessels, General engineering, Tube making, Cold reducing, Wire drawing, Nails, Fasteners, Bright bars, Agriculture implements, General fabrication including SMEs)	35	43
4	**Automotive** (Cars, two-three wheelers, commercial vehicles, auto components, tractors, bus trailer,	2.5	10

	tractor-trolley etc.)		
5	**Railways** (Rail tracks, rolling stocks, wagons, coaches, etc.)	2	5
6	**Packaging** (Petroleum, non-petroleum, LPG cylinders, grain bins, GI boxes)	2	6
7	**Energy** (including Power projects, wind mills, power transmission)	3	11
8	**Ship Building** (AH 32/36, DH32/36, EH 32/36)	4	3
9	**Oil & Gas Pipelines** (X60, X65, X70 & X80 – For main line, X70 is mostly in use whereas X80 used in very limited quantities. For smaller pipes, X60 & X65 grade materials are in use		**4**
10	**Defence (including space, nuclear)** (Steel grades – Maraging Steel, Ultra high strength steels such as AISI/SAE 4130, High strength 4140, deeper hardening and high strength 4340, 6150 & 8640; High alloy Hardenable steel viz. HP9-4-20, HP9-4-25, HP9-4-30, HP9-4-45, HP9-4-20 & HP9-4-30)		**2**
11	**Others** (Misc. other machinery)		**11**
Total Finished Steel Consumption in MT		**81.5**	**230**

Per Capita Finished Steel Consumption in Kgs	**61**	**158**

131. It is submitted that the stand of the Central Government as reflected in the affidavit dated 18th January 2017 overlooks a variety of antecedent facts. The lessees crave leave and liberty of this Hon'ble Court to demonstrate that the affidavit filed by the Government of India dated 18th January 2017 is totally oblivious to the policy of the Government of India and is contrary to the National Steel Policy 2017.

132. It is stated that the National Steel Policy 2017 is a successor to the National Steel Policy 2005. The National Steel Policy 2005 sought to indicate ways and means of consolidating the gains flowing out of the then economic order and charted out a road map for sustained and efficient growth of the Indian Steel Industry. It may be noted that the National Steel Policy 2017 recorded as follows:

"Driven by the positive demand outlook and prevailing high prices of steel in the period post 2004, the Indian steel sector witnessed a wave of investments in the states of Odisha, Jharkhand, Karnataka and Chhattisgarh. Substantial new capacity was created and existing plants were modernized. A significant portion of these investments were funded by banks and other forms of borrowings."

133. Further, the National Steel Policy 2017 stated as follows:

"Steel is a product of large and technologically complex industry having strong forward and backward linkages in terms of material flows and income generation. It is also one of the most important products of the modern world and of strategic importance to any industrial nation. From construction, industrial machinery to consumer products, steel finds its way into a wide variety of applications. It is also an industry with diverse technologies based on the nature and extent of raw materials used. In India, steel has an output multiplier effect of nearly 1.4X on GDP and employment multiplier factor of 6.8X".

134. The following is statement of objectives of the National Steel Policy 2017:

> *"Objectives: The National Steel Policy aims at achieving the following objectives –*
>
> *i. Build a globally competitive industry with a crude steel capacity of 300 MT by 2030-31*
>
> *ii. Increase per Capita Steel Consumption to 160 Kg by 2030-31*
>
> *iii. To domestically meet entire demand of high grade automotive steel, electrical steel, special steels and alloys for strategic applications by 2030-31."*
>
> *iv. Increase domestic availability of washed coking coal so as to reduce import dependence on coking coal to 50% by 2030-31.*
>
> *v. To be net exporter of steel by 2025-26.*
>
> *vi. Encourage industry to be a world leader on energy and raw material efficient steel production by 2030-31, in a safe and sustainable manner.*
>
> *vii. Develop and implement quality standards for domestic steel products."*

135. It is respectfully submitted that the stand of the Central Government at the time of the passing of order dated 16.05.2014, which was expressly noted in the

order of this Hon'ble Court, needs to be set out particularly in the context of the later affidavit dated 18th January 2017:-

> *"8. Mr. K.V. Viswanathan, learned Additional Solicitor General, referred to the application for intervention filed on behalf of Ministry of Steel, Government of India, supported by the affidavit of Shri K.B. Nair, Under Secretary, Ministry of Steel, Government of India, and submitted that more than 50% of the requirement of iron ore of the country is met from the State of Odisha and a large number of iron ore leases in the State are granted for captive mining and the ore from the mines is being utilized for the manufacturing of the steel in the plants of the lessees. He further submitted that commercial miners are also providing raw material to iron and steel industries not only in the State but also in the whole country. He submitted that while there is a need to impose time limits by various authorities, closure of mining operations due to delay in decisions by the State Government on mining lease renewal applications, may adversely affect the availability of critical raw materials like iron ore for domestic value addition industry, including the steel sector and, therefore, where*

the application for renewals have been made within the time prescribed under the statute, the State Government which has to take the decision should be directed to decide the applications in a time bound manner so that the industry is not penalized."

136. At present, India is importing both 'iron ore' and 'steel'. It is submitted that this is a relevant policy consideration why this Hon'ble Court must permit in public interest the mining operations to resume. The affidavit dated 18th January 2017 filed by Ministry of Mines, Central Government is completely oblivious to the industrial requirements of the country. It may be noted that it is also oblivious to the previous studies which have been undertaken on the subject in relation to iron ore mining in this country.

137. It is respectfully submitted that while due regard is necessary for the rule of law and in particular the Environment (Protection) Act, 1986, the Forest (Conservation) Act (hereinafter, the "**FC Act, 1980**"), responsible mining is also a concept contemplated

under law. It is respectfully submitted that the Petitioner has not discerned the concept of responsible mining under the provisions of the 1957 Act, the MCR, 1960, or the MCDR, 1988. It is on account of a failure to appreciate the said concept of responsible mining, coupled with the failure to appreciate the role of the Environment (Protection) Act, 1986 and the FC Act, 1980, that allegations have been levelled that there has been irresponsible mining.

138. At this juncture, it is submitted that considerations of environmental protection, inter-generational equity and sustainable development, although relevant in a material sense, have to be balanced against the ongoing requirements of a society. The growing demand for metals and minerals pushes both domestic and international prices.

139. The principles of inter-generation equity would be best served if we can gift our future generation what they would truly need for sustenance and to thrive on what

would be a modern, developed and robust infrastructure.

140. Growth in per-capita steel consumption is a major indicator of infrastructural & industrial growth of any nation. Once a nation is developed, the growth in per capita steel consumption slows down and reaches an optimum level. Thereon, the burden on dependence of iron ore for making steel reduces drastically as the major raw material requirement can be met from salvaged scrap as can be seen presently in other developed nations such as USA and other European countries. A country like USA presently utilises almost 67% of its iron ore requirement for steel making from salvaged scarp. This shows that the load on production of iron ore would eventually come down progressively with growth of infrastructure and allied industrial and manufacturing activity in the country.

141. Capping on production of iron ore would not only cripple the growth of infrastructure, manufacturing and industrial activity in the country but also severely

affect the economic growth leading to a disastrous consequence. Further, we are, at present lagging years behind our competitors in terms of infrastructure, manufacturing and other core sectors. Any delay in this regard would be a fatal blow to the development of our great nation and would be an absolute injustice to our future generation.

142. Further, the argument that the future generation would depend on iron ore for their development and sustenance would be utterly unfair and unjust, notwithstanding the capabilities of our future generations and the development of science and technology in the world. Our future generation would certainly be equipped with various alternative materials and technologies to replace iron ore or for that matter Steel completely.

143. Thus, intergenerational equity in the context of steel and iron ore should focus on maximum utilization of low grade of iron ore in the steel industry with proper beneficiation and replacement of usage of lumps

through fines - pelletisation and thereby reducing load on iron ore exploitation.

144. It is therefore submitted that the any capping on the iron ore production would be detrimental to the aspiration of a growing nation and its need of basic infrastructure to meet its sustenance.

V. SOCIAL & ENVIRONMENTAL IMPACT OF MINING: USE OF SPECIAL PURPOSE VEHICLE (SPV) TOWARDS UNDERTAKING DEVELOPMENTAL WORK

5.1 Present Status of Mining-Affected Areas

145. That the Petitioner has in the Writ Petition made several general observations of devastation in the mining-affected districts of Keonjhar and Sundergarh. For this, the Petitioner has relied upon a Report of 2008 by the Centre for Science and Environment (CSE). It is respectfully submitted that these averments made by the Petitioner may not be entirely accurate. In particular, the report of the CSE in 2008 does not reflect the contemporaneous position in respect of the mining-affected districts in Odisha.

5.1.1 Environmental Status

146. At this juncture, it is therefore relevant to advert to a report prepared by the CSIR-NEERI, Nagpur at the instance of the MoEF, Central Government in October, 2014. The said exercise was a carrying capacity study, commissioned by the MoEF, in the light of the observations contained in the Justice Shah Commission's report, and therefore accurately represents the contemporaneous environmental and social parameters of three mine-affected districts in the State of Odisha viz. Keonjhar, Sundargarh and Mayurbhanj.

147. The CSIR-NEERI decided to collate baseline environmental quality data and other concomitant information. The report, based on such data, also noted various geological and physical features of the three Districts. It may be noted that NEERI recognised:-

> *"GSI, IBM, State Departments of Mines and Geology, State Mining Corporations, various*

other Central& State PSUs, research institutions, academic institutions, private industry and joint venture exploration companies involving FDI are the key players who recruit competent and trained manpower in the mineral sector carrying out various activities like exploration, mining and mineral processing."

148. The status of all the leases were examined including the 56 working iron ore and manganese mines, and observations were *inter alia* made in respect of air quality, noise environment, water quality, soil quality, biological environment, socio-economic status traffic study, and environment protection measures undertaken by mining companies. The salient findings are mentioned hereinbelow:

(a) *Air Quality:* Air quality was monitored using EPA approved state-of-art Fine Particulate Samplers, AIRMETRICS (USA) and indigenously made NETEL and Envirotech-Model APM 550 MFC and Respirable Dust Samplers. It may be noted that no adverse observations were made in so far as air pollution is concerned. On the

contrary, it was found that the heavy metals analysis carried showed that Pb (lead concentrations), at all the monitored sites, were below the CPCB permissible limit of 1 ug/m^3.

(b) *Noise Environment:* Insofar as noise environment is concerned, the noise levels in residential as well as commercial areas, industrial mining areas and silent zones were recorded. Even the vibration monitoring within the mines during blasting operation was found to be well below the application standards.

(c) *Water Quality:* Insofar the water quality status was concerned, surface and ground water samples at 38 places was collected.It may be noted that it was found that the quality of water samples did not vary significantly in the mining and non-mining area.

(d) *Soil Quality:* Insofar as the soil quality status is concerned, the Committee noted that the

detailed analysis of various physico-chemical, nutrient and microbial parameters, did not indicate any adverse impact of mine overburden/mining activity on the general agricultural activity in the region.

(e) *Biological Environment:* Insofar as the biological status is concerned, the NEERI has made a thorough analysis of the present floral status of forests, trees, herbs, medicinal plants etc. as well as a faunal status of mammals, ungulates, rodents, avi-fauna, micro-fauna etc. In addition, agriculture and fisheries were also comprehensively studied.

(f) *Socio-Economic Status:* As far as the socio-economic status is concerned, the Committee observed that:-

> *"Lot of initiatives have been undertaken by the mine owners in the region, which has helped to improve the status of the people in the region. Most of the mines have*

employed local people to the tune of 70-80% in various activities related to the mines. People are mostly dependent on mining activities in the region. Further, certain infrastructural and social improvements are required to be undertaken on the continual basis."

149. In the recommendations, it was concluded that the present baseline environmental quality assessment in existing mining activities appears to have little/no potential impact on environmental quality, however, proper appraisal is required by undertaking monitoring during critical seasons (winter/summer). It was also noted that:-

"The EC capacity of working 56 mines during the baseline studies was 129 MTPA which includes captive and non-captive mines. Since the baseline environmental quality does not show any impact and also the supportive capacity component envisages sufficient potential, it is suggested that the total capacity of non-captive mines may be temporarily allowed to the tune of 80 MTPA alongwith 5 captive mines with EC capacity of 48.05 MTPA. Further baseline monitoring needs

to be carried out under this mining rate for critical seasons.

All the mines (56 nos.) working during the field study may continue to work with all the necessary statutory permissions during the next round of studies, and details of the activity levels with respect to different aspects be provided on monthly basis to properly assess the impact of mining activities in each mine, leading to evolve a robust approach for sustainable mining in the region."

A copy of the Interim Report of the CSIR-NEERI of October, 2014 is annexed herewith and marked as **ANNEXURE-15**.

150. At this juncture, it is also relevant to advert to a Joint Inspection Report of the Odisha State Pollution Control Board in respect of 55 iron and manganese mines pertaining to emissions into the Baitrani River. The said report analyses the emissions from each of the said mines, and finds that no harmful effluent discharge is occurring from any of the said mines into the Baitrani River. It is relevant to bear in mind that the Report concludes that:-

"....During the inspection of the operating mines, no release of effluents from workshop/mine water into the natural water course has been observed. The period being summer, all the garland drains/settling tanks are dry. The water available in the mine sump is used for spraying on the roads for dust control. Therefore, during the time of inspection the level of pollution contributed by the operating mines is to be considered as nil as there is no discharge from the respective mines into the natural water course....."

151. It was further observed that a total 126 water samples were collected by three teams. Incidentally, some of them were also collected from the upstream and downstream of the Baitrani River. According to the analysis reports, it was observed that:-

"All the above parameters are within the tolerance limits prescribed under IS 2296-1982 for Class C waters at all the sampling points."

152. However, the Report noticed that bathing, washing of clothes as well as washing of two wheelers and four

wheelers should be discouraged alongside the river bank. The Deponent and other lessees undertake to earmark areas where washing can be undertaken in a safe and sterile manner without allowing any effluents to flow into the rivers or streams. It is submitted that sewage pipes should be laid with the assistance of the Special Purpose Vehicle.

A copy of the said Joint Inspection Report of the Odisha State Pollution Control Board is annexed herewith and marked as **ANNEXURE-16**.

5.1.2 Drinking Water Availability

153. It is also necessary to point out that insofar as drinking water is concerned, as far as the Census 2011 data is concerned, there is sufficient drinking water supply in the mining-affected districts. Additionally, overhead tanks and hand pumps have also been made available.

A copy of the relevant data pertaining to drinking water supply in the mining-affected Districts as

obtained from Census 2011 data is annexed herewith and marked as **ANNEXURE-17**.

5.1.3 Forest Density

154. It may be noted as per a document titled 'Highlights of Odisha Forestry Sector, 2016' published by the PCCF, Odisha, on account of implementation of compensatory afforestation guidelines in the State of Odisha by the lessees as well as by the Forest Department, there has been an increase in the forest cover in Odisha. Very dense forest, the moderately dense forest as well as the open forest had increased from 2003 to 2015 on account of implementation of compulsory afforestation as can be seen from the chart given below:

S. No	Year	Geographical Area	Very Dense Forest	Moderately Dense Forest	Open Forest	Total	Increment
1	**2003**	1,55,707	288	27,882	20,196	**48,366**	

2	**2005**	1,55,707	538	27,656	20,180	**48,374**	**8**
3	**2009**	1,55,707	7,073	21,394	20,388	**48,855**	**481**
4	**2011**	1,55,707	7,060	21,366	20,477	**48,903**	**48**
5	**2013**	1,55,707	7,042	21,298	22,007	**50,347**	**1,444**
6	**2015**	1,55,707	7,023	21,470	21,861	**50,354**	**7**

[all figures in above table in sq. km.]

A copy of the document titled ''Highlights of Odisha Forestry Sector, 2016' published by the PCCF, Odisha is annexed herewith and marked as **ANNEXURE-18**.

5.1.4 Employment

155. This Hon'ble Court, in the case of *Samatha v. State of A. P.,* (1997) 8 SCC 191, has held that right to life would include right to continue in permanent employment, in the following words:

> *"78. Article 21 of the Constitution reinforces "right to life" — a fundamental right — which is an inalienable human right declared by the Universal Declaration on Human Rights and the sequential conventions to which India is a signatory. In Delhi Transport Corpn. v. D.T.C. Mazdoor Congress (AIR at p. 173 in para 223 : SCC p. 717, para 232) this Court had held that right to life would include right to continue in permanent employment which is not a bounty of the employer nor can its survival be at the volition or mercy of the employer. Income is the foundation to enjoy many fundamental rights and when work is the source of income, the right to work would become as much a fundamental right. Fundamental rights can ill afford to be consigned to the limbo of undefined premises and uncertain application. That will be a mockery of them. ...."*.

156. In this context, it may be noted that that presently, as per data collected from the i3ms system maintained by the Department of Steel & Mines, Government of Odisha, approximately 22,980 direct employees are being employed in the mines in Keonjhar for whom salaries are being paid. On account of the closure of

the mines, some of them have migrated to working mines. Insofar as indirect downstream employment is concerned (such as transportation, railway siding, security services, spare part manufacturers etc.) the number of people benefited are approximately 45,852 in the District of Keonjhar. It may further be noted that a sum total of Rs. 444.60 crores was paid as salary to the employees in the working mines, whereas a sum total of Rs. 41.85 crores was paid as salary to the employees in the non-working mines. The said figures may be confirmed by the State Government if required.

157. Incidentally, subsequent to the closure of the mines, it may be noted that threats are being received by the Naxalites who are across the border in Jharkhand who are demanding money knowing the condition of increasing unrest in the area on account of closure of mining operations. In this regard, reference may be had to a letter dated 2nd March 2016 addressed by D.

G. Police to the I. G. Police (Western Branch), a copy of which is annexed herewith as **ANNEXURE-19**.

5.1.5 Per Capita Income

158. Insofar as *per capita* income is concerned, in a study conducted by the Asian Institute of Sustainable Development in December, 2016 (based on Census 2011 data), the annual average for the State of Odisha was Rs. 26,900/- whereas the national figure was Rs. 38,005/. However, insofar as the mining-affected region is concerned, the *per capita* income was Rs. 49,241 which is much higher than the national average. Further, this is an increase from Rs. 10,622 in 2000-01 to Rs. 49,241 in 2011-12.

159. It may also be relevant to point out that the district of Sundergarh has been reported to have the highest annual average growth rate of 13.9 per cent during the period from 2005-06 to 2008-09.

160. It may also be noted that in Odisha, the Industry sector has contributed 33.4 % to GSDP. The highest

contributor to GSDP was Sundargarh district, which is also the most prominent mining district in Odisha.

5.1.6 Education

161. Insofar as education is concerned, as per Census 2011 data, altogether 149 educational facilities are found in the mining area villages of the district. Out of the same, there are 57 private education facilities, 54 primary schools, 24 middle schools, and 14 high schools.

162. In addition to the aforesaid facilities, a total of 61 *Anganwadi* centers are existing in the mining area villages, of which 56 centers are functional. *Anganwadi* is an organ of the Integrated Child Development Project (ICDS) which has been established to meet the health, nutritional and educational needs of the poor and vulnerable infants, pre- school aged children and women in their child bearing age. ICDS is a centrally sponsored programme implemented by the Department of Women and Child Development, Ministry of Human Resource

Development of Government of India at the centre and Department of Social Welfare at the state. Anganwadi provides pre-school teaching to the children in the age group of 3-5 years. The purpose of this education is the physical and mental growth of the children and inculcating in them the awareness about health and hygiene behaviour. *Anganwadi* provides services on immunization, health check up for children, pregnant and lactating mother, supplementary nutrition programme, children growth monitoring apart from some additional services like referral services with the help of health department, health and nutrition education, distribution of IFA tablets etc.

A copy of the relevant data pertaining to educational facilities in the mining-affected Districts as obtained from Census 2011 data is annexed herewith and marked as **ANNEXURE-20**.

5.1.7 Health

163. Insofar as health facilities are concerned, as per Census 2011 data, the healthcare facilities available in

the mining-affected villages in the District of Keonjhar are as follows:

(a) Cess Hospital, Labour Welfare Organisation, Joda – the same is a 50-bed hospital exclusively dedicated to mine workers and their dependants

(b) There are a total of 66 of Primary Health Centres, 20 Janani Express, and 15 community health centres.

(c) Tata Memorial Hospital, Joda- this is a 75-bed hospital established by Tata Steel Limited, with ICU facilities, and one of the best blood banks in Odisha.

(d) Approximately 20 medical health centres/dispensaries privately set up by the lessees which are being serviced by approximately 25 ambulances. These figures can be freely audited by the State Government.

Photographs of local health centres, ambulances etc. are part of ANNEXURE-71.

5.1.8 Irrigation

164. Insofar as irrigation for agriculture is concerned, it may be noted that the State Government has been constructing the Kanupur Dam on the Baitrani River. The said dam is under construction, and would have a coverage area of 1500 sq kms benefitting 30,000 hectares of agricultural land in 16 villages in Keonjhar District. The proposed date of completion of the dam is 2018-19.

5.2 Measures Undertaken by Various Lessees

165. It is submitted that, undoubtedly, lessees have to be conscious about the social impact of mining. Responsible mining by a lessee does involve involvement of the local people. The benefits to the local people by way of health, education, employment are three primary factors which have to be kept in mind. It is respectfully submitted that the present Deponent and various other lessees in these Districts have undertaken several measures towards these objectives.

166. The lessees have made significant investment in Environment Management Systems, including for Air Quality Management, emission control, water management, protection of natural water bodies, rain water harvesting.

167. Incidentally, it may be stated that one of the lessees has also established a beneficiation plant and has zero discharge insofar as water effluent is concerned. Incidentally, the lessee also has an independent environmental clearance for the beneficiation plant as well. Thus, there is zero waste in terms of mineral and zero effluent.

168. Incidentally, it may be pointed out that it was in this context, that several lessees had decided to establish a trust called the Gramin Vikas Chaitanya Kendra (GVCK) in which contributions would have been made by the lessees, which would have been directly spent for the benefit of the tribal people and others from the mining affected area.

169. It may be noted that although the said trust was registered before 31st May 2013 and could have proceeded further, Section 9B came to be inserted into the MMDR Act, 1957 with effect from 12th January 2015. Under Section 9B, the Central Government has framed the Mines & Minerals (Contribution to District Mineral Foundation) Rules, 2015, which have been published in the Official Gazette on 17th September, 2015. With effect therefrom, 30% of the royalty has become payable towards the fund Section 9B.

    A copy of the Mines & Minerals (Contribution to District Mineral Foundation) Rules, 2015, as published in the Official Gazette on 17th September, 2015 is annexed herewith and marked as **ANNEXURE-21**.

170. Incidentally, the payment of royalties in India is the highest in the world. The Deponent, in fact, is paying the highest royalty notwithstanding the grade of Iron-ore extracted.

171. As stated hereinabove, in India the royalty which is charged is the highest as would be clear from the following table:-

Australia	6.5-7%
Brazil	2%
Canada	2-16%
India	**15%**
South Africa	0.5-7%
United States	0-5%

172. It may be noted that the State of Odisha has on 18th August, 2015 framed the District Mineral Foundation Rules, 2015 to constitute the DMF in the form of a Trust in respect of each District in Odisha.

A copy of the District Mineral Foundation Rules, 2015 framed by the State Government, as published in the Odisha Gazette on 18th August, 2015 is annexed herewith and marked as **ANNEXURE-22**.

173. It may further be noted that the Central Government had on 16.09.2015 framed the 'Pradhan Mantri

Khanij Kshetra Kalyan Yojana' establishing a scheme for implementation of the DMF moneys, and issued a direction to the State Governments under Section 20A of the MMDR Act, 1957 to incorporate the aforesaid Yojana into the Rules to be framed by them for DMF.

Copy of the directions issued by the Central Government on 16.09.2015 in respect of the 'Pradhan Mantri Khanij Kshetra Kalyan Yojana' is annexed herewith and marked as **ANNEXURE-23**.

174. It may be noted that the lessees have been depositing money in the DMF fund in Odisha. The figures available by way of such deposit in the DMF for the various districts in Odisha are as follows:-

District wise Collection and Utilisation of District Mineral Foundation

Year	District Name	Collection (in Cr.)	Utilisation (in Cr.)
2015-2016	Keonjhar	79.07	0
	Sundargarh	30.82	0
	Jajpur	13.42	0
	Mayurbhanj	0.71	0
	Bargarh	0.3	0

	Ganjam	0.18	0
	Jagatsinghpur	0.10	0
	Koraput	0.09	0
	Gajapati	0.09	0
	Kandhamal	0.09	0
	Total	**124.87**	**0**
2016-2017	Keonjhar	383.23	0
	Sundargarh	200.59	0.05
	Jajpur	91.54	0
	Mayurbhanj	16.84	0
	Bargarh	8.90	0
	Ganjam	6.06	0
	Jagatsinghpur	1.73	0
	Koraput	1.37	0
	Gajapati	1.24	0
	Kandhamal	0.18	0
	Total	**711.68**	**0.05**
	Grand Total	**836.55**	**0.10**

175. These figures are not disputed. However, the said monies are actually mixed up in the consolidated fund of the State and are not earmarked for specific activities of the affected areas in the respective Districts. Neither are the lessees nor is anybody from the local community, who can be a local

representative, or the Gram Panchayat involved in the utilisation or earmarking of these funds for specific projects.

176. It is also necessary to point out that even apart from the proposed projects under the GVCK, the lessees have initiated a number of projects for the socio-economic benefits of the communities. A few examples are given hereinbelow:

a) Some of the lessees have established a scheme by which the local people were able to own trucks through a cooperative society run by the local people themselves. It is further submitted that on account of the disbursements made by the aforementioned cooperative society of transporters, those unemployed are also looked after and with the benefit of allowance from NREGA, such people have been able to take care of their needs.

b) People who were earlier 'alleged naxalites', actually joined mainstream activity, upon being assured employment. For the said purpose an academy for training security personnel has also been established in the border abutting Odisha, close to Jharkhand. The said security academy goes by name of TISA and is run by a concern called Maa Tarini Logistics Ltd. TISA has trained 750 youth who are on regular jobs posted as security guards as well as in other sections. It is relevant to point out that 86 of such persons were Naxalites who surrendered to the District Police and were absorbed into the mainstream. It is further submitted that 26 persons after obtaining training from TISA have joined the Indian Army, Indian Navy, CRPF, CISF and Banks.

A copy of the details of TISA along with its affiliation certificate in annexed herewith and is marked as **ANNEXURE-24**.

It may be noted that photographs of the same are part of ANNEXURE-71.

c) Incidentally, there is a skill development programme afoot in Village Kenduhi in District Keonjhar. The same is registered with the Skill Development Council. This is to enable local people to be able to operate the machines such as excavators, loaders, tippers etc. A simulator machine exists where they are trained and are taught how to operate the machines in the mining areas.

Photographs evidencing the same are part of ANNEXURE-71.

d) Incidentally, the cooperative committee constituted with the help of the one of the lessees and its raising contractor, is able to use the funds for the purpose of construction of the houses of the local tribals. It may be noted that some houses are still under construction / allotment.

Details of the said houses constructed are given in Village Unchabali under Palsa Gram Panchayat are annexed herewith as **ANNEXURE-25**.

177. It may be pointed out that these activities which have been undertaken, as mentioned in the preceding paragraphs, are also due to the trust which the lessees have been able to gain from the local people. It is necessary to bear in mind, that the members of the society, who have contributed to the benefits of the Lessee, are tribals with tremendous human potential.

178. It must also be said in fairness that Padmashri Tulsi Munda, a Gandhian of great repute, who worked with Acharya Vinoba Bhave, has also worked with the lessees and has worked in the area tirelessly to bring about a sea change. It is respectfully submitted that the closure of the mining operations has affected the genuine lessees and the people around their respective mining areas. It is, therefore, necessary to bear in mind that the recommencement of the operations

under the directions of this Hon'ble Court will only enable the restoration of livelihood of people from the mining affected areas.

5.3 Measures Proposed to be taken by Lessees

179. The lessees are conscious that the work undertaken by them is perhaps not enough, and more needs to be done. Incidentally, the proposed trust (GVCK), had, while taking note of the condition of the tribal people from the affected area, proposed the following projects:-

Proposed Project	Details
HEALTH	Planning for a 100 bedded Multi-Specialty Hospital with the state of art treatment for heart/neuro/gastro intestine/Women & children disease/ infectious disease along with handling accidental facilities.
ENVIRONMENT	Ecologically restoring of the dead & degraded forest land through specific restoration technique by experts in the field of environment.
EDUCATION	Planned for modern schooling

	and education with state of art technology in the class rooms.
ALTERNATIVE LEARNING	Schools have been identified & shall be worked on the concept known as SOLE –"Hole in the wall", related to computer literacy
MID-DAY MEAL	Target 10,000 children in two district for mid-day meal
CHILDREN'S HOME	School differently abled children homes will be established at identified location at/in districts.
INFRASTRUCTURE	Specific area and roads rural & major/village have been identified for construction.
SKILL DEVELOPMENT	Affiliation to recognized/specialized institute for a 3 months certification course/ 06 months diploma course/ 12 months Degree course in the field of security 7 disaster management. To train 10,000 youth in industrial security and disaster management
AGRICULTURE COLD STORAGE	A cold storage will be established with a 500 mt with three chambers and a four stage ripping chamber of 5 metric ton which is 20 MT
FARMERS' CO-OPERATIVE	A cooperative farming with collection centers with backward linkages will be established with the 3rd stage of forward linkages with market outlet and branding

	the products
SPORTS	An academy headed by Arjuna award Shree Dilip Tirkey will be shear heading the academy at multiple complexes in the field of sports.
WATER SUPPLY	Activities will be enlarged at all fronts at the existing & newly identified villages in the districts.
ART	A painting school for tribal art and tribal weaving could also be encouraged as an independent skill development.

180. It is respectfully submitted that the aforesaid projects be allowed to be implemented by the lessees conjointly with the State Government either under the auspices of the GVCK trust or the SPV recommended by the CEC.

181. For instance, it is respectfully submitted that it would be possible, by such conjoint efforts, for the lessees to undertake responsibility for the local schools which are Government established, the health and medical facilities for the children and the tribals, and employment in respect of the local people.

182. Insofar as diverted forest areas are concerned, the lessees respectfully submitted that compensatory afforestation and payment of NPV is not sufficient to compensate either local populace or the ecology. The lessees propose that the following ameliorative measures can be undertaken by the trust / SPV to mitigate the effects of diversion of forest land:

(a) *Provision of land for cattle-grazing* – Since mining affects the grazing potential of the area, identified Revenue land can be purchased and earmarked for the local population for the purposes of cattle grazing.

(b) *Rehabilitation of fruit-bearing trees of limited girth* –_Forest areas in the region tend to have fruit-bearing trees having a girth of less than 60 cms. Instead of felling such trees, the same can be uprooted and replanted in designated areas, so that the local populace can continue to derive benefits from their produce. E.g. – *mahua, tendu, bel, achaar, jamun* etc.

Depending on the ecology of the area, seeds from such trees can be collected while carrying out compensatory afforestation so that the genetic pool of the area is preserved.

(c) *Landscape Planning* – Measures can be taken to carry out landscape planning in a 10 sq km radius around the mines for the purposes of soil moisture conservation. For instance, contour bunds can be constructed so that moisture is retained and vegetation of the area is not affected.

(d) *Establishment of Nurseries for Fruit-Bearing Trees / Medicinal Plants* – Designated nurseries can be created near the diverted forest lands, whereby the fruit-bearing trees and medicinal plants can be planted for the free and exclusive exploitation of the local populace.

5.4 Use of Special Purpose Vehicle (SPV)

183. That this Hon'ble Court by order dated 27.01.2014 in IA Nos. 2746-2748 and related IAs in W.P. (C) No.

202 of 1995 had directed that 50% of the additional amounts of NPV recovered by the State of Odisha from the mining lessees would be used by the State of Odisha through a Special Purpose Vehicle (SPV) created for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas.

Copy of the order dated 27.01.2014 passed by this Hon'ble Court in IA Nos. 2746-2748 and related IAs in W.P. (C) No. 202 of 1995 is annexed herewith and marked as **ANNEXURE-26**.

184. That the CEC had submitted a Report dated 09.04.2014 to this Hon'ble Court whereby the scheme for setting up of the SPV for undertaking specific tribal welfare and area development works was filed for consideration of this Hon'ble Court. The CEC specifically recommended as follows:

    i) *The scheme prepared by the Government of Odisha for setting up of Special Purpose Vehicle (SPV) for undertaking specific tribal welfare and area development works so as*

to ensure inclusive growth of the mineral bearing areas in the State of Odisha may be approved by this Hon'ble Court; and

ii) The Ad-hoc CAMPA may be directed to transfer to the SPV 50% of the additional amount of the NPV recovered from the mining lease holders by the State of Odisha for undertaking tribal welfare and development works.

Copy of the Report of the CEC dated 09.04.2014 submitted to this Hon'ble Court is annexed herewith and marked as **ANNEXURE-27**.

185. That thereafter, this Hon'ble Court had by way of order dated 28.04.2014 approved the above said scheme and directed the Ad-hoc CAMPA to transfer to the SPV 50% of the additional amount of the NPV recovered by the State i.e. about Rs.875 crores.

Copy of the order dated 28.04.2014 passed by this Hon'ble Court in IA Nos. 2746-2748 and related IAs in W.P. (C) No. 202 of 1995 is annexed herewith and marked as **ANNEXURE-28**.

186. That therefore, under the authority of the orders of this Hon'ble Court, an SPV has already been created for the purposes of undertaking specific tribal welfare and area development works so as to ensure inclusive growth in the mineral bearing areas. It is reliably learnt that the said SPV has been incorporated as a 'not for profit government company' under Section 7(2) of the Companies Act, 2013 by the name of Odisha Mineral Bearing Areas Development Corporation (OMBADC).

187. In addition to aforesaid funds of approximately Rs. 875 crores lying with the said SPV, it is submitted that an amount of Rs. 836.55 crores has been collected towards DMF for the mineral-bearing districts in Odisha (figures already given above).

188. It may be further noted that as ordered by this Hon'ble Court on 26th September 2005, in *T. N. Godavarman v. Union of India,* (2006) 1 SCC 1, the net present value of the forest land has also been

deposited by Lessees in what is called the CAMPA Fund. Incidentally, in respect of CAMPA Fund, it is clear that insofar as the State of Odisha is concerned, the total principal amount deposited in the CAMPA Fund was Rs. 4837.24 crores. It earned interest of Rs. 1826.03 crores aggregating to Rs. 6663.27 crores. Out of the same, Rs. 666.33 crores are meant to be retained by the Centre and Rs. 5996.94 crores have to be remitted to the State. As per records available in the public domain, the total which has been made available out of Rs. 5996.94 crores is Rs. 1391.15 crores.

Details of Amounts with the CAMPA Fund as on 31.03.2016 as available from the MoEF are annexed herewith and marked as **ANNEXURE-29**.

189. That in this regard, it may be noted that the Parliament has passed the Compensatory Afforestation Fund Act, 2016 as on 03.08.2016 to ensure the safety, security and expeditious utilisation of funds accumulated with the CAMPA Fund. However, it is

understood that the provisions of the said Act are yet to be notified.

Copy of the Compensatory Afforestation Fund Act, 2016 as passed by the Parliament on 03.08.2016 is annexed herewith and marked as **ANNEXURE-30**.

190. It is respectfully submitted that this Hon'ble Court may consider issuing appropriate directions to the authority administering the CAMPA Fund for suitable distribution to the States. It is necessary that this is done since the Net Present Value has been recovered not on account of law but by virtue of Orders passed by this Hon'ble Court. It is, therefore, essential that the objectives underlying the said orders are followed. The objectives behind the Net Present Value and CAMPA Fund, as stated in *T.N. Godavarman v. Union of India,* (2006) 1 SCC 1:-

> *"98. In view of the aforesaid discussion, our conclusions are:*
>
> *1. Except for government projects like hospitals, dispensaries and schools referred to in the body of the judgment, all other projects shall be*

required to pay NPV though final decision on this matter will be taken after receipt of expert committee report.

2. The payment to CAMPA under notification dated 23-4-2004 is constitutional and valid.

3. The amounts are required to be used for achieving ecological plans and for protecting the environment and for the regeneration of forest and maintenance of ecological balance and ecosystems. The payment of NPV is for protection of environment and not in relation to any proprietary rights.

4. The fund has been created having regard to the principles of intergenerational justice and to undertake short-term and long-term measures.

5. NPV has to be worked out on economic principles."

191. However, it is submitted that the CAMPA funds alone not sufficient. It is, therefore, necessary that this Hon'ble Court may direct a complete direct utilisation of the funds which are lying in the DMF account, along with further contributions to be made by the lessees towards the SPV already created, which if properly utilised, can enhance the standard and

quality of life, education, health and the well being of the people.

192. In the event this Hon'ble Court is pleased to accept such contribution from the lessees; and the DMF and CAMPA fund moneys are also directed to be transferred to the same SPV, then the projects which have been outlined in the table above could genuinely be achieved, within 16-18 months. It is respectfully submitted that the implementation of these activities would be subject to scrutiny of this Hon'ble Court.

193. In particular, a commitment is made to construct a 100-bedded. The cost of the construction of the said hospital may be undertaken out of the funds of the Special Purpose Vehicle. The lessees undertakes that they would engage a suitable consultancy firm which will submit a report to the SPV and a report to the State Government for grant of a licence to open a hospital at the earliest.

194. It is respectfully submitted that this Hon'ble Court may accordingly be pleased to issue a mandamus to the above effect in terms of Section 9B (2) of the Act, which provides as follows:-

> *"9B (2) The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affixed by mining related operations in such manner as may be prescribed by the State Government."*

5.5 Directions sought from this Hon'ble Court

195. In view of the foregoing submissions and averments, it is respectfully submitted that the following important directions are sought by the lessees from the Hon'ble Court:

(i) In order to see that the CAMPA fund is effectively administered, a Monitoring Committee may be appointed by this Hon'ble Court; and direction be issued for the purpose of allocation of funds to the State of Odisha.

(ii) This Hon'ble Court may be pleased to accept from each of the lessees herein a voluntary

contribution, which would be diverted to the OMBADC, being the SPV already set up under the orders of this Hon'ble Court. It is however clarified that the said contribution is made on a without-prejudice basis not in the nature of either penalty or compensation;

(iii) This Hon'ble Court may be pleased to direct that the amount lying of Rs. 836.55 crores collected under Section 9B of the Act in respect of the mineral-bearing districts be allocated to said SPV.

(iv) The costs and expenses of the SPV may be defrayed out of the corpus of the SPV.

(v) It may be directed that the SPV will nominate a senior officer or a retired Accountant General of the State of Odisha to be a special financial officer to oversee the audit and the undertaking of expenditure in accordance with established rules of governmental spending.

(vi) It may be directed in order to lend greater transparency, a member of the CEC may also be directed to be co-opted in the management of the

SPV. In view of the importance of the development welfare, the Ld. Amicus Curiae or his nominee may also be requested to attend as a member of the Working Committee.

(vii) It may be directed that certain nominees of the Lessees and members of the local community be also co-opted in the management of the SPV.

(viii) Lastly and most importantly, it is respectfully submitted that this Hon'ble Court, in the exercise of its powers under Articles 32 and 142, may issue suitable directions, that a Judicial Committee, supported by independent Commissioners, be involved in the functioning of this SPV. The lessees crave leave to suggest the names of the following judges to be part of the said Judicial Committee:

(a) Hon'ble Shri Justice Vikramjit Sen (Former Judge, Supreme Court of India)

(b) Hon'ble Shri Justice Mukul Mudgal (Former Chief Justice, Punjab & Haryana High Court)

(c) Hon'ble Shri Justice A.K. Parichha (Former Judge, Odisha High Court)

VI. ISSUES RAISED BY THE LD. AMICUS CURIAE IN HIS NOTE DATED 16.02.2017

6.1 LEASES LAPSED UNDER SECTION 4A(4) OF THE MMDR ACT, 1957

196. That it is respectfully submitted that as already adverted to, the said issue stands settled by the decision of this Hon'ble Court dated 04.04.2016 reported as (2016) 11 SCC 455.

6.2 VIOLATION OF RULE 24 OF THE MINERAL (OTHER THAN ATOMIC AND HYDROCARBON ENERGY MINERALS) CONCESSION RULES, 2016 AND RULE 37 OF THE MINERAL CONCESSION RULES, 1960

197. It is respectfully submitted that the learned Amicus Curiae and the Central Government have erred in placing reliance upon Rule 37 of the MCR, 1960 as well as Rule 24 of the Mineral (Other than Atomic And

Hydrocarbon Energy Minerals) Concession Rules, 2016.

198. It is submitted that none of the components of Rule 37 are satisfied through the appointment of a raising contractor. In the present case:

(i) There is no transfer of interest in immovable property evidenced by any registered instrument nor is such an allegation made by the CEC.

(ii) Secondly, there is no financing of the operations of the Lessee in any manner by the raising contractor.

(iii) Thirdly, even if the corporate veil is lifted, the raising contractor is not in control or management of the affairs of the Lessee.

Thus, none of the limbs of Rule 37 are satisfied.

199. Rule 37(1)(a) of the MCR, 1960 uses the expression *"assign, sublet, mortgage or in any other manner, transfer the mining lease or any right, title or interest, therein."* It is respectfully submitted that the

expression contained in Rule 37(1)(a) would clearly contemplate transfer of interest in immovable property as contemplated under Section 5 of Transfer of Property Act, 1882. It is respectfully submitted that a transfer of immoveable property would take effect only upon mandatory registration of a transfer instrument in terms of Section 17(1)(b) of the Registration Act, 1908. In other words, for the purpose of compliance with Rule 37(1)(a) it is essential that there must be a document which is capable of be admitted in evidence of such registration. It is neither the case of the State of Odisha nor for that matter of fact the case of the CEC that the case of any of the lessee is covered under Rule 37(1)(a) of the Rules.

200. It is further submitted that the expressions used in Rule 37(1)(a) have the following meanings as per the Black's Law Dictionary (10th edition, 2014):

> "**sublease** *n.* (18c) A lease by a lessee to a third party, transferring the right to possession to some or all of the leased property for a term

shorter than that of the lessee, who retains a right of reversion.

assignment (14c) **1.** The transfer of rights or property <assignment of stock options>. **2.** The rights or property so transferred <the aunt assigned those funds to her niece, who promptly invested the assignment in mutual funds>.

"An *assignment* is a transfer or setting over of property, or of some right or interest therein, from one person to another; the term denoting not only the *act* of transfer, but also the instrument by which it is effected. In these senses the word is variously applied in law." Alexander M. Burrill, *A Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors* § 1, at 1 (James Avery Webb ed., 6th ed. 1894)."

201. In view of the above, Rule 37(1)(a) is not applicable to the facts and circumstances of the present case. It is submitted that Rule 37 operates directly and effectively. Thus, the requirement of previous consent in writing of the State Government clearly shows that Rule 37(1) deals with transactions which are evidenced by documents and which are actually

bonafide transfer of interest in immovable property which would need the previous consent in writing of the State Government.

202. It is respectfully submitted that the CEC has not suggested that the arrangements which exist between the lessee and the raising contractors can be construed as assignment / sub lease / mortgage or transfer of mining lease or right title of interest. On the basis of terms of such documents, it is submitted that the legal expressions contained in rule 37(1)(a) are indeed meant to be found as a fact in a judicious manner upon the documents which evidenced the true relationship between the partners.

203. Rule 37(1)(b) contemplates a *bona fide* arrangement, contract or understanding whereby the lessee would or may be directly or indirectly financed to substantial extent by, or under which the lessee's operations or undertakings would or may be substantially controlled by, any person or body of persons other than the lessee.

204. As far as Rule 37(1)(b) is concerned, there are two limbs. Either it is a case where by an agreement there is financing of the operations or alternately, you have to lift the corporate veil to find that the person who is actually undertaking the operations is somebody apart from the lessee. If these are not satisfied, Rule 37 is not attracted. It is respectfully submitted that such is not the finding of the CEC. It is respectfully submitted that without clearly bringing the case under one of the three limbs contained in Rule 37(1), the conclusion of the CEC that there could be an infringement of Rule 37 is incorrect.

205. In any event, it must be said in fairness to the CEC that it has taken cognizance of the fact that the said matters are pending consideration of the State Government which is the competent authority to deal with such matter under Rule 37. As evidenced by the words of Rule 37, it is possible that the State Government can even grant consent in writing insofar as any arrangements are concerned. Under these

circumstances, it is submitted that the findings which have been rendered by the CEC are erroneous in law. However, even the CEC is conscious that it is a matter which must be determined by the State Government.

206. The CEC is also conscious that notices were issued by State of Odisha, which notices were quashed by the Revisional Authority on 12.11.2013 as having been issued by a committee of persons who were not legally authorised and competent to issue such issue notices. The State of Odisha had challenged the order of the Revisional Authority by way of W.P. (C) No. 10720 of 2014 before the Hon'ble Odisha High Court, which writ petition is currently pending adjudication. By way of an interim order dated 12.11.2014 in the said writ petition, the High Court has directed as follows:

> *"It is directed that operation of order dated 12.11.2013 passed by the Revisional Authority, Central Government in Revision Application File No. 22/(32)/2012-RC-1 shall remain stayed till disposal of the writ petition.*
>
> *Proceedings initiated by the Petitioner- State may continue but no final order shall be passed*

thereon without leave of this Court. The Opposite Parties are free to participate in the said proceedings."

Copy of the Final Order dated 12.11.2013 passed by the Revisional Authority is annexed herewith and marked as **ANNEXURE-31**.

Copy of the Order dated 12.11.2014 in W.P. (C) No. 10720 is annexed herewith and marked as **ANNEXURE-32**.

207. It is humbly and respectfully submitted that if Rule 37 is not applicable, the finding of the CEC to that effect is liable to be rejected. If this Court is, however, of the opinion that facts need to be investigated in order to determine whether an infraction of Rule 37 is in place, the matter ought to be remitted to the State Government to decide the same after giving due opportunity of hearing and to permit evidence to be led in order to enable the State Government to arrive at an appropriate finding.

208. If this Hon'ble Court, however, feels necessary to have an independent inquiry for the purposes of matters connected with Rule 37, the lessee has no objection to the appointment of Committee of 3 Judges who can look into such contracts and submit their recommendations to the State Government for appropriate action in accordance with law.

209. The CEC has, in its Final Report dated 16.10.2014, on the basis of the quantum of percentage of revenue earned by the raising contractor has come to a conclusion that there is a deemed transfer of interest as contemplated under Rule 37. It is submitted that this assumption is plainly fallacious. In fact, it is clear on the basis of the capital value of the equipment, investments made, expenditure incurred by the raising contractor, details of which were furnished to CEC, that the raising contractor incurs heavy costs and works on a reasonable profit margin of approximately 12-18%.

210. To take a sample case, one of the Lessees had specifically contended in its detailed Reply before the CEC that its work order dated 24.02.2008 obliged the raising contractor to be paid a 35.8% of the net sale value i.e. gross value after payment of royalty and taxes. However, it was clearly mentioned that the payment on a percentage basis was also a pro-tem measure. It existed only till 01.10.2011 and after 01.10.2011, the Lessee in question remunerated the raising contractor for the services rendered on a per ton basis. It is respectfully submitted that a copy of the work order dated 24.02.2008 and the amended work orders issued on subsequent dates dated 01.10.2011, 01.04.2012 and 24.02.2013 have not been taken into account by the CEC. Thus the conclusion of the CEC is plainly contrary to the record.

A true copy of the Reply filed by the said Lessee before the CEC along with all the annexures is annexed hereto as **ANNEXURE-33**. Similarly replies have been filed by each of the Lessees who were the subject

matter of the CEC's Report on Rule 37, but which were not taken into consideration at all by the CEC.

211. It may be noted that the 'net sales value' mentioned in the work order was not the gross revenue or the total sale proceeds realised by the Lessees. It is submitted that the net sale proceeds are the gross revenue minus the royalties, taxes and costs incurred by the Lessees for the services provided by it to the buyers such as transportation and loading. It is, therefore, submitted that the amount which was paid to the raising contractor cannot be said to be a portion of sale proceeds or profits.

212. The lessees have duly paid income tax on their income from the mining operations, wherein the payments made to the raising contractor have been treated as an expenditure which is deducted from the gross income of the Lessee and is an admissible expenditure. Further, for the payments to the raising contractors, the provisions of the Income Tax Act, 1961 relating to tax deductible at source have to be complied with.

Therefore, Section 194C of the Income Tax Act was also complied with and TDS certificates were issued by the Lessees in favour of the raising contractor.

213. It is respectfully submitted that if the raising contractor is in fact rendering service it is amenable to service tax under the law. The raising contractor is registered with the Service Tax Department of the Central Government. In fact, it was pointed out to the CEC that the service tax amount was deposited by the raising contractor with the Service Tax Department in compliance with the notification No.23/2007-ST dated 22.05.2007. The said notification clearly provides that service tax is payable in relation to services provided to any person by any other person in relation to mining of mineral, oil or gas. It is respectfully submitted that the raising contractor has regularly filed service tax returns. The Revenue has accepted such returns.

214. As per the extant provisions of the Finance Act, 1994; it is the service provider who is liable to deposit the

due service tax, even though such amount of tax is collectible or recoverable from the service recipient. The payment of service tax clearly establishes that the remuneration which was paid to the raising contractor was for services rendered and did not constitute a share of the revenue stream generated by the Lessee.

215. Regarding the correct import of Rule 37, to take a sample case, one the lessees had contended as follows before the CEC:

> *"vi. A revenue sharing occurs (as is the case in the petroleum sector) when both parties are entitled directly to a share in the profit generated. In the case at hand, the sale proceeds are received by the Lessee and are booked in her books of account. Thereafter, the Lessee pays remuneration to the Raising Contractor, which his reflected as expenditure in her books of account and is reflected as income in the Raising Contractor's books of account. Maintaining separate books of accounts negate the theory of Partnership. [Ref: 1973 (3) SCC 463]*
>
> *vii. For 'revenue sharing' to exist, both parties must recognise revenue as arising from the <u>same</u>*

transaction (which in the present case would be the sale of goods). In the present case, both the parties do not recognize the revenue from the same transaction. For the Lessee's revenue stream is from the sale of mineral. For the Raising Contractor it is compensation for the mining extraction activities carried out as per the Work-Order.

viii. Para 14 of AS 18 lays down the accounting principles for recognizing revenue which arises from the 'sale of goods':

> *"Revenue from the sale of goods shall be recognised when all the following conditions have been satisfied:*
>
> *(a) the entity has transferred to the buyer the significant risks and rewards of ownership of the goods;*
>
> *(b) the entity retains neither continuing managerial involvement to the degree usually associated with ownership nor effective control over the goods sold;*
>
> *(c) the amount of revenue can be measured reliably;*
>
> *(d) it is probable that the economic benefits associated with the transaction will flow to the entity;*

(e) the costs incurred or to be incurred in respect of the transaction can be measured reliably."

ix. As can be seen, condition (a) clearly stipulates that the entity seeking to recognise revenue from 'sale of goods' must have had ownership and control over the goods, which must have been passed on to the buyer upon sale.

x. In the present case, the Lessee retains exclusive control and ownership over the ore produced at all points of time, and also determines the final sale price to the ultimate buyer. The Raising Contractor does not have any control or ownership over the iron ore at any point of time. This position is made apparent from the fact that any unused ore is reflected as inventory in the Lessee's books of accounts. Therefore, payment on a percentage basis cannot be termed as '<u>Revenue Sharing</u>'.

xi. It is respectfully submitted that payment on a percentage basis also does not amount to a profit sharing arrangement. A profit sharing arrangement would ensue in a scenario where after having met the service provider's cost of services, the principal agrees to share its profits

with the service provider. The same is not the case in the present matter, as the Raising Contractor was paid a fixed percentage amount, which included its costs for providing services.

xii. Fixing of remuneration on a percentage basis in a variable price contract is consistent with internationally accepted accounting standards. The latest standard on this matter, issued by the Financial Accounting Standards Board (FASB), is FASB 606 of May, 2014 (which is consistent with IFRS 15 issued by the International Accounting Standards Board). The relevant portion reads:

> *"Step 3: Determine the Transaction Price*
> *The transaction price is the amount of consideration (for example, payment) to which an entity expects to be entitled in exchange for transferring promised goods or services to a customer, excluding amounts collected on behalf of third parties. To determine the transaction price, an entity should consider the effects of:*
>
> 1. *Variable consideration – If the amount of consideration in a contract is variable, an entity should determine the amount to include in the transaction price by*

estimating either the expected value (that is probability-weighted amount) or the most likely amount, depending on which method the entity expects to better predict the amount of consideration to which the entity will be entitled....."

xiii. Therefore, as per the Accounting Standard, variable consideration can be fixed on either (a) a historical probability-weighted average method; or (b) the most likely expected amount. In the contractual arrangement between the lessee and the contractor, the price is fixed by reference to actual 'net sale value' which is consistent with (b) i.e. the method most likely to predict the amount of consideration to which the Contractor is entitled.

xiv. Insofar as the exact percentage of the net sale value is concerned, the same is a matter of contractual understanding between the parties, determined at arms' length, and is calculated to ensure a reasonable remuneration, wherein the percentage is a reflection of the technological expertise of the contractor, and efficient performance. Effectively, it is an 'Efficiency Remuneration or incentive remuneration'. The

said percentage includes the entire cost incurred by the contractor in the provision of services.

xv. Efficiency Remuneration will fall in the Direct Cost of Mining, which is a charge on the gross receipt from sale of extracted materials by the Lessee to the end-consumer. A charge can never constitute a transfer under the Transfer of Property Act because in a charge no right in rem is transferred.

xvi. Payment of remuneration on a percentage basis is for the sake of computation.

xvii. However, payment on a percentage basis is a common practice and settled paradigm. Few illustrations of payment on percentage basis in other sectors are as follows:

a. *Section 67 of the Finance Act 1994 – provision of service for a consideration which is not ascertainable;*
b. *charge of canalising agent – in percentage value of import, as recognised in (2000) 1 SCC 718;*
c. *salary including percentage of turnover, as recognised in (1979) 2 SCC 354;*
d. *licence fee as percentage of revenue to IAAI for service taken from them towards ground*

handling, as recognised in (2009) 13 SCC 374.

xviii. Payment in any form by a principal to a Contractor such as monthly salary, tonnage basis or value of receipts can also be reduced to a percentage of the principal's total receipts.

xix. Payment to a Contractor on a percentage basis is not prohibited under any law including the MMDR Act and MC Rules. Therefore, the same cannot be prohibited or cannot be said to lead to a transfer of interest in a property.

xx. At the very highest, the percentage basis is a methodology of payment. It cannot determine the relationship between the Lessee and Raising Contractor without any evidence to such effect.

xxi. It is obvious from the above arrangement that the remuneration to the Raising Contractor on a percentage basis was to protect the interest of the Lessee in case of decrease in sale or earnings in case of change in market conditions. Therefore, a self-protection mechanism for the lessee cannot alter the nature of ownership."

216. It is respectfully submitted that the CEC has not alleged that the raising contract amounted to a partnership.

217. It had also been contended before the CEC that the said Lessee and its employees retained complete supervision and control over all aspects of mining operations within the leasehold area. It had stated that it appoints the necessary personnel and employees who function under her direction, control and supervision for carrying out mining operations. Such employees include the employees who are statutorily required to be appointed under the provisions of the Mines Act, 1952 and the Metaliferous Mines Regulations, 1961. In fact, it is pertinent to mention that the said Lessee had 114 employees on its rolls who are all experienced and qualified in the working of mines, including an Agent who is responsible for the financial and other affairs of the mine. The appointment of the Agent has been duly notified to the Director General Mines and Safety. The

appointment letters of all personnel had also been issued by the said Lessee and the salaries had also been paid by the Lessee.

218. The mining operations carried out in the leasehold area are conducted entirely by the personnel and employees appointed by the Lessees as stipulated under various statutory provisions. The following is the list of personnel appointed under the relevant statutory provisions by the Lessee:

(i) First Class Mines Manager as per Sec 17 of Mines Act, 1952.

(ii) Second Class Mines Manager as per Regulation 35 of Metaliferous Mines Regulations, 1961.

(iii) Mines Foreman as per Regulation 37 of MMR 1961.

(iv) Blaster as per Regulation 39 of MMR 1961.

(v) Surveyor as per Regulation 38 of MMR 1961.

(vi) Mechanical Engineer as per Regulation 36 of MMR 1961.

(vii) Electrical Engineer as per Regulation 36 of MMR 1961.

219. The above said are the key personnel for controlling and carrying out the mining operations. The said personnel have qualifications as required under the relevant provisions and insofar as the First Class Mines Manager, Second Class Mines Manager and Surveyor are concerned, the said personnel also have certificates issued by the Director General of Mines Safety, Ministry of Labour, Government of India.

220. It is submitted that the raising contractor has no role to play once the stacking of the ore has been completed. After excavation and processing, the sale and transport of the iron ore is the exclusive responsibility of the lessee, as contemplated under the Odisha Minerals (Prevention of Theft and Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007. The price for sale of the ore to the ultimate buyer is the sole discretion of the lessee. Further, all necessary approvals and

permissions for transportation of the ore are obtained by the lessee, without any role of the raising contractor.

221. Lastly, it may be mentioned that the work order issued by the lessee for employing the raising contractor is for a limited and short tenure, and is terminable at the option of the lessee. Therefore, the raising contractor works completely at the discretion of the lessee and the lessee retains complete direction, control and supervision of the overall mining operations within the leasehold area.

222. To take the sample case in question, the lessee had also contended before the CEC that the lessee was in no manner financed by the raising contractor. The Balance Sheet and the Profit and Loss account of the lessee (as annexed to the Reply filed before CEC) clearly indicates that the income realised by the lessee from the sale of ore to the ultimate buyer is reflected on the lessee's books of accounts; while the lessee remunerates the raising contractor as per the relevant

clause of the work order for the services performed by him.

223. Similarly, the Lessee had contended that it has substantial capital assets for the purposes of carrying out mining operations. To illustrate, the lessee had stated that she had set up a state-of-the-art beneficiation plant having a capacity of 20,00,000 MT per annum, which entailed an investment of approximately Rs. 60 crores by the lessee. Therefore, it cannot be said that there is any financing of the lessee by the raising contractor.

224. It is respectfully submitted that the analogy which has been drawn by the CEC with reference to the raising contract undertaken by the Odisha Mining Corporation is completely irrelevant. The Odisha Mining Corporation has used its raising contractor only for the purpose of excavation without any further obligation. Thus the raising contractor engaged by OMC is not responsible for either stacking, storing, refining or for that matter of fact processing of ore or

making sure that whatever ore is usable can be segregated from that which is not usable. Thus the obligations in respect of the present raising contractor are substantially different from those engaged by the Odisha Mining Corporation and a parallel could not have been drawn by the CEC and the same could not have been the basis for the purpose of coming to an arbitrary conclusion that the raising charges were so high or exorbitant as to infer a violation or infraction of Rule 37 of the MCR, 1960.

225. At this juncture, reference may be had to an efficiency comparison statement between the contractor engaged by the Odisha Mining Corporation and the raising contractor engaged by one of the lessees.

A copy of the said chart is annexed herewith and marked as **ANNEXURE-34**.

226. It was also contended before the CEC that engagement of experienced raising contractor has resulted in optimum utilisation and extraction of mineral at the

Lessee's mine. To illustrate, between the period 2010-11 to 2013-14, the Lessee had been able to achieve production of 85.18% of the total capacity of 4 MTPA, by engagement of an efficient contractor. In comparison, for the same period, OMC was able to achieve production of only 22.97% of its total production capacity in 5 leases.

227. The payment by the lessees to the raising contractor is contingent upon the event of sale. Consequently, the raising contractor took the responsibility for the quality of the ore being sold, and was penalised in the event of any deficiency in quality / grade of ore.

228. Further, the qualitative contribution of the raising contractor on the lessee's instance in terms of the quality and grade of ore being excavated is much higher than contractors engaged by OMC, wherein the remuneration is linked merely to production of a certain quantity of ore, rather than the actual quality of ore.

229. It may be noted that Rule 37 itself was the subject matter of ambiguity in the Central Government. As recorded in the Agenda Notes dated 17.09.2012 for the Quarterly Meeting of the Central Coordination cum Empowered Committee, the Central Government perceived that there was lack of clarity on the meaning of the expression "*directly or indirectly financed to a substantial extent*" contained in Rule 37, in the following words:

> *"11.1 At present Rule 37 of the MCR, 1960 provides for a lessee to enter into an arrangement, contract, or understanding with any person or body of persons other than the lessee so far as the lessee is not substantially financed or the lessee's operations or undertakings are not substantially controlled by such a person or body of persons. The Ministry is of the opinion that there is lack of clarity in the interpretation of the terms "directly or indirectly financed to a substantial extent" and the terms "undertakings will or may be substantially controlled", which may lead to non-compliance of Rule 37 of the MCR on one hand and disincentivise flow of genuine specialists with*

state-of-art mining technologies as service providers on the other hand."

Copy of the Agenda Notes dated 17.09.2012 for the Quarterly Meeting of the Central Coordination cum Empowered Committee is annexed herewith and marked as **ANNEXURE-35**.

230. It is submitted that Rule 24 of the 2016 Rules has no application in the present matter. It is pertinent to mention that the Final Report dated 16.10.2014 submitted by CEC was with respect to arrangements which existed prior to 2014 and thus had to be construed as per the provisions of Rule 37. It is submitted that the provisions of the Rule 24 of the 2016 Rules, which have come into force on 04.03.2016, cannot be applied retrospectively to arrangements existing much prior to the coming into force of the 2016 Rules.

231. It is respectfully submitted that the contention of the submission of the learned Amicus Curiae in equating Rule 37 of the extant Rules with Rule 24 of the 2016

Rules is incorrect. Rule 37 is distinct from Rule 24. Rule 37 of MCR 1960 had been framed by the Central Government in exercise of its power under Section 13(2)(a). Rule 37 did not prohibit transfer of mining leases, but only contemplated that certain arrangements which could deemed to be a transfer of mining lease (such as substantial financing of lessee or substantial control of operations) require consent of the State Government. Under the new statutory regime w.e.f. 12.01.2015, there is a prohibition under Section 12A(6) of the MMDR Act, 1957 that transfer of mining leases shall be allowed only for those granted through auction, and the proviso states that where the mining lease has been granted otherwise than through auction and where mineral is being used for captive purpose, transfer of such mining lease may be permitted subject to terms and conditions. Thus, Rule 24 of the 2016 Rules had to be framed accordingly.

232. Without prejudice to the contention that Rule 24 of the 2016 Rules is invalid and *ultra vires* the

provisions of the MMDR Act, 1957 (having regard to the fact that the said Rule was framed in an arbitrary manner), from the commencement of the said Rule with effect from 04.03.2016, raising contractors engaged by the lessee have complied with the said Rule. In fact, the raising contractors have been paid raising charges per tonne depending on the service provided. Under those circumstances, there can be no violation under Rule 24. It is submitted that the learned Amicus could not have adverted to Rule 24 for the purpose of suggesting that there was any violation by either the lessee or the raising contractor as far as Rule 24 of the 2016 Rules was concerned. In any event, it is submitted that Rule 24 is prospective.

233. It is respectfully submitted that having regard to the technical expertise which is required in matters of mining, raising contractor is an essential requirement of the day. It is not a subterfuge nor is it intended to circumvent mandatory provisions of law. Thus, there is no infraction even of either Rule 37 of the 1960

Rules or even of Rule 24 of the 2016 Rules as introduced w.e.f. 04.03.2016.

234. In any event, it is submitted that matters of leases which are governed under the extant law are bound to be saved by virtue of Section 6 of the General Clauses Act, 1897. It is humbly and respectfully submitted that the cases of the lessees as well as the raising contractor cannot be dealt with under Rule 24 in any event, assuming without admitting for the sake of argument that Rule 24 can be even applicable that there is no violation for the reasons stated herein above.

235. It is respectfully submitted that mining operations are capital intensive and require state of the art technology. Appointment of a raising contractor for the purpose of employing specialised machinery is a well-known practice in modern mining industry. In fact, a Mine Developer and Operator (MDO), as contemplated in the recent auctions of the Government of India, is no more than a raising

contractor. It is submitted that the raising contractor brings in his capital intensive equipment, uses the equipment, undertakes the operations strictly under the supervision of the various officials and personnel of the lessee. The raising contractor is thus a service provider who undertakes responsibilities and is reimbursed on the basis of despatch of ore of the requisite quality. It is submitted that the manner of reimbursement of a raising contractor can hardly suggest transfer under Rule 37.

236. The affidavit of the Central Government dated 18.01.2017 is oblivious to the Notification issued by the Ministry of Coal on 27.12.2016 whereby the Auction by Competitive Bidding of Coal Mines Rules, 2012 were amended. Under the Part II of the Schedule inserted by the said Notification to the aforesaid Rules, development of a mine through a Mine Developer and Operator (MDO) has been expressly contemplated. It is submitted that a raising contractor is no more than a MDO and performs a similar service for the lessee.

Copy of the Notification dated 27.12.2012 issued by the Ministry of Coal, Government of India is annexed herewith and marked as **ANNEXURE-36**.

237. It is pertinent to note that the raising contractor does not have interest in immovable property. The raising contract is terminable / determinable at the instance of the lessees. It is a business arrangement which is undertaken for the scientific excavation of mineral. No lessee will be able to undertake in the present day world intensive mining with reference to the most modern equipment. In fact, the raising contractor in the present matter is one whose credentials are accepted to be of international standard both in terms of quality of manpower, machinery as well as work deployment.

238. The Petitioner has failed to appreciate the importance of technology in modern mining operations. The remuneration payable to the raising contractor takes into account the state-of-the-art technologies employed by the contractor to enhance the quality of mineral

production, as submitted by the raising contractor before the CEC. An illustrative account of the technologies employed by the raising contractor is as follows:

(a) The raising contractor has successfully implemented the SAP ERP software for mining operations, including the modules of Production Planning, plant maintenance, material management, finance costing and human resource;

(b) The raising contractor has employed the state-of-the-art exploratory drilling machine such as BoartLongyear LF 90D and DB 525 multipurpose drills to ensure detailed exploration of deposits;

(c) The raising contractor has also introduced Quick Dispatch System (QDS) by which all trucks are weighed and dispatched carrying the permitted weightment;

(d) Grizzly Separator, which is designed for continuous and efficient classification and

separation of ores as undersize and oversize materials;

(e) EXTEC High Frequency Screen and Binder Screen High Frequency to ensure qualitative screening of ROM.

239. A raising contractor is necessary for carrying out modern core drilling operations both in prospecting, exploration and excavation of mineral reserves. It is submitted that state of art machinery, highly skilled and experienced team of operators is essential for modern mining operations. Laboratories have been established by the raising contractor in order to ensure that suitable quality testing is undertaken with testing instruments and qualified personnel.

Photographs and details of the technologies employed by the raising contractor at the instructions of the lessee are part of ANNEXURE-71.

240. Global mining techniques were not known in the State of Odisha. It is on account of extensive knowledge of the raising contractor along with the initiative and

cooperation of the lessees that a systematic technological and scientific development of mines and minerals has taken place. It is submitted that now a 3-dimensional dililiation of known deposit is achieved through closed space sampling, pitting, trenching and drilling in a grid. This includes an obvious analysis of outcrops, trenches, boreholes, existing dumps and old working so that the size, shape, structure and grail of the deposit of the mineral body is established with a higher degree of accuracy.

241. It is respectfully submitted that the raising contractor in the present case engaged a renowned Australian consultant Mr. Runge to carry out detailed exploration and excavation operations in various leasehold areas. In fact, the raising contractor was awarded an exploration drilling contract for coal mines by Coal India Mozambique Ltd. The raising contractor is stated to have completed the contract before time.

242. It is respectfully submitted that exploration contracts have even been awarded to the present raising

contractor by the CMPDI, Odisha Mining Corporation, Director of Mines and Geology, Jharkhand, Geo Mysore which only would indicate that the competence of the said raising contractor is a matter of public knowledge. It is, therefore, submitted that allegations suggesting as if the raising contractor was interested in seeking to undertake a subterfuge and gain interest in immovable property in the mining lease is entirely incorrect and is liable to be repudiated.

243. It is regretful that inspite of the fact that the contractor had made all relevant materials available to the CEC; and the CEC has not even once doubted the technical competence, efficiency, efficacy, capability or for that matter of fact the robustness of the raising contractor; but has still chosen to act upon an assumption of violation of Rule 37 based upon the quantum of service charges towards a raising contract.

244. It is submitted that a one-sided picture has been painted by the Petitioner with reference to the activities of the lessee and other similarly situated

lessees. It is further submitted that in order that responsible mining takes place, it is necessary to integrate social aspirations in the activities of the lessees as well as the raising contractor since the raising contractor is also involved on the ground.

245. It is further submitted that in order to see that efficient transport takes place, the members of the local community have been homogenised into taking transport vehicles like trucks on easy and soft loans. The interest payments are also subsidised in respect of these loans. It will be relevant to point out that these transporters which consist of the local tribals are formed to constitute themselves as partnership firms and run the entire transport business. It may be noted that the committees which are constituted by the tribals after paying the expenditure towards transport have a surplus which is distributed amongst the members of the community. As a consequence of the surplus, the people who are old aged, unemployed and physically handicapped are able to survive.

246. It is stated that one of the raising contractors has in fact established a security academy by the name of TISA. It is further state that it is run by its sister concern called Maa Tarini Logistics Ltd., which has already been adverted to earlier. The said company has attempted to provide training and employment to the poor and uneducated as well as less educated tribal youth of Keonjhar District.

247. The above facts are only indicative of the extensive work being undertaken by the raising contractor. It is not that the raising contractor is intended to be of insubstantial consequence. The raising contractor is permitted in terms of Section 9(2) of the MMDR Act, 1957 read with the other provisions of the Act. In any event, it is submitted that the factum of the presence of the raising contractor is known to the State and the activities undertaken by the raising contractor is also known to the State.

248. In light of the above submissions, it is submitted that in the event this Hon'ble Court comes to the conclusion that the matters relating to Rule 37 require to be investigated further, the appropriate course would be to remit the matter back to the State Government for a *de novo* inquiry in accordance with law. In the alternative, it is also submitted that a Committee of eminent Judges be appointed to look into the issue of whether at all there has been any infraction of Rule 37.

6.3 ILLEGAL MINING IN FOREST LANDS

6.3.1 Enactment of Forest (Conservation) Act, 1980 and its development from 1980-1996

249. The regulation of forests and forest produce in India commenced with the enactment of the Indian Forest Act, 1878, which applied to forest lands in British India. The 1878 Act was repealed and replaced by the Indian Forest Act, 1927; whereunder the power to reserved forests, assign village forests and declare protected forests was vested with State Governments.

250. A large number of mining leases were granted before and after Independence by Princely States, Provincial / State Governments. The mining leases included lands which were forest land but at that point of time were classified as zamindari, ryotwari or malguzari / mahalwari. Post-independence, the earlier system of zamindari, ryotwari or malguzari / mahalwari lands was abolished, and all lands but taken over by State Revenue Departments, and subsequently transferred to State Forest Departments. Since there was no requirement to obtain approval/clearance before breaking up of any forest land within the mining lease, the mining lessees accordingly continued to work in the forest lands included within the mining leases.

251. Thereafter, on account of large scale deforestation in the country as permitted by various State Governments, the entries for forest and wildlife were deleted from the State List (Entry 19) and inserted in the Concurrent List (Entries 17A and 17B) by virtue of the Constitution (42nd Amendment) Act, 1976.The

Constitutional Amendment also inserted Article 48A in Part IV of the Constitution, which provided that the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. Thereafter, the Central Government issued the Forest (Conservation) Ordinance, 1980 w.e.f. 25.10.1980, which introduced for the first time the requirement of obtaining prior approval of the Government of India for the diversion of forest land for non-forest purposes.

252. The Ordinance was repealed and replaced by an Act of Parliament viz. the FC Act, 1980, which came into effect on 25.12.1980.The FC Act, 1980 was enacted to regulate the diversion / deforestation of forest areas for non-forest purposes, and to ensure that diversion / deforestation was permitted only with the prior approval of the Government of India and upon mitigative measures having been adopted. The Statement of Objects and Reasons of the FC Act reads as follows:

"1. Deforestation causes ecological imbalance and leads to environmental deterioration. Deforestation had been taking place on a large scale in the country and it had caused wide-spread concern.

2. With a view to checking further deforestation, the President promulgated on the 25th October, 1980, the Forest (Conservation) Ordinance, 1980. The Ordinance made the prior approval of the Central Government necessary for dereservation of reserved forests and for use of forest land for non-forest purposes. The Ordinance also provided for the constitution of an advisory committee to advise the Central Government with regard to grant of such approval.

3. The Bill seeks to replace the aforesaid Ordinance."

253. Section 2 of the FC Act, as it stood upon enactment of the Act in 1980 is relevant and read as follows:

"Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing:

(i) that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;

(ii) that any forest land or any portion thereof may be used for any non-forest purpose.

Explanation – For the purposes of this section "non-forest purposes" means breaking up or clearing of any forest land or portion thereto for any purpose other than reafforestation."

254. The Central Government framed the Forest (Conservation) Rules, 1981, which came into effect on 01.08.1981. In the said Rules, Rule 4 provided for the procedure to make proposal by State Government. It was stipulated that every State Government or other authority seeking prior approval under Section 2 shall send its proposal to the Central Government in the form appended to the rules. Pertinently, neither the FC Act nor the 1981 Rules contemplated any diversion proposal at the instance of any user agency i.e. a mining lessees. The onus of initiating a proposal for

diversion of forest land laid on the State Government or other authority.

Copy of the Forest (Conservation) Rules, 1981 is annexed herewith and marked as **ANNEXURE-37**.

255. Further, neither the FC Act nor the 1981 Rules contained any specific provision regarding mining leases involving forest lands. There was no specific stipulation regarding pre-existing mining leases to obtain approval under Section 2 either at the stage of renewal of the mining lease, or otherwise.

256. The MoEF had issued instructions/circulars for the purpose of ensuring compensatory afforestation while granting approvals under Section 2 of the FC Act.

257. There existed a lot of ambiguity about the application and scope of the FC Act to mining leases granted before the coming into force of the Act. By the time of enactment of the FC Act in 1980, the majority of mining leases in the country, including in the State of Odisha included forest lands, large portions of which

had already been broken up prior to the commencement of the FC Act, 1980.

258. The issue of applicability of the provisions of the FC Act to leases granted before 1980 came up before this Hon'ble Court in the matter of *State of Bihar v. Banshi Ram Modi,* (1985) 3 SCC 643. The facts were that Banshi Ram Modi was granted a mining lease in the year 1966 for mining of mica. A portion of his lease admeasuring 80 acres fell within a part of the reserved forest. During the course of his mining operations in about 5 acres, Banshi Ram Modicame across two other associate minerals, namely, feldspar and quartz. Banshi Ram applied to the State Government to include the said 2 minerals within his mining lease, and a Deed of Incorporation dated 06.04.1983 was accordingly executed. However, the State Government did not obtain the previous approval of the Central Government for the inclusion of the 2 new minerals in the original lease.

259. The issue before this Hon'ble Court was whether in the case of a mining lease which has been granted for winning a certain mineral prior to the coming into force of the Act, if the lessees applies to the State Government after the coming into force of the Act for permission to win and carry any new mineral from any part of forest area which is already utilised for non-forest purposes by carrying out mining operations before the coming into force of the Act, the prior approval of the Central Government has to be obtained under Section 2 of the Act for the purpose of granting such permission.

260. This Hon'ble Court was of the opinion, upon a perusal of the relevant provision, that there was no such requirement of a prior approval since it would lead to an unreasonable result and would not sub-serve the objects of the Act. Thus, this Hon'ble Court held that while granting permission to start mining operations in a virgin area, Section 2 of the Act had to be

complied with; the same was not necessary in respect of land which already stood broken:

> *"10. The relevant parts of Section 2 of the Act which have to be construed for purposes of this case are clause (ii) of and the Explanation to that section. Clause (ii) of Section 2 of the Act provides that notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing that any forest land or any portion thereof may be used for any non-forest purpose. Explanation to Section 2 of the Act defines "non-forest purpose" as breaking up or clearing of any forest land or portion thereof for any purpose other than reafforestation.* ***Reading them together, these two parts of the section mean that after the commencement of the Act no fresh breaking up of the forest land or no fresh clearing of the forest on any such land can be permitted by any State Government or any authority without the prior approval of the Central Government. But if such permission has been accorded before the coming into force of the Act and the forest land is broken up or cleared then obviously the section cannot apply****. In the*

instant case it is not disputed that in an area of five acres out of eighty acres covered by the mining lease the forest land had been dug up and mining operations were being carried on even prior to the coming into force of the Act. If the State Government permits the lessee by the amendment of the lease deed to win and remove felspar and quartz also in addition to mica it cannot be said that the State Government has violated Section 2 of the Act because thereby no permission for fresh breaking up of forest land is being given. The result of taking the contrary view will be that while the digging for purposes of winning mica can go on, the lessee would be deprived of collecting felspar or quartz which he may come across while he is carrying on mining operations for winning mica. That would lead to an unreasonable result which would not in any way subserve the object of the Act. We are, therefore, of the view that while before granting permission to start mining operations on a virgin area Section 2 of the Act has to be complied with it is not necessary to seek the prior approval of the Central Government for purposes of carrying out mining operations in a forest area which is broken up or cleared before the commencement of the Act. The learned counsel for Respondent 1 has also given an undertaking that Respondent 1

would confine his mining operations only to the extent of five acres of land on which mining operations have already been carried out and will not fell or remove any standing trees thereon without the prior permission in writing from the Central Government. Taking into consideration all the relevant matters, we are of the view that Respondent 1 is entitled to carry on mining operations in the said five acres of land for purposes of removing felspar and quartz subject to the above conditions."

(Emphasis supplied)

261. In *Ambica Quarry Works v. State of Gujarat &Ors.*, (1987) 1 SCC 213, the issue before this Hon'ble Court was whether after the coming into operation of the FC Act, the Appellants therein were entitled to renewal of their quarry leases without approval under Section 2 of the FC Act. Although the leases for quarrying had been granted prior to the commencement of the FC Act, the question was whether at the stage of renewal, the requirements in the FC Act were intended to be complied with.

262. This Hon'ble Court held in para 19 of the judgement that the Appellants therein were asking for a renewal of the quarry leases, which would lead to further deforestation or at least would not help reclaiming back the areas where deforestations had taken place.

263. This Hon'ble Court held that renewals could not be claimed as a matter of right and that the obligation to the society engrafted in the FC Act must predominate over the obligation to the individuals. Therefore, the Court came to the conclusion that notwithstanding the judgment in *Banshi Ram Modi*, the situation in *Ambika Quarry* was entirely different since it involved a case of renewal. It was, therefore, held that the Central Government was duty bound to be involved in the process of grant of renewal prior to the renewal of the lease. The following observations of this Hon'ble Court in the said judgement are relevant:

> *"... The appellants are asking for a renewal of the quarry leases. It will lead to further deforestation or at least it will not help reclaiming back the areas where deforestations have taken place. In*

that view of the matter, in the facts and circumstances of the case, in our opinion, the ratio of the said decision cannot be made applicable to support the appellants' demands in these cases because the facts are entirely different here. The primary purpose of the Act which must subserve the interpretation in order to implement the Act is to prevent further deforestation. The Central Government has not granted approval. If the State Government is of the opinion that it is not a case where the State Government should seek approval of the Central Government, the State Government cannot apparently seek such approval in a matter in respect of which, in our opinion, it has come to the conclusion that no renewal should be granted."

(Emphasis supplied)

264. In *Rural Litigation and Entitlement Kendra v. State of UP*, 1989 Supp (1) SCC 504, which was concerned with mining in Doon Valley, this Hon'ble Court followed the earlier judgement in *Ambica Quarry Works* (supra). It was held that the FC Act applied to renewals as welland even if there was a provision for renewal in the lease agreement on exercise of the

lessee's option, the requirements of the FC Act had to be satisfied before such renewal could be granted.

265. The FC Act, came to be amended in 1988 i.e. by Act 69 of 1988, which came into effect on 15.03.1989. By way of the said amendment, sub-sections (iii) and (iv) were inserted in Section 2 and the Explanation to Section 2 was also substituted. The amended Section 2 read as follows:

> *"2. Restriction on the de-reservation of forests or use of forest land for non-forest purpose.— Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing—*
>
> *(i) that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;*
>
> *(ii) that any forest land or any portion thereof may be used for any non-forest purpose;*
>
> *(iii) that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority,*

corporation, agency or any other organisation not owned, managed or controlled by Government;

(iv) that any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reafforestation.

Explanation.—For the purposes of this section "non-forest purpose" means the breaking up or clearing of any forest land or portion thereof for—

(a) the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticulture crops or medicinal plants;

(b) any purpose other than reafforestation,

but does not include any work relating or ancillary to conservation, development and management of forests and wild-life, namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trench marks, boundary marks, pipelines or other like purposes."

266. The amendment to the FC Act also inserted Section 3A in the Act, which provided that whoever contravened or abetted the contravention of any provision of

Section 2 shall be punishable with simple imprisonment for a period extending upto 15 days.

267. The MoEF issued Guidelines for the purpose of implementing provisions of the FC Act on 25.10.1992. Guideline 1.6 dealt with mining activity and provided as follows:

> *"1.6 Mining including underground mining is non-forestry activity. Therefore, prior approval of the Central Government is essential before a mining lease is granted in respect of any forest area. The Act would apply not only to the surface area which is used in a mining but also to the entire underground mining area beneath the forest. A renewal of an existing mining lease in a forest area also requires the prior approval of the Central Government. Continuation or resumption of mining operation on the expiry of a mining lease without prior approval would amount to contravention of the Act."*

Copy of the Guidelines dated 25.10.1992 is annexed herewith and marked as **ANNEXURE-38**.

268. The Guidelines issued on 25.10.1992 also provided a form for seeking approval under Section 2 w.r.t. a mining lease, including renewal thereof, by user agencies i.e. project proponents [para 10 of the Model Form].

269. Thereafter, the MoEF issued a Circular dated 21.12.1993 clarifying the position with respect to mining leases including forest areas broken up prior to 1980. The Circular stated as follows:

> *"(i) In respect of mining lease granted / renewed before 25.10.1980 prior approval of the Central Government under the Forest Conservation Act, 1980 would not be required for continuing mining activities in areas already broken up before 25.10.1980 during continuance of the lease period.*
>
> *(ii) In respect of mining leases granted / renewed before 25.10.1980, if area is to be broken up afresh after commencement of the Act i.e. 25.10.1980, prior approval of the Central Government will be required under the Forest Conservation Act, even during the continuance of lease period.*

(iii) The prior approval of the Central Government under Section 2 of the FCA would be required when a mining lease granted before commencement of the Act, is renewed after its coming into force. It applies even to such cases where mining is to be continued in already broken up areas."

Copy of the Circular dated 21.12.1993 is annexed herewith and marked as **ANNEXURE-39**.

270. The MoEF issued a further Circular dated 25.11.1994, substituting Guideline 2.2 (iv) as follows:

"(iv) The user agency shall submit the proposal for renewal of mining lease to the Forest Department one year prior to date of expiry of existing lese, failing which the proposal may be liable for rejection. The State Government shall send the expiry of the existing lease. In case of any delay, a detailed report elaborating the cause of delay shall be sent along with the proposal".

Copy of the Circular dated 25.11.1994 is annexed herewith and marked as **ANNEXURE-40**.

271. The Circular dated 25.11.1994 also exempted forest areas already broken up / used for mining from the

requirement of compensatory afforestation, and required compensatory afforestation to be done only for the balance area:

> *"No compensatory afforestation shall be insisted upon in respect of the following:*
>
> *... ...*
>
> *(d) Cases of renewal of mining lease, for the forest area already broken/used for mining, dumping of overburden, construction of roads, ropeways, buildings etc. For the balance area, compensatory afforestation shall be required to be done as stipulated, provided that not compensatory afforestation had been stipulated and done in respect of this area at the time of grant/renewal of lease earlier."*

272. The Circular dated 25.11.1994 also inserted Guideline 4.17 providing for grant of temporary working permission in already broken up areas while awaiting formal approval for renewal, in the following terms:

> *"4.17 In respect of renewal of mining leases, temporary working permission may be granted by the Central Government to continue working in already broken up area upto maximum period of one year, even without formal approval for the renewal, provided:*

(a) The user agency has submitted the required proposal with complete details to the Forest Department at least one year prior to the expiry of existing lease period.

(b) The State government has sent the formal proposal to the Central Government for renewal of mining lease prior to the expiry of the existing lease, alongwith particulars and reports as are required to be furnished in the normal course of renewal.

(c) The temporary working permission will be confined to areas already broken up prior to the expiry of the lease, and no fresh areas will be broken up until formal renewal is granted."

273. It is submitted that as a matter of practice, mining leases which sought forest clearances at the stage of renewal were allowed to work in the already broken up forest areas by issuance of temporary working permissions from time to time, by either the Central Government or the State Government.

6.3.2 Judgment of Hon'ble Supreme Court dated 12.12.1996 in T.N. Godavarman v. UOI, (1997) 2 SCC 267 *and concept of "DLC Forest"*

274. This Hon'ble Court considered the import and significance of the provisions of Section 2 of the FC Act in its seminal order dated 12.11.1996 in *T.N. Godavarman Thirumalpad v. Union of India,* reported as (1997) 2 SCC 267. In the said matter, this Hon'ble Court was of the opinion that the running of saw mills, including vineyard or plywood mills, and mining of minerals, being essentially non-forest purposes, could not take place in forest areas without prior approval of the Central Government and must stop forthwith.

275. In order to determine the meaning of the expression 'forest' under the FC Act, it was held that the word 'forest' must be understood according to its dictionary meaning. It was held that it covers all statutorily recognised forests, whether designated as reserved, protected or otherwise, for the purpose of Section 2(i) of the FC Act, 1980. It was noted that the term 'forest

land' occurring in Section 2 will not only include forest as understood in the dictionary sense but also any area recorded as forest in the Government record irrespective of the ownership. The Court accordingly issued the following directions, inter alia:

> *"... 5. Each State Government should constitute within one month an Expert Committee to:*
> *(i) Identify areas which are "forests", irrespective of whether they are so notified, recognised or classified under any law, and irrespective of the ownership of the land of such forest;*
> *(ii) identify areas which were earlier forests but stand degraded, denuded or cleared; and*
> *(iii) identify areas covered by plantation trees belonging to the Government and those belonging to private persons.*
>
> *6. Each State Government should within two months, file a report regarding:*
> *(i) the number of saw mills, veneer and plywood mills actually operating within the State, with particulars of their real ownership;*
> *(ii) the licensed and actual capacity of these mills for stock and sawing;*
> *(iii) their proximity to the nearest forest;*
> *(iv) their source of timber.*

7. Each State Government should constitute within one month, an Expert Committee to assess:

(i) the sustainable capacity of the forests of the State qua saw mills and timber based industry;

(ii) the number of existing saw mills which can safely be sustained in the State;

(iii) the optimum distance from the forest, qua that State, at which the saw mill should be located. ..."

276. The above said observations and directions of this Hon'ble Court in *T.N. Godavarman*(supra) led to a number of queries being addressed to the MoEF regarding leases granted prior to 1980, which were still continuing. The MoEF issued Guidelines dated 18.02.1997 stating as follows:

"The Ministry has received many queries after the interim order was issued by the Hon'ble Supreme Court on 12th December, 1996 in the matter of WP (Civil) No.202 of 1995, regarding the applicability of the Forest (Conservation) Act, 1980 on the leases which were granted prior to 1980 and the lease period is still continuing. In this connection, I am directed to invite your

attention to Annexure III of the Forest (Conservation) Act, 1980 Rules and Guidelines as amended on 25th October, 1992, issued by the Ministry of Environment and Forests. It will be seen that sub-para (i) of the Annexure III clearly states that in respect of the mining operations being carried out on forest land leased before the commencement of Forest (Conservation) Act, 1980 during the continuance of the lease period, the approval of the Central Govt. under Section 2 of the said Act is not required.

2. However, to settle the doubt, if any, the opinion of the Attorney General of India was solicited. A copy of the opinion given by the Attorney General of India on this issue is enclosed for information. It is requested that appropriate action may be taken in the light of the opinion given by the Attorney General of India."

Copy of the Guidelines dated 18.02.1997 is annexed herewith and marked as **ANNEXURE-41**.

277. Therefore, the MoEF clearly understood that mining operations being carried out on forest lands leased before the commencement of the FC Act could continue during the lease period and approval under

Section 2 of the FC Act was not required. It is reliably learnt that the said understanding was based upon an opinion given by the then Attorney General.

278. Subsequent to the issuance of the above said directions dated 12.12.1996, every State Government, including the Government of Odisha, constituted District Level Committees (DLC) for identification of forest land irrespective of their classification as such. The identification exercise was carried out by the State Government by conducting joint verifications at each mining lease. Consequently, large tracts of land within mining leases which were earlier categorised as non-forest lands were reclassified as DLC forests upon revising the entry in the revenue records. The records of such reclassified DLC forest were then placed before this Hon'ble Court through affidavits filed by the Government of Odisha in 1997-1998.

279. The MoEF also issued Circular dated 30.10.1998 inserting Guideline 4.18, which provided that in respect of proposals related to renewal of mining

leases, the Central Government could extend the 1-year working permission by 1 more year, subject to submission of reasonable progress report from the State Government as regards to steps being taken to comply with the stipulated conditions.

Copy of the Circular dated 30.10.1998 is annexed herewith and marked as **ANNEXURE-42**.

280. On 03.02.1999, the MoEF issued Circular dated 03.02.1999, and substituted Guideline 4.3, which contemplated condonation of past violations of the FC Act in exceptional circumstances upon payment of penal compensatory afforestation.The said aspect of penal compensatory afforestation and its implementation by the MoEF has been explained in detail infra.

Copy of the Circular dated 03.02.1999 is annexed herewith and marked as **ANNEXURE-43**.

6.3.3 Framing of FC Rules, 2003 and Guidelines issued by MoEF.

281. The Central Government framed the Forest (Conservation) Rules, 2003 w.e.f. 10.01.2003. Significantly, Rule 6(1) of the FC Rules provided for the manner of submission of proposal seeking approval under Section 2 of the FC Act, (including for renewal of mining leases) and read as follows:

> *"6. Submission of proposals seeking approval of the Central Government under Section 2 of the Act:*
>
> *(1) Every user agency, who wants to use any forest land for non-forestry purposes, shall make its proposal in the relevant Form appended to these rules, i.e., Form A for proposals seeking first time approval under the Act, and Form B for proposals seeking renewal of leases, where approval of the Central Government had already been obtained, to the Nodal Officer of the concerned State Government or the Union Territory Administration, as the case may be, along with requisite information and documents, complete in all respects."*

282. Thus, for the first time, MoEF prescribed separate forms for seeking forest clearance i.e. Form A for first time approval and Form B for approval in cases of renewal.

283. The FC Rules have thereafter been amended from time to time. The amendments as relevant have been adverted to infra.

284. It is relevant to mention here that the MoEF has issued detailed guidelines on Compensatory Afforestation, contained in Chapter 3 of the Guidelines. In the said Guidelines, it is provided that Compensatory Afforestation shall be done as per the scheme framed by the Government, and the scheme shall include details of non-forest/degraded forest area identified for compensatory afforestation, map of areas to be taken for compensatory afforestation, year wise phased forestry operations, details of species to be planted and suitability certificate from afforestation/management point of view along with the cost structure of various operations. It is also provided

that the scheme has to be site-specific and the per hectare rate will vary according to species, type of forest and site.

285. It is provided in guideline 3.2(i) that compensatory afforestation shall be done over an equal validity of non-forest land. However, it is provided in Guideline 3.2(iv) that where non-forest lands are not available or non-forest land is available in less extent to the forest area being diverted, compensatory afforestation has to be carried out over degraded forest twice in extent to the area being diverted.

286. As per Guideline 3.3, the scheme for compensatory afforestation should contain the following details:

(a) Details of equivalent non-forest or degraded forest land identified for raising compensatory afforestation;

(b) Delineation of proposed area on suitable map;

(c) Agency responsible for afforestation;

(d) Details of work schedule proposed for compensatory afforestation;

(e) Cost structure of plantation, provision of funds and mechanism to ensure that funds will be utilised for raising afforestation;

(f) Details of proposed monitoring mechanism.

Sample copy of a compensatory afforestation scheme is annexed herewith and marked as **ANNEXURE-44**.

Copy of Plantation Cost Norms, 2016 issued by PCCF, Odisha is annexed herewith and marked as **ANNEXURE-45**.

287. It is also necessary to consider the effect of Guideline 4.4 issued by MoEF and the ambiguity surrounding the same. It is submitted that by way of communication dated 06.01.2011, the MoEF had substituted para 4.4 of the Guideline to provide that if a project involved forest as well as non-forest land, it would be advisable that work should not be started on non-forest land till approval of the Central Government for release of forest land. The earlier Guideline had stipulated that work should not be

started even on non-forest land till approval for release of forest land had been obtained.

288. However, the MoEF withdrew the revision of Para 4.4 by way of communication dated 17.02.2011. Further, by letter dated 21.03.2011, MoEF restored the status quo on Guideline 4.4 to provide that work should not be started on is non-forest land till approval of the Central Government for release of forest land had been given.

289. It is submitted that the above demonstrated prevarication is reflective of the ambiguity prevalent in the FC regime. Further, it is respectfully submitted that Guideline 4.4 is intended to apply only to greenfield projects i.e. projects wherein approvals are being sought for projects where work has not commenced at all; and not to projects wherein non-forest lands were already being worked upon.

290. In fact, the CEC in its Report dated 26.04.2010 had recommended in para.15(b) as follows:

"even otherwise the Rule 24 A (6) MCR, 1960 does not authorize the lessee to operate a mine without the statutory clearances/ approvals. Therefore, in respect of a mine covered under the deemed extension clause the mining operations should be permitted to be undertaken in the non forest area of the mining lease only if (i) it has requisite environmental clearances; (ii) it has the consent to operate from the State Pollution Control Board under the Air & Water Acts; (iii) Mining Plan is duly approved by the competent authority; and (iv) the NPV for the entire forest falling within the mining lease is deposited in the Compensatory Aforestation Fund. The mining in the forest land included in the mining lease should be permissible only if, in addition to the above, the approval under the FC Act/TWP has been obtained"

6.3.4 Levy of NPV under orders of this Hon'ble Court.

291. In the meantime, since the amounts being collected under the head of compensatory afforestation were not being adequately spent, this Hon'ble Court espoused the concept of Net Present Value (NPV). On 17.04.2000, in *T.N. Godavarman (33) v. UOI*, (2002) 10 SCC 646, this Hon'ble Court noticed that

even though the State Governments were realising money from industries under the head of 'Compulsory Afforestation', the funds were not being spent on afforestation. This Hon'ble Court thus directed as under:

> *"4. During the course of hearing of this IA, Mr Raval on behalf of the Central Government has placed on record a statement showing the position of the cases approved for diverting afforested land stipulation for compensatory afforestation under the Forest Conservation Act and the compensatory afforestation done, funds to be utilised and actually utilised.*
>
> *5. This statement is to be considered as an IA and we take suomotu action thereon. The same may be separately numbered. This statement reflects the position as on 29-3-2000 and provides dismal reading. In short, after the total afforestation compensatory and otherwise which was required to be done by all the States put together there is a shortfall to the extent of 36 per cent. This statement further reflects that though funds have been realised by all the States in connection with such afforestation a very large number of States have spent 50 per cent or less amount thereon. These States are Arunachal Pradesh, Assam,*

Bihar, Haryana, Himachal Pradesh, Jammu and Kashmir, Madhya Pradesh, Mizoram, Orissa and Tamil Nadu. Notice to issue to all these States to explain as to why monies realised have not been so far spent on carrying out afforestation. Replies to be filed will indicate the heads under which the monies have been spent. Notice to also go to those States who have not submitted quarterly performance reports up to September 1999. The Registry will send along with the notice a copy of the statement placed by Mr K.N. Raval. Notice will be returnable after eight weeks. Affidavit to be filed on the reopening day after summer vacation."

292. The statement as referred to above was registered as I.A. No. 566. The said application was listed on 23.11.2001 before this Hon'ble Court and this Hon'ble Court was pleased to pass the following order [reported as (2007) 15 SCC 288]:

"Most of the affidavits have been filed from a statement which has been placed on record by the learned Amicus Curiae. It is clear that large sums of money have been realised by various States from the user-agencies to whom permissions were granted for using forest land

for non-forest purposes. Monies were paid by them to the State Governments for compensatory afforestation but the utilisation of the money for re-forestation represents only about 63 per cent of the funds actually realised by the State Governments. The shortfall is of nearly Rs.200 crores.

While on the next date of hearing the Court will consider as to how this shortfall is to be made good, the Ministry of Environment & Forests should formulate a Scheme whereby whenever any permission is granted for change of user of forest land for non-forest purposes and one of the conditions of the permission is that there should be compensatory afforestation then the responsibility of the same should be that of the user-agency and should be required to set apart a sum of money for doing the needful. In such a case the State Governments concerned will have to provide or make available land on which reforestation can take place and this land may have to be made available either at the expense of the user-agency or of the State Governments, as the State Governments may decide. The scheme which is framed by the Ministry of Environment & Forests should be such as to ensure that afforestation takes place as per the permissions which are granted and

there should be no shortfall in respect thereto. Counsel for the Union of India states that appropriate scheme will be formulated on the basis of which permissions will be granted in future and the same placed before this Court within eight weeks. List thereafter."

293. Thereafter, as per the directions of this Hon'ble Court, the MoEF submitted a scheme along with an affidavit dated 22.03.2002. The Central Empowered Committee (CEC) after considering the material on record as well as the scheme submitted by MoEF, submitted a report, which was registered as IA No. 826. The report recommended that in addition to the funds realised for compensatory afforestation, Net Present Value of the forest land diverted for non-forestry purposes should also be recovered from the user agencies, while the approval under the FC Act, 1980 was being granted. It was further recommended that a "Compensatory Afforestation Fund" be created in which all the monies received from the user agencies towards compensatory afforestation, additional compensatory afforestation, penal compensatory afforestation, net present value of

forest land, catchment area treatment plan funds, etc., should be deposited.

294. This Hon'ble Court thus passed an order dated 29.10.2002 [reported as (2008) 16 SCC 337], and issued the following directions regarding realisation of Net Present Value (NPV) and compensatory afforestation fund:

> *"31. The Central Empowered Committee examined this question while dealing with IA No. 566 and after notice to all State Governments and hearing the learned counsel has submitted a report dated 5-9-2002. The report, inter alia, provides that there should be a change in the manner in which the funds are released by the State Governments relating to compensatory afforestation. It has, therefore, been observed in this report by the Central Empowered Committee that it is desirable to create a separate fund for compensatory afforestation wherein all the monies received from the user-agencies are to be deposited and subsequently released directly to the implementing agencies as and when required. The funds received from a particular State would be utilised in the same State.*

35. We have examined the said report and are of the opinion that it merits acceptance by us as well. As recommended by the Central Empowered Committee we direct as follows:

(a) The Union of India shall within eight weeks from today frame comprehensive rules with regard to the constitution of a body and management of the Compensatory Afforestation Funds in concurrence with the Central Empowered Committee. These rules shall be filed in this Court within eight weeks from today. Necessary notification constituting this body will be issued simultaneously.

(b) Compensatory Afforestation Funds which have not yet been realised as well as the unspent funds already realised by the States shall be transferred to the said body within six months of its constitution by the respective States and the user-agencies.

(c) In addition to above, while according transfer under the Forest Conservation Act, 1980 for change in user-agency from all non-forest purposes, the user-agency shall also pay into the said fund the net value of the forest land diverted for non-forest purposes. The present value is to be recovered at the rate of Rs 5.80 lakhs per hectare to Rs 9.20 lakhs per hectare of forest land depending upon the quantity and density of

the land in question converted for non-forest use. This will be subject to upward revision by the Ministry of Environment and Forests in consultation with the Central Empowered Committee as and when necessary.

(d) "Compensatory Afforestation Fund" shall be created in which all the monies received from the user-agencies towards compensatory afforestation, additional compensatory afforestation, penal compensatory afforestation, net present value of forest land, Catchment Area Treatment Plan Funds, etc. shall be deposited. The rules, procedure and composition of the body for management of the Compensatory Afforestation Fund shall be finalised by the Ministry of Environment and Forests with the concurrence of the Central Empowered Committee within one month.

(e) The funds received from the user-agencies in cases where forest land diverted falls within protected areas i.e. area notified under Sections 18, 26-A or 35 of the Wild Life (Protection) Act, 1972, for undertaking activities related to protection of biodiversity, wildlife, etc. shall also be deposited in this fund. Such monies shall be used exclusively for undertaking protection and conservation activities in protected areas of the respective States/Union Territories.

(f) The amount received on account of compensatory afforestation but not spent or any balance amount lying with the States/Union Territories or any amount that is yet to be recovered from the user-agency shall also be deposited in this fund.

(g) Besides artificial regeneration (plantations), the fund shall also be utilised for undertaking assisted natural regeneration, protection of forests and other related activities. For this purpose, site-specific plans should be prepared and implemented in a time-bound manner.

(h) The user-agencies, especially the large public sector undertakings such as Power Grid Corporation, NTPC, etc. which frequently require forest land for their projects should also be involved in undertaking compensatory afforestation by establishing special purpose vehicle. Whereas the private sector user-agencies may be involved in monitoring and most importantly, in protection of compensatory afforestation. Necessary procedure for this purpose would be laid down by the Ministry of Environment and Forests with the concurrence of the Central Empowered Committee.

(i) Plantations must use local and indigenous species since exotics have long-term negative impacts on the environment.

(j) An independent system of concurrent monitoring and evaluation shall be evolved and implemented through the Compensatory Afforestation Fund to ensure effective and proper utilisation of funds."

295. In view of the above-mentioned facts, the MoEF filed an application registered as I.A. No. 1046 seeking directions that the NPV calculation may be a part of the detailed project report submitted to it for a forestry clearance under the FC Act. The application stated that in case of mining, NPV should be calculated at the rate of 10% for the major minerals and 5% for the minor minerals to be levied on the annual royalty.

296. The Ministry of Mines, Government of India, also filed an application bearing I.A. No. 1047 taking similar pleas as were taken in I.A. No. 1046 seeking directions that in mining NPV may be calculated at the rate of 10% and 5%.

297. The MoEF also issued Guidelines dated 17/18 September 2003 providing for levy of NPV within the

range given by the Hon'ble Court i.e. Rs. 5.80 lakhs per hectare to Rs. 9.20 lakhs per hectare. Thereafter, by Guideline dated 19/22 September, 2003, it was stipulated that NPV will be charged in all cases which had been granted in principle approval after 30.10.2002 before grant of Stage II final approval.

Copy of MoEF Guidelines dated 17/18 September 2003 is annexed herewith and marked as **ANNEXURE-46**.

Copy of MoEF Guidelines dated 19/22 September 2003 is annexed herewith and marked as **ANNEXURE-47**.

298. Vide notification dated 23.04.2004, the MoEF, in exercise of the powers under section 3(3) of the EP Act, constituted an authority known as Compensatory Afforestation Fund Management and Planning Authority (hereinafter referred to as "**CAMPA**") for the purpose of management of money towards compensatory afforestation, NPV and any other money recoverable in pursuance of this Hon'ble Court's order and in compliance with the conditions stipulated by

the Central Government while according approval under the FC Act.

Copy of Notification dated 23.04.2004 is annexed herewith and marked as **ANNEXURE-48**.

299. By way of judgment dated 26.09.2005 in *T.N. Godavarman v. UOI*, (2006) 1 SCC 1, this Hon'ble Court directed the constitution of the Kanchan Chopra Committee to, inter alia, identify and define parameters on the basis of which each of the categories of values of forest land should be estimated, formulate a practical methodology applicable to different bio-geographical zones of India for estimation of the values in monetary terms in respect of the categories of forest values, to illustratively apply the methodology to obtain actual numerical values for different forest types for each bio-geographical zone in the country, to determine on the basis of established principles of public finance who should pay the costs of restoration and/or compensation with respect to each category of values of forests, and which projects

deserve to be exempted from the payment of NPV. A report was thereafter submitted by the Kanchan Chopra Committee, which came up for consideration before the Hon'ble Supreme Court in *T.N. Godavarman v. UOI*, reported as (2008) 7 SCC 126. This Hon'ble Court, on 28.03.2008, while accepting the recommendations of the Committee, with certain qualifications and additions after hearing the parties, the CEC and user agencies, therein, noted:

> *"11. It may be noted that the expert committee under the leadership of Mrs Kanchan Chopra recommended 5% social discount rate but CEC has reduced further and accepted 4% social discount rate. It may be noted that CEC had made consultation with eminent economists and it was of the view that the social discount rate should be around 2% in India. We do not find much force in the contention advanced by the learned counsel who appeared for the user agencies. The 10% suggested by them cannot be applied to the present case because 10% is the rate linked to assumptions about the opportunity cost of capital. One cannot apply that rate for social time preference in evaluating the benefits from an environmental resource such as forests. In*

project evaluation, the horizon is compatible with the life of the project whereas in forest matters, the horizon spans over several generations. Therefore, the rate of 10%, as suggested by the user agencies cannot be accepted.

12. Another contention raised by the applicant (FIMI) is that NPV is not fixed on site specific and, therefore, the fixation of the rate is based on surmises and conjectures and the same rate cannot be applied to the large extent of area covered by the forests. This question was elaborately considered by CEC. Considering the large extent of this country and the forest being spread over in various parts of the State, it is difficult to fix NPV based on the specific area. It is not feasible to fix NPV is each and every individual case. The entire forest area in each of the State/UT is calculated by considering the monetary value of the services provided by it. The average NPV per hectare of the forest area in the State has also been calculated. If NPV is to be calculated on the specific area, the process would be time-consuming and in most of the cases, it may be beyond the capability of the Range Forest Officers or other officials posted at the grassroots level. Moreover, NPV is linked with the type of the forest and no useful purpose would be served

by carrying out NPV calculations in each case involving the diversion of forest areas.

13. We are of the view that NPV now fixed is more scientific and is based on all available data. We accept the recommendations and we make it clear that the NPV rate now fixed would hold good for a period of three years and subject to variation after three years..."

300. The above said directions were implemented by the MoEF by issuance of Guideline dated 19.12.2005, wherein certain Government projects like hospitals, dispensaries, non-commercial government ventures etc were exempted from payment of NPV, and the other user agencies had to pay NPV at the rate of Rs. 5.8 lakhs to Rs. 9.2 lakhs per hectare.

Copy of MoEF Guidelines dated 19.12.2005 is annexed herewith and marked as **ANNEXURE-49**.

301. The MoEF also issued a Guideline dated 03.10.2006 providing that NPV would be payable in all cases of diversion of forest land where final approval had been granted on or after 30.10.2002, irrespective of the date of in principle approval.

Copy of MoEF Guidelines dated 03.10.2006 is annexed herewith and marked as **ANNEXURE-50**.

302. Thereafter, this Hon'ble Court passed a further order dated 28.03.2008 accepting the report submitted by the Kanchan Chopra Committee and fixing rates for levy of NPV as follows [(2008) 7 SCC 126]:

> *"9. Based on this, NPV was fixed and the following recommendations have been made:*
> *(i) for non-forestry use/diversion of forest land, NPV may be directed to be deposited in the Compensatory Afforestation Fund as per the rates given below:*

Eco-value class	*Very dense forest*	*Dense forest*	*Open forest*
Class I	*10,43,000*	*9,39,000*	*7,30,000*
Class II	*10,30,000*	*9,39,000*	*7,30,000*
Class III	*8,87,000*	*8,03,000*	*6,26,000*
Class IV	*6,26,000*	*5,63,000*	*4,38,000*
Class V	*9,39,000*	*8,45,000*	*6,57,000*
Class VI	*9,91,000*	*8,97,000*	*6,99,000*

(inRs per hectare)

> *(ii) the use of forest land falling in national parks/wildlife sanctuaries will be permissible*

only in totally unavoidable circumstances for public interest projects and after obtaining permission from the Hon'ble Court. Such permissions may be considered on payment of an amount equal to ten times in the case of national parks and five times in the case of sanctuaries respectively of NPV payable for such areas. The use of non-forest land falling within the national parks and wildlife sanctuaries may be permitted on payment of an amount equal to NPV payable for the adjoining forest area. In respect of non-forest land falling within marine national parks/wildlife sanctuaries, the amount may be fixed at five times the NPV payable for the adjoining forest area;

(iii) these NPV rates may be made applicable with prospective effect except in specific cases such as Lower Subhanshri Project, mining leases of SECL, field firing ranges, wherein pursuant to the orders passed by this Hon'ble Court, the approvals have been accorded on lump sum payment/no payment towards NPV; and

(iv) for preparation and supply of district-level maps and GPS equipments to the State/UT Forest Departments concerned and the regional offices of the MoEF, the Ad-hoc CAMPA may be asked to provide an amount of Rs 1 crore to the Forest Survey of India out of the interest received by it."

303. The above said judgement dated 28.03.2008 was implemented by the MoEF by Guideline dated 05.02.2009.

Copy of MoEF Guidelines dated 05.02.2009 is annexed herewith and marked as **ANNEXURE-51**.

6.3.5 Report dated 26.04.2010 by CEC in I.A. No. 2746-2748 of 2008 in W.P. (C) No. 202 of 1995 (Rabi Das).

304. The issue regarding identification of DLC forest land was considered in detail by the CEC in its report dated 26.04.2010 submitted to this Hon'ble Court in I.A. No. 2746-2748 of 2008 in W.P. (C) No. 202 of 1995. The difficulty in identification of DLC land and the consequent inadvertent violations of the FC Act were taken note of by the CEC in the following terms:

> *"(c) no forest land can be leased/assigned without first obtaining the approval under the FC Act. Therefore, the forest area approved under the FC Act should not be lesser than the total forest area included in the mining leases approved under the MMDR Act, 1957. Both necessarily have to be the same. In view of the*

above, this Hon'ble Court while permitting grant of Temporary Working Permission to the mines in Odisha and Goa has made it one entire forest area included in the mining leases. Similarly, all the mining lease holders in Odisha should be directed to pay the NPV for the entire forest area, included in the mining leases.

(d) in Odisha substantial areas included in the mining leases as non forest land have subsequently been identified as DLC forest (deemed forest/ forest like areas) by the Expert Committee constituted by the State Government pursuant to this Hon'ble Court's order dated 12.12.1996. While processing and/or approving the proposals under the FC Act in many cases such areas have been treated as non-forest land. It is recommended that (i) the NPV for the entire DLC area included in the mining lease, after deducting the NPV already paid, should be deposited by the concerned lease holder and (ii) the mining operations in the unbroken DLC land (virgin land) should be permissible only if the permission under the FC Act has been obtained/ is obtained for such area. Keeping in view the peculiar circumstances as was existing in Odisha and subject to the above, the mining operations in the broken DLC land may be allowed to be continued provided the other statutory

requirements and Rules are otherwise being complied with"

(Emphasis Added)

305. The abovesaid CEC Report dated 26.04.2010 was accepted by this Hon'ble Court vide order dated 07.05.2010.

6.3.6 Concept of Penal Compensatory Afforestation

306. As stated above, MoEF had contemplated condonation of past violations upon payment of penal compensatory afforestation. The imposition of Penal Compensatory Afforestation for past violations while granting forest clearance is in accordance with Guideline 4.3 issued by the MoEF:

"4.3. Anticipatory Action by the State/UT Governments-Penal Compensatory Afforestation

i) Cases have come to the notice of the Central Government in which permission for diversion of forest land was accorded by the concerned State Government in anticipation of approval of the Central Government under the Act and/or where work has been carried out in forest area without proper

authority. Such anticipatory action is neither proper nor permissible under the Act, which clearly provides for prior approval of the Central Government in all cases. Proposals seeking ex-post-facto approval of the Central Government under the Act are normally not entertained. The Central Government will not accord approval under the Act unless exceptional circumstances justify condonation. However, penal compensatory afforestation would be insisted upon by the MOEF on all such condonation.

ii) The penal compensatory afforestation will be imposed over the area worked/used in violation. However, where the entire area has been deforested due to anticipatory action of the State Government, the penal compensatory afforestation will be imposed over the total lease area."

307. It is submitted that penal compensatory afforestation has been paid by lessees in the present case as demanded by the MoEF. It is submitted that although ideally the clearance under the F.C. Act is essential as a prior requirement as contemplated under law, it

appears that penal compensatory afforestation was actually imposed in the event clearances were given and such cases were suitable for condonation under the law.

308. It is further submitted that the levy and payment of penal compensatory afforestation for condonation of past violations of the FC Act, 1980 and grant of forest clearance on that basis has been approved by this Hon'ble Court in *T.N. Godavarman Thirumulpad v. Union of India,* (2011) 15 SCC 658:

> *"4. The applicants who are engaged in mining, have agreed to the recommendations made by CEC. Learned counsel appearing for the applicants submits that they are agreeable for the following recommendations:*
>
> *1. to pay NPV (if not already paid) for entire forest area included in mining lease approved under the MMDR Act, 1957;*
>
> *2. to pay compensatory afforestation for the entire forest area excluding the forest area broken before/prior to 25-10-1980;*
>
> *3. to pay penal compensatory afforestation — if the mine has operated in the past in violation of the Forest (Conservation) Act, 1980;*

4. no transfer of mining lease has taken place in violation of the provisions of the MMDR Act/Forest (Conservation) Act;

5. the mine was actually in operation and not closed during the validity of mining lease; however, mines were closed and mining operations stopped as soon as the mining leases expired;

6. they agree to give undertaking to pay additional charges, if any, payable as per the conditions imposed at the time of formal approval.

We accept the recommendations. MoEF may consider the applications of the applicants and pass appropriate orders in the matter of grant of licences to these applicants. Applications are disposed of accordingly."

309. Similar directions passed by this Hon'ble Court in *T.N. Godavarman Thirumulpad v. Union of India,* (2011) 15 SCC 681:

"3. The learned counsel appearing for the said sixteen temporary licence-holders submitted that the entire NPV amount demanded by the authority has been paid by the licensees and the compensatory afforestation work is under way. Therefore, we permit the sixteen temporary

licence-holders to carry out the mining activities, subject to fulfilment of the following conditions:

i. *NPV for the entire forest area included in the mining lease will be payable by the mining lease-holders after deducting the amount of NPV already paid;*

ii. *the amount for carrying out compensatory afforestation in degraded forest land, twice the forest area included in the mining lease after excluding the forest area broken up prior to 1987 and broken thereafter with valid permissions, will be payable by the lease-holders;*

iii. *in respect of mines where mining has continued beyond 20-6-1987 without obtaining the approval under the Forest Conservation Act i.e. after the constitutional validity of the Goa, Daman and Diu Concession (Abolition and Declaration) Act, 1987 has been upheld by the Hon'ble High Court of Bombay, Panaji Bench in Writ Petition No. 293 of 1989, penal compensatory afforestation charges are payable by the lease-holders for carrying out mining during the period between 1987 and till the date on which the approvals under the Forest Conservation Act were accorded. It is recommended that in such cases the*

lease-holders may be asked to pay charges for penal compensatory afforestation over degraded forest land, twice the forest area included in the mining leases; and

iv. a realistic and effective plan for reclamation and rehabilitation of mined area should be drawn up along with specific time-limits for each prescribed activity and an effective monitoring mechanism should be put in place for this purpose."

310. It may be noted that similar conditions were in fact reiterated by the CEC and accepted by this Hon'ble Court in unmistakable terms, as stated above. It is respectfully submitted that the CEC has not found that the lessees have not paid NPV or the penal compensatory afforestation in respect of forest land which has been used prior to the date of receipt of clearance.

6.3.7 Onerous and prolonged procedure for obtaining Forest Clearance

311. The process for obtaining a forest clearance by a user agency has been provided in brief in the FC Rules and

in detail in the Guidelines issued by MoEF. The mining leaseholder is required to submit large number of documents and maps along with the application prescribed under the FC Rules. The process entails approvals and clearances at various stages by MoEF, as well as by State Governments. The procedure contemplates diversion of forest land in favour of a user agency only upon steps being undertaken towards, inter alia, compensatory afforestation and payment of Net-Present Value (NPV) for the area identified for diversion.

312. The submission of proposal by the user agency to the Nodal Officer of the State Government or the Union Territory Administration itself required submission of multiple documents, which in turn take considerable time to prepare. The following is an illustrative list of documents required to be submitted:

(i) Application form as prescribed under FC Rules;

(ii) Map of the project site showing forest and non-forest areas; cadastral map of non-forest areas;

It is mandatory to provide satellite imagery of the proposed diversion site along with geo-coordinates obtained from differential GPS. The satellite imagery can be obtained from Forest Survey of India or National Remote Sensing Agency or Indian Space Research Organization.

(iii) Layout of project site and its location in district and State maps;

(iv) Statement showing details of forest areas proposed for diversion;

(v) Results of tree enumeration carried out depicting site quality, crown density etc;

(vi) Certificate from competent authority that no alternative of the diversion proposal is possible;

(vii) Certificate for minimum use of forest land (this certificate is issued by Director (Geology & Mining), State Government);

(viii) Justification for locating forest diversion proposal to be submitted by user agency and examined and counter-signed by DFO;

(ix) Cost benefit as per Guidelines issued by Respondent No. 1;

(x) NOC from Gram Sabha / panchayat / local bodies;

(xi) Details of application submitted under Environment (Protection) Act, 1986 seeking EC;

(xii) Detailed rehabilitation and resettlement scheme of project affected persons;

(xiii) Details of individual and community claims submitted and details of individual and community claims settled under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006;

(xiv) Details of non-forest land / degraded forest land identified for compensatory afforestation, including map of 1:4000 or 1:15000 scale;

(xv) Detailed scheme for compensatory afforestation on selected non-forest area / degraded forest, duly signed by DFO and sanctioned by territorial Conservator of Forests. The scheme should include technical details, work schedule,

financial outlays, and proposed monitoring mechanism.

(xvi) Certificate from DFO about the technical suitability of land selected for compensatory afforestation;

(xvii) If non-forest land is not available for compensatory afforestation, then certificate of Chief Secretary for non-availability of non-forest land is required;

(xviii) Undertaking of user agency to bear cost of compensatory afforestation;

(xix) Undertaking by user agency to make payment of NPV;

(xx) Site inspection report of forest diversion area if area is less than 40 Ha / certificate of Territorial Chief Conservator if diversion area is more than 40 Ha. If proposed diversion proposal 2 or more divisions or 2 or more forest circles, then certificate of DFOs and Territorial Conservator is required.

(xxi) Certificate of DFO that no violation of Indian Forest Act, 1927, FC Act, 1980 and Wildlife (Protection) Act, 1972 has taken place;

(xxii) If proposed diversion proposal is situated in buffer zone of protected area / tiger reserve or affecting wildlife corridor, then a separate proposal is required for Wildlife Habitat Management Sanction under 38-O(g) of the Wildlife (Protection) Act, 1972;

(xxiii) Safety Zone Management Plan;

(xxiv) the Mining Plan duly approved by the competent authority;

(xxv) Reclamation Plan;

(xxvi) Detailed prospecting report of mineral deposit;

(xxvii) Detailed Land Subsidence Report in case of UG mines.

313. The approval under Section 2 is spread over two stages i.e. 1st stage clearance and 2nd stage clearance [as per Guideline 4.2]. In case of fresh grant of Forest

Clearance, the 1st stage stipulates compensatory afforestation by the user agency, as well as payment of Net-Present Value (NPV), due compliance with which leads to the 2nd stage. However, in case of renewal of mining leases, where Forest Clearance, the process for obtaining the clearance remains the same, but there is no requirement of compensatory afforestation or payment of NPV (unless NPV has either not been paid or paid at low rates earlier).

314. It is submitted that the procedure for obtaining forest clearances has always been cumbersome and onerous. However, the CEC has not noticed the delays on part of the Government authorities in according the forest clearances. It may be noted that there has been public outcry on account of delay in grant of approvals by MoEF. It is therefore necessary to take a holistic view that lessees were not responsible for non-receipt of clearances. They applied genuinely and sought it in time.

315. In this regard, it is relevant to refer to the order dated 30.07.2014 passed by this Hon'ble Court in W.P. (C) No. 562 of 2009, wherein it was recorded as follows:

> *"The issue pertaining to the time schedule, for renewal of mining leases, and forest clearance, has engaged the attention of this Court for some time now. The procedure of renewal, was sought to be crystallised, by an order passed by this Court on 04.08.2006.*
>
> *Supplemental to the aforesaid order, the concerned authorities formulated the Forest Conservation Rules, 2003, which came to be amended from time to time. The latest amendment thereof was made by a Notification dated 14.03.2014.*
>
> *Neither the time frame expressed by this Court in its order dated 04.08.2006, nor the time schedule depicted in the Rules referred to hereinabove, have been followed by the State functionaries, or by the Central Government. There are enormous delays in the disposal of renewal applications, for mining leases, and forest clearance. Out of 5 illustrative cases brought to our notice during the course of hearing today, none is stated to have been granted clearance. Some of them are still pending with the concerned State Governments,*

whereas, two are pending with the Central Government. The process of renewal, we may record, came to be initiated by the lease holders, during the year 2010, and thereafter.

It is apparent, that the administrative functioning has remained stalled, for some unknown reasons. Even though Mr. A.D.N. Rao, learned amicus, has brought to our notice reasons why no final decision could be taken, on the subject of renewal of mining leases, and forest clearance, we are of the view that there is no explicit or real justification emerging therefrom.

We would, therefore, request the Principal Secretary / Additional Chief Secretary of the States of Odisha and Karnataka to assist this Court in respect of the time schedule prescribed for the State Government. The Director General of Forest and Special Secretary, Ministry of Environment and Forest, Government of India will also to assist this Court on the issue of delayed clearances. They may interact in the meantime, with the learned counsel who participated in the deliberations of proceedings today and come out with solutions for ensuring, implementation of the time schedule, on the next date of hearing.

List on 19.08.2014 on the top of the list."

Copy of order dated 30.07.2014 passed by this Hon'ble Court in W.P. (C) No. 562 of 2009 is annexed herewith and marked as **ANNEXURE-52**.

316. Thereafter, by order dated 19.08.2014, this Hon'ble Court directed the framing of a time schedule for grant of a forest clearance.

Copy of order dated 19.08.2014 passed by this Hon'ble Court in W.P. (C) No. 562 of 2009 is annexed herewith and marked as **ANNEXURE-53**.

317. Consequently, the CEC submitted a report dated 29.08.2014 recording the delays in grant of forest clearances and suggesting fresh timelines for grant of forest clearances. Thus, just a few weeks before the report in the present matter dated 16.10.2014 was submitted, the CEC was conscious of the delays which were caused by the MoEF. It was persuaded to note that this Hon'ble Court had to summon the officers of the MoEF to determine the cases of such delay. It also was aware that the CEC had to prepare timelines for

the purpose of dealing with applications of forest clearance. This included various levels of Stage I and Stage II clearance.

A true and correct copy of CEC's report dated 29.08.2014 is annexed herewith and marked as **ANNEXURE-54**.

6.3.8 CEC findings in Final Report dated 16.10.2014.

318. It is submitted that in the present matter, the CEC has dealt with issues of alleged violation of the FC Act, 1980 in paras 45 to 50 of its Final Report dated 16.10.2014. The following observations of CEC in its Final Report are relevant:

> *"46. ... ... The lands identified in the State of Odisha as deemed forest / DLC land included substantial areas classified as non-forest land in the Government records and in which the mining leases were sanctioned by considering such land as non-forest lands. The details of the lands identified as DLC lands along with the details of the other identified forest lands were filed before this Hon'ble Court by the State Government. In many cases, while processing and / or approving the proposals under the*

Forest (Conservation) Act, 1980, such identified DLC lands continued to be treated as non-forest land.

47. The CEC in its Report dated 26th April, 2010 in IA No. 2746-2748 of 2009 recommended that the mining operations in the broken DLC land, keeping in view the peculiar circumstances as existing in Odisha and subject to the payment of the NPV for the entire forest land included in the mining leases, may be allowed to be continued provided the other statutory requirements and rules are otherwise being complied with. This Hon'ble Court by its order dated 7.5.2010 directed that the recommendation of the CEC which are acceptable to the State Government can be complied with. Accordingly, about Rs.1750 crores has been recovered from the lessees as additional NPV. During the lease period the mining operations have been permitted to continue in the broken DLC land which at the time of the submission / approval of the proposals under the Forest (Conservation) Act, 1980, were treated as non-forest lands.

... ...

48. ... ... This issue was on 5th August, 2014 discussed by the CEC with the Principal Secretary (Forest), the Principal Chief Conservator of Forests and other senior officers of the

Government of Odisha. A copy of the record of discussion held during the above said meeting is enclosed at ***ANNEXURE-R-22*** *to this Report. During the meeting the Principal Chief Conservator of Forests took the stand that in cases where the MoEF has with retrospective effect granted approvals under the Forest (Conservation) Act, 1980 and imposed penal compensatory afforestation the mining operations carried out in the forest land prior to the date of grant of such approvals should not in such cases be considered as violation of the Act. The CEC did not agree with this stand of the State Forest Department because the MoEF in none of the cases where it has with retrospective effect granted approvals under the Forest (Conservation) Act, 1980 has by an explicit order condoned or regularized in such cases the mining done in the forest land in violation of the Forest (Conservation) Act, 1980. Even otherwise there is no provision in the Act to condone or regularize such cases of illegal mining."*

319. It is submitted that it is apparent from the above said observations of CEC that all lessees in Odisha have paid NPV for the entire forest lands within the mining leases.

320. The CEC has alleged violation of the FC Act in 20 mines from 2000 – 2001 onwards. It is respectfully submitted that the said findings of the CEC are fallacious since the alleged violations are with respect to forest lands which were already broken up prior to 1980, and there is no allegation regarding breaking up of any virgin forest land after 1980 without a forest clearance in respect of the Deponent or the lessees herein. Further, the allegations pertain to continuance of operations by lessees on areas broken up prior to 1980 after applying for forest clearance and awaiting the grant of formal approval under Section 2. In addition, the Central Government has subsequently levied and recovered penal compensatory afforestation from such lessees and granted forest clearance, thus effectively condoning the past violations. It is therefore submitted that the interpretation and findings given by CEC are ex-facie erroneous and ought not to be accepted by this Hon'ble Court.

321. It is further submitted that the requirement of forest clearance would also not arise for the time period wherein the leases continued to operate under the provisions of Rule 24-A(6) of MCR, 1960, inasmuch as there was no actual renewal of the lease deed. It is necessary to consider in this regard that the deemed extension of a lease under Rule 24-A(6) would not be equivalent to the renewal of the lease. The said principle has laid down by this Hon'ble Court in its judgement in *State of UP v. Lalji Tandon,* (2004) 1 SCC 1, wherein it was held as follows:

> *"There is a difference between an extension of lease in accordance with the covenant in that regard contained in the principal lease and renewal of lease, again in accordance with the covenant for renewal contained in the original lease. In the case of extension it is not necessary to have a fresh deed of lease executed, as the extension of lease for the term agreed upon shall be a necessary consequence of the clause for extension. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof*

and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execution of a fresh deed of lease, another lease for a fixed term shall not come into existence though the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year or month by month, as the case may be."

322. Therefore, the working by mining lessees in previously broken up forest areas as per Rule 24-A(6) without forest clearance would not be violative of the provisions of Section 2. In any case, it may be noted that no formal removals of the lease were granted by the Government of Odisha without there being a prior approval of the Central Government under Section 2 of the FC Act.

323. It is further submitted that a number of the alleged violations have been amplified on account of the severe delays in processing and grant of forest clearance by Government authorities. However, reference in this regard maybe had to the orders dated 30.07.2014, 19.08.2014 and 01.09.2014 passed by

this Hon'ble Court wherein judicial notice was taken of the delays on part of Government authorities in grant of forest clearances. It is submitted that if the CEC was aware of the delay in obtaining the clearance under the F.C. Act, 1980 and was also conscious that the lessees have obtained forest clearance under the F.C. Act, 1980, albeit after payment of penal compensatory afforestation, the CEC ought not to have recommended imposition of a penalty of 70% in respect of such lessees.

324. It is submitted that the grant of the clearance under the FC Act is liable to be treated at par with the principles enunciated in *Lafarge Umiam Mining (P) Ltd. v. Union of India*, (2011) 7 SCC 338 (as discussed infra) and must constitute as an ex post-facto valid clearance, subject to the conditions that NPV, compensatory afforestation and penal compensatory afforestation have been paid.

325. In view of the fact that all the lessees have obtained clearance under the FC Act and have furnished all

requisite documents to the CEC, the conclusion arrived at by CEC are legally untenable, devoid and liable to be rejected.

6.3.9 Judgment in Lafarge Umiam Mining (P) Ltd. v. Union of India, (2011) 7 SCC 338; and grant of ex-post facto clearances

326. It is respectfully submitted that the CEC has not considered the judgment of this Hon'ble Court in *Lafarge Umiam Mining (P) Ltd. v. Union of India*, (2011) 7 SCC 338, which had specifically considered approvals being granted on an ex post facto basis.

327. It is pertinent to note that in the said matter, this Hon'ble Court recorded that mining projects can be positive:

> *"34. At the same time the report states that the project is positive and beneficial to the residents of Nongtrai Village due to huge amount of cash going to the village durbar and reaching the individual household improving the financial health of the population of two villages i.e. Nongtrai and Shella. According to the report, interaction took place between the High-Powered*

Committee constituted by MoEF and the locals. That villagers of Shella are not having any problems from Lafarge and that the people are very satisfied with the mining company which has provided health care facilities, drinking water facilities, employment, schools, etc. According to the report, Lafarge has been contributing for the benefit of the village as well as for all the villagers by way of payment of rent for the use of the community land as well as towards the price of limestone exported to Bangladesh. The figures of such payments are also indicated in the report. Further, the report states that mining is not having any adverse effect on the human life."

328. In the said matter, this Hon'ble Court was of the opinion that there was a subsequent *ex post facto* clearance by the MoEF, upon payment of compensatory afforestation, penal compensatory afforestation with interest. Thus, this Hon'ble Court upheld the grant of the approval:

"105. On the above facts, it is not possible for us to hold that the decision to grant ex post facto clearances stood vitiated on account of non-

application of mind or on account of suppression of material facts by Lafarge as alleged by SAC."

329. The following observations of this Hon'ble Court are apposite:

"119. The time has come for us to apply the constitutional "doctrine of proportionality" to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review. It cannot be gainsaid that utilisation of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices. In the circumstances, barring exceptions, decisions relating to utilisation of natural resources have to be tested on the anvil of the well-recognised principles of judicial review. Have all the relevant factors been taken into account? Have any extraneous factors influenced the decision? Is the decision strictly in accordance with the legislative policy underlying the law (if any) that governs the field? Is the decision consistent with the principles of sustainable development in the sense that has the decision-maker taken into account the said principle and, on the basis of

relevant considerations, arrived at a balanced decision? Thus, the Court should review the decision-making process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint. Once this is ensured, then the doctrine of "margin of appreciation" in favour of the decision-maker would come into play. Our above view is further strengthened by the decision of the Court of Appeal in R. v. Chester City Council reported in All ER paras 14 to 16.

330. This Hon'ble Court issued the following directions in conclusion:

"*122*. (i) As stated in our order hereinabove, the words "environment" and "sustainable development" have various facets. At times in respect of a few of these facets data is not available. Care for environment is an ongoing process.*

(i.1.) The time has come for this Court to declare and we hereby declare that the National Forest Policy, 1988 which lays down far-reaching principles must necessarily govern the grant of permissions under Section 2 of the Forest (Conservation) Act, 1980 as the same provides the road map to ecological protection and

improvement under the Environment (Protection) Act, 1986. The principles/guidelines mentioned in the National Forest Policy, 1988 should be read as part of the provisions of the Environment (Protection) Act, 1986 read together with the Forest (Conservation) Act, 1980. This direction is required to be given because there is no machinery even today established for implementation of the said National Forest Policy, 1988 read with the Forest (Conservation) Act, 1980. Section 3 of the Environment (Protection) Act, 1986 confers a power coupled with duty and, thus, it is incumbent on the Central Government, as hereinafter indicated, to appoint an appropriate authority, preferably in the form of regulator, at the State and at the Central level for ensuring implementation of the National Forest Policy, 1988.

331. This Hon'ble Court also considered it appropriate to direct the appointment of a National Regulator under Section 3(3) of the Environment (Protection) Act, 1986:

"... ... (i.2.) The difference between a regulator and a court must be kept in mind. The

court/tribunal is basically an authority which reacts to a given situation brought to its notice whereas a regulator is a proactive body with the power conferred upon it to frame statutory rules and regulations. The regulatory mechanism warrants open discussion, public participation and circulation of the draft paper inviting suggestions.

(i.3.) The basic objectives of the National Forest Policy, 1988 include positive and proactive steps to be taken. These include maintenance of environmental stability through preservation, restoration of ecological balance that has been adversely disturbed by serious depletion of forests, conservation of natural heritage of the country by preserving the remaining natural forests with the vast variety of flora and fauna, checking soil erosion and denudation in the catchment areas, checking the extension of sand dunes, increasing the forest/tree cover in the country and encouraging efficient utilisation of forest produce and maximising substitution of wood.

(i.4.) Thus, we are of the view that under Section 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects,

enforcing environmental conditions for approvals and to impose penalties on polluters.

(i.5.) There is one more reason for having a regulatory mechanism in place. Identification of an area as forest area is solely based on the declaration to be filed by the user agency (project proponent). The project proponent under the existing dispensation is required to undertake EIA by an expert body/institution. In many cases, the court is not made aware of the terms of reference. In several cases, the court is not made aware of the study area undertaken by the expert body. Consequently, MoEF/State Government acts on the report (Rapid EIA) undertaken by the institutions who though accredited submit answers according to the terms of reference propounded by the project proponent. We do not wish to cast any doubt on the credibility of these institutions. However, at times the court is faced with conflicting reports. Similarly, the Government is also faced with a fait accompli kind of situation which in the ultimate analysis leads to grant of ex post facto clearance. To obviate these difficulties, we are of the view that a regulatory mechanism should be put in place and till the time such mechanism is put in place, MoEF should prepare a panel of accredited institutions from which alone the project

proponent should obtain the Rapid EIA and that too on the terms of reference to be formulated by MoEF."

332. It is submitted that the above said directions by this Hon'ble Court in *Lafarge* (supra) were extremely significant and the constitution of National Regulator was envisaged to ensure due compliance with all norms and procedures and to consider all parameters.

333. However, the abovesaid directions regarding appointment of a National Regulator under Section 3(3) of the EP Act have not been implemented by the Central Government till date, despite reiteration of the said directions by this Hon'ble Court. By order dated 06.01.2014 in I.A. Nos. 1868, 2091, 2225-2227, 2380, 2568 and 2937 in Writ Petition (Civil) No. 202 of 1995 [reported as (2014) 4 SCC 61], this Hon'ble Court rejected the contention advanced by the Government of India and held as follows:

"11. Hence, the present mechanism under the EIA Notification dated 14-9-2006, issued by the Government with regard to processing,

appraisals and approval of the projects for environmental clearance is deficient in many respects and what is required is a Regulator at the national level having its offices in all the States which can carry out an independent, objective and transparent appraisal and approval of the projects for environmental clearances and which can also monitor the implementation of the conditions laid down in the environmental clearances. The Regulator so appointed under Section 3(3) of the Environment (Protection) Act, 1986 can exercise only such powers and functions of the Central Government under the Environment (Protection) Act as are entrusted to it and obviously cannot exercise the powers of the Central Government under Section 2 of the Forest (Conservation) Act, 1980, but while exercising such powers under the Environment (Protection) Act, 1986, will ensure that the National Forest Policy, 1988 is duly implemented

as held in the order dated 6-7-2011 of this Court in Lafarge Umiam Mining (P) Ltd.

12. Hence, we also do not find any force in the submission of Mr Parasaran that as under Section 2 of the Forest (Conservation) Act, 1980 the Central Government alone is the Regulator, no one else can be appointed as a Regulator as directed in Lafarge Umiam Mining (P) Ltd.

13. We, therefore, direct the Union of India to appoint a Regulator with offices in as many States as possible under sub-section (3) of Section 3 of the Environment (Protection) Act, 1986 as directed in the order in Lafarge Umiam Mining (P) Ltd. and file an affidavit along with the notification appointing the Regulator in compliance with this direction by 31-3-2014."

334. It is respectfully submitted that the violations, if any, must be viewed in the light of directions issued in the judgment of this Hon'ble Court in *Lafarge* (supra). It

is submitted that the recommendation of the CEC imposing recovery of 70% price is clearly arbitrary.

6.4 IRON ORE PRODUCED WITHOUT / IN EXCESS OF THE ENVIRONMENTAL CLEARANCE

6.4.1 Period from 1994-2006

335. That it may be noted that the Environment (Protection) Act, 1986 was enacted on 23.05.1986. Further, under Section 6 of the said Act, the Central Government has framed the Environment (Protection) Rules, 1986 published in the Official Gazette *vide* Notification S.O. 844(E) dated 19.11.1986. Rule 5(3) of the said Rules are relevant:

> *"(3) (a) Whenever it appears to the Central Government that it is expedient to impose prohibition or restrictions on the locations Of an industry or the carrying on of processes and operations in an area, it may by notification in the Official Gazette and in such other manner as the Central government may deem necessary from time to time, give notice of its intention to do so.*

(b) Every notification under clause (a) shall give a brief description of the area, the industries, operations, processes in that area about which such notification pertains and also specify the reasons for the imposition of prohibition or restrictions on the locations of the industries and carrying on of process or operations in that area.

(c) Any person interested in filing an objection against the imposition of prohibition or restrictions on carrying on of processes or operations as notified under clause (a) may do so in writing to the Central Government within sixty days from the date of publication of the notification in the Official Gazette.

(d) The Central Government shall within a period of one hundred and twenty days from the date of publication of the notification in the Official Gazette consider all the objections received against such notification and may [within one hundred and [eighty] days from such day of publication] impose prohibition or restrictions on location of such industries and the carrying on of any process or operation in an area."

336. That the requirement of obtaining EC was introduced first vide EIA Notification dated 27.01.1994 ["**EIA**

Notification 1994"] issued under the aforesaid Rule 5(3) of the Environment (Protection) Rules, 1986. Under the said notification, EC was required only for 'new projects' or for 'expansion or modernisation' of existing projects.

Copy of the EIA Notification dated 27.01.1994 is annexed herewith and marked as **ANNEXURE-55**.

337. That it is relevant to note that the Explanatory Note to the EIA Notification 1994 stated that 'expansion or modernisation' would mean an increase in the pollution load from existing levels. This was understood to mean that if there was no increase in the sanctioned leasehold area, or unless the lease fell for renewal, there would be no requirement of obtaining EC.

338. That this understanding was made clear by the MoEF in July 1994 by way of a Press Note which stated *inter alia* as follows:

> *"2. The question of applicability of the Notification to certain types of mining projects*

which are in the process of renewal have been released from time to time. In this regard, it is further clarified that: -

(i) Environmental Clearance will not be required at the time of renewal if there is no increase in the originally sanctioned lease area.

i.

(ii) Environmental clearance will not be required at the time of renewal in cases where expansion is envisaged if the lease area does not exceed 5 ha., even after expansion."

Copy of the Press Note of July, 1994 issued by the MoEF is annexed herewith and marked as **ANNEXURE-56**.

339. That further, it is relevant to point out that the MoEF on 19.06.1997 issued a letter whereby the requirements for obtaining EC at the time of renewal were clarified.

Copy of the letter dated 19.06.1997 issued by the MoEF is annexed herewith and marked as **ANNEXURE-57.**

340. That it may further be noted that in respect of the EIA Notification, 1994, the MoEF continuously issued circulars allowing new units to apply for clearance under the EIA Notification, 1994 on an *ex post facto basis*. The first such Circular was dated 5th November, 1998, which permitted such new units to apply for environmental clearances by 31st March, 1998. This period, vide Circular dated 27th December, 2000, was extended up to 30th Jun, 2001. The MoEF finally vide Circular dated 14th May, 2002, further extended the deadline upto 31st March, 2003.

Copy of the Circular of the MoEF dated 14.05.2002 is annexed herewith and marked as **ANNEXURE-58**.

341. That the position regarding the EIA Notification 1994 was further clarified by the judgment dated **18.03.2004** of the Hon'ble Supreme Court in *M.C. Mehta v. UOI,* (2004) 12 SCC 118 wherein it was stated that the requirement of obtaining EC under the EIA Notification 1994 would be applicable at the time

of renewal if the lease in question fell for renewal after 1994.

Copy of the Judgment dated 18.03.2004 of the Hon'ble Supreme Court in *M.C. Mehta v. UOI,* (2004) 12 SCC 118 is annexed herewith and marked as **ANNEXURE-59**.

342. That pursuant to the decision of the Hon'ble Supreme Court in *M.C. Mehta*, the MoEF issued two clarificatory circulars viz. 28.10.2004 and 25.04.2005 wherein it was stated that the requirement of obtaining EC under the EIA Notification 1994 would be when (a) mining projects started production; or increased production; or increased their lease area, after 1994; or (b) the lease fell for renewal. Therefore, the 2005 Circular clarified that mining units which continued to operate at pre-1994 capacities would obtain EC only at the time of renewal. It further gave a window to even get an *ex post facto* approval in case production had been increased or lease area had been expanded after 1994.

Copies of the Circulars dated 28.10.2004 and 25.04.2005 are annexed herewith and marked as **ANNEXURE-60**.

343. It is clear from a perusal of the above Circulars that the EIA Notification 1994 was to apply only in respect of (a) new projects; (b) if there was an increase in production higher than the year prior to year 1993-94.; (c) if there was an expansion of lease area; and (d) at the time of renewal.

344. The expression expansion was defined to include expansion in both production and lease area. However, as far as production is concerned it was clarified that if the annual production of any year from 1994-95 onwards exceeded the annual production the years preceding 1993-94, the same would constitute expansion.

345. It is respectfully submitted that the CEC has grossly erred in adopting the year 1993-94 as the base year. It is also respectfully submitted that for the period

1994 to 2006 the question of the requirement of obtaining environmental clearance for on-going lessee would not apply.

6.4.2 Period from 14.09.2006– 2010

346. The existing regime under the EIA Notification 1994 continued until its supersession by the issuance of the EIA Notification dated 14.09.2006 ("**EIA Notification 2006**"). Therefore, for the first period, being 27.01.1994 till 14.09.2006, the conclusion is that there was no requirement of any EC unless there was an increase in pre-1994 production capacity, and the lessee failed to obtain an *ex post facto* EC with regard to the same.

Copy of the EIA Notification dated 14.09.2006 is annexed herewith and marked as **ANNEXURE-61**.

347. The Notification of 14th September, 2006 provided for prior environmental clearance from the Central Government in the following events:-

I. If it was a new project.

II. If it was an expansion of modernisation of existing project i.e. if there was an addition of capacity beyond the limits specified.

348. That subsequent to the issuance of the EIA Notification 2006, the MoEF issued Circular dated 13.10.2006 containing Interim Operational Guidelines in respect of applications made under the EIA Notification 1994. In the same, it was stated that applications received under the EIA Notification 1994 would continue to be processed thereunder, and violations, if any, would attract the relevant provisions of the Environment (Protection) Act, 1986.

Copy of the Circular dated 13.10.2006 issued by the MoEF containing Interim Operational Guidelines is annexed herewith and marked as **ANNEXURE-62.**

349. That subsequent to the issuance of the EIA Notification 2006, the MoEF issued a clarificatory Circular dated 02.07.2007 on the applicability of the same, stating as follows:

"It is clarified that all such mining projects which did not require environmental clearance under the EIA Notification 1994 would continue to operate without obtaining environmental clearance till the mining lease falls due for renewal, if there is no increase in lease area and / or there is no enhancement of production. In the event of any increase in lease area and or production, such projects would need to obtain prior environmental clearance. Further, all such projects which have been operating without any environmental clearance would obtain environmental clearance at the time of their lease renewal even if there is no increase either in terms of lease area of production."

Copy of the Circular of the MoEF dated 02.07.2007 is annexed herewith and marked as **ANNEXURE-63**.

350. That on 19.08.2010, the MoEF issued Office Memorandum clarifying as follows:

"All the project proponents may note that any contravention of the provisions of the EIA Notification amounts to violation of the Environment (Protection) Act, 1986 and would attract penal action under the provisions thereof. The project proponent may also note that in case

of any project where TORs have been prescribed for undertaking detailed EIA study and where construction activities relating to the project have been initiated by them, the TORs so prescribed may be suspended / withdrawn in addition to initiating penal action under the provisions of the EP Act, 1986."

Copy of the Office Memorandum dated 19.08.2010 is annexed herewith and marked as **ANNEXURE-64**.

351. That on 16.11.2010, the MoEF issued a further Office Memorandum issuing a clarification in respect of projects which had not obtained prior clearance under the EIA Notification 2006. The MoEF stated *inter alia* as follows:

"As per existing practice being followed in the Ministry for considering such violation cases as and when these are submitted for environmental clearance, while environmental clearance is granted to deserving projects prospectively, based on their merit, in accordance with the recommendation of the Expert Appraisal Committees, simultaneously the concerned State Governments, under the powers delegated to them under the Environment (Protection) Act,

1986 are requested to initiate action against such units for the period these units have operated in violation of the said Act as per procedure laid down."

Further, the MoEF laid down a detailed procedure to deal with such violations. Copy of the Office Memorandum dated 16.11.2010 of the MoEF is annexed herewith and marked as **ANNEXURE-65**.

352. That on 12.12.2012, the MoEF issued a further Office Memorandum stating that in case of any violations, a certain procedure would need to be followed, which included *inter alia* the following*:*

"ii. The State Government concerned will need to initiate credible action on the violation by invoking powers under Section 19 of the Environment (Protection) Act, 1986 for taking necessary legal action under Seciton1 5 of the Act for the period for which the violation has taken place and evidence provided to MoEF of the credible action taken."

The Office Memorandum further goes on to state as follows:

> "*6. Once action as per para 5 above has been taken, the concerned case will be dealt with and processed as per the prescribed procedure for dealing with cases for grant of TORs/Environment Clearance/CRZ Clearance and appropriate recommendation made by the EAC/decision taken by the Ministry as per the merit of the case.*"

Copy of the Office Memorandum dated 12.12.2012 is annexed herewith and marked as **ANNEXURE-66**.

353. That therefore, it can be seen, even in respect of the EIA Notification, 2006, there has been considerable vagueness and lack of clarity with regard to its application. However, it may be stated that upon the coming into force of the EIA Notification 2006, the lessees in good faith applied for an EC shortly thereafter. That however, the application made under the EIA Notification 2006 takes significant time. The said Notification contemplates a number of activities viz. Screening, (Clause 7(I)); Scoping (Clause 7 (II)), Public Consultation (clause 7(III)); Appraisal (Clause 7(IV)), and finally Grant / Rejection of Environmental

Clearance by the Regulatory Authority (Clause 8). It is submitted that considerable time is taken by the authority to discharge these functions. In fact, the following chart would indicate that a period of 390 days would be required for the purpose of obtaining environmental clearance after 14th September 2006.

Stage	*Steps*	*Timeframe*
Scoping [Clause 7(i)(II)]	1. Application by Project Proponent (PP) in Form I; 2. Pre-feasibility Report and Draft ToR by PP; 3. EAC/State-EAC to determine Terms of Reference (ToR) for EIA preparation; 4. Intimation of final ToR to PP and display in website.	**60 days**
	Preparation by Project Proponent of EIA/EMP (on one season data)	**150 days**
Public Consultation [Clause 7(i)(III)]	Conduct of public hearing at, or in close proximity of site, by State Pollution Control Board SPCB).	**45 days (with further extension of 45 days)**

	Modification of EIA/EMP by PP upon receipt of minutes of public hearing.	**30 days**
Appraisal [Clause 7(i)(IV)]	1. Appraisal of final EIA Report and other documents by EAC or State-EAC. 2. Recommendation for grant of EC by EAC or State-EAC.	**60 days**
Grant/Rejection of EC [Clause 8]	Consideration by regulatory authority of recommendations by EAC or State-EAC.	**45 days**
TOTAL		**390 days**

354. A few examples indicated herein would indicate that the time taken for grant of environmental clearance would be anywhere between 390 days and almost four (4) years.

State	**Project**	**Date of issuance of TOR**	**Date of recommendation by EAC**	**Time taken**

Andhra Pradesh	Laterite Mine, East Godavari	10/09/2007	28-30 June, 2010.	**2 yrs 8 months**
Chhattisgarh	Hahaladdi Iron Ore Mine,	20/06/2008	24-26 Nov, 2010.	**2 yrs 5 months**
Himachal	Baldhwa Limestone Mine	20/04/2009	25 -27 April, 2011	**2 yrs**
Jharkhand	Meghahatuburu Iron and Manganese Ore Deposits	06/08/2009	19-21 October, 2011	**2 yrs 2 months**
	BhatinMinining Project	25/01/2008	22-24 December, 2010	**2 yrs 11 month**
	Renewal of Hisri Bauxite Mine.	15/02/2008	23-25 February, 2011	**3 yrs**
	Lagla Mahal Sand	25/11/2008	23-25 February, 2011	**2 yrs 3 months**
	Jamdih Quartz & Quartzite mine	09/04/2008	23-25 February, 2011	**2 yrs 10 months**

	Pakhar Bauxite Mining Project.	14/09/2007	25-27 May, 2011	**3 yrs 8 months**
Karnataka	Habbigegudda Iron Ore Mine	31/07/2008	20-22 July, 2011,	

355. That therefore, a significant amount of time was spent by the concerned authority in processing the Environmental Clearance. There is therefore a time-lag between when the Mining Plan/Scheme was modified by the IBM and when the EC was granted by the MoEF under the EIA Notification 2006. During this intervening period, the lessees in good faith adhered to the enhanced production limits under the modified Mining Plan/Scheme.

356. That it is submitted that all applicants who have carried out EIA-EMP procedure correctly would have a legitimate expectation that the EC would be granted. Thus, an EC for a project which is in accordance with the same, is always likely to be granted upon consideration by the EAC. The EAC consists of subject

practitioners, who consider each case separately. In these cases, the attempt was not to violate the law.

357. At this juncture, it may be relevant to state the importance of a Mining Plan. Section 5(2) of the MMDR Act, 1957 contemplates that before a mining lease is granted, a Mining Plan has to be submitted for approval under Section 5(2) of the MMDR Act read with Rules 9, 10, 12 and 13 of the MCDR, 1988. The approval of a mining plan (including the scheme of mining) is granted by the IBM. Usually, approvals are granted for 5-year periods and a new scheme of mining is submitted every 5 years which is then considered by the IBM for a new approval. In addition, thereto, even during the pendency of a Mining Plan, a lessee may opt for modification of a Mining Plan in terms of Rule 10 of the MCDR, 1988. Rule 58 of the MCDR, 1988 is also relevant inasmuch as it provides that a contravention of these Rules would attract punishment by way of imprisonment for a term which

could extend up to 2 years or fine extended to Rs.50,000/- or both.

358. That Rules 22(5) and (6) of the MCR, 1960 are also relevant:

> *"(5) The mining plan shall incorporate—*
>
> *(i) the plan of the leasehold area showing the nature and extent of the mineral body, spot or spots where the mining operations are proposed to be based on the prospecting data gathered by the applicant or any other person;*
>
> *(ii) details of the geology and lithology of the area including mineral reserves of the area;*
>
> *(iii) the extent of manual mining or mining by the use of machinery and mechanical devices;*
>
> *(iv) the plan of the area showing natural water courses, limits of reserves and other forest areas and density of trees, if any, assessment of impact of mining activity on forest, land surface and environment including air and water pollution; details of the scheme of restoration of the area by afforestation, land reclamation, use of*

pollution control devices and such other measures as may be directed by the Central Government or the State Government from time to time;

(v) a tentative scheme of mining and annual programme and plan for excavation from year to year for five years;

(va) a progressive mine closure plan as defined in clause (oo) of rule 3 of the Mineral Conservation and Development Rules, 1988; and

(vi) any other matter which the Central Government may require the applicant to provide in the mining plan.

(6) The mining plan once approved shall be valid for the entire duration of the lease: Provided that any modification or modifications of the mining plan shall be approved by the competent authority and such approval of the modified mining plan shall remain valid for the balance duration of the mining lease."

That a presentation showing the facets that go into the preparation of a Mining Plan in terms of Rule 22(5) of the MCR, 1960 is annexed herewith and marked as **ANNEXURE-67**.

359. That therefore, tt may be noted that in terms of Rule 22(5)(v) of the MCR, 1960, the Mining Plan/Scheme approves a calendar of proposed production for a block of 5 years. Further, the said calendar is admitted by the IBM/Union of India to be a tentative/dynamic document, and a variation in production of +/- 20% is expressly permitted by the IBM/Union of India, as stated in the letter dated 12.12.2011 issued by the Ministry of Mines, Government of India, and as recognised by the CEC at **para. 20(v), page 29 of its** Final Report.

    A sample Mining Plan / Scheme showing a calendar of proposed production for a block of 5 years is annexed herewith and marked as **ANNEXURE-68**.

360. In fact, it may be noted that if a lessee under-produces, then he is liable to be show-caused by the IBM. That therefore, it is clear that in the eyes of the IBM, under-production is viewed as a serious matter, as the same

indicates inefficiency and non-scientific mining leading to wastage of resources.

Sample copies of show-cause notices issued by the IBM for under-production are annexed herewith and marked as **ANNEXURE-69**.

361. At this juncture, it must also be stated that under the MCDR, 1988, considerations underlying the Environment (Protection) Act, 1986 are also considered at the time of approving the Mining Plan, as can be seen from Rules 31-41 (Chapter V) of the MCDR, 1988.

362. It may be noted at this juncture that the modified Mining Plan/Scheme including the calendar of production forms the basis for the Environmental Clearance, and is submitted as a necessary document along with the application for Environmental Clearance. As correctly noted by the CEC at **para. 20(vi), page 30** of its report dated 16.10.2014, the EC is granted only after the Mining Plan is approved. It is only upon a consideration of the same that the MoEF

grants an EC. In fact, the EC as granted by the MoEF contains a specific condition that "*no change in the calendar plan including excavation, quantum of mineral, iron ore and waste should be made*". Therefore, the subsequent grant of the EC ratifies the proposed calendar of production on an retroactive basis w.e.f. the date of the approval of Mining Plan.

A sample Environmental Clearance which ratifies the proposed calendar of production on a retroactive basis is annexed herewith and marked as **ANNEXURE-70**.

363. It was under these circumstances that a suggestion was made by the Hoda Committee that it was *per se* impractical to apply for a fresh environmental clearance for any increase in the quantity, and that there should therefore be a latitude of plus-minus 10%. This was on account of both market situations and process complexities. In fact, it is this recommendation which was accepted by the Central Government while issuing its letter dated 12.12.2011 where it exhorted the State Government to treat the

five years period as a block with a +/- 20% latitude for the purpose of reckoning what was covered under the environmental clearance.

364. It is respectfully submitted that if adequate safeguards are undertaken by a lessee as is contemplated under the Act, the possibilities of pollution or any adverse effect can be overruled. It is submitted that the expression 'sustainable development' has multiple definitions each incorporating its own social values. The definition from the Brundtland report is the most quoted, namely, *"....development that meets the needs of the present without compromising the ability of future generations to meet their own needs...."*.

365. It is respectfully submitted that if mining is undertaken carefully with reference to present environment and also bears adequate exploration of deeper results, then the concerns of sustainable development are adequately addressed. It is submitted that while natural resources do constitute common inheritance, the ideas which are being propounded of

self-reliance in a developing country coupled with a high degree of social responsibility and commitment in mining is indeed consistent with the theory of sustainable development. It is respectfully submitted that there is a relationship between environmental quality and crop creation, the need to switch the tax burden from labour to resource use, the empowerment of local groups and the need for policy targets. It is humbly and respectfully submitted that the MMDR Act, 1957 in the context of Chapter 5 of the MCDR, 1988 which contains detailed steps pertaining to the environment and pollution load at the time of preparation of a mining plan, itself contemplates careful and scientific mining.

6.4.3 Period after 07.05.2010

366. It is submitted that with respect to mining leases in the State of Odisha, this Hon'ble Court had on an earlier occasion directed the CEC to submit a detailed report in IA No. 2746-2748 of 2009 in W.P. (C) No. 202 of 1995. Pursuant to this direction, the CEC filed

a report regarding mining leases in Odisha on 26.04.2010, which was accepted by this Hon'ble Court and directed to be implemented by order dated 07.05.2010.

367. On account of the report submitted by CEC as accepted by this Hon'ble Court, the State of Odisha immediately suspended the operations of all mining leases which did not possess the requisite statutory approvals. This fact has also been recorded by the CEC in its Final Report dated 16.10.2014 (para 4, pg.8-9) filed before this Hon'ble Court in the present matter.

368. Therefore, post 2010, there have been no instances of production by mining lessees without / in excess of limits prescribed in the environmental clearance, since the same has been proscribed by the State Government. The regulatory regime has ensured that nobody has undertaken any mining unless they had an existing EC for the quantity being mined.

369. The lessees craves leave of this Hon'ble Court to attach photographs of work carried out in relation to CSR, of the mining affected areas, etc. as **ANNEXURE-71**.

370. That the contents of the above Affidavit are true and correct to my knowledge gathered from the records of the case and based on legal advice, and no part of it is false and nothing material has been concealed therefrom.

DEPONENT

VERIFICATION

Verified at New Delhi, on this _____day of _____, 2017 that the contents of paras ___ to ___ of the above affidavit are true and correct to the best of my knowledge based on records of the case and on legal advice. No part of this affidavit is false and nothing material has been wilfully concealed there from.

DEPONENT