

**Samatha**  
**Vs**  
**State of Andhra Pradesh**

**11.07.1997**

AIR 1997 SUPREME COURT 3297  
(From: Andhra Pradesh)

K. RAMASWAMY S. SAGHIR AHMED AND G.B. PATTANAİK.J.J.\*\*

Civil Appeal Nos. 4601-02 of 1991(1) with Civil Appeal No.4603 1997 (2) (arising out of S.L.P. © Nos. 17080-81 of 1995 with 21457 of 1993 D/- 11-7-1997.

Samatha, Appellant v. State of Andhra Pradesh and others.

WITH

M/s. Hyderabad Abrasives and Minerals (P) Ltd., Appellant Vs. State of Andhra Pradesh and others, Respondents.

(A) A.P. Scheduled Area Land Transfer Regulation (1 of 1959) S. 3 – Word.

(1) W.P.No.9513 of 1993 and 7725 of D/- 28.-4-1995 reported in 1996 AIHC 316 (Andh Pra).

(2) W.P.No.3734 of 1993 D/p-. 27-8-1993 (Andh Pra).

\*\* In this case the Judges of the Supreme Court differ in their views. The majority view is taken by K. Ramaswamy and S. Saghir Ahmad, JJ., and the minority view by G.B. Pattanaik. J.

The Judgement are printed in the order in which they are given in the Certified Copy.Ed.) ”person” in S. 3(1) – Would include both natural persons as well juristic person and constitutional Government – Transfer of land by juristic persons or allotment of land by State to non-tribals – Stand prohibited.

Constitution of India, Pre., Arts 38, 39, 46, Sch. 5, CL 5(2) (b)  
Maxim – “ Reddendo Singula Singulis “ Interpretation of Statutes.

Majority View:- (Per K. Ramaswamy, J.) There is no reason to consider the word ‘person’ S.3 in a narrow sense. It must be construed in a broader perceptivity, unless the statute, either expressly or by necessary implication, exempts the State from the operation of the Act as against the State and would include “ State Government”.

The maxim “reddendo singula singulis” will apply to the interpretation of the word “person” so that the general meaning of the word “person” in its generic sense with its width would not be cut down by the specific qualification of one species, i.e., natural “person” when it is capable to encompass in its ambit, natural persons, juristic persons and constitutional mechanism of governance in a democratic set up. The State, by Cabinet form of Government, is a persona ficta, a Corporate sole. Constitution empowers the State to acquire, hold and dispose of their property. The Governor in his personal responsibility is empowered to maintain peace and good Government in scheduled area. The Fifth Schedule to the Constitution empowers him to regulate allotment of the land by para 5(2) (b) read with S. 3 of the Regulation of the land be it between natural persons, i.e., Tribals and non-Tribals; it imposes total prohibition on transfer of the land in scheduled area. The object of the Fifth Schedule and the Regulation is to preserve tribal autonomy, their culture and economic empowerment to ensure social, economic and political justice for preservation of peace and good Government in the scheduled area. Therefore, all relevant clauses in the Schedule

and the Regulation should harmoniously and widely be read so as to elongate the aforesaid constitutional objective and dignity of person to the Scheduled Tribes, preserving the integrity of the Scheduled Areas and ensuring distributive justice as an integral scheme thereof. Clauses (a) and (c) of sub-para (2) 5 of the Fifth Schedule prohibits transfers inter vivos between tribals and non-tribal natural persons and prevents money-lenders to exploit the tribals. Clause (b) intends to regulate allotment of land not only among tribals but also prohibits allotment of the land belonging to the Government to the non-tribals. In that behalf, wider interpretation of “regulation” would include “prohibition” which should be read into that clause. If so read, it sub serves the constitutional objective of regulating the allotment of the land in scheduled areas exclusively to the Scheduled Tribes. Clause 5(2) (b) ensures distributive justice of socio-economic empowerment which yields meaningful results in reality. If purposive construction, in this backdrop is adopted, no internal or external contradiction would emerge. The word “person” would include both natural persons as well as juristic person and constitutional Government. This liberal and wider interpretation would maximise allotment of Government land in scheduled area to the tribals to make socio-economic justice assured in the Preamble and Articles 38, 39 and 46 a reality to the tribals. The restricted interpretation would defeat with objective of the Constitution. The word “person” would be so interpreted as to include State or juristic person corporate sole or persona ficta. Transfer of land by the juristic persons or allotment of land by the State to the non-tribals would stand prohibited, achieving the object of para 5 (2) of the Fifth Schedule of the Constitution and S.3 of the Regulation. If the word ‘person’ is interpreted to mean only natural persons, it tends to defeat the object of the Constitution, the genus and the Regulation, its species. As a corollary, by omission in the final draft of the Fifth Schedule of the power of the State Government to transfer its land to the non-tribals with the sanction of a competent authorised officer or authority would, by interpretation brought into effect and the object of the Constitution would easily be defeated, therefore, the word “person” be it natural or juristic person except to its instrumentality or a co-operative Society composed solely of tribes as is specified in the second part of S.3 (1) (a). Any other interpretation would easily defeat the purpose of exclusive power entrusted by First Schedule onto the Governor. If the Cabinet form of Government would transfer the land of the Government to non-tribals peace would be disturbed, good governance in scheduled area would slip into the hands of the non-tribals who would drive out the tribals from scheduled area and create monopoly to the well developed and sophisticated non-tribals; and slowly, and imperceptible, but surely, the land in the scheduled area would pass into the lands of the non-tribals. The letter of law would be an empty content and by play of words deflect the course of justice to the tribals and denude them of the socio-economic empowerment and dignity of their person.

(Paras 95, 127)

The word “person” in S.3(1) (a) would, therefore, be construed to include not merely the natural persons, in the context of tribal and non-tribal who deal with the land in scheduled areas by transfer inter vivos but all juristic person in the generic sense, including the Corporation, partnership firm, a company, any person with corporate veil or persons of all hues, either as transferor or transferee so that the word ‘regulate’ in para 5 (2) (b) of the Fifth Schedule in relation to the land in scheduled areas would be applicable to them either as transferor or transferee of land in a scheduled area. It, thus, manifests the constitutional and legislative intention that tribals and a Co-operative Society consisting solely of tribal members alone should be in possession and enjoyment of the land in the scheduled area as dealt with in various enactments starting from Gunjam and Vizianagaram Act, 1839 to the present regulation.

AIR 1988 SC 1626, AIR 1985 SC 389 and AIR 1984 SC 1151, Foll.

(Para 96)

There is no internal and external contradiction in this process of harmonious and purposive interpretation of para 5(2) (a) of the Fifth Schedule which regulates transfers between natural persons; para 5 (2) (a) encompasses within its ambit, the transfer by the Government of its land to a non-tribal and CI. (c) or the relevant clauses in Ss.3 and 4 of the Regulation. The Regulation prevents exploitation of the tribals through the State Government; from the other end, it does not allow parting with of their land and prevents education of non-tribals into the scheduled area by allotment of the land or by regulating allotment of the land, be it private or private corporate aggregate. This interpretation per se, therefore, is public law interpretation to subserve the constitutional purpose without recourse to private law principles.

(Para 97)

It is an established rule of interpretation that to establish Socialist Secular Democratic Republic, the basic structure under the rule of law, pragmatic board and wide interpretation of the Constitution make social and economic democracy with liberty, quality of opportunity, equality of status and fraternity a reality to “we, the people of India,” who would include the Scheduled Tribes. All State actions should be to reach the above goal with this march under rule of law. The interpretation of the words ‘person’ regulation’ and ‘distribution’ require to be broached broadly to elongate socio-economic justice to the tribals. The word ‘regulates’ in para 5(2) (b) of the Fifth Schedule to the Constitution and the title of the Regulation would not only control allotment of and to the Tribes in Scheduled area but also prohibits transfer of private or Government’s land in such areas to the non-tribals. While later CI (a) achieves the object of prohibiting transfers inter vivos by tribals to the non-tribals or non-tribals inter se, the first clause includes the State Government or being a juristic person integral scheme of para 5 (2) of Schedule. The Regulation seeks to further achieve the object of declaring with a presumptive evidence that the land in the scheduled areas belongs to the Scheduled Tribes and any transfer made to a non-tribal shall always be demand to have been made by a tribal unless the transferee establishes the contra. It also prohibits transfer of the land in any form known to law and declared such transfer as void except by way of testamentary disposition by a tribal to his kith and kin/tribal or by partition among them. The regulation and its predecessor law in operation in respective areas regulate transfer between a tribal and non-tribal with prior permission of the designated officer as a condition precedent to prevent exploitation of the tribals. If a tribal is unwilling to purchase land from a non-tribal, the State Government is enjoined to purchase the land from a non-tribal as per the principles set down in the regulation and to distribute the same to a tribal or a Co-operative Society solely composed of tribals.

(Para 108)

Per S. Sagir Ahmed, J (concurring): - Under the Regulations the property of the member of the Scheduled Tribe or any other person in the scheduled area becomes the property of the State Government at least in two circumstances viz. i) When the land is acquired on the inability of the landowner to sell it and ii) When a decree for eviction of transferee is passed and restoration of property to the transferor is not possible. In all these circumstances, when the property either comes to vest in the State Government or becomes a property at the disposal of the State Government, the Government cannot, transfer the property to a “person” of its own choice but has to transfer, assign or sell to a member of the Scheduled Tribe or a Co-operative Society of the Scheduled Tribes. When such restriction on power of transfer applies to properties which become the Government properties, how the properties which are already the Government properties could be excluded from the applicability of these Regulations? The Government has to be bound down to the constitutional scheme sought to be enforced through Regulations made by the Governor under

para 5(2) of the Fifth Schedule and cannot be permitted to transfer its own properties in favour of non-tribals so as to allow their infiltration contained in para 3 (1) (a) that no person, whether he is a member of the Scheduled Tribe or not, shall transfer his immovable property to a non-tribal must, therefore, in its scope, cover the Government, as well, which, if it possesses land in the Agency Tracts, cannot transfer it either by sale, allotment, lease or otherwise to a non-tribal. To this limited extent, it has to be treated as a “person” within the meaning of CI.3(1) (a) of the Regulations.

(Para 191, 192)

The words “or in such other manner and subject to such conditions as may be prescribed” occurring in para 3(1) (c) and the words “or otherwise dispose it of as if it was a property at the disposal of the State Government” cannot be read as retaining in the Govt. the power and choice to dispose of the property otherwise than in favour of a member of Scheduled Tribe or Co-operative Society of Scheduled Tribe. The words have to be read, not in isolation, but in the context or other words used in those provisions. The emphasis throughout in these Regulations has been that the property would be sold or transferred only to a member of the Scheduled Tribe or other Co-operative Societies. The constitutional scheme which is sought to be enforced through Regulations is that the property of the Scheduled Tribe or the immovable property situated in Agency Tracts may be protected and be not frittered away and further that they may retain their original character and may be transferred to a tribal alone. The words “or in any other manner” in para 2(1) © or the words “otherwise dispose it of as if it was a property at the disposal of the State Government” occurring in para 3(2) (b) have to be read in that context with the result that even if the Government intended to deal with such immovable properties “in any other manner” it could deal only in a manner of the Scheduled Tribe or their Co-operative Societies.

(Para 193)

The Government being under a legal constraint to deal with the property situated in the Agency Tracts only in the manner indicated above, cannot itself act beyond the scope of the Regulations by saying that it is free to dispose of its own properties in any manner it likes. If the Government was allowed to transfer or dispose of its own land in favour of non-tribals, it would completely destroy the legal and constitutional fabric made to protect the Scheduled Tribes. The prohibition, so to say, disqualifies non-tribals as a class from acquiring or getting property on transfer. On account of this disqualification, the Government cannot, even if it is not a “person” within the meaning of para 3(1) (a), transfer, let out or allot its land or other immovable property to a non-tribal.

(Para 193)

Minority view (per Pattanaik, J.):— Where the mining leases were granted in favour of non-scheduled tribal person, provisions of Regulations cannot be held to have been contravened thereby. The word ‘person’ used in S.3(1)(a) of the Andhra Pradesh Regulation as amended in 1970 has to be construed to convey the same meaning throughout the section to mean natural person and the said expression does not include the State Government. Neither the legislative history nor the object with which special power has been conferred on the Governor under Fifth Schedule to the Constitution make it necessary to construe the word ‘person’ in the first part of S.3(1) (a) differently from the rest part of the section so as to include State Government within the said expression.

(Para 239)

The constitutional scheme embodied in Arts, 15(4) 46 and 244 as well as the power conferred upon the Governor of the State under Schedule V of the Constitution are intended to preserve and protect the interest of the tribal in the tribal areas. It cannot be said by any stretch of imagination that all lands within the tribal areas vest in the tribal people. State is the paramount owner of lands and in the garb of preventing the exploitation of tribals from the non-tribals so far as the lands belonging to the tribals are concerned the State cannot be denuded of its power to exploit resources which vest with the State. Judged from this angle there is no justification for interpreting the word 'person' in the first part of S.3(1) (a) of the regulation to include State and, therefore, the prohibitions and restrictions contained in the regulation would not apply to the lands belonging to the State.

(Para 228)

Moreover, if word 'person' used in S.3(1) (a) is interpreted to mean to include the State then the expression 'whether or not such a person is a member of a Scheduled Tribe' becomes meaningless as the State can never be a member of the Scheduled Tribe. If a literal meaning to the word 'person' is given in S.3(1) (a) of the regulation then the prohibitions or restrictions contained therein would apply with full force to inter se transfer of land between the Scheduled Tribe and non-Scheduled Tribe and such an interpretation would sub serve the main object of the legislation, namely, to save the tribal people from being exploited upon by the non-tribal people. Consequently, the State is not denuded of its power in the matter of exploiting its mineral resources within the scheduled area by grant or renewal of lease even in favour of non-tribal persons and the restrictions and embargo contained in Regulation 3(1) (a) is not applicable to the State in dealing with the land belonging to the State.

(Para 229, 230)

However, since the mining activities are being carried out mostly within the scheduled areas it is the duty of the State to see that a part of the profits earned by the lessees should be spent for ameliorating the living conditions of the tribals by the lessees themselves. The Supreme Court further observed that appropriate legislation should be made for making it compulsory for the lessees within the tribal area to spend a portion of the income arising out of the mining business for the general upliftment of the living conditions of the tribal people. Which should be in addition to the royalty and other cess under different legislations and that. The State may also consider the question of incorporating some provisions in the leases itself for achieving the aforesaid objectives.

(Para 231)

(B) Constitution of India, Art s 298, 245, Sch. 5, Part 8, Para 5 – Scope – Executive power of State is subject to legislative power under CI.5(1) of Fifth Schedule – sub-para 5(2) combines both legislative as well as executive power – Word “regulation” in para 5 (2) (b) is thus of wide import – In view of para 5(2) there is implied prohibition on States power of allotment of land to non-tribals in scheduled areas.

A.P. Scheduled Area Land Transfer Regulation (1 of 1959), S.3.

Per K. Ramaswamy, J. (S. Saghir Ahmad, J. concurring):-

The legislative power in Cl. (1) of Art.245 equally is “subject to the provisions of the Constitution” i.e., Fifth Schedule. Clause (1) of para 5 of Part B of the Fifth Schedule applicable to scheduled area, adumbrates with a non obstante clause that “Notwithstanding anything in the Constitution, in other words, despite the power, under Art. 298, the Governor may, by public notification, direct that any particular Act of Parliament or of the Legislature of a State shall not apply to a scheduled area or any part thereof in the State or shall apply to a scheduled area or any part thereof in the State, subject to such exceptions and modifications as he may specify in the notification and any direction given under Cl: (1) of para 5, may be given so as to have retrospective effect. “The executive power of the State is, therefore, subject to the legislative power under Cl.5(1) of the Fifth Schedule. Similarly sub-para (2) thereof empowers the Governor to make regulation for the peace and good Government of any area in a State which is for the time being a scheduled area. In particular and without prejudice to the generality of the foregoing power, such regulation may regulate the allotment of land to members of the Scheduled Tribes in such area or may prohibit or restrict the transfer of land under Cl. (a) by or among the members of the Scheduled Tribes in such areas. In other words sub-para 5(2) combines both legislative as well as executive power, Cl 5(2)(a) and (c) legislative power and Cl. (b) combines both legislative as well as executive power. The word ‘regulation’ in para 5(2) (b) is thus of wide import.

(Paras 186,197)

The word “regulate” the allotment of land to members of Scheduled Tribes in scheduled area in the Fifth Schedule by Cl.5(2) (b) must be read as a whole to ensure regulation of the land only to and among the members of the Scheduled Tribes in the scheduled area. In the light of the provisions contained in Cl. (a) of sub-para (2) of para 5, there is implied prohibition on the State’s power of allotment of its land to non-tribals in the scheduled areas. When so read there is no incompatibility and inconsistency between the power of the executive Government and the Constitution and conjoint operation would elongate the good governance of the scheduled areas. So, while prohibiting transfer of land between natural persons, i.e., tribes and non-tribals and preventing non-tribals to purchase from or transfer to another non-tribal, his right, title or interest in the land in the scheduled area, at the same breathe would not be permissible for the Government to transfer their land to a non tribal except for equally competing public purpose. The answer obviously should be that it is permissible to the Government to transfer its lands to the non-tribals. This negative answer leads to effectuate the constitutional objective to preserve the land in the scheduled area to the tribals, prohibits the Government from allotting their land to the non-tribals; prohibit infiltration of the non-tribals into the scheduled area and prevents exploitation of the tribals by non-tribals in any form. This purposive interpretation would ensure distributive justice among the tribals in this behalf and elongates the constitutional commitment. Any other interpretation would sow the seed beds to disintegrate the tribal autonomy, their tribal culture and frustrate empowerment of them, socially, economically and politically, to live a life of equality, dignity of person and equality of status.

It would, therefore, be clear that the executive power of the State to dispose of its property under Art. 298 is subject to the provisions in the Fifth Schedule as an integral scheme of the Constitution. The legislative power of the State under Art. 245 is also subject to the Fifth Schedule, to regulate the allotment of the Government land in the scheduled areas. Obviously, therefore, the State Legislature of Andhra Pradesh has now imposed total prohibition under Mines Act to transfer its lands to the non-tribals. Doubtless that under Art. 298, the State exercises its power of disposal for public purpose. When two competing public purposes claim preferential

policy decision, option to the State should normally be to elongate and achieve constitutional goal. Secondly, the constitutional priority yields place to private purpose, though it is hedged by executive policy. As a facet of interpretation, the Court too adopts purposive interpretation tool to effectuate the goals set down in the Constitution. Equally, the executive Government in its policy options requires to keep them in the back drop and regulate disposal of their land property in accordance with the constitutional policy, executive decision backed by public policy and, at the same time, preserve paramount Tribal interest in the scheduled area. No abstract principle could be laid in that behalf. Each case requires examination in the backdrop of the legislative / executive action, its effect on the constitutional objectives and the consequential result yields there from.

(Paras 87, 88)

(C) Constitution of India, Art. 21 – Right to life – Scope – Right to life means something more than mere survival of animal existence – Thus tribals have fundamental right to social and economic empowerment.

Per K. Ramaswamy, J. :- Right to life enshrined in Art.21 means something more than mere survival of animal existence. The right to live with human dignity with minimum sustenance and shelter and all those rights and aspects of life which would go to make a Man's life complete and worth living, would form part of the right to life. Enjoyment of life and its attainment – social, cultural and intellectual – without which life cannot be meaningful, would embrace the protection and preservation of life guaranteed by Art. 21. The tribals, therefore, have fundamental right to social and economic empowerment. As a part of right to development to enjoy full freedom, democracy offered to them through the States regulated power of good Government that the lands in scheduled areas are preserved for social – economic empowerment of the tribals.

(Para 79)

(D) A.P. Scheduled Area Land Transfer Regulation (1 of 1959), S.3 – Govt. land in scheduled area – Transfer by Govt. – Permissibility – Regulation does not prohibit transfer of Govt. and for its public purpose.

Mines and Minerals (Regulation and Development) Act (67 of 1957), S. 11(5).  
Constitution of India, Sch. 5, Para 5(2).

Per K. Ramaswamy J:- The plea that the Government being empowered to operate the Regulation, by implication, the Regulation does not apply to Government land in scheduled area perforce, is untenable in view of the unambiguous constitutional, legislative and executive policy. The further plea that there is no need for its incorporation and that the Government would be prohibited from transferring such land for public purpose, is untenable. They do not detract from legal reasoning purposive interpretation. The transfer of such land for a public purpose, viz., to construct a hospital or to set up a bank by the Government or its instrumentalities and for any public purposes etc., is not prohibited for two reasons, namely, (i) there is no transfer of interest in the Government land in favour of a non-tribal; (ii) there is no transfer of its land in law to itself. It cannot, therefore, be said that the Regulation prohibits transfer of Government land for its public purpose. What the Regulation prohibits is the transfer of right, title and interest in the immovable property in scheduled area in favour of non-tribals. There is no prohibition on non-tribals philanthropist to organise, through tribals and a Co-operative Society composed solely of tribals,



actions to ameliorate socio-economic as of the tribals in the scheduled area. The plea that the rich mineral wealth being a national asset cannot be kept unexploited which is detrimental to the national Government, is devoid of force. Instead of getting the minerals it exploited through non-tribals, by exploitation through an appropriate scheme, without disturbing ecology and forest, by the tribals themselves, either individually or through Co-operative Societies composed solely of the tribes with the financial assistance of the State or its instrumentalities. It would itself be an opportunity to the tribals to improve their social and economic status and a source of their economic endowment and empowerment and would give them dignity of person, social and economic status and an opportunity to improve their excellence.

(Para 110)

In the absence of any total prohibition, undoubtedly Art. 298 empowers the Governor being the head of the Executive to sanction transfer of its lands. Since the Executive is enjoined to protect social, economic and educational interest of the tribals and when the State leases out the lands in the scheduled areas to the non-tribals for exploitation of mineral resources, it transmits the correlative above constitutional duties and obligation to those who undertake to exploit the natural resources should also be to improve social economic and educational empowerment of the tribals. As a part of the administration of the project, the licensee or lessee should incur the expenditure for;

- a) re-forestation and maintenance of ecology in the scheduled areas;
- b) maintenance of roads and communication facilities in the scheduled areas where operation of the industry has the impact;
- c) supply of potable water to the tribals;
- d) establishment of schools for imparting free education at primary and secondary level and providing vocational training to the tribals to enable them to be qualified, competent and confident in pursuit of employment;
- e) providing employment to the tribals according to their qualifications in their establishment / factory;
- f) establishment of hospitals and camps for providing free medical aid and treatment to the tribals in the scheduled areas;
- g) maintenance of sanitation;
- h) construction of house for tribals in the scheduled areas as enclosures; The expenditure for the above projects should be part of his / its Annual Budget of the industry establishment or business avocation / venture.

(Para 113)

(E) Mines and Minerals (Regulation and Development) Act (67 of 1957), S. 11(5) – Mining lease – Govt. land in scheduled area – Transfer of lease or renewal of mining lease in favour of non-tribals – Not permissible – However Govt. can transfer its land in favour of its instrumentalities.

Constitution of India, Sch. 5, Para 5 (2).

Per K. Ramaswamy, J. :- In view of the conclusion that the word 'person' would include the State Government, the necessary corollary would be that the transfer of the land in scheduled area by way of lease, for mining purpose in favour of non-tribals stands prohibited by para 5 (2) (b) of the Fifth Schedule read with S.3 of the Regulation. It is on

record that the non-tribal individuals have transferred their, lease hold interest in the mining leases in favour of some of the respondent-Companies. The Government stand prohibits to transfer the mining leases to Corporation aggregate etc. except to its instrumentality.

(Para 115, 116, 119)

Transfer of the Government land in favour of its instrumentalities, in the eye of law, is not a transfer but one of entrustment of its property for public purpose. Since, admittedly, a public Corporation acts in public interest and not for private gain, such transfer stands excluded from the prohibition under para 5(2)(b) of the Fifth Schedule and S.3 (1) (a) of the Regulation. Such transfer lease, therefore, stands upheld. But a transfer of mining leases to non-tribal natural persons or company. Corporation aggregate or partnership firm etc. is unconstitutional, void and inoperative.

(Para 117)

(F) Forest (Conservation) Act (69 of 1980), S.2 – Preservation of forest – Mining operation in forest area – Provisions of Act get attracted to ensure preservation of forest – Govt. land in reserved forests – Mining leases in respect of – Grant or renewal – It is duty of State Govt. to obtain prior approval of Central Govt.

(paras 122, 125, 127, 130, 197, 239)

(G) Mines and Minerals (Regulation and Development) Act (67 of 1957), S.11(5) as amended in 1991) – Scope – Prohibition as to allotment of land for mining to non-tribals – Provisions under S. 11(5) are prospective in nature.

(Paras 110, 195, 196, 238)

(H) Forest (Conservation) Act (69 of 1980), S.2 – Expression “Forest land” – Does not mean only reserved forest but should be given extended meaning to cover track of land covered with trees, shrubs, vegetation and undergrowth under mingled with trees with pastures, be it of natural growth or man made forestation (Per Pattanaik, J.)

(Para 233)

(I) Forest (Conservation) Act (69 of 1980), S.2 – Mining activities in forest land – Absence of material to show that lessees in present case were carrying on such activities on land which formed part of forest land – No direction for prohibition of activities can be issued – State Govt. directed to examine mining activities were carried on forest land and then to proceed according to law. (Per Pattanaik, J.)

(Para 239)

(J) Environment Protection Act (29 of 1986), S.7 – Mining lease – No date to show that on account of mining operations in question there had been emission of environmental pollutant in excess of standard prescribed – Lease cannot be annulled on ground of violation of provisions of Act. (Per Pattanaik, J.)

(para 236)

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Samatha

Vs

State of Andhra Pradesh

(K. Ramaswamy, S. Saghir Ahmad, G.B. Pattanaik JJ)11.07.1997

JUDGMENT

K. RAMASWAMY, J.

1. Leave granted.

2. These appeals are directed to resolve mutually inconsistent law adumbrated by two Division Benches of Andhra Pradesh High Court. The appeals arising from SLP (C) No.17080-81/95 are filed against the judgement passed on April 28, 1995 in Writ Petition Nos.9513/93 and 7725/94 in which the Division Bench has held that the Andhra Pradesh Scheduled Area Land Transfer Regulation (1 of 1959), as amended by Regulation II of 1970 (for short, the 'Regulation') and the Mining Act (67 of 1957) do not prohibit grant of mining leases of Government land in the scheduled area to the non-tribals. The Forest Conservation Act, 1980 (for short, the 'FC Act') does not apply to the renewals. The Andhra Pradesh Forest Act, 1967 also does not apply to the renewal of the leases. It, accordingly, dismissed the writ petitions filed by the appellant challenging the power of the Government to transfer the Government land situated in the tribal area to the non-tribals for mining purpose.

3. In the appeal arising from SLP (C) No.21457 of 1993 filed by Hyderabad Abrasives and Minerals, another Division Bench, earlier had taken dramatically the opposite view and held that mining leases are illegal. The word 'person' used in Section 3 of the Regulation includes Government. Any lease to the non-tribals even of a Government land situated in scheduled area is in violation of Section 3 and so is void. Equally, it held that a mining lease in a forest area for non-forest purpose or renewal thereof, without prior approval of the Central Government, is in violation of Section 2 of the FC Act. Accordingly, the Division Bench directed the Government to prohibit mining operations in scheduled area except that the mines stacked on the surface be permitted to be removed after obtaining proper permits. This decision, though earlier in point of time, was not brought to the notice of later Bench mentioned above.

4. The admitted facts are that Borra reserved forest area along with its environs consisting of 14 villages, is the notified scheduled area in Ananthagiri Mandal of Visakhapatnam District of Andhra Pradesh. The State Government granted mining leases in this area to several non-tribal persons. K. Appa Rao, respondent No.13, was granted mining lease in that reserved forest area. Most of the area granted to M/s. Perclase India Ltd., respondent No.7 falls in reserved forest area M/s. Unirock Minerals Pvt. Ltd., respondent No.8 had 125.30 acres in the reserved forest area and 45.70 acres in the non-reserved forest area. M/s. Kalyani Minerals, respondent No.10 had 48.00 acres in the reserved forest area and 32 acres in non-reserved forest area. One M. Seetharama Swamy was granted mining lease of an extent of 300 acres in Borra reserved forest area. Sri R.K. Deo is also having mining lease in that area. Respondent No.9 is said to be the legal heir of M. Seetharama Swamy. These facts are admitted in the counter-affidavit filed by the Government.

5. It is also an admitted fact that Ananthagiri Mandal in which the mining areas are situated, is within the scheduled area. The tribal people from tribal groups are inhabiting therein. Two mining leases were granted to one Chalapati Rao, respondent No.11 for graphite to an extent of 50 acres in Nandkota Reserve Forest for a period of 20 years on August 26, 1971. The lease deed was executed on January 24, 1972 and expired on January 23, 1992; it is stated that thereafter mining operations are not being carried on. Similarly, mining lease for an extent of 111 acres of land situated in Chimidipalli and Saripalli villages of Ananthagiri Mandal, was granted on August 29, 1974. The lease was executed on December 20, 1974 for a period of 20 years, which expired on December 19, 1994. Mining lease for Andhra Phosphates (P) Ltd was granted to an extent of 271.544 hectares in Y.Seetharampram, Veduruvada Reserved Forest on March 23, 1957 for 20 years. The lease deed was executed on June 10, 1957 which was renewed for 20 years on May 2, 1978. The renewed deed was executed on the even date which would continue upto June 9, 1997. As stated earlier, K. Apparao, respondent No. 13, was granted mining lease for 20 years on July 26, 1978 which was executed on January 24, 1979. It is due to expire on July 23, 1999. But, it is stated that at present he is not working out the mining operations. Respondent No.14, M. Venkatapathi Raju was granted mining lease for 13.84 acres for yellow ochre in un surveyed revenue poramboku, in Konapuram, Ananthagiri Mandal for a period of 20 years on April 4, 1980. The lease deed was executed on April 26, 1981 and is to expire on April 25, 2001. It is claimed that the lease is not being worked out and it is said to have lapsed. The lease granted to M/s. Visaka Mines & Minerals, respondent No.15, is said to be in non-surveyed area in Mandaparti village of Ananthagiri Mandal on July 20, 1978 for a period of 20 years. The lease deed was executed on December 18, 1978 and it would expire on December 17, 1998. They are working out their mines. Another lease was granted for 130 acres in reserved forest area of Sivalingam village of Ananthagiri Mandal on September 20, 1977 for a period of 20 years, which expires on December 30, 1997. It is stated that the lease had lapsed since it was not being worked out, w.e.f. February 9, 1988 as per G.O.Ms. No.295 dated June 6, 1989. Associated Mica Export, respondent No.16 holds two leases for 50 acres in Dumbriguda village of Ananthagiri Mandal for a period of 20 years granted on March 13, 1986. The lease was executed on September 11, 1986 and it is to expire on September 10, 2006. It is stated that lease is not being worked out at present. They had another lease for 10 acres in Borra group of villages for 20 years granted on October 20, 1983 and the lease deed was executed on November 21, 1983. The lease is to expire on November 20, 2003. It is stated that the mine is not being worked out at present. Respondent No.17, N. Madan Mohan Reddy had a lease in Mallagumuru village of Ananthagiri Mandal. The extent of the land has not been mentioned but the lease was granted on July 4, 1984. The lease was executed on September 5, 1984 and it is to expire on September 4, 2004. It is stated that the mine is not being worked out at present. M/s. Trowall Cements Ltd. obviously got it transferred from N. Madan Mohan Reddy to whom lease was granted for 20 years in G.O.Ms. No.303, Industries and Commerce on July 9, 1984 for a period of 20 years. The lease deed was executed by Madan Mohan Reddy on January 7, 1985 and is due to expire on January 6, 2005. It is stated that the mining is not being worked out and steps are being taken to declare it as a lapsed lease. It is the case of the appellant that the above lease was subleased to M/s. Indian Rayon Industries Ltd., respondent No.19 but in the affidavit filed by the Government, it is said that no steps are taken to win over the mine from the leased area. On the other hand, in the counter- affidavit filed on behalf of respondent No.19, it is admitted that the mines are being worked out and that high purity calcite with minimum silica content is their product. Calcite mine is available in Visakhapatnam District at a short distance of 100 Kms. from their factory situated in Visakhapatnam. One M. Laxminarayana was the lessee of an extent of 21.56 acres of land in Nimmalapadu village in Ananthagiri Mandal, which is valid upto May 31, 2005. Another lease of 37.895 hectares in Ananthagiri Mandal was granted for a period of 10 years.



The lease is valid upto July 3, 1996. Respondent No. 19 had transfer of the said lease in its favour in G.O. Ms. No.4, Industry and Commerce dated January 5, 1993 and they are working out the mines. M/s. Birla Periclase is a subsidiary of respondent No.19. It is stated in the affidavit filed on behalf of the Government that 21.56 acres of land containing mica, calcite, quartz and yellow ochre in Nimmalapudu village which is the subject matter of the original lease dated November 17, 1984 for a period of 20 years had by M. Laxminarayana, was transferred to respondent No.19. It was stated that the same has further been transferred in favour of M/s. A.P. Mineral Development Corporation Ltd. on December 20, 1994 by G.O.Ms. No. 456 dated December 7, 1994. The latter is a State Government Undertaking but that is not so stated in the counter-affidavit filed on behalf of respondent No.19. It is sought to be justified that M.Laxminarayana, Respondent No. 20, has a legal right to assign the lease in favour of Respondent No.19. It is also admitted in the Government's counter-affidavit that by operation of Section 11 (5) of the Mine and Mineral (Regulation and Development) Act, 1957 (for short the 'Mining Act'), as amended by State Act, on and from August 14, 1991, no mining leases in the scheduled area should be granted in favour of non-tribals. It is also admitted that tribals have their patta lands in five enclosures and have their right to cultivate those lands. It is the case of the appellant that after re-survey, the entire area was identified as reserved forest area or at any rate is a forest area in scheduled area.

6. On this factual matrix, the appellant-Society claiming to protect the interests and life of the scheduled tribes in the area, filed the writ petitions questioning the power of the Government to grant mining leases in favour of non-tribals in the scheduled area, in violation of the Regulation, which prohibits transfer of any land in scheduled area to a non-tribal. The Division Bench of the High Court had held that the Regulation does not prohibit transfer of the Government land by way of lease to the non-tribals. The word 'person' in Section 3 of the Regulation is applicable to natural persons, namely, tribals and non-tribals. The Regulation prohibits transfer, of the land in schedule area by a tribal to a non-tribal natural persons. The leases granted in accordance with the provisions of the Mining Act to non-tribals are valid. The FC Act was not violated by grant of leases or renewal thereof. Therefore, the writ, as sought for, was not available. Resultantly, the writ petitions were dismissed.

7. In the appeal of M/s. Hyderabad Abrasives and Minerals, the admitted facts are that the appellant it was granted mining lease for 20 years in 1974 for mining literate situated in Peddamaredumilli Reserved Forest Area in East Godavari District. The total extent of the land leased was 318 acres out of which it was carrying on mining operation in 42. Similarly, other, persons were also granted mining leases in the reserved forest area in East Godavari District. Consequently, M/s. Shakti, the voluntary organisation filed the writ petition in the High Court questioning the power of the Government to grant mining leases in violation of Section 3 of the Regulation and the FC Act. The lease expired in 1994. The Division Bench held that by operation of the prohibition contained in Section 3 of the Regulation and Section 2 of the FC Act, the appellant is not entitled to mining operations. However, since he had already broken up the mining, the excavated mine on the surface may be removed on obtaining permission from the appropriate authorities. Feeling aggrieved, the appellant has filed the above appeal.

8. The primary questions in these Cases are: whether the Regulation would apply to transfer of Government land to a non-tribal? Whether the Government can grant mining lease of the lands situated in scheduled area to a non-tribal? whether the leases are in violation of Section 2 of the FC Act? And whether the leases are in violation of Environment Protection Act, 1986 (for short, the EP Act)? It is stated in paragraph 3 (c) of the Petition of Samatha that the Borra Reserve Forest

area was part of the domain of the Rajah of Jeypore and from time immemorial, it was a tribal area occupied by tribal villages. They have pattas in their favour and do cultivation. In 1967, 14 villages were declared as Borra Reserved Forest. About 250 tribal families settled in 14 villages have in their occupation, 436 acres of land in five enclosures. They are situated in Ananthagiri Mandal. In the counter-affidavit filed on behalf of respondent No.10, M/s. Kalyani Minerals, it is admitted that Borra caves may be as old as million of years. It is admitted that the "entire area around Borra caves is thickly forested". In the counter-affidavit filed by the District Forest Officer, respondent No.4, it is admitted that Ananthagiri Mandal is a scheduled area and the tribals belong to diverse denominations. It is also one of the important hill regions of the Eastern Ghats and is known not only for the diversity of its flora and fauna but also for the richness of mineral deposits. It is also rich in forest wealth and the minerals. It is their contention that the forest wealth in this area is the national asset.

9. Agriculture - A means of livelihood, succor for, social justice and base for dignity of person.

10. Agriculture is the main part of the economy and source of livelihood to the rural Indians and a source and succor for social status and a base for dignity of person. Land is a tangible product and sustaining asset to the agriculturists. In Rao V. Union of India [(1981) 2 SCR 1] a Constitution Bench had observed that India being a predominantly agricultural society, there is a "strong linkage between the land and the person's status in social system". The strip of land on which they till and live assures them equal justice and 'dignity of their person by providing to them a near decent means of livelihood'. Agricultural land is the foundation for a sense of security and freedom from fear. Assured possession is a lasting source for peace and prosperity. Agriculture is the only source of livelihood for Scheduled Tribes, apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality, permanent place of abode and work and living. It is a security and source for economic empowerment. Therefore, the tribes too have great emotional attachment to their lands. The land on which they live and till, assures them equality of status and dignity of person and means to economic and social justice and potent weapon of economic empowerment in social democracy.

11. Ninety per cent of the Scheduled Tribes predominantly live in forest areas and intractable terrains 95 per cent of them are below poverty line and totally depend upon agriculture or agriculture based activities and some of them turnout as migrant construction labour due to their displacement from hearth and home for the so-called exploitation of minerals and construction of projects. As per 1991 Census, in Andhra Pradesh the population of the Tribes was 41.99 lakhs. They adopted traditional shifting cultivation (Podu or Jhoom), since they are poor, and illiterate and away from winds of modern agricultural technology and economy. Such cultivation is predominantly prevalent in Andhra Pradesh, Bihar, Orissa, Madhya Pradesh, Maharashtra, Gujarat, Rajasthan, North-eastern States and some parts of Uttar Pradesh. According to this practice, an area covered with vegetation is burnt out to serve as manure. Cultivation is done for a year or two and then the area is abandoned. Another area is cleared in a similar manner and again abandoned. Vegetation regenerates in the abandoned area and after a lapse of 8 to 10 years the area is again cleared and burnt and, this, shifting cultivation is carried on. This cycle repeatedly goes on. Due to pressure on land this shifting cultivation has now been abandoned and the Tribes are settling to cultivate crops in fixed holdings.

## **Plight of the Tribes.**

12-14. Detailed study in this behalf and of their exploitation has been conducted by sociologists and anthropologists the foremost notable of them being Prof. C.V.F. Haimendorf and Arher. Many others equally have evinced keen interest and investigated into living conditions of the tribes, their culture and customs, etc. which established that initially the tribes had held large tracts of lands as masters and had their own rich culture with economic status and cohesiveness as compact groups. The policy adopted by the rulers encouraged non-tribals to immigrate in large number and settle down in tribal areas. Governments compelled tribal Chieftains to permit non-tribals to take hold of revenue administration, which led to the slipping of lands from the hold of the tribes to the, non-tribals . In the "Tribes of India - The Struggle for Survival". Prof. Haimendorf has graphically explained diverse methods by which the tribals were deprived of their lands. Numerous methods adopted to exploit them having become unbearable, they rebelled against their exploitation. Inderelli [Andhra Pradesh] police firing in which hundreds of innocent tribals were killed, is one of the latest events which would depict the enormity of their exploitation. By laying the railway tracks and roads as means of communication by the British rulers, the tribal areas became accessible to the non-tribal immigrants who, with limited means, came in large number in search of livelihood and settled down in the agency areas and acquired large holdings by exploitation of the tribals. Dr. P.V. Ramesh, IAS, Director, Tribal Welfare in his article "Land Reforms Land Transfer in Scheduled Area" in a seminar organised by A.P. Judicial Academy and published by it as "Scheduled Tribal and Social Justice" page 178 at 202 has stated that in Utnoor Division of Adilabad District a tribal in whose name, 148 acres was recorded as owner, was declared as surplus land-holder under, the Land Reforms Act and the only 5 acres of land in his actual possession and enjoyment was taken by the Government as surplus land. In contrast, Izaradars surrendered Government land as they entered their names in revenue records as owners and claimed compensation under the Land Acquisition Act for 742 acres.

15. The tribal economy was simple but with the gradual contact with the non-tribals they started taking loans. The wiles of money-lenders and traders exploited their innocence. Honest, truthful and hard working tribals become prey for the greed and exploitation by non-tribals. They charged maximum rate of interest etc. for fringe money or gains or goods lent to them. Tribals had to repay disproportionately in three or four fold in kind. Exorbitant rate of interest was charged and repayment collected in kind, i.e., the produce in three or four-fold. In the "Land Alienation and Restoration in Tribal Communities in India" edited by S.N. Dubey and Ratna Murdia, (Himalaya Publishing House), compilation of articles presented and read out at a Seminar organised by Tata Institute of Social Science in which bureaucrats and social scientists participated. B. Danam, IAS, then Project Officer, ITDA, Khammam, had highlighted in his paper about diverse modes of exploitation by moneylenders of the tribals in Andhra Pradesh. They were short-term loan at an exorbitant rate of interest (Kandagutha), the repayment of which was made in kind, i.e., harvest produced from a particular extent of land; the medium term loan on the security of the immovable property, repayable with compound interest at yearly or half yearly rests. Third mode was lease of land against a loan for a fixed number of years (Tirumanam) during which period the tribals have to cultivate their land, raise the crop and deliver the entire produce to the moneylender; by usufructuary mortgage, the money lender remains in possession and enjoys the produce from the land for a fixed number of years or till the principal sum is repaid; by advancing cash and kind loans (Namu) and lending commodities like food grains mostly for sustenance during the lean months or for seedlings, on the condition that the same would be repaid in full along with flat rate of interest at the time of harvest and in default payment should be with compound interest; in case

of further default, the accumulated arrears get merged with the principal, by way of compound interest. The other types of money-lending extend to petty loans or selling clothes on credit to the tribals during the lean months on the condition that it would be paid in full at the time of harvest and in default the money-lender would take over the land by threat of physical force.

#### **Legislative intervention - Enforcement ineffectiveness.**

16. The Ganjam and Vizagapatnam Act of 1839 declared the Agency Areas of the Madras Presidency, comprising parts of southern Orissa and seven present Andhra Pradesh districts for special administration. In 1874, the Scheduled Districts Act XIV (Central Act) was passed. There under, Scheduled districts were defined to mean the territories mentioned in the First Schedule and parts thereof; they also include any other territory to which the Secretary of State for India by resolution in Council, may declare. Subsequently, the Act was extended to the Taluk of then Badrachalam in East Godavari District which is now a part of Khammam District together with the districts covered under 1839 Act. The provincial Government issued rules prescribing the procedure to be followed by the officers appointed there under to administer Agency Tracts. Later on, the Agency Tracts and Land Transfer Act 1 of 1917 came to be passed. There under, to mitigate the hardships of the tribals from the wiles of money-lenders and other migrants from plain areas, provision was made so that rate of interest would not exceeding 24% per annum and compound interest would not be charged nor any collateral advantage would be taken by the money-lenders. The total interest allowed or decreed should not to exceed the principal amount. The "Scheduled Districts" defined in 1874 Act were reconfirmed in 1917 Act. Section 4 thereof prohibited transfer of land in the Agency Tracts which read as under :

"4. Transfer of Immovable property by a member of a hill tribe. (1) Notwithstanding any rule of law or enactment to the contrary, any transfer of immovable property situated within the Agency Tracts by a member of a hill tribe shall be absolutely null and void unless made in favour of another member of a hill tribe, or with the previous consent in writing of the Agent or any other prescribed officer.

(2) Where a transfer of property is made in contravention of subsection (1), the Agent or any other, prescribed Officer may on application by any one interested, decree ejectment against any person in possession of the property claiming under the transfer and may restore it to the transfer or his heirs.

(3) Subject to such conditions as may be prescribed an appeal against a decree or order under sub-section (2) if made by the Agent shall lie to the Governor in Council and if made by any other officer shall lie to the Assistant Agent or to the Agent as may be prescribed. "Montague and Chelmsford Report, 1918 briefly touched the administration of tribal areas and political reform excluded them from the reformed provincial Governments. Govt. of India Act, 1919 divided the area into two parts "wholly excluded and partially excluded areas for reform". The former were shall and the latter were given joint responsibility of the Governor and the Governor General in Council."

17. Montague Chelmsford Report of 1918 suggested that the backward area where primitive (tribal) live should be excluded from proposed political reform and administration was entrusted to the Governors of the Provinces.

18. Pursuant to Simon Commission Report, the Government of India Act, 1935 dealt with excluded and partially excluded areas as per Order 1936 issued under Section 91 of Government of India Act, 1935. Simon's Report is worth-extracting here and reads thus:

"There were two dangers to which subjection to normal laws would have specially exposed these peoples, and both arose out of the fact that they were primitive people, simple, unsophisticated and frequently improvident. There was a risk of their agricultural land passing to the more civilized section of the population, and the occupation of the tribals was the most part agricultural; and, secondly they were likely to get into the "wiles of the moneylenders". The primary aim of Government policy then was to protect them from these two dangers and preserve their tribal customs; and this was achieved by prescribing special procedures applicable to these backward areas."

19. Therein also, "Scheduled Districts" defined in 1874 Act were treated as excluded and partially excluded areas. The administration thereof was exclusively vested in the Governor of the Province under Section 92 of Government of India Act, 1935 sub-sections (1) and (2) which are relevant for our purpose read as under: "92. (1) The executive authority of a Province extends to excluded and partially excluded areas therein, but, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature shall apply to an excluded area or a partially excluded area, unless the Governor by public notification so directs, and the Governor in giving such a direction with respect to any Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit. (2) The Governor may make regulations for the peace and good government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any regulations so made may repeal or amend any Act of the Federal Legislature, or of the Provincial Legislature or any existing Indian Law, which is for the time being applicable to the area in question. Regulations made under this sub-section shall be submitted forthwith to the Governor General and until assented to by him in his discretion shall have no effect, and the provisions of this Part of this Act with respect to the power of His Majesty to disallow Acts shall apply in relation to any such regulations assented to by the Governor General as they apply in relation to Acts of a Provisional Legislature assented to by him."

20. The Government of India (Adoption of Indian Laws) Order, 1937 repealed 1874 Act and brought excluded and partially excluded areas directly under the governance of the Governor under, Section 92 of the Government of India Act, 1935. Thus they became the Scheduled Areas by virtue of the Scheduled Areas(Part 'A' States) Order, 1950 issued by the President of India. After the advent of the Constitution, Fifth and Sixth Schedules were engrafted as part of the scheme of the Constitution by the founding fathers. Fifth Schedule empowers the President of India who there under issued Scheduled Areas (Part 'A' States) Order, 1950 declaring specified areas therein to be Scheduled Areas with in migration became in due course, tribals. Even those migrant non-tribals were prohibited to purchase the lands in agency areas from the tribals except with the prior sanction of the officer appointed by the Government in that behalf. However, with the connivance and fabrication of revenue records, non-tribals got hold of the lands and exploited the tribals.

22. Prof. Haimendorf has explained how notoriously the migrants swelled in number in the agency areas in Telangana of Andhra Pradesh and dispossessed the tribals from their holdings with impunity and prevented them from enjoying right over their lands or unlawfully dispossessed them in collusion with the Patwaris, Deshmukh or Deshpandes, the lower level local officials. He has given the comparison of population at page 57 thus:

"Despite all such obstacles the allocation of land to the tribals of Adilabad which began in 1944 made good progress. By 1945 a total of 45,417 acres of land had been granted to 3,144 tribals, and by 1949 the amount of land assigned on patta to tribals had risen to 160,000 acres and the numbers of beneficiaries to 11,198. The work continued until about 85 per cent of the tribal householders of Adilabad adequate holdings of cultivable land." At page 59, he has stated that:

"Visual impressions of the process of ethnic and cultural change are supported by demographic figures. While in 1951 the population of Utnoor Taluk was only 4,404, the majority of whom were tribals, by 1961 it had risen to 55,099 and by 1971 to 93,823. No official census figures are available for later years, but according to a malaria survey of 1977 the population of the taluk had then reached a total 112,000. This phenomenal increase is clearly due to immigration, and all the new comers are non-tribals. The change in the composition of the population is reflected in the figures for tribals in individual circles. Thus in the Marlavai Circle, which in 1941 was almost totally tribal, the percentage of tribals in 1961 was still 90.38 per cent, but by 1971 it had dropped to 65.52 per cent, a figure which undoubtedly has diminished since then."

Narrating the event (after his revisit), he has stated at pages 59-60 thus:

"On 7 December 1976, Kumra Boju of Kerimeri came to see me in Kanchanpalli and told me the following story: My father Somu owned fifteen acres of patta land, but for the last thirteen years Rama Gaudu of Asifabad [a man of toddy-tapping caste] has been cultivating this land. When my father died I was a small child, and Rama Gaudu occupied our land. Some time ago I applied to M. Narayan, the Special Dy. Collector, for restoration of my father's land. The Dy. Collector, decided the case in my favour and restored the land to me. I was very happy and ploughed the land in preparation for sowing jawari. But when I was ready to sow Rama Gaudu, supported by some villagers of Keslaguda, stopped my cultivating. Then the Tahsildar, the revenue inspector and the Patel came to the village and told me that my father's land was mine by right. But at the same time they advised me not to cultivate that land, but to occupy instead of adjoining field which belongs to a Muslim. How could I do this? Then Rama Gaudu brought some men and sowed on land. Moreover Rama Gaudu had reported to the police that I had illegally ploughed his land. So the Sub-inspector of police came to me house with some constables and wanted to arrest me. But in the end they did not take me to Asifabad. Rama Gaudu has occupied also the patta land of three other Gond, who are my mother's brothers. they all died but they have sons who have a claim to their land. Now none of us has any land of our own because Rama Gadure has all of it taken away."

23. This is only a tiny iceberg of several instances. He has highlighted the gross injustice done to the tribals. The book contains full details which need no recounting here to avoid needless burden.

24. Dr. G.P. Reddy at pages 66-67 of his book "Politics of Tribals Exploitation" has stated thus:

"These non-tribal cultivator immigrants enjoyed liberal concessions. They were assigned land just for asking even waiving land revenue. Many of them were also conferred with right of Patel and Patwari. They were encouraged not only to establish new villages but also to settle in already well-established Goa villages. In this process the aboriginals gained nothing but became mute witnesses to the process set in by the rulers which ultimately pauperised the tribals, turning them from land owners to agricultural proletariat."

25. Writing about the non-tribals acquiring interest in the land in the tribal areas of Adilabad. Sethumadhava Rao has stated that:

"Where land outside the forest was vacant it was readily granted Patta to the non-tribals. The Gonds too had an opportunity of acquiring Patta rights in the land but they were slow to understand that they would suffer if they did not take advantage of these concessions. The new Watandars made a subtle use of their office as village headmen to evict the original possessors or take lands vacated by them for themselves."

26. Another modus operandi for evicting the tribals who were cultivating the lands was by treating them as Sivaijamabandi, i.e., treating as unauthorized occupants. A cultivator who held land under Sivaijamabandi tenure is liable to eviction at any time. The tribals who were owners under the law were treated as unauthorised occupants by manipulation of revenue records. The tribals who could not understand the meaning of Patta rights could not be expected to understand the meaning of Sivaijamabandi. In many cases, though tribal had been cultivating the lands for several decades and generations, they were purposefully categorised as Sivaijamabandi, and were evicted. Their lands were assigned to non-tribals. It is ridiculous even to classify the lands held by tribals as Sivaijamabandi just because these people lacked knowledge of the nature of their rights over their lands.

27. Traditionally, the tribals of the area acquired absolute right over the land for cultivation the day they started clearing new patches of forest. Prof.Haimendorf has narrated hundred of such cases where in the poor tribals had complained to him as to how they had lost their lands because of wrong and false entries made in the land records by the Patwaris. Even till recently, the records were not maintained properly. This gave scope for the manipulation both by the Patwaris as well as by the petty revenue officials. This manipulation of records took place mainly due to corrupt practices.

28. Dubey's compilation gives first-hand account given by I.A.S. officers on the field representing Andhra Pradesh, Bihar, Gujarat, Maharashtra, represented then by K. Padmanabhaiah, the present Home Secretary, Govt. of India, Orissa, M.P, Rajasthan and West Bengal and they had given graphic first hand account of the magnitude of the problems of land alienations, causes of exploitation. They pointed out urgent need for restoration of the lands to the tribals. Dr. G.Prakash Reddy from ICSSR surveyed the problems once again and has graphically explained it in his "Politics of Tribal Exploitation" [Mittal Publication]. "The Khonds and Jaungs in Andhra Pradesh, Hand Book for Development" by Dr. Ramakant Nath, B.M. Boal and N. Soreng tells the plight of, and the need for restitution of the land to and rehabilitation of, Orissa tribes. The Reports of the Commissioner of SCs and STs, 1980-81 and 1984-85 also emphasise the urgency of the problem.

As in the year 1995, in Andhra Pradesh, the non-tribals are in possession of 7,51,435.66 acres in scheduled areas of A.P. State (Vide page 192 of Scheduled Tribes and Social Justice).

29. Like in Madras province, in Bihar, the Chotanagpur Tenancy Act, 1908 prohibited transfer of lands by sale etc. except with the previous sanction of the Deputy Commissioner. The Bombay Province Land Revenue Code, 1879 also prohibited transfer of land from a tribal to a non-tribal without the permission of the District Collector. Similarly, the Chotanagpur Tenancy Act, 1908, Santhal Pargana Tenancy (Supplementary Provisions) Act, 1959 and the Bihar Scheduled Areas Regulations, 1969 also prohibit the alienation of land of the tribals. These regulations also provide for restoration of alienated land to the tribals or when converted for urban use, to give them equivalent lands. As early as in 1901, in Gujarat, some measures of protection were provided (when it formed part of the Bombay Province) by amendment of Sections 73-A and 79-A in the Bombay Land Revenue Code, 1879, and imposed ban on transfer of land of tribes in those scheduled villages in which survey and settlement had not been introduced without previous permission of the Collector. The Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974 and the Maharashtra (Restoration of Lands to Scheduled Tribes) Act, 1974 also prohibit alienation and ensure restoration of alienated lands to the tribes. Dr. B.L. Maharda, IAS, a bureaucrat of Rajasthan Cadre, in his "History and Culture of Giriasias" of State of Rajasthan, has narrated the similar problems of tribals.

30. The Regulation prohibits absolutely the transfer of land in scheduled areas of Andhra Pradesh between tribals and non-tribals inter se. In 1971, an amendment was made to exempt hypothecation of lands by tribes to the Co-operative Land Mortgage Banks and other financial institutions approved by the Government, subject to certain conditions. In Assam, the Assam Land and Revenue Regulation Act, 1964 was enacted. In Himachal Pradesh, the H.P. Transfer of Land (Regulation) Act, 1968 was made. In Karnataka, the Bombay Tenancy and Agricultural Lands Act, 1948 was made applicable in Bombay region of the Karnataka State. The Mysore Land Revenue (Amendment) Rule, 1960 was suitably amended imposing restriction on alienation of the lands allotted to the Scheduled Tribes and Scheduled Castes without prior permission of the Government. In Kerala, the Kerala Land Reforms Act, 1963 contains similar provision. The Kerala Scheduled Tribes (Restriction of Transfer of Land and Restoration of Alienation Lands), Act, 1975 was enacted for the same object which has recently been amended by a bill, details whereof are not available. Madhya Pradesh, the M.P.L.P. Code, 1959, under Sections 165(6) and 168(l), prohibits alienation of land and remedy of restoration thereof is provided. In Manipur, the Manipur Land Reforms and Land Revenue Act, 1970 was made similarly, the Orissa Scheduled Areas (Transfer of Immovable Property) Regulation and also Orissa Land Reforms Act, 1960 were made for the same purpose. The Rajasthan Tenancy Act, 1955, as amended in 1956, prohibits such transfer of lands. In Sikkim, Sikkim Revenue Order, 1977 and Sikkim Agricultural Land Ceiling and Reforms Act, 1977 are enforced. Equally, the Madras Cultivating Tenants Protection Act, 1955 provides the same relief. In Tripura, Tripura Land Revenue and Land Reforms Act, 1960 imposes similar restrictions. In Uttar Pradesh, the U.P. Land Laws (Amendment) Act, 1982 was made though its implementation was stayed by the High Court.

31. The above bird's eye survey discloses the enormity of the yawning gap between making of the Acts and their proper enforcement. The magnitude of the problem is of national importance, which needs to be tackled and solved by Parliamentary law and effective enforcement.



32. As we have seen from the legislative history, from the beginning of the British rule in India the Legislature has adopted the policy to exclude some areas totally and some partially the governance through the Executive Council and given power to the Governor, of the Province and the Governor General/Viceroy to administer them with their special responsibilities. The partially excluded areas had the dual control by the Executive with primacy given to the Governor of the Province to apply or to exclude the application of the laws made by the Legislature or the Executive Council to the partially excluded scheduled areas. In either event the object was to prevent the tribals to get into the wiles of the money-lenders and preservation of their property and customs and to allow the tribals autonomy of their living in accordance with their customs and culture. Until the Simon Commission, the legislative protection was not available in that behalf. The Simon Commission found it necessary to bring the tribals to the mainstream of national life. In consequence, tribal area was to be brought under the direct administration of the elected governments by encouraging education, self-reliance and the provincial Government were to devote special attention for their upliftment. But the scheme was not given effect to in the Constitution of India Act, 1935. As is seen, Sections 91 and 92 of the Government of India Act and the Cabinet Mission Statement of May 16, 1946 emphasised the special attention on the tribal areas.

33. From this perspective, we are required to consider the debate in the Constituent Assembly and the draft statements by the two Committees, one for the North-east area now called Sixth Schedule and the rest of the areas covered under Fifth Schedule to the Constitution. The Draft Constitution on Fifth Schedule, presented by Dr. Ambedkar related to Draft Articles 215A and 215B making provision for administration and control of scheduled areas and Scheduled Tribes. Emphasis was laid therein on the creation of the Tribal Advisory Council to assist the Governor or the Ruler of each State having scheduled area therein, who are required to submit annual report to Government of India regarding the administration of scheduled area in that State, so that the executive power of the Union shall extend to that area to give directions to the State as to the administration of the said area. Draft Part II, clause 5 relates to law applicable to scheduled area and clause (a) of sub-clause (2) of Clause 5 postulated, prohibition or restriction on the transfer of land by or among members of the Scheduled Tribes in such area; clause (b) regulate the allotment of the land to members of the Scheduled Tribe in such area and clause (c) regulate by person who lend money to members of the Scheduled Tribes in such area. Sub-clause (3) of Clause 5 gives power to the Governor or Ruler to amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question. The draft report contained provision for allotment of the lands to the non-tribals. The report dated August 18, 1947 indicates that areas like the Madras and Orissa agency still need to be of simplified type which does not expose them to the complicated machinery of ordinary law course vide Shiv Rao's study. It is provided at pp.755-56 thus : As regards the allotment of new land for cultivation or residence, however, "we are of the view that the interest of the tribal need to be safeguarded in view of the increasing pressure on land every where. We have proceeded accordingly that the allotment of vacant land belonging to the State in scheduled area should not be made except in accordance with special regulation made by the Government on the advice of the Tribal Advisory Council". In the joint report on the partially excluded areas other than Assam and North-east frontier dated August 25, 1947 the above finds place As per the minutes of the advisory committee dated December 7, 1947 it was felt that the amendment should be made after discussion in the Constituent Assembly. In the revision of Articles qua allotment of land to non-tribals was retained. However, after authorisation given by the Constituent Assembly to make necessary restructuring of the Fifth Schedule as explained by Dr. Ambedkar, the Draft was amended excluding all references to the allocation of land of tribals to the non-tribals with no amendment proposed by any member vide Vol. 9 C.A.D., pp.965-1001.

34. It would, therefore, be seen that before the Draft Constitution became paramount law and the Fifth Schedule as its integral part, the members of the Constituent Assembly deliberated to protect land, the precious asset to the tribals, for their economic empowerment, economic justice, social status and dignity of their person by retention of the land with the tribals not only belonging to them but also allotment of the Government land. The proposal for allotment of the Government land to the non-tribals though was initially proposed but was ultimately dropped. After restructuring Fifth Schedule, as presently found, the specific provision in the draft report to allot land to non-tribals was omitted which was accepted by the members of the Constituent Assembly without any demur or discussion.

35. The draft Constitution 1948, clause (6) as originally proposed reads as under : "(i) alienation of allotment of land to non-tribals in Scheduled Areas, it shall not be lawful for a member of Scheduled Tribes to transfer any land in person who is not a member of the Scheduled Tribes; (ii) no land in scheduled area vested in the State within such area shall be allotted to person who is not a member of the Scheduled Tribes except in accordance with the rules made in that behalf by the Governor in consultation with the Tribal Advisory Council for the State." The text ultimately approved by the Constituent Assembly as part of the Constitution reads as under:

(1) The Governor may make regulations for the peace and good government of any area in the State which is for the time being a scheduled area.

(2) In particular and without prejudice to the generality of the foregoing powers, such regulations may:-

(a) prohibit or restrict the transfer of a land by or among members of the Scheduled Tribes in such area;

(b) regulate the allotment of land to members of the Scheduled Tribes in such area;

(c) regulate the carrying on of business as money-lenders by person who lend money to members of the Scheduled Tribes in such area."

36. It would, therefore, be clear from the narration of the Debates in the Constituent Assembly that various drafts were placed before the Constituent Assembly. Suggestions and ultimate approval of the Fifth Schedule, as extracted here in before, would manifest the animation of the founding fathers that land in the scheduled area covered by the Fifth Schedule requires to be preserved by prohibiting transfers between tribals and non-tribals and providing for allotment of land to the members of the Scheduled tribes in such area and regulating the carrying on of the business by money-lenders in such area.

### **Constitutional Scheme to protect the Tribes**

37. Chapter VI, Part X of the Constitution deals with "Scheduled Tribes and Tribal Areas". Article 244 provides that the provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the State of Assam,

Meghalaya, Tripura and Mizoram. The provision of Clause (2) of Article 244-A are not relevant for the purpose of this case; hence omitted. The Fifth Schedule makes the provisions as to the administration and control of Scheduled Area and Scheduled Tribes. Para(1) envisages that unless the context otherwise requires, the expression "State" defined in the Schedule does not include the State of Assam, Meghalaya, Tripura and Mizoram. Part V of the Schedule gets attracted to its administration and control. Para (2) envisaged that subject to the provisions of the Schedule, the executive power of a State extends to the Scheduled Areas enumerated there in. Special duty has been entrusted to the Governor to report to the President of the administration of scheduled area. It enjoins that the Governor of each State, having Scheduled Areas therein, shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the State as to the administration of the said area. Para 5(2) provides that the Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area. Without prejudice to the above general power, special power has been conferred under clause (a) to prohibit or to restrict the transfer of land by or among members of the Scheduled Tribes in such area and under clause (b) to regulate the allotment of land to members of the Scheduled Tribes in such area; under clause (c) regulates money-lending to the tribals in the Scheduled Area.

38. In the Constitution, the expression 'Scheduled Areas' has been defined to mean such area as the President may by order declare to be Scheduled Areas. Clause (2) of para 6 provides that the President may at any time by order (a)direct that the whole or any specified part of a scheduled Area shall cease to be a scheduled Area or a part of such an area; (a) increase the area of any Scheduled Area in a State, after consultation with the Governor of that State;(b) alter, but only by way of rectification of boundaries, any Scheduled Area;(c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area. Clause (d) deals with the rescission of any order under para 6. Such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph(1) of that paragraph shall not be varied by any subsequent order. Part D, para7 empowers the Parliament to amend the Schedule by way of addition, variation or repeal of any of the provisions of the Fifth Schedule. Such a varied or modified Schedule shall be referred to such amended Schedule. The other details are not material for the purpose of this case. Hence they are omitted. Scope and Sweep of the Regulation 1970.

39. As has been stated, the Regulation came into force on March 4, 1959 in Andhra Pradesh area and in Telangana area with effect from December 1, 1963. the prior order in operation in Telangana area will be dealt with a little later. The material provisions relevant for the purpose are dealt with hereunder.

40. Section 2(a) defines 'Agency tracts' to mean the areas in the districts of East Godavari, West Godavari, Visakhapatnam, Srikakulam, Vizianagar, Adilabad,Nizamabad, Warangal, Khammam and Mahaboobnagar declared from time to time as Scheduled areas by the President under sub-paragraph (1) of paragraph 6 of the Fifth Schedule to the Constitution. 'Scheduled Tribe' has been defined in Section 2(f) to mean any tribe or tribal community or part of or groups within any tribe or tribal community resident in the Agency tracts and specified as such by a public notification by the President under clause (1) of Article 342 of the Constitution. Section 2(g) defines 'transfer' to mean mortgage with or without possession, lease, sale, gift, exchange or "any other dealing" with

immovable property, not being a testamentary disposition and includes a charge on such property or a contract relating to such property in respect of such mortgage, lease, sale, gift, exchange or other dealing. The definition of transfer is a comprehensively wide definition except testamentary disposition by a tribal to another tribal so as to effectuate the prohibition of transfer of immovable property to any person other than a Scheduled Tribe or a cooperative society composed solely of members of the Scheduled Tribes. Section 3(1) reads as under:

"3. Transfer of immovable property by a member of a Scheduled Tribe- (1) (a) Notwithstanding anything in any enactment, rule or law in force in the Agency tracts any transfer of immovable property situated in the Agency tracts by a person. Whether or not such person is a member of a Scheduled Tribe, shall be absolutely null and void, unless such transfer is made in favour of person, who is a member of a Scheduled Tribe or a Society, Andhra Pradesh Co-operative is composed solely of members of the Scheduled Tribes. (b) Until the contrary is proved, any immovable property situated in the Agency tracts and in the possession of a person who is not a member of Scheduled Tribe, shall be presumed to have been acquired by person or his predecessor in possession through a transfer, made to him by a member of a Scheduled Tribe.

(c) Where a person intending to sell his land is not able to effect such sale, by reason of the fact that no member of a Scheduled Tribe is willing to purchase the land or is willing to purchase the land on the terms offered by such person, then such person may apply to the Agent, the Agency Divisional Officer or any other prescribed officer for the acquisition of such land by the State Government, and the Agent. Agency Divisional Officer or the prescribed officer as the case may be may by order, take over such land on payment of compensation in accordance with the principles specified in Section 10 of the Andhra Pradesh Ceiling on Agricultural Holdings Act, 1961 (Act X of 1961) and such land shall thereupon vest in the State Government free from all encumbrances and shall be disposed of in favour of members of the Scheduled Tribes or a Society registered or deemed to be registered under the Andhra Pradesh Co-operative Societies Act, 1964 (Act 7 of 1964) composed solely of members or in such other manner and subject to such conditions as may be prescribed. Section 2 reads as under:

2(a) Where a transfer of immovable property is made in contravention of sub-section (i), the Agent, the Agency Divisional Officer or any other prescribed Officer may, on application by any one interested, or on information given in writing by a public servant, or suo motu decree ejectment against any person in possession of the property claiming under the transfer, after due notice to him in the manner prescribed and may restore it to the transfer of his heirs.

(b) If the transferor or his heirs are not willing to take back the property or where their whereabouts are not known, the Agency, the Agency Divisional Officer or prescribed officer, as the case may be may order the assignment or sale of the property to any other member of a Scheduled Tribe (or a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in the State) composed solely of members of the Scheduled Tribes, or otherwise dispose of it, as if it was property at the disposal of State Government.

Section 4 reads as under:

(4) For the purposes of this section, the expression 'transfer' includes a sale in execution of a decree and also a transfer made by member of Scheduled Tribe in favour of any other member of a

Scheduled Tribe benami for the benefit of a person who is not a member of a Scheduled Tribe; but does not include a partition or a devolution by succession."

41. Section 3, therefore, prohibits transfer of immovable property by a member of the Scheduled Tribes to a non-Scheduled Tribe. Sub-section (1) (a) envisages, with a non obstante clause, that notwithstanding anything contained in any enactment, rule or law in force in the Agency tracts, any transfer of immovable property situated in the Agency tracts by a person, whether or not such person is a member of a Scheduled tribe, shall be absolutely null and void, unless such transfer is made in favour of a Scheduled Tribe or a society registered or deemed to be registered under the Andhra Pradesh Co-operative Societies Act, 1964 and composed solely of members of the Scheduled Tribes. Clause (b) provides rule of evidence by way of presumption that until the contrary is proved, and immovable property situated in the Agency tracts and in the possession of a non-Scheduled Tribe, shall be presumed to have been acquired by such person or his predecessor in possession, through a transfer made to him by a member of a Scheduled Tribe (emphasis supplied). The burden would always be on the non-tribal to prove that the land in his possession was not acquired by transfer from a tribal; in other words, the land belongs to tribal and the non-tribal possesses it in contravention of law.

42. Clause (c) of Section 3 provides that if a non-scheduled tribe, though intending to sell, is unable to sell his land on account of either unwillingness of other tribals to purchase the land or the terms offered by him to a tribe, are inaccessible to a tribal, he may apply to the agent named or other prescribed officer who would acquire the land and take over possession of such land on payment of compensation in accordance with the principles laid down in Section 10 of the Andhra Pradesh Ceiling on Agricultural Holdings Act, 1961, as amended in 1972. Such land shall thereupon vest in the State Government free from all encumbrances and shall be disposed of in favour of members of the Scheduled Tribes or a Co-operative Society composed solely of members of the Scheduled Tribes or in such other manner and subject to such conditions as may be prescribed.

43. In case of any transfer made in contravention of sub-section (1) of Section 3, the agent, the Agency Division Officer, or any other prescribed officer, may, on an application by any one interested, or on information given in writing by a public servant or suo motu, issue decree of ejectment against any person in possession of the property claiming under the transfer. This should be done after due notice to such person. Clause (b) of sub-section (2) of Section 3 provides that if a transferor or his heirs are not willing to take back the property or where whereabouts of the transferor are not known, the said officer may by order assign or sell the property to another member of the Scheduled Tribe or a Co-operative Society. Sub-section 3(4) provides that for the purpose of Section 3(4), the expression 'transfer' includes sale in execution of a decree and also a benami transfer made by a member of a Scheduled Tribes in favour of any other member of the Scheduled Tribes but does not include a partition or a devolution by succession.

44. Section 3-A makes special provision relating to mortgages without possession; the details thereof are not material. Section 4 provides for the remedy of suit to be instituted in the Agency Courts against a member of the Scheduled Tribe; the details thereof are not material. Section 5 provides for attachment and sale of immovable property. Section 6 gives revisional power to the State Government. Section 6-A provides for penalties for contravention of the provisions of the Regulation. Section 7 prescribes limitation for purpose of initiating proceedings under the Regulation. Section 8 gives power to the State Government to make rules. Section 9 provides for

repeal of repugnant provisions of the Madras Act 1 of 1917. Section 10 provides for saving of certain transfers and rights.

45. It is settled law that the transfer of immovable property between a member of the Scheduled Tribe to a non-scheduled Tribe in the Agency tracts is null and void. The non-tribal transferee acquires no right, title and interest in that behalf in furtherance of such sale. This Court in *Manchegowda & Ors. Vs. State of Karnataka & Ors.* [(1984) 3 SCC 301] had declared such sales to be voidable. In *Lingappa Pochanna Appelwar Vs. State of Maharashtra & Anr.* [(1985) 1 SCC 479] this Court upheld the constitutionality of similar provisions of Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974.

46. When the constitutionality of Section 3 of the Regulation was impugned as violative of Articles 19(1) (f) and 14 of the Constitution, this Court, in *P.Rami Reddy & Ors. Vs. State of Andhra Pradesh & Ors.* [(1988) 3 SCC 433] up held its validity holdings that the Regulation aims to restore the lands to the tribals which originally belonged to them but passed into the hands of non-tribals. It would be unjust, unfair and highly unreasonable merely to freeze the situation, instead of reversing the injustice and restoring the status quo ante. The non-tribal economic exploiters would get no immunity and not be accorded a privileged treatment by permitting them to transfer the lands and structures, if any, raised on such lands to non-tribals and to make profits at the cost of the tribals. Section 3, though it causes hardship to the non-tribals, equally, alleviates hardship of the tribals. The Court must keep in mind the larger perspective of the interest of the tribal community in its entirety; the restrictions cannot be condemned as unreasonable. The presumption embodied in Section 3(1) (b) is a rule of evidence. The non-tribals could be reasonably expected to disclose their title to the properties. The tribals due to handicaps and ignorance are unable to prove their right to land. The burden to prove title, therefore, was shifted to the non-tribals. The presumption was upheld as reasonable.

47. As a part of on-going industrial advancement, large industries or projects are being set up or constructed in the scheduled areas displacing the tribals and rendering them impoverished landless labourers. When their lands are acquired for public purpose, the Government should give alternative lands for rehabilitation and easy loans for reclamation. Law relating to prohibition of alienation and restoration of lands to tribes must be simple, less cumbersome and result-oriented. The machinery must be speedy and the officers must have compassion and sense of dedication and direction to ameliorate the economic status of the tribes to assimilate them into national mainstream.

48. In Telangana area of the State of Andhra Pradesh, prior to the Regulation and pursuant to Part B State Regulation in Fifth Schedule, the AP Tribal Area Regulation, III of 1359F promulgated by Raj Pramukh of Hyderabad was in vogue. Section 46 of the Agricultural Land and Tenancy Act, 1950 prohibits transfer of agricultural land without sanction of the competent authority. Section 3 of the Tribal Area Regulation excludes the application of any Act, Regulation or Rules by a notification published in the official Gazette. Section 4 gives power to the Government to make Rules. Sub-section (2) of Section 4 prohibits eviction of tribals from the lands in their possession or occupied by them. Clause (f) prohibits grant of patta rights over any land in notified area to a non-tribal; the agent is empowered to cancel such transfer or revise any title of land granted to a non-tribal in any notified tribal area. Clause (g) prohibits sale in execution of a decree or whenever made, cancellation of sales not finally confirmed before coming into force of the regulation etc. As stated earlier, the Regulation was extended to Telangana region w.e.f. December 1, 1963. Prior

thereto, law in Telangana area was in operation prohibiting any transfer of agricultural lands without prior permission of the officers and 1950 Regulation referred to earlier draws rebuttable presumption that all the acquisitions of immovable property situated Scheduled Areas are acquired through a transfer from tribals. The non-tribals shall be presumed to have acquired title from tribals unless they are able to prove to the contrary that their possession of properties in the Agency tracts was lawfully acquired.

### **Scope of Fifth Schedule -Interplay with Regulation.**

49. The predominant object of Para 5(2) of the Fifth Schedule of the Constitution and the Regulation is to impose total prohibition of transfer of immovable property to any person other than a tribal for peace and proven good management of tribal area; to protect possession, right, title and interest of the members of the Scheduled Tribes held in the land at one time by the tribals. The non-tribals, at no point of time, have any legal or valid title to immovable property in Agency tracts unless acquired with prior sanction of the Government and saved by any law made consistent with the Fifth Schedule. With the passage of time, when persons other than tribals gained unlawful title to and possession of the lands in agency tracts, their acquisition and holding of the immovable property, unless proved otherwise, have always been null and void. The Regulation, as its predecessor law, did prohibit transfer by a tribal to any other person and even benami purchaser in the name of a tribal for the benefit of a non-tribal also is null and void. Non-tribal thereon, acquires no right, title and interest in the land situated in scheduled area. Indisputably, any transfer inter vivos between tribals or non-tribals or inter se between non-tribals except testamentary disposition to a tribal, has been totally prohibited. The only exception engrafted is the transfer to Co-operative Societies composed solely of tribals or mortgage of the land to a Co-operative Land Mortgage Bank registered as an instrumentality of the State or any Government approved lending agency to improve the agricultural lands or sale to an agent to the Government etc. A non-tribal person who is unable to find a tribal buyer is not totally prohibited to transfer it. He should offer it to the named or nominated Government agent etc. who would purchase it in the prescribed manner under the Regulation and assign it on to a tribal. The Andhra Pradesh High Court had held that the transfer of land in Scheduled Area by a tribal given to either a Scheduled Caste or a Backward Class settled in Agency tracts as void.

50. In P. Rama Reddy's case (AIR 1988 SC 1626), this Court had observed thus (at pp.1630, 1631 and 1634 of AIR):-

"Within the scheduled areas of both Telangana and Andhra regions the land was entirely in occupation of different tribal communities. The area was an inaccessible tract of land covered by forests and hills. These tribal communities were in occupation of lands and lived by shifting cultivation and gathering whatever produce that was available.

The non-tribals who arrived in these areas late in the 19th Century in certain areas and the early 20th Century in certain other areas found the tribals who were in occupation of these lands an easy prey for the schemes of exploitation. The non-tribals were lending money to the tribal communities and taking the land belonging to them as security though nothing was taken in writing from a tribal. The rates of interests charged ranged between 25 to 50 per cent and in certain cases even 100 per cent. The tribals who were traditionally honest and who were simple in their thought and habits fell an easy prey to the schemes of the non-tribals. It was observed by several committees that the non-tribals were able to find ways and means to circumvent the provisions of Regulation 1 of 1959 by

entering into benami transactions and other clandestine transactions with unsophisticated tribals. It is absolutely necessary to create conditions for peace and maintain peace and prevent the new non tribals from settling down in the scheduled area. If the alienations are permitted to the non-tribals there is a danger of large-scale exploitation by the new non-tribals again with the result peace will be disturbed in that area.

Unless new entrants into the scheduled areas are prevented from settling down in the scheduled areas by purchasing properties either from tribals or non-tribals, it is not possible to prevent the exploitation of the unsophisticated tribals. It is only with a view to enforce the valid provisions of Regulation I of 1959, the Regulation viz., Regulation I of 1970 was made. It is in the interests of the tribals and for their protection Regulation I of 1970 was passed, because without restricting or prohibiting the alienation of lands in the possession of non-tribals to non-tribals the objectives cannot be achieved.

True, transfer by 'non-tribals' to non-tribals' would not diminish the pool. It would maintain status quo. But is it sufficient or fair enough to freeze the exploitative deprivation of the 'tribals' and thereby legalize and perpetuate the past-wrong instead of effecting the same. As a matter of fact, it would be unjust, unfair and highly unreasonable merely to freeze the situation instead of reversing the injustice and restoring the status quo ante."

51. In this Constitutional perception and statutory operation, the crucial question that arises for consideration is: whether the transfer of its land in a scheduled area, by the Government is valid in law?

52. It is indisputable that apart from the patta lands or other lands held by the tribals, the State holds vast tracts of land in scheduled area, in some areas with rich mineral deposits. The questions are: whether the State Government is exempt from the Regulation?; whether the State Government stands above the law? whether the meaning of the word "person" in Section 3(i)(a) of the Regulation would include the State Government? Article 244(1) read with the Fifth Schedule, Part I, defining "State" except certain States as enumerated therein. It bears repetition that paragraph 5(2) of Fifth Schedule enjoins the Governor to make regulations for the peace and good governance in a Scheduled area. Without prejudice to the general power, subsequent clauses amplify particular power. Clause (a) empowers him to prohibit or restrict the transfer, of land by or among members of the tribal; and non-tribals in such area. Clause (b) regulates the allotment of land only (added to emphasise) to members of the Scheduled Tribes in the area. The question, therefore, is: while regulating allotment of land under this clause, can the Government exclude itself from the power to allot land to a non-tribal when the object of Article 244(1) read with the Fifth Schedule is to control and maintain peace and good governance of the Scheduled area for the social and economic advancement of Scheduled Tribes? Would it be permissible to construe that the land belonging to the Government is outside such control or prohibition or restriction; whether the State Government could allot its land to non-tribals in violation of the Constitution and the law? Answer to these crucial questions bears paramount significance and impact since the object of the founding fathers of the Constitution in empowering the Governor, on the basis of his personal satisfaction, is to regulate by law the administration or control of the scheduled area for peace and good governance of the Scheduled Tribes in the area. The question is: whether any contra interpretation would sub serve the Constitutional animation or would it frustrate the constitutional objective? The Division Bench of the High Court in Samatha's case relied upon the dictionary meaning of the word 'person' and the prohibition on transfer of land inter vivos between natural persons of Scheduled Tribes and



non-tribes in Agency tracts; it came to conclude that the Regulation does not apply to the land owned by the State Government since the State Government is not a natural person. The earlier Division Bench had taken contra view. The question, therefore, is: which of the two views subserves the constitutional purpose and is correct in law?

### **Meanings of the word 'Person' - whether Government is persona ficta?**

53. From this perspective, the next question that arises is: whether the State Government is a person within the meaning of Section 3 of the Regulation and whether its transfer, of land to non-tribals or is valid in law?

54. The word 'person' in the interplay of juristic thought is either natural or artificial. Natural persons are human beings while artificial persons are Corporations. Corporations are either Corporation aggregate or Corporation sole. In "English Law" by Kenneth Smith and Denis Keenan [Seventh Edition] at page 127, it is stated that "[L]egal personality is not restricted to human beings. In fact various bodies and associations of persons can, by forming a corporation to carry out their functions, create an organisation with a range of human beings. In English law such corporations are formed either by charter, statute or registration under the Companies Acts; there is also the common law concept of the Corporation Sole" At page 163, it is further stated that "[T]he Crown is the executive head in the United Kingdom and Commonwealth, and government, departments and civil servants act on behalf of Crown". In "Salmond on Jurisprudence" by P.J. Fitzgerald [Twelfth Edition], at page 66, it is stated that "[A] legal person is any subject-matter other than a human being to which the law attribute personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination...". At page 72, it is further amplified that "[T]he King himself, however, is in law no mere mortal man. He has a double capacity, being not only a natural person, but a body politic, that is to say, a corporation sole. The visible wearer or the crown is merely the living representative and agent for the time being of this invisible and underlying persona ficta, in whom by law the powers and prerogatives of the Government of this realm are vested". In "Jurisprudence" by R.W.M. Dias (Fifth Edition), at page 265, it is stated that "... the value of personifying group activities is further reduced by the fact that, courts have evolved ways of dealing with such activities without resorting to the device of persona'.

55. In *Madras Electric Corporation Vs. Board of Water Supply* [(1955) 1 All ER 7531], relied upon by Shri Dhawan, it has been held that the word 'person' in its ordinary and natural sense includes Crown. The same view was reiterated in *I.R. Commissioner Vs. Whitworth Coal Co. Ltd.* [(1968) 2 All ER 91 at 108). On the concept of "legal personality" and the concept of 'person', in "Elementary Principles of Jurisprudence" by Keeton [1949 Edition] relied on by Shri Rajeev Dhawan, in Chapter XIII at page 150, it is stated that in modern law, this personification by law is confined to certain definite limits, although this restriction is based, not upon principle, but upon convenience. In law, however, we are concerned with legal persons, whether they are natural, i.e., human beings capable of sustaining rights and duties, or artificial or juristic, i.e., groups or things to which the law attributes the capacity to bear rights and duties. Legal personality is itself nothing but a fiction, in so far as it is intended to imply no more than that a legal person is simply a complex of legal rights and duties. At page 151, it is stated that juristic person may be defined as those persons or groups of persons which the law deems capable of holding rights and duties, with a few exceptions. At page 152, he has amplified that corporation sole is a juristic person and it succinctly describes the position in modern English law. The conception of separate personality attaching to the

successive occupants of a particular office is as valid juristically as the conception of incorporation of the members of a group. The Law of Property Act 1925, Section 180 contents itself with addition briefly, that a corporation sole may now hold personal property with rights and duties. At page 154, it is stated that principles applying to corporation aggregate are not fully applicable to corporation sole. "Court regarded the corporation sole not as a person, but as a device for the transmission of rights from one natural person to another". He quotes Blackstone : that "Corporation sole consists of one person only and his successors, in some particular station, who are incorporated by law, in order to give them legal capacities and advantages, in particular that of perpetuity, which in the natural persons could not have had. In this sense the King is a corporation sole,. At page 155, it is further stated that the law, therefore, has wisely ordained, that the person, qua tenus person, shall never die, anymore than the King; by making him and his successors a corporation sole. By which means all the original rights of a personage are preserved entirely to the successors. At page 169, it is stated that the reason for King personality, a corporate sole, is that corporate personality is a technical device, applied for a multitude of very divers each aggregations, institutions and transactions, whereas each of many theories has been conceived for particular type of juristic personality. None of them foresaw the extent to which the device of incorporation would be used in modern business, or we may add, to cloak the activities of some branch of Government.

56. Thus, in Great Britain, Crown has been regarded as a Corporation sole, persona ficta so that it has never been considered necessary to personify the State. The Crown in its political capacity represents the State in England and can sue in the English courts as a person. In Madras Electric Corporation case the same view was reiterated but when liability was sought to be imposed upon a person, it was held that the general principle of person, does not include the Crown, unless the statute is binding on the Crown, by express provision or by necessary implication. As held in I.R. Commissioner v. Whiteworth Coal Co. Ltd. [(1968) 2 All ER 91 at 108] in a taxing statute it was held that there was no objection to interpret the word 'person' to include the Crown in any provision other than those which seek to impose a burden.

57. In the American Jurisprudence 2nd Series, Vol. 72, page 407, it is stated that a State, in the ordinary sense of the Federal Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organised under a Government sanctioned and limited by a written constitution, and established by the consent of the governed. While the municipal corporation is organised under the authority of a state legislature and draws its public character from the law of the State creating it, it is endowed with a public character by virtue of having been invested by the legislature with subordinate legislative powers to administer local and internal affairs of the community, as well as by having been created as a branch of the state government to assist it in the civil government of the state. A public corporation, with capacity to sue and be sued, under modern statutory provisions, is a legal person. So also, for purposes of convenience, certain Departments of Government or the board of managers of a public institution are sometimes incorporated, but the corporations thus created, although public, are not Municipal Corporations. In Black's Law Dictionary, Sixth Edition., Page 675, the word "Government" has been defined thus:

"From the Latin gubernaculum, signifies the instrument, the helm, whereby the ship to which the state was compared, was guided on its course by the "gubernator" or helmsman, and in that view, the government is but an agency of the state, distinguished as it must be in accurate thought from its scheme and machinery of government.

In the United States, government consists of the executive, legislative, and judicial branches in addition to administrative agencies. In a broader sense, includes the federal government and all its agencies and bureaus, state and country governments, and city and township governments.

The system of polity in a state, that form of fundamental rules and principles by which a nation or state is governed, or by which individual members of a body politic are to regulate their social actions. A constitution, either written or unwritten, by which the rights and duties of citizens and public officers are prescribed and defined, as a monarchical government, a republican government, etc. The sovereign or supreme power in a state or nation. The machinery by which the sovereign power in a state expresses its will and exercises its functions, or the framework of political institutions, departments, and offices, by means of which the executive, judicial, legislative, and administrative business of the state is carried on."

58. In *Edgar B. Sims. Vs. United States of America* (1959) 359 US 108 : 3 Law ed 2d 667, Federal Tax Authorities issued notices of levy of tax for assessment on unpaid income of employees of the State of West Virginia and had the notice served on the defendant. The State auditor, seized the accrued salaries of the taxpayers pursuant to Sections 6331 of the Internal Revenue Code of 1954. The defendant-State refused to honour the levy and instead, delivered payroll warrants to the taxpayers for their, then accrued salaries. Thereafter, the Government brought the action in the District Court for the Southern District of West Virginia to recover from defendant the amount of salaries he had so paid to the taxpayer in disobedience to the Governments levies. The District Court upheld the Government's order. The Court of Appeals, on appeal, affirmed it. On a writ of certiorari, it was held by the Supreme Court of USA that the levy of tax made under Section 6331 was authorised levy and that defendant under Section 6331 of the Interval Revenue Code of 1954 as 'person' was liable to pay the same.

59. In *State of Ohio Vs. Guy T. Helvering* (1933) 292 US 360 : 78 Law ed 1307 at 1310 the question was whether "the State", when it was selling liquor through its agency and sources, "was a person" within the meaning of U.S.C. title 26, Section 205 [Section 3244, as amended]" It was held at page 1310 that the tax is levied upon every person who sells liquor etc. The word 'person' as used in the title, should be broadly construed as mean and include a partnership, association, company or corporation, as well as a natural person. Whether the word 'person' or 'corporation' includes a State or the United States depends upon the connection in which the word is found. In South Carolina case, the United States Court disposed of the question by holding that since the State was not exempt from the tax, the statute reached the individual sellers who acted as dispensers for the State. While not rejecting that view, the Court preferred to place on the word 'person' the broader ground that when the State itself becomes a dealer in intoxicating liquors, it falls within the reach of the tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension.

60. In *State of Georgia Vs. Hiram W. Evans* (1941) 316 US 159: 86 Law ed 1346 the same view was reiterated by the U.S.A. Supreme Court and it was held that if the word 'person' is to include a State as plaintiff, it must equally include a State as a defendant or else the language used would be meaningless.

61. In *United States of America Vs. Cooper Corporation et al.* (1940) 312 US 600: 85 Lawed 1071 relied on by Sri Sudhir Chandra, considering the word 'person' used in

Sections 7, 85 and 178 of the Sherman Anti Trust Act, it was held that although the term "person", as used in a statute, is not ordinarily construed to include the sovereign, this is not a hard and fast rule of exclusion, but may be negated by resort to aids to construction indicating a contrary intent. On the facts, it was held that State was not a person. In that context it was held that in the absence of any indication to the contrary, the term 'person', when used in different sections of a statute, was employed throughout the statute, in the same, and not different sense. But the said decision was reversed in *State of Georgia, case. In United States Vs. I.C.C* (1948) 337 U.S. 426 it was held that when relief is sought against State itself, the word 'person' would include the State and be construed accordingly.

62. In *Superintendent & Legal Remembrances, State of West Bengal Vs. Corporation of Calcutta* [(1967) 2 SCR 170] a Bench of nine Judges of this Court was to consider whether the State of West Bengal, when it was carrying on trade, as owner and occupier of the market at Calcutta, without obtaining the license, was bound by the Calcutta Municipality Act or, by necessary implication, was exempted to obtain license. A complaint against the State, for its failure to obtain license was filed by the Municipal Corporation. It was contended that the State is not a person under Section 218 of the said Act. Per majority, it was held that the Common Law rule of construction that the Crown is not, unless expressly named or clearly intended, bound to be a State, was held to be not acceptable as a rule of construction. It was held that the archaic rule based on prerogative and protection of the Crown has no relevance to a democratic republic. It is inconsistent with the rule of law based on the doctrine of equality and introduces conflicts and anomalies. The normal construction, viz., that an enactment applies to citizens as well as to the State, unless it expressly or by necessary implication exempts the State from its operation, steers clear of all the anomalies and is consistent with the philosophy of equality enshrined in the Constitution. Under the Act there is a distinction between fine imposed under Section 537 and under Section 541 of the Act, the fines under Section 537 are in respect of offences enumerated therein they certainly go to the coffers of the States. In respect of such offences it may be contended that, as the fines paid reach the State itself. There is an implication that the State was not bound by the Sections enumerated therein, for a person who receives the fine, cannot be the same person who pays it. This incongruity may lead to the said necessary implication. Another Bench of nine Judges in *State Trading Corporation of India Ltd. Vs. The Commercial Tax Officer & Ors.* [AIR 1963 SC 1811 at 1817] per majority interpreted the word 'citizen' in a broader perspective. In *Union of India Vs. Jubbi* [AIR 1968 SC 360 at 362] a three-Judge Bench had held that a statute applies to State as much it does to a citizen, unless, it expressly by necessary implication, exempts the State from its operations. If the Legislature intended to exclude the applicability of the Act to the State, it could have easily stated in Section 11 itself or by a separate provision that the Act was not to be applied to the Union or to the lands held by it. In the absence of such a provision, in a constitutional set up like the one we have in this country, and of which the overriding basis is the broad concept of equality, free from any arbitrary discrimination, the presumption would be that a law of which the avowed object is to free the tenant of landlordism and to ensure to him security of tenure would bind all landlords irrespective of whether such a landlord is an ordinary individual or the Union. In that case it was contended that Abolition of Big Landed Estates and Land Reforms Act, 1953 and Section 11 thereof does not apply to the land held by the Government. This Court rejected that contention. It would, therefore, be set tied law that the question whether or not the word 'person' used a statute would include the State has to be determined with reference to the provisions of the Act, the aim

and its object and the purpose the Act seeks to sub serve. There is no reason to consider the word 'person' in a narrow sense. It must be construed in a broader perspective, unless the statute, either expressly or, by necessary implication, exempts the State from the operation of the Act as against the State and would include "State Government".

### **Property of the State - how dealt with under the Constitution.**

63. Part I of the Constitution of India deals with Union and its territories. Article 1 declares that India, that is Bharat, shall be a Union of States. The States and the territories thereof have been specified in the First Schedule to the Constitution. The territory of India shall comprise of - (a) the territory of States; (b) the Union territories specified in the First Schedule; and (c) such other territories as may be acquired. Articles 2 to 4 deal with the power of the Parliament to admit into the Union, by law, any State, or establish new States on such terms and conditions as it thinks fit. Formation of the new States and alteration of areas, boundaries and names of the existing States are regulated by law made by Parliament. It also gives power to the Parliament to amend the First and the Fourth Schedules and to provide for supplemental, incidental and consequential matters. The First Schedule enumerates the States and the first in the alphabetical order is Andhra Pradesh with territories specified there under.

64. Under Part VI of the Constitution titled "The States", Article 152 defines "State". For the interpretation of the Constitution, by operation of Article 367, unless the context otherwise requires or modifies, the General Clauses Act shall apply. Section 3(23) thereof defines Government to include both the Central Government and State Government. Section 3(8) defines "Central Government" and Section 3(60) defines 'State Government' as regards anything done and or to be done, shall mean the Governor. The Governor of each State is its Executive Head and the executive power of the State shall be exercised by the Governor either directly or through officers subordinate to him in accordance with the Constitution as envisaged under Article 154. The executive power of the State, subject to the provisions of the Constitution, by operation of Section 162, shall extend to the matters with respect to which the Legislature of the State has power to make laws. The proviso thereto is not relevant for the purpose of this case.

65. The executive power, therefore, of the State is co-extensive with that of the legislative power of the State. The Governor shall appoint the Chief Minister and on his advise, he appoints the Council of Ministers, who shall aid and advise the Governor in the exercise of his function except, in so far, as he is, by or under the Constitution, required to exercise functions or any of them, in his discretion. The Council of Ministers, headed by the Chief Minister, shall be collectively and individually responsible to the Legislature and the people in the matter of the governance of the State. All executive actions of the Government of a State, shall be expressed to be taken in the name of the Governor and the business of the Government is conducted in accordance with Article 166 and the Business Rules made, by the Governor, by clause (3) thereof.

66. Under Chapter III of Part XII, Article 294 vests the union and the corresponding all property and assets which immediately before the commencement of the Constitution were vested in His Majesty for the purposes of the Government of, Dominion of India or of each Governor's Province, whether arising out of any contract or otherwise, similarly all rights, liabilities and obligations, respectively of the Government of the Dominion of India and of the Government of each

corresponding State, shall belong to the Government of India and the Government, of each corresponding State. Article 295 provides for succession to the property, assets, rights, liabilities and obligations in other, cases. Article 298 provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or, business, and to the acquisition, holding and disposal of property and the making of contracts for any purpose co- extensive with legislative power. The Union of India and each State under Article 300 may sue or be sued, with all rights and liabilities as a constituent power of the State under the Constitution. Article 299 empowers Union of India and the Government of each State to enter into contract, in the exercise of the executive power, to be expressed in topic name of the President or the Governor, as the case may be. All assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor, by such persons and in such manner as he may direct or otherwise. However, the President or, the Governor shall not be personally liable there for. Article 300 is of material importance. As stated earlier, the Government of India or, a State may sue or be sued, by the name of the State and subject to the provisions of the Constitution and the law enacted and by virtues of the power conferred by the Constitution, it can sue and be sued in relation to their respective affairs in the like cases.

67. The members of the Legislature, are elected by the people periodically at the end of every five years. The political party or group of political parties who secure majority in the Legislative Assembly of the State elects the leader who would be called upon by the Governor to form the Government and on his appointment as the Chief Minister. On his advise, the Governor appoints his Council of Ministers who act in collective responsibility to aid and advise the Governor in the governance of the State during the tenure of their office.

### **Permanent bureaucracy acts as an arm of the Government.**

68. Articles 309 to 312A in Chapter I of Part XIV under the heading "Services under the Union and the States" regulate the recruitment and conditions of service and appointments to the public services and posts in connection with the affairs of the Union or the States, subject to the provisions of the Constitution and acts of the appropriate Legislature. Details thereof are not material for the purpose of this case suffice it to state that Constitution has created permanent bureaucracy consisting of diverse all India services allotted to various States and State Services created there under, to assist the political executive and to implement the provisions of the Constitution, the laws and the executive policy of the appropriate Government. Under the Constitution, in all ordinary matters of administration, the Ministers take full responsibility, subject to the control by the Legislature. The bureaucracy gives shape to the decisions taken by the Council of Ministers at the Cabinet meeting or by the individual Ministers by working out the details and they are applied in the given set of facts. In Halsbury's Laws of England (4th Edn.] Vol.8 in paragraph 1152 at page 711 it is stated that the Government offices and departments through which the general executive administration of the country is carried on owe their, establishment and organisation, together with the powers they possess and duties they perform, partly to the royal prerogative and partly to the Parliament. They derive almost all their powers directly or indirectly from Parliament, which alone can provide them with the supplies of money, necessary for their, operations. Their internal arrangements, on the other hand, are hardly ever organised or directly interfered with by Parliament, but have been a matter for the royal prerogative. This principle *proprio vigore* applies to Cabinet form of functioning under our Constitution. In paragraphs 1155 at page 713, it is further

stated that where functions entrusted to a Minister or to a department are performed by an official employed in the ministry or department there is in law no delegation because constitutionally the acts or decisions of the officials are that of the minister. In the exercise of their functions relating to land under any enactment, every minister and government department must have regard to the desirability of conserving the natural beauty and amenity of the countryside.

### **Ministerial Responsibility.**

69. As stated hereinbefore, the Constitution envisions to establish an egalitarian social order rendering to every citizen, social, economic and political justice in a social and economic democracy of the Bharat Republic. Article 261 [1] of the Constitution provides that full faith and credit shall be given, throughout the territory of India, to public acts, record and judicial decisions of the Union and of every State. In *Secretary, Jaipur Development Authority v. Daulat Mal Jain* [(1997) 1 SCC 35], a Bench of this Court had held thus:

"The Governor runs the Executive Government of a State with the aid and advice of the Chief Minister and the Council of ministers which exercise the powers and performs its duties by the individual Ministers as public officers with the assistance of the bureaucracy working in various Departments and Corporate sectors etc. Though they are expressed in the name of the Governor, each Minister is personally and collectively responsible for the actions, acts and policies. They are accountable and answerable to the people. Their powers and duties are regulated by the law and the rules. The legal and moral responsibility or liability for the acts done or, omissions, duties performed and policy laid down rest solely on the Minister of the Department. Therefore, they are indictable for their conduct or omission, or misconduct or misappropriation. The Council of Ministers are jointly and severally responsible to the Legislature. He/they is/are also publicly accountable for the acts or conducts in the performance of duties.

The Minister holds public office though he gets constitutional status and performs functions under constitution, law or executive policy. The acts done and duties performed are public acts or duties as holder of the public office. Therefore, he owes, certain accountability, for the acts done or, duties performed. In a democratic society governed by rule of law, power is conferred on the holder of the public office or the concerned authority by the Constitution by virtue of appointment. The holder of the office, therefore, gets opportunity to abuse or misuse of the office. The politician who holds public office must perform public duties with the sense of purpose, and a sense of direction, under rules or sense of priorities. The purpose must be genuine in a free democratic society governed by the rule of law to further socio-economic democracy. The executive Government should frame its policies to maintain the social order, stability progress and morality. All actions of the Government are performed through/by individual persons in collective or joint or individual capacity. Therefore, they should morally be responsible for their actions.

When a Government in office misuses its powers, figuratively, we refer to the individual Minister/Council of Ministers who are constituents of the Government. The Government acts through its bureaucrats, who shapes its social, economic and administrative policies to further the social stability and progress socially, economically and politically, Actions of the Government, should be accounted for, social morality. Therefore, the actions of the individuals would reflect on the actions of the Government. The actions are intended to further the goals set down in the

Constitution, the laws or administrative policy. The action would, therefore, bear necessary integral connection between the 'purpose' and the end object of public welfare and not personal gain. The action cannot be divorced from that of the individual actor. The end is something aimed at and only individuals can have and shape the aims to further the social, economic and political goals. The ministerial responsibility thereat comes into consideration. The Minister is responsible not only for his actions but also for the job of the bureaucrats who work or have worked under him. He owes the responsibility to the electors for all his actions taken in the name of the Governor in relation to the Department of which he is the head.

70. In *Shamsher Singh Vs. State of Punjab & Anr.* [(1974) 2 SCC 831](AIR 1974 SC2192), a Bench of seven Judges of this Court had held that under the Cabinet System of Government as embodied in our Constitution, the Governor is the formal head of the State. He exercises all his powers and functions conferred on him by or under the Constitution, on the aid and advice of Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his function in his discretion. The satisfaction of the Governor for the exercise of any power or function, required by the Constitution, is not the personal satisfaction of the Governor but is the satisfaction in the constitutional sense under the Cabinet System of Government. The executive is to act subject to the control of the legislature. The executive power of the State is vested in the Governor as head of the Executive. The real executive power is vested in the Ministers of the Cabinet. The Chief Minister and the Council of Ministers with the Chief Minister as its head aid and advise the Governor in the exercise of his executive functions. The same principle was reiterated by a Bench of three Judges in *R.K. Jain Vs. Union of India* [(1995) 4 SCC 119]. Therein, it was held that in a democracy governed by rule of law, State is treated on par with a person by Article 19 (6) in commercial/industrial activities.

71. It would thus be clear, that in a democratic polity governed by the rule of law, the administration is run through constitutional mechanism i.e., Cabinet form of Govt. by a Council of Ministers headed by the Chief Minister. They aid and advise the Governor, the executive head of the State. The bureaucracy – an arm of the political executive - assists as an integral part of administrative mechanism. Their, actions or the acts, individually or collectively, are directed to elongate and fulfill the socio-economic goals set down in the Constitution to establish the egalitarian social order in which socio-economic justice is secured to the poor and weaker sections of the society including the Scheduled Castes and Scheduled Tribes, in particular, as enjoined in Article 46 of the Constitution, to promote their socio-economic interest and protect them from social injustice and all forms of exploitation. The State is therefore, a "person" the constitutional mechanism *persona ficta* is enjoined to elongate the objects of the Constitution.

### **Scope of the power of the Govt. in disposal of its property in Scheduled area and constitutional duty and limitation of the State.**

72. In "In the Framing of India's Constitution", a study by B. Shiva Rao, (Volume II) in Chapter 20 on the Fifth Schedule of the Constitution on the Tribal Area, the author has surveyed the historical background for integration of Scheduled Tribes into the national main stream. The historical survey and legislative development do assure us that throughout ... A system of modified exclusion of law was applied to the Scheduled areas. The power was with the Governor. He exercises the executive and legislative power to apply, or to refrain from applying any law made by Parliament or State



Legislature to the Agency tracts. The object of Government policy is to protect the tribals or their land, by securing to them protection from exploitation. The principal duty of the administration is to protect them from exploitation. Considering the past experience and the exploitation of the tribals' simplicity and truthfulness by the non-tribals, it became imperative by statutory safeguards to preserve the land which is their natural endowment and mainstay for their economic empowerment. No laws affecting social matters, occupation of land including tenancy laws allotment of land and setting apart of land for village purposes and village management, including the establishment of Village Panchayats, would apply, unless they are suitable to the conditions. Shiva Rao has stated at page 579 thus:

"The transfer of land in a Scheduled Area from a tribal to a non-tribal was forbidden; and the State Government was also prohibited from allotting State land in a Scheduled Area to non-tribals except in accordance with rules made after consulting the Tribes Advisory Council. Likewise, if advised by the council, the Governor was obliged to license money-lending, prescribing such conditions as were considered necessary; and the breach of these conditions would be an offence. In order that public attention must be focused on development work carried out in these areas, the State Government was required to show separately in its annual financial statement the revenues and expenditure pertaining to these areas."

72. Thus, the Fifth and Sixth Schedules an integral scheme of the Constitution with direction, philosophy and anxiety is to protect the tribals from exploitation and to preserve valuable endowment of their land for their economic empowerment to elongate social and economic democracy with liberty, equality, fraternity and dignity of their person in our political Bharat.

### **Egalitarian Social Order - Scope and Content.**

73. Justice is an attribute of human conduct. Law, as a social engineering, is to remedy existing imbalances, as a vehicle to establish an egalitarian social order in a Socialist Secular, Bharat Republic. The Upanishad says that, "let all be happy and healthy, let all be blessed with happiness and let none be unhappy". Bhagwatgeeta preaches through Yudhishtira that "I do not long for, kingdom, heaven or rebirth, but I wish to alleviate the sufferings of the unfortunate". Prof. Friedlander in his "Introduction of Social Welfare" at page6 states that social welfare is the organised system of social service and institutions are designed to aid individuals and groups to attain specified standard of life and health and personal and social relationship which permit them to develop their full capacities and to promote their well-being in harmony with the needs of their families and the community. Welfare State is a rubicon between unbridled individualism and communism. All human rights are derived from the dignity of the person and his inherent worth. Fundamental Rights and Directive Principles of the Constitution have fused in them as fundamental human rights as indivisible and inter-dependent. The Constitution has charged the State to provide facilities and opportunities among the people and groups of people to remove social and economic inequality and to improve equality of status. Article 39 (b) enjoins the State to direct its policy towards securing distribution of the ownership and control of the material resources of the community as best to sub serve the common good. The founding fathers with hindsight, engrafted with prognosis, not only inalienable human rights as part of the Constitution but also the State as its policy to remove obstacles, disabilities and charged inequalities for human development and positive actions to provide opportunities and facilities to develop human dignity and equality of

status and of opportunity for social and economic democracy. Economic and social equality is a facet of liberty without which meaningful life would be hollow and mirage.

### **Right to development - a fundamental right.**

74. Declaration of "Right to Development Convention" adopted by the United Nations and ratified by India, by Article 1 "right to development" became part of an inalienable human right. By virtue thereof, every human person and all people are entitled to participate in, contribute to, and economic, social, cultural and political development, in which all human rights and enjoy fundamental freedoms would be fully realised (emphasis supplied). Clause (2) thereof provides that "the human right to development also implies the full realisation of the right of the people to improve their natural wealth and resources". Article 2(1) provides that "the human person is the central subject of development and should be the active participant and beneficiary of the right to development". Clause (2) says that all human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure free and complete fulfillment of the human being and they should, therefore, promote and protect an appropriate political, social and economic order, for development". Clause (3) thereof provides that the States have "the right and the duty to Formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from".

75. Article 3 (1) recognises and enjoins that it is the State's primary responsibility to create conditions favourable to the realisation of the right to development. Under clause (3) thereof, it reminds the State of its duty to cooperate with each other and of "ensuring development and eliminating obstacles to development". Article 6(2) reassures that "human rights freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights (emphasis supplied) and clause (3) thereof enjoins that "the States should take steps to eliminate obstacles to development. Article 8 enjoins that "the State should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure inter alia equality of opportunity for all in their access to basic resources, education, health service food, housing employment and the fair distribution of income". It also provides that "an appropriate economic and social reform should be carried out with a view to eradicating all social injustice". Article 9 gives a right declaring that "all the aspects of the right to development set forth in the present declaration are indivisible and interdependent and each of them should be considered in the context of the whole" and Article 10 concludes and reminds the State of its duty "to take steps to ensure them the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national levels". The directive principles in Part V of the Constitution are forerunners to the Convention (Emphasis supplied).

76. India being an active participant in the successful declaration of the Convention on Right to Development and a party signatory thereto, it is its duty to formulate its policies, legislative or executive, accord equal attention to the promotion of and to protect the right to social, economic, civil and cultural rights of the people, in particular, the poor, the Dalits and Tribes as enjoined in Article 46 read with Articles 38, 39 and all other related Articles read with right to life guaranteed by Article 21 of the Constitution of India. By that constant, endeavor and interaction, right to life would become meaningful so as to realise its full potentiality of 'person' as in alienable human right and to raise the standard of living, improve excellence and to live with dignity of person and of equal status with social and economic justice, liberty, equality and fraternity, the trinity are pillars to establish the egalitarian social order, in Socialist Secular Democratic Bharat Republic.

77. Social and economic democracy is the foundation on which political democracy would be a way of life in the Indian polity. Law as a social engineering to create just social order removing inequalities in social and economic life, socio-economic disabilities with which poor people are languishing by providing positive opportunities and facilities to individuals and groups of people. Dr.B.R. Ambedkar, in his closing speech in the Constituent Assembly on November 25,1949, had lucidly elucidated thus:

"What does social democracy mean? It means way of life which recognises liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty, would kill "individual initiative - we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty". We cannot afford to have equality in political life and inequality in economic life. How long shall we continue to live this life of contradiction? How long shall we continue to deny equality in our social and economic life ? We must remove this contradiction at the earliest possible moment or else those who suffered from inequality will blow up the structure of political democracy which this Assembly has laboriously built up."

**(Vide B. Shiva Rao's, 'The Framing of India's Constitution: Select Documents,**

**Vol IV, p.944.)**

78. The core constitutional objective of "social and economic democracy" in other words, just social order, cannot be established without removing the inequalities in income and making endeavor to eliminate inequalities in status through the rule of law. The mandate for social and economic retransformation requires that the material resources or their ownership and control should be so distributed as to sub serve the common good. A new social order, thereby, would emerge, out of the old unequal or hierarchical social order. The legislative or executive measures, therefore, should be necessary for the reconstruction of the unequal social order by corrective and distributive justice through the rule of law.

## **Right to life - scope and content.**

79. 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 assignatory. In *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress* [AIR 1991SC 101 at 173] in paragraph 223, 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. In *Bandhua Mukti Morcha Vs. Union of India* [(1984) 3 SCC 161 at 183-84], this Court had held that right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and that opportunities and facilities should be provided to the children to develop in a healthy manner and in conditions of freedom and dignity. Adequate facilities, just and humane conditions of work etc. are the minimum requirements which must exist in order to enable a person to live with human dignity and the State has to take every action. In *Subhash Kumar Vs. State of Bihar* [AIR 1991 SC 420], this Court had held that the right to life includes the right to enjoyment of pollution free water and air for full enjoyment of life. In *Olga Tellis Vs. Bombay Municipal Corporation* [AIR 1986 SC 180], this Court had held that right to livelihood is an important facet of the right to life. In *C.E.S.C. Ltd. & Ors. Vs. S.C. Bose & Ors.* [1992 (1) SCC 441 at 462-63, para 30], it was held that right to social and economic justice is a fundamental right. Right to health of a worker is a fundamental right. Therefore, right to life enshrined in Article 21 means something more than mere survival of animal existence. The right to live with human dignity with minimum sustenance and shelter and all those rights and aspects of life which would go to make a man's life complete and worth living, would form part of the right to life. Enjoyment of life and its attainment -social, cultural and intellectual -without which life cannot be meaningful, would embrace the protection and preservation of life guaranteed by Article 21. Right to health and social justice was held to be fundamental right to workers in *Consumer Education and Research Centre Vs. Union of India* [(1995) 3SCC 42] and *Life Insurance Corporation Vs. Consumer Education and Research Centre* [(1995) 5 SCC 482]. Right to economic equality is held to be fundamental right in *Dalmia Cement Bharat Ltd. & Anr. etc. Vs. Union of India & Ors. etc.* (JT 1996(4) SC 555). Right to shelter is held to be fundamental human right in *P.G. Gupta Vs. State of Gujarat & Ors.* [1995 Supp.(2) SCC 182], *M/s. Shantistar Builders Vs. Narayan Khimlall Totame & Ors.* [(1990) 1 SCC 520], *Chameli Singh & Ors. Vs. State of U.P. And Anr.* [(1996) 2 SCC 549] and *Ahmedabad Municipal Corporation Vs. Nawab Khan Gulab Khan & Ors.* [JT 1996 (10) SC 485]. The tribals, therefore, are fundamental right to social and economic empowerment. As a part of right to development to enjoy full freedom, democracy offered to them through the States regulated power of good Government that the lands in Scheduled areas are preserved for social economic empowerment of the tribals.

## **Meaning of Socialist Democratic Republic.**

80. It is necessary to consider at this juncture the meaning of the word "socialism" envisaged in the Preamble of the Constitution. Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution. The Fundamental Rights and the-Directive Principles are the means, as two wheels of the chariot, to achieve the above object of democratic socialism. The word "socialist" used in the Preamble must be read from the goals Articles 14, 15, 16, 17, 21, 23, 38, 39,

46 and all other cognate Articles seek to establish, i.e., to reduce in equalities in income and status and to provide equality of opportunity and facilities. Social justice enjoins the Court to uphold government's endeavor to remove economic inequalities, to provide decent standard of living to the poor and to protect the interest of the weaker sections of the society so as to assimilate all the sections of the society in a secular integrated socialist Bharat with dignity of person and equality of status to all.

81. Shri P.A. Choudhary, learned senior counsel for the 13th respondent, contended that the word 'person' in Section 3 (1) of the Regulation does not cover the executive Government of the State nor does it prohibit the Government from transferring its land. According to him, such an interpretation would get the Regulation exposed itself to be ultra vires of Article 298 of the Constitution which should be avoided. The premise of his contention is founded on the principle that the Constitution empowers the Executive to acquire, hold and dispose of the property and the Governor, as sovereign head of the Executive, gets no power under the Fifth Schedule to prohibit the State Government to transfer its property to non-tribals. On the other hand, the Constitution has full faith in the Executive to implement the directives contained in the Fifth Schedule to the Constitution to promote the welfare of the Tribes. The Constitution has built up a balanced structure distributing powers and functions to each of the three branches of the State. The Fifth Schedule read with Article 244 of Chapter X of the Constitution, with a non obstante clause, has conferred only the legislative power on the Governor, referable to Article 245 to enact the law relating to scheduled areas. The power to acquire, hold and dispose of the property of the State was wisely left untouched in that behalf. The prohibition contained in Fifth Schedule, therefore, does not affect the power of the State under Article 298 to dispose of its property situated in Scheduled area in the manner it deems appropriate. To buttress his contention, the learned counsel cited a passage from Walter Bagehot - The English Constitution at page 283 that the Queen, without consulting the Parliament, can by law disband the Army, engage or dismiss the officers from General Commanding- in-Chief downwards. She could sell all her warships and all novel stores etc. He also cited "Governmental Law" by Hartles and Griffith, page 289 in that behalf. He further cited Lord Birkenhead's dictum in Birkdale District Electric Supply Company Ltd. Vs. Corporation of Southport [1926 AC 355 at 364] wherein it was held that power entrusted to a person or public body by the Legislature was to effectuate public purpose. They cannot divest themselves of those powers and duties. Nor can they do any action incompatible with due exercise of their powers or the discharge of their duties.

82. In Rederiaktiebolaget Amphitrite Vs. The King [(1921) 3 KB 500] cited by the learned counsel, the Government had given an undertaking to the owners and permitted the neutral warships to carry a particular class of cargo to a British colony in which event the said ships will be released from detention. On the faith of it the owners of the ships carried the cargo and requested for their release from detention. When clearance was refused, action was laid in the court for damage for breach of contract. It was held that such an undertaking by the Government was not enforceable in a Court of law, as it was not being within the competence of the Crown to make a contract which would have the effect of limiting its power of executive action in the future.

83. He also cited Youngstown Sheet & Tube Company et al. Vs. Charles Sawyer [343US 579 at 632 : 96 L ed 1153 at 1198] for the proposition that the President has executive inherent power to seize private property to meet an emergency subject to the legislation confronting him of the power. He also cited Lois P. Myers Vs. United States [272 US 160 : 71 L ed 11] wherein it was held that the President has the executive power to appoint and remove executive subordinates.

84. In *The State of Uttar Pradesh & Ors. Vs. Babu Ram Upadhyay* [(1961) 2 SCR 679] cited by Shri Choudhary, it was held that the pleasure doctrine of the President under Article 310 of the Constitution is qualified by Article 311 and is not subject to any law made by the Parliament or the Legislature of the State. In other words, according to the learned counsel, the ratio therein reiterates that the executive power of the President/Governor granted under the Constitution is not subject to any limitations but is co-extensive with the exercise of the legislative power.

85. *Maru Ram Vs. Union of India & Anr.* [(1981) 1 SCR 1196]: (AIR 1980 SC 2147) was cited for the proposition that the power of the President under Article 72 and of the Governor under Article 162, are not subject to legislative control. The power of Legislature imposing minimum sentence of imprisonment under Section 433A of the Code of Criminal Procedure is not subject to, nor can nullify wholly or partly, the executive power of the President or the Governor to pardon or to reduce the life imprisonment of a convict.

86. It is true, as contended by Shri Chowdhary, that the Constitution has demarcated legislative, executive and judicial powers and entrusted them to the three wings of the State; in particular the President/Governor of the State is to exercise the executive power in their individual discretion. It is not subject to legislative limitations to be done in accordance with rules of business. In particular, the President/Governor is entrusted with the executive power co-extensive with the legislative power enumerated in the Seventh Schedule read with Article 245 of the Constitution. The executive power especially conferred by the Constitution like the pleasure tenure or the power of pardoning a convict are in our view, not apposite to the issue. The power of the executive Government in that behalf has wisely been devised in the Constitution is not subject to any restriction except in accordance with the Constitution and the law made under Article 245 read with the relevant Entry in the Seventh Schedule to the Constitution is subject to Fifth Schedule when it is applied to Scheduled area. The power of the Government to acquire, hold and dispose of the property and the making of contracts for any purpose conferred by Article 298 of the Constitution equally is co-extensive with the legislative power of the Union/State. However, Article 244 (1) itself specifies that provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State except the excluded areas specified therein. The legislative power in Clause (1) of Article 245 equally is "subject to the provisions of the Constitution" i.e. fifth Schedule. Clause (1) of para 5 of Part B of the Fifth Schedule applicable to Scheduled areas, adumbrates with an onerous clause that "Notwithstanding anything in the Constitution, in other words, despite the power, under Article 298, the Governor may, by public notification, direct that any particular Act of Parliament or of the Legislature of a State shall not apply to a Scheduled Area or any part thereof in State or shall apply to a Scheduled Area or any part thereof in the State, subject to such exceptions and modifications as he may specify in the notification and any direction given under clause (1) of para 5, may be given so as to have retrospective effect". The executive power of the State is, therefore, subject to the legislative power under clause 5(1) of the Fifth Schedule. Similarly sub-para (2) thereof empowers the Governor to make regulation for the peace and good government of any area in a State which is for the time being a Scheduled Area. In particular and without prejudice to the generality of the foregoing power, such regulation may regulate the allotment of land to members of the Scheduled Tribes in such area or may prohibit or restrict the transfer of land under clause (a) by or among the members of the Scheduled Tribes in such areas. In other words sub-para 5(2) combines both legislative as well as executive power, clause 5(2)(a) and (c) legislative power and clause (b) combines both legislative as well as executive power. The word 'regulation' in para

5(2)(b) is thus of wide import. Meaning of the word 'Regulation' in the title of the Regulation para 5(2)(b) of the Fifth Schedule of the Constitution.

87. The question then is: whether the word "regulate" in para 5 clause (2)(b) would include prohibition to transfer the Government land? It requires no elaborate discussion in this behalf. While interpreting Article 19(1)(g) of the Constitution, this Court has consistently being held that the term 'regulation' would include total prohibition vide *Narendra Kumar Vs. Union of India* [(1960) 2SCR 372] *Fatehchand Himmatlal Vs. State of Maharashtra* [(1977) 2 SCC 670; *State of U.P. & Ors. Vs. Hindustan Aluminium Corpn. And Ors.* [(1979) 3 SCC 229]; *K.Ramanathan Vs. State of Tamil Nadu & Anr.* [(1985) 2 SCC 116]. This Court consider the meaning of the word 'regulation' in *Air India Statutory Corporation etc. Vs. United Labour Union & Ors. etc.* [1996 (9) SCALE 70 paragraph 56 at104-05]. Therein, the Contract Labour (Regulation and Abolition) Act, 1970 came for consideration. The question was whether the word "regulation" would include regularisation of the contract labour in the establishment in which contract labour system was abolished, though it was not expressly provided. A Bench of three Judges had held that the word "regulation", in the absence of restrictive words, must be regarded as plenary in the larger public interest. By necessary implication it includes to do everything which is indispensable for the purpose of carrying out the purposes in view. Accordingly, it was held that though no express provision was made in the Contract Labour Regulation and Abolition Act to regularise the services of the contract labour, working in an establishment after the abolition of contract labour, by necessary implication, the word 'regulation' includes the power to regularise their services as permanent employees in the establishment. Therefore, the word "regulate" the allotment of land to members of Scheduled Tribes in scheduled area in the Fifth Schedule by Clause 5(2)(b) must be read as a whole be ensure regulation of the land only to and among the members of the Scheduled Tribes in the Scheduled area. In the light of the provisions contained in clause (a) of sub-para (2) of para 5, there is implied prohibition on the State's power of allotment of its land to non-tribals in the Scheduled Areas. When so read there is no incompatibility and inconsistency between the power of the executive Government and the Constitution and conjoint operation would elongate the good governance of the Scheduled Areas. So, while prohibiting transfer of land between natural persons, i.e., tribes and non-tribals and preventing non-tribals to purchase from or transfer to another non-tribal, his right, title or interest in the land in the scheduled area, at the same breathe would not be permissible for the Government to transfer their land to a non-tribal except for equally competing public purpose. The answer obviously should be that it is permissible to the Government to transfer its lands to the non-tribals. This negative answers leads to effectuate the constitutional objective to preserve the land in the scheduled area to the tribals, prohibits the Government from allowing their land to the non-tribals; prohibit infiltration of the non-tribals into the scheduled area and prevents exploitation of the tribals by non-tribals in any form. This purposive interpretation would ensure distributive justice among the tribals in this behalf and elongates the constitutional commitment. Any other interpretation would sow the seed beds to disintegrate the tribal autonomy, their tribal culture and frustrate empowerment of them, socially, economically and politically, to live a life of equality, dignity of person and equality of status.

88. It would, therefore, be clear that the executive power of the State to dispose of its property under Article 298 is subject to the provisions in the Fifth Schedule as an integral scheme of the Constitution. The legislative power of the State under Article 245 is also subject to the Fifth Schedule, to regulate the allotment of the Government land in the Scheduled Areas. Obviously, therefore, the State legislature of Andhra Pradesh has now imposed total prohibition under Mines Act to transfer its lands to the non-tribals. Doubtless that under Article 298, the State exercises its

power of disposal for public purpose. When two competing public purposes claim preferential policy decision, option to the State should normally be to elongate and achieve constitutional goal. Secondly, the constitutional priority yields place to private purpose, though it is hedged by executive policy. As a facet of interpretation, the Court too adopts purposive interpretation tool to effectuate the goals set down in the Constitution. Equally, the executive Government in its policy options requires to keep them in the backdrop and regulate disposal of their land-property in accordance with the constitutional policy, executive decision backed by public policy and, at the same time, preserve paramount Tribal interest in the scheduled area. No abstract principle could be laid in that behalf. Each case requires examination in the backdrop of the legislative/executive action, its effect on the constitutional objectives and the consequential result yields there from. The law relating to the power of the President under the Constitution of U.S.A. as has been interpreted by the Supreme Court of U.S.A. or the executive power of the Queen under the scheme in English unwritten Constitution transformed by Convention does not assist us much in this behalf. Shri Chowdhary also cited an article "The Notion of a Living Constitution" written by William H. Rehnquist, the present Chief Justice of Supreme Court of USA [Texas Law Review Vol. 54, 693] emphasising that the Executive should have full freedom in exercising its executive power and the Court cannot limit the executive power by interpretation of a statute or regulation. This also is of no assistance since the Constitution of India conferred express power of judicial review on the constitutional Courts, i.e., Supreme of India and High Courts under Article 32 and 226 of the Constitution respectively. From the a fore stated constitutional perspective and the interpretation of the words 'person' and 'regulation' put up in the earlier parts of the judgement, the question arises: whether the word 'person' under Section 3(1) of the Regulation would include the State Government.

89. Shri Rajeev Dhavan, learned senior counsel for the appellant, contended that the word 'person' in Section 3(1)(a) requires interpretation, keeping in view the contextual constitutional history of prohibition on transfer of the land by a tribal to a non-tribal including that of the Government land differently depending upon the context in which it has occurred in the First part of Section 3(2)(a) the word 'person' may be considered in a generic sense and in the Second Part thereof to mean a natural person. Prohibition on the transfer of the land by a tribal to a non-tribal visualises transfer between natural persons. The factum of membership of the person as a tribe does not necessarily cut down the width of the word 'person', namely, legal person taken alongside the natural person. The word 'person' requires interpretation in the natural sense of the context which it is used. Legal person may be natural, artificial or statutory person. The words "whether or not" in clause 3(2)(a) are in the nature of clarification and it would not cut down the contextual meaning. The words "such person" in the first part of Section 3(1)(a) must be interpreted to mean transfer or, namely, artificial or statutory person apart from natural person. The objection of Section 3(1)(a) would be rendered nugatory if the meaning of the word 'person' is confined or restricted to natural person in Section 3(2)(a). Generic person may be a co-operative society, a shareholder of a company and equally a Government constitutionally capable to hold, acquire and dispose of the property. Therefore, the word 'person' used in the first part of Section 3(2)(a) is of wider import in the context of ownership of the land transfer of which is prohibited within the scheduled area to a non-tribal. The word 'person' in the second clause was used in the context to natural persons, i.e., the transfer between the tribes and non-tribes. In that context, the word 'person' was used in a restricted sense. So in the context of the artificial or juridical or statutory person, the word 'person' is of wider import. Any other interpretation would defeat the object of the Fifth Schedule and the Regulation. Similarly, Section 3(2)(b) regulates the reverse effect. The land in Scheduled area is presumed to belong to the tribals treating them as a class. The meaning of the word 'person' does not detract



from the meaning of the word 'person' in Section 3(2)(a). Similarly, in Section 3(2)(c) if a non-tribal intends to sell the land to a tribal and if the latter is not willing to purchase the same the Government may purchase the land from the non-tribal person and distribute it to the tribal (in such manner as may be prescribed). The words "manner of disposal" would indicate that it should be only in favour of the Scheduled Tribes since the sole object of the Fifth Schedule and its species, the regulation, is that the land in Scheduled area requires preservation among the tribals by allotment and their enjoyment by the tribals alone. Section 3(2)(b) reinforces that the assignment or sale of the property should only be in favour of the Scheduled Tribes or a Society composed solely of the members of the Scheduled Tribes. The entire property in Scheduled area is treated to be the property, be it taken from the non-tribals or is of the Government and at the disposal of the State Government. In that context, the learned counsel has drawn our attention to the word 'regulation' in the Fifth Schedule, para 5(2)(b). He also contends that the word 'regulation' requires to be interpreted broadly to preserve not only the tribal autonomy but also to sub serve distributive justice in favour of the tribals in the matter of assignment of the land belonging to the Government in their favour. Conversely, there is implied prohibition on the transfer of Government land in favour of the non-tribal. The words "peace and good government" used in para 5(2) also requires to be understood in a wider sense. Good Government must, of necessity, be in accordance with the Constitution and dispensation of socioeconomic justice to the tribals including regulation of the land, distribution between the tribals and prohibition on the non-tribals to entrench into scheduled area, to acquire, hold and deal with the lands in scheduled area. It would defeat the object of the Constitution envisaged in the Fifth Schedule thereof because the non-tribals get the Government land transferred in their favour and maneuver to have the tribals deprived of their land by other illegal means. The word 'State', therefore, would include within the concept of the word 'person' in Section 3 of the Act. In support there of, Shri Rajeev Dhavan cited *State of West Bengal Vs. Union of India* [(1964) 1 SCR371] and *Madras Electric Corporation case*. He has also drawn our attention to construe the provisions in the context of the whole statute relying upon *Reserve Bank of India Vs. Peerless General Finance & Investment Co. Ltd. & Ors.* [(1987)1 SCC 424 para 33 at page 150-51] and *C.E.S.C. Ltd & Ors. Vs. Subhash ChandraBose & Ors.*[(1992) 1 SCC 441 at 464]. He further contends that in view of the object, the word may be read broadly, in the light of public purpose and social and economic justice which the Regulation seeks to serve. He cited in support of his contention, the following decisions, viz. *The State of Bombay Vs. R.M.D.Chamarbaugwala* [1957 SCR 874 at 892-95]; *Ishwar Singh Bindra & Ors. Vs. The State of U.P.* [(1969) 1 SCR 219 at 225]; *Nedurimilli Janardhana Reddy Vs. Progressive Democratic Students' Union & Ors.* [(1994) 6 SCC 506 para 6). A word may be read in different contexts in a different way. He cited that the word 'sale' used in the context of freedom of speech and expression was given different meaning in *Printers (Mysore) Ltd. & Ors. Vs. Asstt. Commercial Tax Officer & Ors.* [(1994) 2 SCC 434 at 445], *Pushpa Devi and Ors. Vs. Milkhi Ram(dead) by his Lrs.* [(1990) 2 SCC 134] and *Commissioner of Income-tax, BangaloreVs. J.H.Gotla Yadagiri* [(1985) 4 SCC 343]. The word 'vest' was interpreted with a different meaning in *Dr. M. Ismail Faruqui & Ors. Vs. Union of India & Ors.*[(1994) 6 SCC 360 at pp. 393, 404-05 and 423]. He therefore, contends that different meaning is required to be given to the word 'person' as used in Section 3(1)(a), 3(1)(b) and 3(1)(c) of the Act. We find force in his contention.

90. M/s. Sudhir Chandra. L. Nageswara Rao, A.V. Rangam and their companion learned advocates, contended that in Section 3 of the Regulation read with the Fifth Schedule, para 5 sub- clauses 2(b), the word "person" would be understood in its natural and contextual perspective which would indicate that the word 'person', would be applicable only to natural persons. The learned counsel laid great emphasis on the Statement of Objects and Reason for amendment of the Regulation in

1970. According to the learned counsel, the golden rule of interpretation is that the legislative intent is to be effectuated by giving natural and grammatical meaning to the word used in a statute. Only when the court finds ambiguity of the expression used by the statute, principles of interpretation would be applicable. In this case, there is no such ambiguity. The word 'person' is simple and plain, connoting prohibition on transfer of land between natural persons, namely, tribals and non-tribals. That is made manifest by the Statement of Objects and reasons of the amended Regulation which envisages that the Regulation was brought on statute to prohibit alienation of the lands in the scheduled area by tribal in favour of a non-tribal. By necessary implication the Government is not intended to be included if the word 'person'. Shri P.A.Choudhary, learned Senior counsel further elaborated, stating that Section 3(2)(b) amplifies that the land is purchased from a non-tribal by the Government or where the heirs of a tribal transferor are not willing to take back the property, assignment or disposal of the said property in favour of another tribal as "a property at the disposal of the State Government" and prosecution for violation of the Regulation under Section 6A by way of penalty, are not intended to be applied to the Government when the transfer is made in violation of the provisions of the Regulation; and, therefore, the word 'person' should be given restricted meaning applicable only to natural person.

91. Sri Sudhir Chandra further contended that Clause 2(a) of para 5 of the Fifth Schedule restricts transfer of land by or among members of the Scheduled Tribes; clause (b) regulates the allotment of land to members of the Scheduled Tribes in such area; and clause (c) regulates money-lending business by non-tribals to members of the Scheduled Tribes in Scheduled Area and para 5(3) gives power to the Governor to regulate by law or to repeal or amend any Act of Parliament or of the Legislature of the State or any existing law in relation to that area. The purpose, thereby, is to prevent exploitation of tribals by non-tribals. The State Government is not expected to exploit the tribals. The Fifth Schedule does not prevent establishment of any factory or an industry or any scheme for development of the tribal area by non-tribals. Exploitation of valuable minerals by the non-tribals is not intended to be prevented by Fifth Schedule to the Constitution. In particular, they laid emphasis on para 5, clause 2(b) of the Fifth Schedule, which does not prohibit the allotment of the land to the non-tribals. It is contended that the word "regulate" used therein does not necessarily imply prohibition. If such a construction is adopted, it would hinder the progress of the tribal areas. It introduces mutually internal and external contradictions. Harmonious interpretation, therefore, has to be adopted to make the Regulation and the Fifth Schedule work as a consistent whole, regulating prohibition on transfer of land in the tribal areas to the non-tribal natural persons only. Thereby, the word 'person' should be understood in that perspective. The government and juristic persons are outside the purview of paras 5(2) and 5(3) of the Fifth Schedule and Section 3 of the Regulation.

92. The respective contentions give rise to the question: whether the regulation prohibits the State Government transferring its lands to non-tribals?

93. The historical evidence collected and culled out from B. Shiva Rao's "In the making of the Constitution" and the scheme of the representative form of Government furnishes background material for interpretation of the word "person". It is well established rule of interpretation that the words of width issued in the Constitution requires wide interpretation to effectuate the goals of establishing an egalitarian social order supplying flesh and blood to the glorious contents and context of those words and to enable the citizen to enjoy the rights enshrined in the Constitution from generation to generation. In Ashok Kumar Gupta Vs. State of U.P. [JT 1997 (4) SC 251], this Bench has applied the rule of wide interpretation of the Constitution. It bears no reiteration; reasons

given therein *mutates mutandis* would *proprio vigore* apply to the fact situation. From the above perspective, having given our deep and anxious consideration to the respective contentions of the learned counsel for the parties, we are of the considered view that the interpretation put up by Shri. Rajeev Dhavan merits acceptance. It is seen and bears recapitulation that the purpose of the Fifth and Sixth Schedules to the Constitution is to prevent exploitation of truthful, inarticulate and innocent tribals and to empower them socially, educationally, economically and politically to bring them into the mainstream of national life. The founding fathers of the Constitution were conscious of and cognizant to the problem of the exploitation of the Tribals. They were anxious to preserve the tribal culture and their holdings. At the same time, they intended to provide and create opportunities and facilities, by affirmative action, in the light of the Directive Principles in Part IV, in particular, Articles 38, 39, 46 and cognate provisions to prevent exploitation of the tribals by ensuring positively that the land is a valuable endowment and a source of economic empowerment, social status and dignity of persons. The Constitution intends that the land always should remain with the tribals. Even the government land should increasingly get allotted to them individually and collectively through registered Cooperative Societies or agricultural/farming Cooperative Societies composed solely of the tribals and would be managed by them alone with the facilities and opportunities provided to them by the Union of India through their Annual Budgetary allocation spent through the appropriate State Government as its instrumentalities or local body in a planned development so as to make them fit for self-governance. The words "peace and good government" used in the Fifth Schedule require widest possible interpretation recognised and applied by this Court in *T.M. Kannian Vs. Income-tax Officer, Pondicherry & Anr.* [(1968) 2 SCR 103 at 107-08] and *Queen Vs. Russel* [(1882) 7AC 829].

94. By the Constitution [73rd Amendment] Act, 1992 amended Part IX of the Constitution, the principle of self-government based on democratic principles at Gram Panchayat and level upwards was introduced through Articles 343 to 343ZG. As an integral scheme thereof, the Andhra Pradesh (Provision of the Panchayats Extension to Scheduled Areas) Act, 1966 came to be made. Section 4 (d) of that Act provides that "(N)otwithstanding anything contained under Part IX of the Constitution, every Gram Sabha shall be competent to safeguard and preserve...community resources". Clause (j) of Section 4 provides that planning and management of minor water bodies in the Scheduled Areas shall be entrusted to the Panchayats at the appropriate level. Under clause (m) (iii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawful alienation of land of a Scheduled Tribe and under clause (iv) the power to manage village markets, by whatever name called, are entrusted to the Gram Panchayats. It would indicate that the tribal autonomy of management of their resources including the prevention of the alienation of the land in the Scheduled Areas and taking of appropriate action in that behalf for restoration of the same to the tribals, is entrusted to the Gram Panchayats.

95. The maxim "*redden do singula singulis*" will apply to the interpretation of the word "person" so that the general meaning of the word "person" in its generic sense with its width would not be cut down by the specific qualification of one species, i.e., natural "person" when it is capable to encompass, in its ambit, natural persons, juristic persons and constitutional mechanism of governance in a democratic set up. It has already been held, and bears no repetition, that the State, by Cabinet form of Government, is a *persona ficta*, a Corporate sole. Constitution empowers the State to acquire, hold and dispose of their property. The Governor in his personal responsibility is empowered to maintain peace and good government in scheduled area. The Fifth Schedule to the Constitution empowers him to regulate allotment of the land by para 5(2)(b) read with Section 3 of the Regulation of the land be it between natural persons, i.e., tribals and non-tribals; it imposes total

prohibition on transfer of the land in scheduled area. The object of the Fifth Schedule and the Regulation is to preserve tribal autonomy, their culture and economic empowerment to ensure social, economic and political justice for preservation of peace and good government in the Scheduled Area. Therefore, all relevant clauses in the Schedule and the Regulation should harmoniously and widely be read so as to elongate the aforesaid constitutional objectives and dignity of person to the Scheduled Tribes, preserving the integrity of the Scheduled Areas and ensuring distributive justice as an integral scheme thereof. Clauses (a) and (c) of sub para (2) of para 5 of the Fifth Schedule prohibits transfers inter vivos between tribals and non-tribal natural persons and prevents money-lenders to exploit the tribals. Clause (b) intends to regulate allotment of land not only among tribals but also prohibits allotment of the land belonging to the government to then on-tribals. In that behalf, wider interpretation of "regulation" would include 'prohibition' which should be read into that clause. If so read, it sub serves the constitutional objective of regulating the allotment of the land in Scheduled Areas exclusively to the Scheduled Tribes. Clause 5(2)(b) ensures distributive justice of socioeconomic empowerment which yields meaningful results in reality. If purposive construction, in this backdrop is adopted, no internal or external contradiction would emerge. The word 'person' would include both natural persons as well as juristic person and constitutional Government. This liberal and wider interpretation would maximise allotment of Government land and scheduled area to the tribals to make socio-economic justice assured in the Preamble and Articles 38, 39 and 46, a reality to the tribals. The restricted interpretation would defeat the objective of the Constitution. The word "person" would be so interpreted as to include State or juristic person Corporate sole or persona ficta. Transfer of land by the juristic persons or allotment of land by the State to the non-tribals would stand prohibited, achieving the object of para 5(2) of the Fifth Schedule of the Constitution and Section 3 of the Regulation. If the word 'person' is interpreted to mean only natural persons, it tends to defeat the object of the Constitution, the genus and the Regulation, its species. As a corollary, by omission in the final draft of the Fifth Schedule of the power of the State Government to transfer its land to the non-tribals with the sanction of a competent authorised officer or authority would, by interpretation brought into effect and the object of the Constitution would easily be defeated. We are, therefore, inclined to take the view that the word 'person' includes the State Government. The State Government also stands prohibited to transfer by way of lease or any other form known to law, the Government land in scheduled area to non-tribal person, be it natural or juristic person except to its instrumentality or a Co-operative Society composed solely of tribes as is specified in the second part of Section 3(1)(a). Any other interpretation would easily defeat the purpose exclusive power entrusted by the Fifth Scheduled to the Governor. If the Cabinet form of Government would transfer the land of the Government to non-tribals peace would get disturbed, good governance in scheduled area would slip into the hands of the non-tribals who would drive out the tribals from scheduled area and create monopoly to the well developed and sophisticated non-tribals; and slowly, and imperceptible, but surely, the land in the scheduled area would pass into the lands of the non-tribals. The letter of law would be an empty content and byplay of words deflect the course of justice to the tribals and denude them of the socio-economic empowerment and dignity of their person.

96. The word "person" in Section 3(1)(a) would, therefore, be construed to include not merely the natural persons, in the context of tribal and non tribal who deal with the land in Scheduled Areas by transfer inter vivos but all juristic person in the generic sense, including the Corporation aggregate or Corporation sole, State, Corporation, partnership firm, a company, any person with corporate veil or persons of all hues, either as transferor or transferee so that the word 'regulate in para 5(2)(b) of the Fifth Schedule in relation to the land in Scheduled Areas would be applicable to them

either as transferor or transferee of land in a Scheduled Area. It, thus, manifests the constitutional and legislative intention that tribals and a Cooperative Society consisting solely of tribal members alone should be in possession and enjoyment of the land in the scheduled area as dealt with in various enactments starting from Ganjam and Vizianagaram Act, 1839 to the present regulation.

97. This interpretation of ours is consistent with the constitutionality of the Regulation as was upheld by this Court in P. Rami Reddy & Ors. etc. Vs. State of A.P. & Anr. etc. [(1988) Supp. 1 SCR 443]; Lingappa Pochanna Appelwar Vs. State of Maharashtra and Anr. [(1985) 1 SCC 479] and Manchegowda and Ors. Vs. State of Karnataka and Ors. [(1984) 3 SCC 301]. There is no internal and external contradiction

in this process of harmonious and purposive interpretation of para 5(2)(a) of the Fifth Schedule which regulates transfers between natural persons; Para 5(2)(b)encompasses within its ambit, the transfer by the Government of its land to anon-tribal and clause (c) or the relevant clauses in Sections 3 and 4 of the Regulation. The Regulation prevents exploitation of the tribals through the State Government; from the other end, it does not allow parting with of their land and prevents induction of non-tribals into the scheduled area by allotment of the land or by regulating allotment of the land, be it private or private corporate aggregate. This interpretation per se, therefore, is public law interpretation to sub serve the constitutional purpose without recourse to private law principles.

98. In *Minerva Mills Ltd. & Ors. Vs. Union of India & Ors.* [(1981) 1 SCR 206],the Constitution Bench had held that the edifice of our Constitution is built upon the concept crystalised in the Preamble. We "the People" resolved to constitute ourselves a socialist State which carries with it the obligation to secure to the people, justice - social, economic and political. We, therefore, put Part IV into our Constitution containing Directive Principles of State Policy which specifies the socialistic role to be achieved. In *D.S. Nakara &Ors. Vs. Union of India* [(1983) 2 SCR 165 at 187F to 189H], another Constitution Bench had dealt with the object to amend the Preamble by the Constitution (42ndAmendment) Act and pointed out that the concept of Socialist Republic was to achieve socioeconomic revolution to end poverty, ignorance and disease and inequality of opportunity. It was pointed out that socialism is a much misunderstood word. Values determine contemporary socialism - pure and simple. The principal aim of socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people especially to provide security from cradle to grave. The less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be prohibited. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. The Preamble directs the centers of power, Legislature, Executive and Judiciary - to strive to set up from a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society under rule of law though it is a long march, but during the journey to the fulfillment of goal every state action including interpretation whenever taken, must be directed and must be so interpreted as to take the society towards establishing egalitarian socialist State, the goal. It was, therefore, held that" it, therefore, appears to be well established that while interpreting or examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other."

99. Pt. Jawaharlal Nehru, while participating in the discussion on the Constitution (First Amendment) Bill, had stated that the Directive Principles are intended to bring about a socio-

economic revolution and to create a new socio- economic order where there will be social and economic justice for all and for everyone, not only to fortunate few but also the teeming millions of India who would be able to participate in the fruits of freedom and development and exercise the fundamental rights.

100. Dr. Ambedkar, while introducing the Preamble of the Constitution for discussion by the Constituent Assembly, had stated that the purpose of the Preamble is to constitute "a new society in India based on justice, liberty and equality". The Constituent Assembly debates of November 1948 at pages 230 to 357 do indicate that the Directive Principles intended to provide life blood to social, economic and political justice to all people. Some of the members like Mahavir Tyagi, Professor K.T. Shah, Dr. Saxena etc. pleaded for incorporation of socialism as part of the Preamble but Dr. Ambedkar, the father of the Constitution, while rejecting the amendment, made it clear that the socio-economic justice provided in the Directive Principles and the Fundamental Rights given in Chapter III would meet the above objective without expressly declaring India as a socialist State in the Constitution. Alladi Krishnaswamy Ayyer supported Dr. Ambedkar and had stated that "the Constitution, while it does not commit the country to any particular form of economic structure of social adjustment, gives ample scope for the future legislature and the future Parliament to evolve any economic order and undertake any legislation they choose in public interest". Pandit Jawaharlal Nehru in his speech also emphasised the need to enter into a new social order in which "there would be valid growth in the standard of living of all the people of India with equitable distribution of wealth and equality of opportunity and status of all". Dias, in his "Jurisprudence" 5th Edn.) on 'distributive justice' in Chapter 4 at page 66, has stated that justice is not synonymous with equality; equality is one aspect of it. Justice is not something which can be captured in a formula once and for all. It is a process, a complex and shifting balance between many factors including equality. Justice is never given, it is always a task to be achieved Justice is just allocation of advantages and disadvantages, preventing the abuse of power, preventing the abuse of liberty by providing facilities and opportunities to the poor and disadvantaged and deprived social segments for a just decision of disputes adapting to change.

101. Justice P.B. Sawant, former Judge of this Court in his "Socialism under the Indian Constitution" had stated at page 2 that today socialism has come to be associated with certain social and economic arrangements and a way of life in a socialist economy that the resources of the society are owned by the State as a whole and are used for the benefit of all, for ensuring all basic human rights to every member of the society and not for the profit of a few. By human rights is meant - all economic, political, social and cultural rights which are necessary for an individual to realise his full potential. In a socialist society, social, political and economic inequalities disappear and none is allowed to possess economic power to the extent that he is in a position to exploit or dominate others. It is only such society which can guarantee human dignity, stability, peace and progress.

102. Mahatma Gandhiji, the father of the nation, in 'Harijans' dated October 9, 1937 had stated that "true economics never militates against the highest ethical standard, just as all true ethics to be worth its name must at the same time be also good economics. An economics that inculcates Mammon worship, and enables the strong to amass wealth at the expense of the weak, is a false and dismal science. It spells death. True economics, on the other hand, stands for social justice, it promotes the good of all equally, including the weakest, and is indispensable for decent life." Dr. V.K.R.V. Rao, one of the eminent economists of India, in his "Indian Socialism Retrospect and Prospect" has stated at page 46-47 that a socialist society has not only to bring about equitable

distribution but also to maximise production. It has to solve problems of unemployment, low income and mass poverty and bring about a significant improvement in the national standards of living. At page 47, he has stated that socialism, therefore, requires deliberate and purposive action on the part of the State in regard to both production and distribution and the fields covered are not only savings, investment, human skills and use of science and technology, but also changes in property relations, taxation, public expenditure, education and the social services. A socialist society is not just a give-away society nor is it only concerned with distribution of income. It must bring about full employment as also an increase in productivity.

103. A socialistic society involves a planned economy which takes note of time and space considerations in the distribution and pricing of output. It would be necessary for both the efficient working of socialist enterprises and the prevention of unplanned and anarchical expansion of private enterprises. The Indian conception of socialism with democracy with human dignity is by creation of opportunities for the development of each individual and not the destruction of the individual. It is not for the merging of the individual in the society. The Indian socialist society wants the development of each individual but requires this development to be such that it leads to the upliftment of the society as a whole. Fundamental duties in Chapter VI-A of the Constitution to bear meaningful content, facilities and opportunity on equal footing is advance must not be private profit, but social gain, and that the pattern of development and the structure of socio-economic relations should be so planned that they result not only in appreciable increase in national income and employment but also in greater equality in incomes and wealth... ..The benefits of economic development must accrue more and more to the relatively less privileged classes of society, and there should be progressive reduction of the concentration of incomes, wealth and economic power... ..The socialist pattern of society is not to be regarded as some fixed or rigid pattern. It is not rooted in any doctrine or dogma. ... It is neither necessary nor desirable that the economy should become a monolithic type of organisation offering little play for experimentation either as to forms or as to modes of functioning. Nor should expansion of the public sector mean centralization of decision- making and of exercise of authority. ...The accent of the socialist pattern of society is on the attainment of positive goals, the raising of living standards. The enlargement of opportunities for all the promotion of enterprise among the disadvantaged classes and the creation of a sense of partnership among all sections of the community. These positive goals provide the criteria for basic decisions. The directive principles of State policy in the Constitution have indicated the approach in broad terms; the socialist pattern of society is a more concretised expression of this approach. Economic policy and institutional changes have to be planned in a manner that would secure economic advance along democratic and egalitarian lines..."

105. Mr. G.D.H. Cole, one of the leading socialist of U.K., in his speech "The Growth of Socialism" published in 'Law and Opinion in England in the 20th Century' (Morris Ginsberg, Editor) at page 79-80, has stated that socialism is a movement aiming at greater social and economic equality and using extended State action as one of its methods, perhaps the most distinctive but certainly not the only one needed to be taken into account. The affairs of the community shall be so administered as to further the common interests of ordinary men and women by giving to everyone, as far as possible, an equal opportunity to live a satisfactory and contented existence, coupled with a belief that such opportunity is incompatible with the essentially unequal private ownership of the means of production. It requires not merely collective control of the uses to which these are to be put, but also their collective ownership and disinterested administration for the common benefit. This basic idea of socialism involves not only the socialisation of the essential instruments of production, in the widest sense, but also the abolition of private incomes which

allow some men to live without rendering or having rendered any kind of useful service to their fellowmen and also the sweeping away of forms of educational preference and monopoly which divide men into social classes. It involves, in effect, whatever is needful for the establishment of what socialists call a 'classless society' and in pursuance of this aim its votaries necessarily look for support primarily, though not exclusively, to the working classes, who form the main body of the less privileged under the existing social order. Socialists seek to reduce economic and social inequalities not only in order to remove unearned sources of superior position and influence, but also in order to narrow the gaps between men to such as are compatible with all men being near enough together in ways of living to be in substance equals in their mutual intercourse.

106. In *Excel Wear Etc. Vs. Union of India & Ors.* [(1979) 1 SCR 1009], the Constitution Bench had held at pages 1030-31 that the concept of socialism or socialist state has undergone changes from time to time from country to country and from thinker to thinker. But some basic concept still holds the field. The doctrinaire approach to the problem of socialism be eschewed and the pragmatic one should be adapted. So long as the private ownership of an industry is recognised and governs an overwhelmingly large proportions of an economic structure, it is not possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely or to a very large extent the interest of another section of the public, namely, the private ownership of the undertaking. In other words, the object of intermediation should be co-existence and flourishing of mixed economy. In *State of Karnataka Vs. Shri Ranganatha Reddy & Anr. etc.* [(1978) 1 SCR 641], a Bench of nine Judges of this Court considered nationalisation of the contract carriages. In that behalf, it was held that one of the principal aims of socialism is the distribution of the material resources of the community in such a way to sub serve the common good. This principle is embodied under Article 39(b) of the Constitution as one of the essential directive principles of State polity. Therein, this Court laid stress on the word 'distribute' as used in Article 39(b) being a key-word of the provision emphasising that "The key word is distribution and the genius of the Article, if we may say so, cannot but be given full play as it fulfills the basic purpose of restructuring the economic order. Each word in this Article has a strategic role and the whole Article is a social mission. It embraces the entire material resources of the community. Its task is to distribute such resources, its goal is to undertake distribution as best to sub serve the common good. It reorganises by such distribution the ownership and control."

107. In *Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Ltd. & Anr.* [(1983) 1 SCR 1000] another Constitution Bench reiterated the above view; while considering Article 39(b) of the Constitution, at page 1020, this Court had held that the broad egalitarian principle of economic justice was implicit in every directive principle and, therefore, a law designed to promote a directive principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the law, would most certainly advance the broader egalitarian principle and desirable constitutional goal of social and economic justice for all. If the law was aimed at the broader egalitarianism of the Directive Principles, Article 31C protected the law from needless, unending and rancorous debate on the question whether the law contravened Article 14's concept of the equality before the law. The law seeking the immunity afforded by Article 31C must be a law directing the policy of the State towards securing a Directive Principle and the connection with the Directive Principle must not be some remote or tenuous connection. The object of the nationalisation of the coalmine is to distribute nations resources. It was held at page 1023 that though the word 'socialist' was introduced in the Preamble by late amendment of the Constitution, that socialism has always been the goal is evident from the Directive Principles of the State policy. The amendment was only to emphasise the urgency. Ownership, control and distribution of



national productive wealth for the benefit and use of the community and the rejection of a system of misuse of its resources for selfish ends is what socialism is about and the words and thought of Article 39(b) but echo the familiar language and philosophy of socialism as expounded generally by all socialist writers. Socialism is, first of all, a protest against the material and cultural poverty inflicted by capitalism on the mass of the people. Nationalisation of coal mine for distribution was upheld as a step towards socialism. In *State of Tamil Nadu etc. etc. Vs. L. Abu Kavur Bai & Ors.* Etc. [(1984) 1 SCR 725], the same extended meaning of distribution of material resources in Article 39(b) was given by another Constitution Bench to uphold *Tamil Nadu State Carriages and Contract Carriages (Acquisition) Act*. Similar view was reiterated by a three Judge Bench in *Madhusudan Singh & Ors. Vs. Union of India & Ors.* [(1984) 2 SCC 381]. In *Air India* case the concept of socialism was elaborated and applied to fill in the gaps of the Act to regularise the services of the contract labourers in the establishments of Air India.

108. It is an established rule of interpretation that to establish Socialist Secular Democratic Republic, the basic structure under the rule of law, pragmatic broad and wide interpretation of the Constitution makes social and economic democracy with liberty, equality of opportunity, equality of status and fraternity a reality to "we, the people of India", who would include the Scheduled Tribes. All State actions should be to reach the above goal with this march under rule of law. The interpretation of the words 'person' 'regulation' and 'distribution' require to be broached broadly to elongate socio-economic justice to the tribals. The word 'regulates' in para 5(2)(b) of the Fifth Schedule to the Constitution and the title of the Regulation would not only control allotment of land to the Tribes in Scheduled area but also prohibits transfer of private or Government's land in such areas to the non-tribals. While after clause (a) achieves the object of prohibiting transfers inter vivos by tribals to the non-tribals or non-tribals inter se, the first clause includes the State Government of being a juristic person integral scheme of para 5(2) of Schedule. The Regulation seeks to further achieve the object of declaring with a presumptive evidence that the land in the Scheduled Areas belongs to the Scheduled Tribes and any transfer made to a non-tribal shall always be deemed to have been made by a tribal unless the transferee establish the contra. It also prohibits transfer of the land in any form known to law and declared such transfer as void except by way of testamentary disposition by a tribal to his kith and kin/tribal or by partition among them. The regulation and its predecessor law in operation in the respective areas regulate transfer between a tribal and non-tribal with prior permission of the designated officer as a condition precedent to prevent exploitation of the tribals. If a tribal is unwilling to purchase land from a non-tribal, the State Government is enjoined to purchase the land from a non-tribal as per the principles set down in the regulations and to distribute the same to a tribal or a cooperative society composed solely of tribals.

### **Whether lease is a transfer.**

109. Section 105 of the Transfer of Property Act defines 'lease' as a transfer of right to enjoy immovable property made by the transferor to the transferee for a certain period, express or implied, for consideration of price paid or promised etc. to the transferor by the transferee who accepts the transfer on such terms. Thereby the lease creates a right or an interest in enjoyment of the demised property on terms and conditions contained therein to remain in possession thereof for the duration of the period of lease unless it is determined in accordance with the contract or the statute. It is an encumbrance on the right to be in possession; use and enjoyment of the land by the transferee. Lease is the outcome of separation of ownership and possession. It may be either rightful or wrongful. If it is rightful, it is an encumbrance on the owner's title but if it is wrongful

the transferee acquires no lawful right to enjoy the interest therein. Section 11(5) of the Mines and Minerals (Regulation and Development) Act, 1957 brought by State Amendment Act prohibits grant of mining lease in Scheduled Areas in favour of the non-tribals. It reads as under:

"Notwithstanding anything contained in this Act no prospecting license or mining lease shall be granted in the Scheduled areas to any person who is not a member of the Scheduled Tribes:

Provided that this sub-section shall not apply to an undertaking owned or controlled by the State or Central Government or to a Society registered or deemed to be registered under the Andhra Pradesh Co-operative Societies Act, 1964 which is composed solely of members of Scheduled Tribes.

Explanation: For the purpose of this sub-section; (a) the expression "Scheduled Areas" shall have the same meaning assigned to it in clause (25) of article 366 of the Constitution of India; and

(b) the expression "Scheduled Areas" shall have the same meaning assigned to it in paragraph 6 of the Fifth Schedule to the Constitution of India."

110. It brings out and effectuates public policy envisaged in the Fifth Schedule of the Constitution and the Regulation. Undoubtedly, it is prospective but the underlying principle would permeate the purpose of interpretation that the State Governments being a person is regulated under Section 3 of the Regulation prohibit transfer of their land situated in the Scheduled Areas in which mines are discovered or for any other purpose. G.O.Ms. No.971/Rev B of 1969 provides that Government land should not be given to non-tribals. The contention of Shri Sudhir Chandra that the Government being empowered to operate the Regulation, by implication, the Regulation does not apply to Government land per force, is untenable in view of the above unambiguous constitutional, legislative and executive policy. The further contention that there is no need for its incorporation and that the Government would be prohibited from transferring for public purpose, is untenable. They do not detract from legal reasoning and purposive interpretation. The transfer of such land for a public purpose, viz., to construct a hospital or to set up a bank by the Government or its instrumentalities and for any public purpose etc., is not prohibited for two reasons, namely, (i) there is no transfer of interest in the Government land in favour of a non-tribal; (ii) there is no transfer of its land in law to itself. The contention, therefore, that the Regulation prohibits transfer of Government land for its public purpose is unsustainable. The further contention that even philanthropic persons imbued with social zeal and spirit to ameliorate the social status and economic position of the tribals, would also be prevented to serve them is untenable. What the Regulation prohibits is the transfer of right, title and interest in the immovable property in scheduled area in favour of non tribals. There is no prohibition on non-tribals philanthropist to organise, through tribals and a Cooperative Society composed solely of tribals, actions to ameliorate socio-economic status of the tribals in the Scheduled Area. The further contention that the rich mineral wealth being a national asset cannot be kept unexploited which is detrimental to the national development, is devoid of force. Instead of getting the minerals exploited through non-tribals, by exploitation of tribals, the minerals could be exploited through an appropriate scheme, without disturbing ecology and forest, by the tribals themselves, either individually or through Cooperative Societies composed solely of the tribes with the financial assistance of the State or its instrumentalities. It would itself be an opportunity to the tribals to improve their social and economic status and a source of their economic endowment end empowerment and would give them dignity of person, social and economic status and an opportunity to improve their excellence. In the Constituent Assembly, a demand was made for allotment of mining areas in North-Eastern

States to the autonomous bodies; the Constituent Assembly instead approved payment of royalty. At many a place, the minerals deposits may be situated in tribal area. In the light of the language used in Section 3 of the Regulation and Section 11(5) of Mining Act, we have examined the question taking aid of the source thereof, i.e., para 5(2)(a) and (b) of the Fifth Schedule and interpreted the word 'person' to include State Government.

111. The object of Fifth and Sixth schedules to the Constitution, as seen earlier, is not only to prevent acquisition, holding or disposal of the land in Scheduled Areas by the non-tribals from the tribals or alienation of such land among non-tribals inter se but also to ensure that the tribals remain in possession and enjoyment of the lands in Scheduled areas for their economic empowerment, social status and dignity of their person. Equally exploitation of mineral resources national wealth undoubtedly, is for the development of the nation. The competing rights of tribals and the State are required to be adjusted without defeating rights of either. The Governor is empowered, as a constitutional duty, by legislative and executive action, to prohibit acquiring, holding and disposing of the land by non-tribals in the Scheduled Areas. The Cabinet, while exercising its power under Article 298, should equally be cognizant to the constitutional duty to protect and empower the tribals. Therefore, the Court is required to give effect to the constitutional mandate and legislative policy of total prohibition on the transfer of the land in Scheduled area to non-tribals.

112. Right to health has been declared to be a fundamental right in CERC case; right to education is a fundamental right under Article 46 as held by this Court in Maharashtra State Board of Secondary and Higher Secondary Education Vs.K.S.Gandhi [1991 (2) SCC] and J.P.Unni Krishnan Vs. State of A.P.((1993) 1 SCC645]; right to pollution-free atmosphere has been held to be a part of right to life under Article 21 as held by this Court in Subhash Vs. State of Bihar [AIR1991 SC 420]; right to potable water is a fundamental right as held by this Court in State of Karnataka Vs. Appa Balu In gale & Ors. [(1995) Supp. 4 SCC 469]; right to shelter has been held to be a fundamental right in catena of decisions of this Court starting with Olga Tellis Case. These are all basic human rights declared under the Universal Declaration of Human Rights and integral part of right to life under Article 21 and other fundamental rights provided in Part III of the Constitution.

113. In the absence of any total prohibition, undoubtedly Article 298 empowers the Governor being the head of the Executive to sanction transfer of its lands. Since the Executive is enjoined to protect social, economic and educational interest of the tribals and when the State leases out the lands in the Scheduled Areas to the non-tribals for exploitation of mineral resources, it transmits the correlative above constitutional duties and obligation to those who undertake to exploit the natural resources should also to improve social, economic and educational empowerment of the tribals. As a part of the administration of the project, the licensee or lessee should incur the expenditure for:

[a] reforestation and maintenance of ecology in the Scheduled Areas: [b] maintenance of roads and communication facilities in the Scheduled Areas where operation of the industry has the impact;

[c] supply of potable water to the tribals; [d] establishment of schools for imparting free education at primary and secondary level and providing vocational training to the tribals to enable them to be qualified, competent and confident in pursuit of employment;

[e] providing employment to the tribals according to their qualifications in their establishment/factory;

[f] establishment of hospitals and camps for providing free medical-aid and treatment to the tribals in the Scheduled Areas;

[g] maintenance of sanitation;

[h] construction of houses for tribals in the Scheduled Areas as enclosures; The expenditure for the above projects should be part of his/its Annual Budget of the industry establishment or business avocation/venture.

114. In this behalf, at least 20 per cent of the net profits should be set apart as a permanent fund as a part of Industrial/business activity for establishment and maintenance of water resources, schools, hospitals, sanitation and transport facilities by laying roads etc. This 20% allocation would not include the expenditure for reforestation and maintenance of ecology. It is needless to mention that necessary sanction for exemption of said amount from income- tax liability may be obtained; and the Centre should ensure grant of such exemption and see that these activities are undertaken, carried on and maintained systematically and continuously. The above obligations and duties, should be undertaken and discharged by each and every person/industry/licensee/ less concerned so that the constitutional objectives of social, economic and human resource empowerment of the tribals could be achieved and peace and good government is achieved in Scheduled Areas. We have not examined the other Acts in detail but as and when such need arises, they may be examined in the light of the language used therein and the law.

### **Mining Lease of Government land is whether outside the Regulation.**

115. The question then is: whether grant of mining leases of lands in the Scheduled Areas belonging to the Government is outside the purview of the Regulation? In the light of the a fore stated discussion and the conclusion that the word 'person' would include the State Government, the necessary corollary would be that the transfer of the land in Scheduled area by way of lease, for mining purpose in favour of non-tribals stands prohibited by para 5(2)(b) of the Fifth Schedule read with Section 3 of the Regulation. It is on record that then on-tribal individuals have transferred their lease hold interest in the mining leases in favour of some of the respondent-companies. The Government stands prohibited to transfer the mining leases to Corporation aggregate etc. except to its instrumentality.

116. The lease being a transfer of an interest in the land or a right to enjoy such property during subsistence of lease, its transfer stands prohibited. It is well settled position of law, by catena of decisions of this Court, that renewal of lease is in reality a fresh grant of lease, though it is called a renewal because it postulates the existence of a prior lease. It has been brought out from record that some of the respondents-companies have got transfer of mining lease in their favour from the individual lessees. This Court in *M/s. Victoria Granites (P) Ltd. Vs. P.Rama Rao & Ors.* [JT 1996 (9) SC 303] has held that the transfer of mining leases by an individual in favour of a company is void and in effect, would defeat the object of Article 39(b) of the Constitution and would nullify the object of distributive justice of the largess of the State to accord economic justice to individuals to improve socio-economic status and to secure dignity of persons. Therefore, the transfer of lease

or renewal of mining lease in favour of some of the respondents is void as it defeats the constitutional and statutory objectives.

117. It is seen that in one case, the transfer was claimed to have been made in favour of the State instrumentalities, i.e., A.P.S.M.D. Corporation Ltd. It has already been held that transfer of the Government land in favour of its instrumentalities, in the eye of law, is not a transfer but one of entrustment of its property for public purpose. Since, admittedly, a public Corporation acts in public interest and not for private gain, such transfer stands excluded from the prohibition under para 5(2)(b) of the Fifth Schedule and Section 3(1)(a) of the Regulation. Such transfer or lease, therefore, stands upheld. But a transfer of mining leases to non-tribal natural persons or company, corporation aggregate or partnership firm etc. is unconstitutional, void and inoperative.

118. The A.P.S.M.D. is required to exploit minerals in conformity with law, namely, Forest Conservation Act, 1980, E.P. Act etc.

### **Enclosures - whether government can lease the lands in mining operation**

119. It is an admitted position that five enclosures comprise of 426 acres of land occupied by the tribals in those villages, Re-survey started in 1990 jointly by Revenue, Forest and Mining Departments and was completed and there port was made on August 2, 1990. Though 14 villages with five enclosures were notified as Borra reserved forest in GOMs No.2997 F & A dated October 31, 1966, they stood excluded from reserved forest area. Therefore, the lands in the enclosures being cultivated by the tribals are their patta lands and are entitled to get pattas by the concerned officers. It is conceded on behalf of the respondents that the Government have no power to grant mining leases for these lands situated within the enclosures.

### **Whether leases are in violation of F.C. Act or E.P. Act**

120. In the counter-affidavit filed on behalf of the Government, it is conceded that major part of the lands to which mining leases were granted are situated in reserved forest. It has already been held that transfer of lands situated within scheduled area to non-tribals is void. It is stated that a part of the land covered by some mining leases is outside the reserved forest. The question, therefore, arises; whether these areas are forest? A controversy has been raised by the respondents that unless the lands are declared either as a reserved forest or forest under the Andhra Pradesh Forest Act, 1967, the F.C. Act has no application. Thereby, there is no prohibition to grant mining lease or renewal thereof by the State Government. The need for prior approval of the Central Government is not, therefore, necessary. Prior to the Andhra Pradesh Forest Act, 1967, the Madras Forest Act, 1882 was in force. For declaration of reserved forest for the purpose of the Central Forest Act or a State Act, the set scheme has been devised, namely, publication in the State Gazette constituting any land as a reserved forest specifying its situation, its limits and a declaration constituting such land as reserved forest. A Forest Settlement Officer gets appointed to consider the objections, if any, from the persons claiming any right, title and interest in any land covered by the notification. Pending consideration thereof, provisions exist in the respective Acts prohibiting clearance of the forest or deforestation of the forest or depletion of forest wealth and resultant consequences. After consideration of objections, if any, and rejection of the objections and claims, subject to preserving

the easmentary right of way, water course or use of water or right to pastures or right to forest produce, the Forest Settlement Officer would determine the right of parties and would direct the concerned department to pay compensation determined on the basis of the principles laid in the Act with a right of appeal thereon. Thereafter, a declaration would duly be published in the Gazette with fixed boundaries that the "aforesaid area are a reserve forest". Similar is the Provision and procedure in the Wild Life Sanctuary under Wild Life (Protection) Act, 1972. Therein too, provisions have been made declaring them as sanctuary for preservation and protection of wild life etc. However, the right to residence and right to collect forest produce, forest goods or agriculture etc., to the tribals is regulated under the appropriate provisions.

121. The Words 'forest' or 'forest land' have not been defined in the A.P. Act or the Central Forest Act. In Collins English Dictionary (1979 Edn.) the word 'forest' has been defined as page 568 as "a large wooded area having a thick growth of trees and plants, the trees of such an area, something resembling a large wooded area especially in density". Shorter Oxford English Dictionary defines 'forest' as "an extensive tract of land covered with trees and undergrowth, sometimes intermingled with pasture". In Webster's comprehensive Dictionary (International Edn.) at page 495, 'forest' has been defined as "a large tract of land covered with a natural growth of trees and underbrush, in English Law wild land generally belonging to the crown and kept for the protection of game, Of, pertaining to, or inhabiting woods or forest, To overspread or plant with trees; make a forest of". The 'forest cover' means "The sum total of vegetation in a forest; more especially, herbs, shrubs and the litter of leaves, branches". 'Forest reserve' for the different manners 'a tract of forest land set aside by Government order for protection and cultivation". According to Stroud's Judicial Dictionary (fifth ed.), Vol.2, at page 1014 'forest' means "a place privileged by royal authority or by prescription for the peaceable abiding and nourishment of the beasts or birds of the forest, for resort of the King; a subject may hold a forest by grant from the Crown; by the grant of a forest in a man's own ground, not only the privilege but the land itself passes; within the bounds and within the regard". Black's law Dictionary (6th Edn.) defines 'forest' at page 649 as 'A tract of land covered with trees and one usually of considerable extent'. Chamber's Twentieth Century Dictionary defines the expression forest at page 415 as 'a large uncultivated tract of land covered with trees and under wood: woody ground and rude pasture'.

122. It would thus be seen that 'forest' bears extended meaning of a tract of land covered with trees, shrubs, vegetation and undergrowth inter-mingled with trees with pastures, be it of natural growth or man-made forestation. The FC Act, as amended by 1988 Act was enacted to check deforestation and conservation of forest. Sub-section (2) with a non obstante clause on deforestation of forest or use of forest land for non-forest purposes; regulates the forest and provides that notwithstanding any other law for the time being in force in the State, no State Government or other authority shall make, except with prior approval of the Central Government, (i) any order directing that any reserved forest or any portion thereof shall cease to be a reserved forest, (ii) that any forest land or portion thereof may be used for any non-forest purpose; (iii) that any forestland or any portion thereof may be assigned, by way of lease or otherwise, to any private person or to any authority or corporation, agency or any other organisation, not owned, managed or controlled by the Government, (iv) that any forest land or any portion thereof may be cleared or trees which have grown natural in the land or portion for the purpose of using it for reforestation. Clauses (iii) and (iv) were added by Amendment Act, 1988 (69 of 1988) w.e.f. December 19, 1988. The explanation thereto of non-forest purpose was defined to mean the breaking or clearing of any forest land or portion thereof for the cultivation of but does not include any work relating to ancillary to conservation development and management of forest and wild life, namely, establishment of check-

posts, fire lines or other like purposes. Section 2, therefore, prohibits de-reservation of the forest or use of any forest land for any non-forest purpose or assignment by way of lease or otherwise of any portion of land to any private person other than Government controlled or owed, organised or managed by the State Government agency; it prohibits clearance of trees or natural growth in the forest land or any portion thereof to use it for reforestation, except for preservation. Breaking up or clearance of forest land or a portion thereof is amplified to be of non-forest purpose. The object of the F.C. Act is to prevent any further deforestation which causes ecological imbalance and leads to environmental degradation. It is, therefore, necessary for the State Government to obtain prior permission of the Central Government for (1) de-reservation of forest; and (2) the use of forest land for non-forest purpose. The prior approval of the Central Government, therefore, is a condition precedent for such permission. The State Governments are enjoined by FC Act, with power coupled with duty, to obtain prior approval of the Central Government. The leases/renewal of leases otherwise are good.

123. The Environment (Protection) Act, 1986 (for short, the 'EP Act') was enacted to protect and improve environment and prevention of hazards to human beings, other living creatures, lands and property. Section 3 of EP Act enjoins the Central Government that it should take such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. It would, therefore, be clear that the meaning of the expression 'forest land' in the respective Acts requires extended meaning given so as to preserve forestland from deforestation to maintain ecology and to prevent environmental degradation and hazardous effects on right to life. In *Virender Gaur & Ors. Vs. State of Haryana & Ors.* [(1995) 2 SCC 577] this Court in paragraph 7 at pages 580-81 has held that environmental, ecological, air, water pollution, etc. should be regarded as amounting to violation of right to life assured by Article 21. Hygienic and environment are an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence. Promotion of environmental protection implies maintenance of eco-friendly environment as a whole comprising of man-made and the natural environment. It is, therefore, the duty of every citizen and industry to conserve, and if it becomes inevitable to disturb its existence, it is concomitant duty to reforest and restore forestation; duty of the State to coordinate with all concerned and should ensure adequate measures to promote, protect and improve both man-made, natural environment flora and fauna as well as bio-diversity.

124. In *Rural Litigation and Entitlement Kendra Vs. State of U.P.* [1989 Supp.(1)SCC 504] in paragraph 14, this Court had observed that consciousness regarding environmental upkeep and cognizance of ecological importance had in recent times entered into governmental activities. The EP Act protects to upkeep forest land or reserved forest, prevents deforestation. encourages forestation and takes steps as are necessary to preserve ecology. In paragraph 23, it was held that mining activity was held uncongenial to ecology and environment. Trees are friends of mankind and forests are inevitable necessity for human existence, healthy living and the civilisation to thrive and flourish. The need of protection and preservation of forests is fundamental duty of every citizen and all persons in comprehensive sense, i.e., juristic as well. The problem of forest preservation and protection was no more to be separated from the lifestyle of tribals. The approach required is shift from the dependence on law and executive implementation to dependence on the conscious and voluntary participation of all persons. Maintenance of ecology is the primary duty of the State to prevent any further degradation of the ecology and environment and equally is the duty of every citizen. All persons conjointly should allow regeneration of forest as an essential step for health

life. This Court in *Chhetriya Pardushan Mukti Sangarsh Samiti Vs. State of U.P. & Ors.* [(1990) 4 SCC 449] and *Subhash Kumar Vs. State of Bihar & Ors.* [(1991) 1 SCC 598], had held that the protection to environment is the duty of the State. In *Sachidanand Pandey Vs. State of West Bengal* [(1987) 2 SCC 295], it was held that it is the fundamental duty of every citizen under Article 51A(g) and Article 48A of the Constitution to protect the forest and environment. The same view was reiterated in *State of Bihar Vs. Murad Ali Khan & Ors.* [(1988) 4 SCC 655] and *M.C. Mehra Vs. Union of India & Ors.* [(1992) 1 SCC 358]. On the positive obligation to protect environment, this Court had emphasised it in *M.C. Mehra's case (supra)* and *Indian Council for Enviro-Legal Actions. Union of India & Ors.* [(1995) 3 SCC 77]. Industries which created environment inimical to the human existence, were directed to be disclosed in *Rural Litigation and Entitlement Kendra Vs. State of U.P.* [(1989) Supp. 1 SCC 504], *Tarun Bharat Singh, Alwar Vs. Union of India & Ors.* [(1992) Supp. 2 SCC 448], *Vellore Citizens' Welfare Forum Vs. Union of India & Ors.* [(1996) 5 SCC 647] and *Indian Council for Enviro-Legal Action case (supra)*. In particular, in *Vellore Citizens case*, this Court had pointed out that the sustainable development consists in preservation of the person without compromising the ability of the future generation to meet their needs. Sustainable development is a balancing concept between ecological development and industrialisation. Therefore, with a view to improve the quality of human life, while living within the carrying capacity of the subordinate ecology system, sustainable development should be maintained by the industry and the State should ensure environmental protection and prevent degradation thereof. As a facet thereof, as the principle of "the polluter pays", this Court awarded damage, for causing deforestation and directed development of eco-friendly environment.

125. Mining operation, though detrimental to forest growth, are part of layout of the industry, provision should be made for investment or infrastructural planning to reforest the area; and to protect environment and regenerate forest. The Ministry of Environment and Forests and all Secretaries of all the State Government holding charge of Forest Departments, have a duty to prevent mining operations affecting the forest. It is significant to note that, whether, mining operations are carried on within the reserved forest or other forest area. It is their duty to ensure that the industry of enterprise does not denude the forest to become a menace to human existence nor a source to destroy flora and fauna and biodiversity. The provisions of the FC Act get attracted to ensure preservation of forest. In *Garwal case*, this Court, prohibited mining operations. In *Rural Litigation and Entitlement Kendra Vs. State of U.P. & Ors.* [1989 Supp.(1) SCC 537] and *State of H.P. & Ors. Vs. Ganesh Wood Products & Ors.* [(1995) 6 SCC 363] it expressed anxiety to ensure eco-friendly environment. In the latter case, two Judges Bench applied provisions of EC Act and EP Act and held that the application of sustainable development requires that appropriate assessment should be made of the forest wealth and the establishment of industries based on forest produce; other working should also be monitored closely to maintain the required ecological balance. No distinction can be made between the Government forest and private forests in the matter of forest wealth of the nation and in the matter of environment and ecology. The same view as taken by *Andhra Pradesh High Court in M/s. Coloroxt Pvt. Ltd. Vijayawada Vs. The Director of Mines & Geology, Government of A.P.* [(1983) 3 ALT 39]; *M.S. Anupama Minerals Vs. Union of India & Ors.* [AIR 1986 AP 225]; *M/s Yashwant Stone Works Vs. State of U.P.* [AIR 1988 All 121]; *Upendra Jha Vs. State of Bihar* [AIR 1988 Patna 263]; and *Ambalal Manibhai Patel & Ors. Vs. State of Gujarat* [(1986) 27(2)Guj.LR 1073].

126. It is well settled law that mining operation is a non-forest purpose. In *Ambika Quarry Works & Anr. Vs. State of Gujarat & Ors.* [(1987) 1 SCR 562], a Bench of three Judges of this Court had held that the renewal of a mining lease, without prior approval of the Central Government was in



violation of Section 2 of the FC Act. The same view was reiterated in *State of M.P. & Ors. Vs. Krishnadas Tikaram* [(1995) Supp. 1 SCC 587] and *Tarun Bharat Sangh, Alwar Vs. Union of India & Ors.* [(1993) Supp. 3 SCC 115]. In *Tarun Bharat Sangh's* case, it was, however, held that even for mining operations outside the Tiger Reserved Forest declared as protected area, prior permission of the Central Government was necessary. *State of Bihar Vs. Banshi Ram Modi & Ors.* [(1985) Supp. 1 SCC 345]. strongly relied on by the Division Bench in *Samantha's* case and learned counsel for the respondents, was over-ruled by this Court in *Ambika Quarry Works's* case. Therefore, the decision no longer operates as a *ration decidendi*. The same view was taken by the High Courts in the above judgments. It would, therefore, be mandatory that even renewal of mining leases without prior approval of the Central Government, is void. In *M/s. Victorian Granites* case, sub-lease of the mining leases, even with prior approval and grant by the State Government, was held to be illegal.

127. It is seen from the evidence that the mining leases were granted by the State Government or were transferred and retransferred with the sanction of the State Government from private individuals to juristic persons, the partnership firms or companies. The lands with mining area are situated either in the reserved forest or forest land or within the Scheduled Area. Therefore, all the mining leases or renewals thereof are in violation of the Fifth Schedule. Equally, mining leases/renewals of mining leases by the State Government are in violation of Regulation 3(1)(a) read with Section 3(2) of the Regulation and F.C. Act. Therefore, they are all void.

128. Shri Sudhir Chandra in his written submissions has stated that in respect of the lands leases to the 19th respondent, a sum of Rs.350 crores has been invested for manufacturing of "High Purity Sea Water" magnified by using 100% import high technology. The said product saves annually 70 crores of foreign exchange. It is essential for modernisation of steel industry. The product also has wide application for major core industry saving large foreign exchange for the country. He has also stated that the mining operations are carried on in plain area only and thereby forest area is not affected. However, since these averments have been made for the first time in the written submissions, after Court reserved its decision, we are deprived of the advantage of having the response of the State Government, which in fact, has not taken any active interest in this litigation. We, therefore, feel it necessary that the Chief Secretary of the Andhra Pradesh State should constitute a committee consisting of himself, Secretary (Industry), Secretary (Forest), Secretary (Tribal Welfare/Social Welfare) to have the factual information collected and consider whether it is feasible to permit the industry to carry on mining operations. If the Committee so opines, the matter may be placed before a Cabinet sub-Committee consisting of Minister, Minister for Industries, Minister for Forests and Minister of Tribal Welfare to examine the issue whether licenses could be allowed to continue until they expire by efflux of time or whether it is expedient to prohibit further mining operations in the light of Section 11(5) of the Mining Act, to take appropriate action in that behalf and submit report to this Court on the actions so taken.

129. In cases where the similar Acts in other States do not totally prohibit grant of mining leases of the lands in the Scheduled Area, similar Committee of Secretaries and State Cabinet sub-Committees should be constituted and decision taken thereafter.

130. Before granting leases, it would be obligatory for the State Government to obtain concurrence of the Central Government, which would, for this purpose, constitute a sub-Committee consisting of the Prime Minister of India, Union Minister for Welfare, Union Minister for Environment so that the State's policy would be consistent with the policy of the nation as a whole.

131. It would also be open to the appropriate legislature, preferably after a thorough debate/conference of all the Chief Ministers, Ministers holding the concerned Ministry and the Prime Minister and the Central Ministers concerned, to take a policy decision so as to bring about a suitable enactment in the light of the guidelines laid down above so that there would emerge a consistent scheme throughout the country, in respect of the tribal lands under which national wealth in the form of minerals, is located.

132. The State Government, therefore, is directed to ensure that all concerned industrialists, be they natural or juristic person stop forthwith mining operations within the scheduled area, except where the lease has been granted to the State Undertaking, i.e., A.P.S.M.D. Corporation; they should report compliance of this order to the Registry of this Court within six months of the receipt of this judgment. The lessees of mining leases are directed not to break fresh mines; however, in the meanwhile, they are entitled to remove the minerals already extracted and stocked in the reserved forest area within four months time from today. All concerned authorities are directed to ensure compliance thereof. Even the State Undertaking carrying the mining operations, would be subject to the regulations under the FC Act and EP Act. It would be open to the State Government to organise Co-operative Societies composed solely of the Scheduled Tribes to exploit mining operations within the Scheduled Area subject to the compliance of the FC Act and EP Act.

133. The appeals of Samatha are accordingly allowed. The judgment of the High Court stands set aside and directions are issued accordingly.

134. The appeal of Hyderabad Abrasives and Minerals (P) Ltd. stands dismissed since their license has already expired by efflux of time and grant of renewal is prohibited under F.C. Act and Section 11 (5) of the Mining Act. No costs.

**S. SAGHIR AHMED, J. (Concurring with K. Ramaswamy.J.): -**

135. Leave granted.

136. I have had the advantage of going through the judgements prepared separately by Esteemed Brothers Ramaswamy and Pattanaik. I am inclined to agree with Brother Ramaswamy, for the reasons which I am presently setting out hereinbelow.

137. Tribals were the first settlers in this country but they were gradually pushed back to the forests and hills by subsequent settlers who were non-tribals. The forests and hills provided a natural barrier and isolated the tribals from people living on the plains. On account of their isolation, they remained illiterate, uneducated, unsophisticated, poor and destitute and developed their own society where they allowed themselves to be governed by their own primitive and customary laws and rituals.

138. Successive Governments who ruled India from medieval times to modern times (British Period) allowed these tribals and aboriginals to live in complete isolation and allowed them to follow their own traditional culture, social customs and animistic tribal faiths. There were many dangers in subjecting them to normal laws and they were, therefore, governed by special laws.

139. The Tribal Areas or Agency Areas of the Madras Presidency were governed by Ganjam and Vizagapatnam Act of 1839. Then came the Scheduled Districts Act 14 of 1874 which was followed by the Agency Tracts and Land Transfer Act 1 of 1917, Sections 4(1) and (2) of this Act provided as under:-

“4. (1) Notwithstanding any rule of law or enactment to the contrary, any transfer of immovable property situated within the Agency tracts by a member of a hill tribe shall be absolutely null and void unless made in favour of another member of a hill tribe, or with the previous consent in writing of the Agent or of any other prescribed officer.

(2) Where a transfer of property is made in contravention of sub-section (1), the Agent or any other prescribed officer may on application by anyone interested, decree ejectment against any person in possession of the property claiming under the transfer and may restore it to the transferor or his heirs.”

140. Under the Government of India Act, 1935, the administration of the Scheduled Districts was exclusively vested in the Governor of the Province. Sub-sections (1) and (2) of S.92 of the Government of India Act, 1935 provided as under:-

“92.(1) The executive authority of a Province extends to excluded and partially excluded areas therein, but, notwithstanding anything in this Act, no Act of the Dominion Legislature or of the Provincial Legislature shall apply to an excluded area or a partially excluded area, unless the governor by public notification so directs and the Governor in giving such a direction with respect to any Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit.

(2) The Governor may make regulations for the peace and good Government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any regulations so made may repeal or amend any Act of the Dominion Legislature, or of the Provincial Legislature, or any existing Indian Law, which is for the time being applicable to the area in question. Regulations made under this sub-section shall be submitted forthwith to the Governor-General and until assented to by him shall have no effect.

141. In B. Shiva Rao's Study Volume of "The Framing of India's Constitution" it is stated as under.

“There were two dangers to which subjection to normal laws would have specially exposed these peoples, and both arose out of the fact that they were primitive people, simple, unsophisticated and frequently improvident. There was a risk of their agricultural land passing to the more civilized section of the population, and the occupation of the tribals was for the most part agricultural' and, secondly, they were likely to get into the "wiles of the money-lender". The primary aim of Government policy then was to protect them from these two dangers and preserve their tribal customs; and this was achieved by prescribing special procedures applicable to the backward areas. At first individual laws were enacted, applicable to particular simple and elastic forms of judicial administrative procedures. The Scheduled Districts Act, enacted in 1874, appears to have been the

first measure adopted to deal with these areas as a class. That Act enabled the executive to extend any enactment in force in any part of British India to a “scheduled district” with such modifications as might be considered necessary. In other words, the executive had power to exclude these areas from the normal operation of ordinary law and give them such protection as they might need.

The Montague-Chelmsford Report of 1918 contained a brief reference to these areas: it suggested that the political reforms contemplated for the rest of India could not apply to these backward areas where the people were primitive and “there was no material on which to found political institutions.” The typically backward tracts were therefore to be excluded from the jurisdiction of the reformed Provincial Governments and administered personally by the heads of the Provinces. In the Government of India Act of 1919 these tracts were divided into two categories. Some areas were considered so backward that they were wholly excluded from the scope of the reforms. The effect of this was that neither the Central nor the Provincial Legislature had power to make laws applicable to these areas and the power of legislation was vested in the Governor acting with his Executive Council, the Ministers being excluded from having any share in the responsibility for the administration of these areas. Proposals for expenditure in these tracts were not required to be submitted to the vote of the Legislative Assembly; and no question could be asked and no subject relating to any of these tracts could be discussed in the Assembly without the Governor’s sanction.”

142. It is further stated as under: -

“ The object of Government policy in relation to these areas, inhabited by backward, tribal and aboriginal populations, was clearly visualized by the Simon Commission. Until then the aim had primarily been to give the primitive inhabitants of these areas security of land tenure, freedom in the pursuit of their traditional means of livelihood, and a reasonable exercise of their ancestral customs, not self-determination or rapid political advance, but experienced and sympathetic handling and protection from economic subjugation by their neighbours. The Commission realized that perpetual isolation from the main currents of progress would not be a satisfactory long-term solution: and that it would be necessary to educate these people ultimately to become self-reliant. In this direction practically nothing had been achieved. The Commission observed.

The responsibility of Parliament for the backward tracts will not be discharged merely by securing to them protection from exploitation and by preventing those outbreaks which have from time to time occurred within their borders. The principal duty of the administration is to educate these peoples to stand on their own feet, and this is a process, which has scarcely begun.

The Commission recognised this problem to be one of considerable magnitude and complexity. On the one hand it was too large a task to be left to the efforts of missionary societies and individual officials, since co-ordination of activity and adequate funds were required. On the other hand, the typically backward tract was deficit area and “no provincial legislature (was) likely to possess either the will or the means to devote special attention to its particular requirements.” In these circumstances the Commission recommended that the responsibility for the Backward Classes would be adequately discharged only if it was entrusted to the Center. It was recognized that it would not be a practicable arrangement if centralization of administrative authority in these areas led to a situation in which these areas would be separated from the Provinces of which they were an integral part; and in order to meet this difficulty the Commission suggested that even though there would be a Central responsibility, the backward tracts should not be separated from the Provinces but that the Central Government should use the Governors as degree of backwardness, it could be

laid down by rules how far the degree of backwardness, it could be laid down by rules how far the Governor would act in consultation with his Ministers in the discharge of these agency duties.

The proposal for centralizing the administration of these areas was however not adopted in the constitutional reforms of 1935. Under the Government of India Act of 1935, these backward areas were classified as excluded areas and partially excluded areas. A small number of excluded areas of the total extent of these was about 18,600 square miles in Assam and 10,000 square miles in the rest of India – in the Provinces of Madras, Bengal, the North-West Frontier Province, the Punjab and Assam, were placed under the personal rule of the Governor acting in his discretion; and while partially excluded areas were within the field of ministerial responsibility, the Governors exercised a special responsibility in respect of the administration of these areas; and they had the power in their individual judgement to overrule their Ministers if they thought fit to do so. No Act of the Federal or Provincial Legislature would apply to any of these areas; but the Governors had the authority to apply such Acts with such modifications, as they considered necessary.

In addition to these excluded and partially excluded areas, there were in the territory of India certain “tribal areas”, which were defined in the Government of India Act, 1935, as “areas along the frontiers of India or in Baluchistan which are not part of British India or Burma or of any Indian State or of any foreign State. “ The position of these areas was even more peculiar. In terms of the definition they did not form part of the territory of British India and neither the Parliament of Britain nor the Legislatures of British India claimed or exercised any direct legislative powers over these areas. The powers exercisable in these areas were described as arising out of “treaty, grant, usage, sufferance or otherwise” and the Act of 1935 contained a specific authorization enabling these powers to be exercised as part of the executive authority of the Central Government, by the Governor-General acting in his discretion, and therefore outside the area of responsibility of the Ministry”

143. It is further stated as under:-

“The Cabinet Mission’s statement of May 16, 1946, mentioned the excluded and partially excluded areas and the tribal areas as requiring the special attention of the Constituent Assembly. The Advisory Committee on Fundamental Rights and Minorities, to be set up at the preliminary meeting of the Assembly, was to contain due representation of all the interests affected; and one of its functions was to report to the Constituent Assembly on a scheme for the administration of tribal and excluded areas at its meeting on February 27, 1947, the Advisory Committee set up three sub-committees—one to consider the tribal and excluded and partially excluded areas in Assam: one to consider the tribal areas in the North-West Frontier Province and Baluchistan; and the third sub-committee to consider the position of excluded and partially excluded areas in the Provinces other than Assam”.

144. The Sub-Committee on Assam submitted its report on 28<sup>th</sup> July, 1947 while the other Sub-Committee on the Excluded and Partially Excluded Areas other than Assam submitted its interim report on 15-8-1947 and final report in September, 1947. The joint meeting of the two Sub-Committees was held in August, 1947. The joint meeting summed up the problems as under: -

“ The areas inhabited by the tribes, whether in Assam or elsewhere, are difficult of access, highly malarial and infested also in some cases by other diseases like yaws and venereal disease and lacking in such civilizing facilities as roads, schools, dispensaries and water supply. The tribes,

themselves are for the most part extremely simple people who can be and are exploited with ease by plains folk, resulting in the passage of land formerly cultivated by them to money-lenders and other erstwhile non-agriculturists. While a good number of superstitious and even harmful practices are prevalent among them, the tribes have their own customs and way of life with institutions like tribal and village panchayats or councils, which are very effective in smoothing village administration. The sudden disruption of the tribals' customs and ways by exposure to the impact of a more complicated and sophisticated manner of life is capable of doing great harm. Considering past experience and the strong temptation to take advantage of the tribals' simplicity and weaknesses, it is essential to provide statutory safeguards for the protection of the land which is the mainstay of the aboriginals' economic life and for his customs and institutions which apart from being his own, contain elements of value".

145. It would be useful at this stage to reproduce further the two passages from Shri Rao's book relating to the recommendations: -

" From the beginning the objectives of the Government's policy in regard to the tribes and tribal areas were primarily directed to the preservation of their social customs from sudden erosion and to safeguarding their traditional vocations without the danger of their being pauperized by exploitation by the more sophisticated elements of the population. At the same time it was recognised that this stage of isolation could not last indefinitely; a second and major objective was therefore, laid down, that their educational level and standard of living should be raised in order that they might in course of time be assimilated with the rest of the population. From this point of view the Sub-Committee was of the opinion that the policy of exclusion and partial exclusion had not yielded much tangible result in the progress of the aboriginal areas towards the removal of their backward conditions or in their economic and educational betterment. The Sub-Committee did not therefore, find it advisable to abolish the administrative distinction between the backward areas and the rest of the country; and it recommended that while certain areas like Sambalpur in Bihar and Angul in Orissa need no longer be treated differently from the regularly administered areas, there were other areas which needed a simplified type of administration to protect the aboriginal people from exposure to the complicated machinery of the ordinary law Courts and save them from the clutches of the money-lender who took advantage of their simplicity and illiteracy, deprived them of their agricultural land, and reduced them to a state of virtual serfdom. The general position, according to the sub-committee, was that the areas predominantly inhabited by tribal people should be known as "Scheduled Areas" (the intention being that these areas should figure in a schedule to a notification) and special administrative arrangements made in regard to them.

At the same time, having found the treatment of exclusion and partial exclusion to have proved a failure, the sub-committee recommended that the responsibility for the betterment and welfare of these areas should be squarely that of the Provincial, Governments and that accordingly the Governors should not have any special reserved or discretionary powers in regard to these areas. But the ultimate responsibility was to be that of the Centre, both for drawing up plans for the betterment of these areas and for providing the necessary finances. In order to ensure that the requirements of these areas were given full consideration, the sub-committee recommended that the Constitution should provide for the setting up in each Province of a body which would keep the Provincial Government constantly in touch with the needs of the aboriginal tracts in particular and with the welfare of the tribes in general. This body was to be known as a Tribes Advisory Council, which it was proposed should have a strong representation of the tribal element.

The Tribes Advisory Council would primarily advise the Government in regard to the application of laws to the scheduled areas; no laws affecting the following matters would apply if the Tribal Advisory Council considered such a law unsuitable.

(1) Social matters: (2) occupation of land, including tenancy laws, allotment of land and setting apart of land for village purposes (3) village management, including the establishment of village panchayats.

The provisions for the other States were more detailed. In their case, the advisory body was known as the Tribes Advisory Council. The membership of the Tribes Advisory Council in each of the States was to be between ten and twenty-five, of whom three-fourths were to be elected representatives of the Scheduled Tribes in the Legislative Assembly of the State as in the case of the Punjab and the United Provinces; it was laid down as the duty of the Tribes Advisory Council generally to advise the Government on all matters pertaining to the administration of the scheduled area and the welfare of the tribes. The State Government was statutorily enjoined to give effect to the advice of the Council if it considered that an Act, whether of Parliament or of the State Legislature, relating to the following matters was unsuitable for, or required modification in, its application to a scheduled area:

(a) marriage: (b) inheritance of property; (c) social customs of tribes; (d) land, including rights of tenants, allotment of land and reservation for any purpose (e) village administration and village panchayats. It was made obligatory that the Governor should act according to the advice of the Tribes Advisory Council on the application of Acts relating to these matters. He was not bound to accept the advice of the council on laws relating to other matters. The State Government was also empowered to make regulations applicable to a scheduled area after consulting the council. As in the case of East Punjab and the United Provinces, such regulations would make provision for the trial of offences other than those punishable with death, transportation for life or imprisonment for five years or more; such regulations could also provide for the trial of disputes other than those arising out of any such laws as may be defined in such regulations”.

The transfer of land in a Scheduled Area from a tribal to a non-tribal was forbidden; and the State Government was also prohibited from allotting State land in a Scheduled Area to non-tribals except in accordance with rules made after consulting the Tribes Advisory Council. Likewise, if advised by the Council, the Governor was obliged to license money-lending prescribing such conditions as were considered necessary; and the breach of these conditions would be an offence. In order that public attention might be focussed on the development work carried out in these areas, the State Government was required to show separately in its annual financial statement the revenues and expenditure pertaining to these areas”.

146. The Sub-Committee in its report with regard to the land in Tribal (Scheduled) Area provided as under:-

“25 Land: The importance of protection for the land of the tribals has been emphasised earlier. All tenancy legislation which has been passed hitherto with a view to protecting the aboriginal has tended to prohibit the alienation of the tribals land to non-tribals. Alienation of any kind, even to other tribals, may have to be prohibited or severely restricted according to the different stages of advancement. We find however that Provincial Governments are generally alive to this question and that protective laws exist. We assure that these will continue to apply and we have made special provision to see that land laws are not altered

to the disadvantage of the tribal in future, we do not consider additional restrictions necessary. As regards the allotment of new land for cultivation or residence, however, we are of the view that the interests of the tribal need, to be safeguarded in view of the increasing pressure on land everywhere. We have provided accordingly that the allotment of vacant land, belonging to the State in scheduled areas should not be made except in accordance with special regulations made by the Government on the advice of the Tribes Advisory Council”.

147. In Part II of Appendix C to this report, it was indicated as under:-

“Vacant land in a Scheduled Area which is the property of the State shall not be allotted to a non-tribal except in accordance with rules made by the Provincial Government in consultation with the Tribes Advisory Council”.

148. The recommendations of the two Sub-Committees were not considered by the Constituent Assembly in its Session in July, 1947, when the broad principles of the Constitution were settled since, as explained by Dr. Ambedkar, they were received too late. The drafting Committee however, considered these proposals at the state of drafting and suitable provisions including Schedule V and VI were included in the Draft Constitution of February, 1948 in which it was indicated that the transfer of land in scheduled area from tribal to non-tribal was forbidden; and the State Government was also prohibited from allotting the State land in the scheduled area to non-tribal except in accordance with Rules which may be made by the Governor after consulting the Tribes Advisory Council.

149. The Draft Fifth Schedule prepared by the Drafting Committee with regard to Arts, 189 (a) and 190(1) which related to the administration and control of Scheduled Area and Scheduled Tribes consisted of several parts. Part I contained the general provision that the executive power of a State specified in Part I of the First Schedule shall extend to the scheduled areas therein. It further provided that the Governor of each State having scheduled areas therein shall annually, or whenever so required by the Government of India, may report to the Government regarding the administration of the scheduled areas and the executive power of the Union shall extend to the giving of directions to the State as to the administration of the said areas.

150. Part II applied to the States of Madras, Bombay, West Bengal, Bihar, the Central Provinces and Berar, and Orissa. Clause 5 specified the laws applicable to scheduled areas in these States. It provided as under:-

“5. Law applicable to scheduled areas: (1) The Governor may, if so advised by the Tribes Advisory Council for the State, by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to scheduled areas or any part thereof in the State subject to such exceptions and modifications as he may with the approval of the said Council specify in the notification.

Provided that where such Art relates to any of the following subjects, that is to say –

- (a) marriage;
- (b) inheritance of property;
- (c) social customs of the tribes;



- (d) land, other than lands which are reserved forest under the Indian Forest Act, 1972 or under any other law for the time being in force in the area in question, including rights of tenants, allotment of land and reservation of land for any purpose.
- (e) any matter relating to village administration including the establishment of village panchayats;

(2) The Governor may, after consultation with the Tribes Advisory Council for the State, make regulations for any scheduled area in the State with respect to any matter not provided for by any law for the time being in force in such area.

(3) The Governor may also make regulations for any scheduled area in the State with respect to the trial of cases relating to offences other than those which are punishable with death, transportation for life or imprisonment for five years or upwards or relating to disputes other than those arising out of any such laws as may be defined in such regulations, and may be such regulations empower the headmen or panchayats in any such area to try such cases.

(4) Any regulations made under this paragraph when promulgated by the Governor shall have the same force and effect as any Act of the appropriate Legislature which applies to such area and has been enacted by virtue of the powers conferred on that Legislature by this Constitution”.

151. Clause 6 which dealt with the alienation and allotment of land to non-tribals in scheduled areas provides as under:-

“6. Alienation and allotment of lands to non-tribals in scheduled areas: (1) It shall not be lawful for a member of the Scheduled Tribes to transfer any land in a scheduled area to any person who is not a member of the Scheduled Tribes;

(2) No land in a scheduled area vested in the State within such area is situate shall be allotted to or settled with, any person who is not a member of the Scheduled Tribes except in accordance with rules made in that behalf by the Governor in consultation with the Tribes Advisory Council for the State.”

152. Part III was applicable to the State of United Provinces (now known as Uttar Pradesh) Para 12 provided as under:

“(2) The Governor may also make regulations so as to prohibit the transfer of any land in a scheduled area in the State by a member of the Scheduled Tribes to any person who is not a member of the Scheduled Tribes.

(3) Any regulations made under this paragraph when promulgated by the Governor shall have the same force and effect as any Act of the appropriate Legislature which applies to such area and has been enacted by virtue of the powers conferred on that Legislature by this Constitution.”

153. Part. IV related to the State of East Punjab, Clause 17 provided as under:-

“(2) The Governor may also make regulations so as to prohibit the transfer of any land in a scheduled area in the State by a member of the Scheduled Tribes to any person who is not a member of the Scheduled Tribes.

(3) Any regulations made under this paragraph when promulgated by the Governor shall have the same force and effects as any Act of the appropriate Legislature which applies to such area and has been enacted by virtue of the powers conferred on that Legislature by this Constitution”.

154. The important provision to be noticed is that although in respect of States of Madras, Bombay, West Bengal, Bihar, the Central Provinces and Berar, and Orissa, a total ban was placed on the transfer of land by a member of the Scheduled Tribe to a person who is not a member of the Scheduled Tribe, it was provided, so far as allotment of Government land was concerned, that no land in a scheduled area could be allotted to or settled with a non-tribal except in accordance with the rules made in that behalf by the Governor after consulting the Tribes Advisory Council. This indicated that if a rule was made by the Governor in that regard, land in a scheduled area which was vested in the Government, could be allotted to the non-tribal. It is obvious that the power of allotment could not be exercised so long as the rules were not made.

155. No provision, so far as allotment of Government land was concerned, was made for the State of United Provinces and West Bengal for which the only provision made was that the Governor may make regulations so as to prohibit the transfer of land in a scheduled area by a member of the scheduled Tribe to any person who is not a member the Scheduled Tribe.

156. It also requires to be noticed that the Regulations made by the Governor for all these States to which the Fifth Schedule was applicable were to have the same force and effect as an Act of the appropriate Legislature. But this was not stated in respect of rules which could be made by the Governor under Cl. 6(2) of the Fifth Schedule applicable to States of Madras, Bombay, West Bengal, Bihar, the Central Provinces and Berar, and Orissa.

157. The comments and suggestions made on the Draft Constitution including the Fifth Schedule prepared by the Drafting Committee, so far as relevant paras, namely, para 5, para 6, para 12 and para 17 of the Fifth Schedule, are concerned, and the decision of the Drafting Committee thereon are quoted below:-

#### “ PARAGRAPH 5

The Government of Orissa has questioned the propriety of the provisions contained in sub-para (1) of para 5 in Part II of the Fifth Schedule and has made the following comments:

Under Section 92 (1) of the Government of India Act, 1935 no Act of the Federal or Provincial Legislature applies to a partially excluded area unless the appropriate Provincial Government so directs by a notification. The plan followed in the Draft Constitution of India is, however, fundamentally different. The idea underlying paragraph 5(1) of Part II of the Fifth Schedule to the Draft Constitution is that as soon as an Act of the Federal or the Provincial Legislature is passed, it will apply automatically to all scheduled areas unless the Governor on the advice of the Tribes Advisory Council directs, in respect of any particular legislation, either that it shall not apply to any specified scheduled areas or that it shall apply to such areas, subject to

specified exceptions and modifications. Although on the whole the Government of Orissa prefer the plan indicated in para 5(1) of Part II of the Fifth Schedule to the Draft Constitution to the provision of S.92(1) of the Government of India Act, 1935, they apprehend that difficulties, mainly of an administrative nature, might arise out of the inevitable time lag between the passing of an Act by either the Dominion or the State Legislature and the decision of the Governor either that the Act shall not apply to any scheduled area or that in its application to such an area, it shall be subject to certain modifications and exceptions. Since the position will be that as soon as an Act is passed by a Legislature it will apply in all scheduled areas, certain rights and obligations will be created or modified by virtue of the Act. The accrual of such rights and obligations in the interim period might give rise to an awkward situation if it is decided subsequently (and a direction is made to that effect) either that the Act shall not apply to scheduled areas or that it shall apply to such areas subject to certain specified exceptions and modifications. It is of course possible to give retrospective effect to the directions made under para 5(1) in order to secure that the exceptions and modifications subject to which the Act is applied to scheduled areas will have effect therein from the date of the passing of the Act. If that is done, consequential provisions will have to be inserted by way of 'modifications' in order to regularize anything done under the Act during the interim period. Even so, however, it is likely that the rights of several parties, might be seriously affected and there might be much confusion. The provincial Government, however, see no easy solution of such difficulties if the plan envisaged in para 5(1) of Part II of the Fifth Schedule is adhered to.

Note: The provisions of sub-paragraph (1) of paragraph 5 of the Fifth Schedule are based on the recommendation of the Sub-Committee on Excluded and Partially Excluded Areas (other than Assam) as adopted by the Advisory Committee. Attention is invited in this connection to paragraphs 10 and 11 of Volume 1 (Report of the Excluded and Partially Excluded Areas (other than Assam) Sub-Committee). It will appear from the said report that the present system under which the Governor in his discretion applies the legislation did not appeal to the Committee, as this principle would be regarded as undemocratic even though the Governor in future might be an elected functionary. The criticism offered by the Government of Orissa to the provision set out in sub-paragraph (1) of Paragraph 5 will also apply if the present provisions of the Government of India Act, 1935, under which no Act of the Central or a Provincial Legislature applies to an excluded or a partially excluded area unless the Governor, by a public notification so directs, is adopted, for, if in such case it is essential that an Act of the Central or a Provincial Legislature should apply to any such area along with other areas on the date when it becomes law after it has been assented to there is bound to be some time lag between the passing of the Act and the decision of the Governor that the Act shall apply to such area or that in its application to such area it shall be subject to certain modifications and exceptions as in the present case. A decision will have to be arrived at in either case as to the application or non-application of the Act when the Bill is passing through the Legislature and a notification will have to be kept ready for issue on the date the Bill on being assented to becomes law.

**Decision of the Drafting Committee. October, 1948:** The Drafting Committee decided to recast the proviso to sub-paragraph (1) of paragraph 5 of Part II of the Fifth Schedule as follows:

Provided that where such Act relates to any of the following subjects, that is to say;

- (a) marriage, inheritance or property or social customs of the Scheduled Tribes.
- (b) and (c) (Omit);

(d) land, other than lands which are reserved forests under the Indian Forest Act, 1927, or under any other law for the time being in force in the area in question, including rights of tenants, allotment of land and reservation of land for any purpose.

(e) any matter relating to village administration including the establishment of village panchayats.

the Governor shall issue such direction when so advised by the Tribes Advisory Council.

The Government of Orissa has also made the following comments with regard to sub-paragraph (2) of para 5 of Part II of the Fifth Schedule:

With reference to the Governor's power to make regulations under paragraph 5(2) of Part II of the Fifth Schedule, the question has been raised whether the power is as plenary as the power at present conferred by S.92(2) of the Government of India Act, 1935. A regulation made under S.92(2) may deal with any subject irrespective of whether it is included in the Central, Provincial or Concurrent List; it may even amend a Central Act. Since, however, sub-paragraph (4) of paragraph 5 of Part II of the Fifth Schedule does not specifically refer to the Dominion Parliament, the provincial Government are doubtful if the power to make regulations conferred by sub-paragraph (2) of paragraph 5 will be equally plenary or will be restricted to matters on which the State Legislature will be competent to legislate. Although the term "appropriate legislature" used in sub-paragraph (4) of paragraph 5 would etymologically include the "Dominion Parliament" as well as "the State Legislature" on the other. It may, therefore, be the intention of the Draft Constitution that the Governor's power to make regulations under sub-paragraph (2) of paragraph 5 will not extend to matters included in the Central List. If that is the plan, the provincial Government beg to differ from it, as they feel that the Provincial Governor's power to make regulations for the good Government of scheduled areas should continue to be as plenary as it is at present.

Note: The power to make regulations conferred by sub-paragraph (2) of paragraph 5 is not restricted only to matters on which the State Legislature will be competent to legislate. The expression "with respect to any matter not provided for by any law for the time being in force in such area" in sub-paragraph (2) of paragraph 5 and the use of the expression "appropriate legislature" in sub-paragraph (4) of that paragraph make it clear that the power to make regulations under sub-paragraph (2) of that paragraph is not restricted only to matters with respect to which the Legislature of the State is competent to legislate. Any further clarification is hardly necessary. However, to make the intention clearer the following amendment may be made in paragraph 5 of Part II of the Fifth Schedule.

In sub-paragraph (2) of para 5 of the Fifth Schedule, the following be added at the end:

and any regulations so made may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to such area.

**Decision of the Drafting Committee, October, 1948:** The Drafting Committee decided to substitute the following for sub-paragraph (2) of paragraph 5 of Part II of the Fifth Schedule:

(2) The Governor may, after consultation with the Tribes Advisory Council for the State, make regulations for any scheduled area in the State with respect to any matter not provided for by any law for the time being in force in such area, and any regulations so made may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to such area.

Provided that any regulations so made with respect to any matter enumerated in the Union list shall be submitted forthwith to the President and until assented to by him, shall have no effect”.

#### PARAGRAPH 6

K. Santhanam: That in paragraph 6(1) of Part II of the Fifth Schedule, the following be added at the end:

except in accordance with rules made in that behalf by the Governor in consultation with the Tribes Advisory Council;

Note: Sub-paragraph (1) of paragraph 6 of the Fifth Schedule follows the recommendation of the Excluded Areas Sub-Committee as adopted by the Advisory Committee. But, prima facie, there should no objection to the amendment: of the wording of sub-paragraph (2).

L.N. Sahu: That a suitable proviso be added to paragraph 6 (1) of the Fifth Schedule to permit the making of regulations by the Provincial Government in order to prohibit the transfer of lands by members of a particular Scheduled Tribe to members of any other Scheduled Tribe.

Note: Paragraph 6 of Part II of the Fifth Schedule follows the recommendation of the Sub-Committee on Excluded Areas as adopted by the Advisory Committee. This amendment involves a question of policy. If it is accepted, then it should be redrafted as follows:

After sub-paragraph (3) of paragraph 5 of Part II of the Fifth Schedule, the following sub-paragraph be inserted:

(3-A) The Governor may also make regulations so as to prohibit the transfer of any land in a scheduled area in the State by a member of any Scheduled Tribe to a member of any other Scheduled Tribe.

**Decision of the Drafting Committee, October 1948:** The Drafting Committee decided to recast sub-paragraph (1) of paragraph 6 of Part II of the Fifth Schedule as follows:

(1) It shall not be lawful for a member of the Scheduled Tribes to transfer any land in a scheduled area to any person who is not a member of the Scheduled Tribes except in accordance with rules made in that behalf by the Governor in consultation with the Tribes Advisory Council.

#### PARAGRAPH 12

K. Santhanam: That in paragraph 12(2) of Part III of the Fifth Schedule, after the words “so as to prohibit” the words “or regulate” be inserted.

Note: Sub-paragraph (2) of paragraph 12 follows the recommendation of the Excluded Areas Sub-Committee as adopted by the Advisory Committee. This amendment may, however, be accepted.

Decision of the Drafting Committee, October, 1948: The Drafting Committee decided to recast sub-paragraph (2) of paragraph 12 of Part III of the Fifth Schedule as follows:

(2) The Governor may also make regulations so as to control or prohibit the transfer of any land in a scheduled area in the State by a member of the Scheduled Tribes to any person who is not a member of the Scheduled Tribes.

#### PARAGRAPH 17

K. Santhanam: That in paragraph 17(2) of Part IV of the Fifth Schedule, after the words “so as to prohibit” the words “or regulate” be inserted.

Note: The remarks on the amendment to paragraph 12 above would also apply to this amendment. This amendment may be accepted.

Decision of the Drafting Committee, October, 1948: The Drafting Committee decided to recast sub-paragraph (2) of paragraph 17 of Part IV of the Fifth Schedule as follows.

(2) The Governor may also make regulations so as to control or prohibit the transfer of any land in a scheduled area in the State by a member of the Scheduled Tribes to any person who is not a member of the Scheduled Tribes”.

158. When the Constituent Assembly took up the Fifth Schedule for consideration on 5<sup>th</sup> September 1948, Dr. B.R. Ambedkar moved another Draft Fifth Schedule in place of the original Fifth Schedule. This Schedule was simpler in form and uniformly applied to all the scheduled areas. Para 5 of new Draft is quoted below:

“5. Law applicable to scheduled areas—“ (1) notwithstanding anything contained in this Constitution the Governor or Ruler, as the case may be, may, by public notification direct that any particular Act of Parliament or of the legislature of the State shall not apply to a scheduled area or any part thereof in the State or shall apply to a scheduled area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification.

(2) The Governor or Ruler, as the case may be, may make regulations for the peace and good Government of any area in a State which is for the time being a scheduled area.

In particular and without prejudice to the generality of the foregoing power, such regulations may –

(a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in any such area;

(b) regulate the allotment of land to members of the Scheduled Tribes in such areas:

(c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such areas.

(3) In making any regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor or Ruler may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and until assented to by him shall have no effect.

(5) No regulation shall be made under this paragraph unless the Governor or the Ruler making the regulations has, in the case where there is a Tribes Advisory Council for the State, consulted such Council”.

159. Before the Fifth Schedule was finally adopted by the Constituent Assembly, there was debate in the Assembly on every Clause of the Schedule. It will be useful, at this stage, to reproduce some passages from the Constituent Assembly Debate as under:-

“ (Shri Yudhisthir Mishra)

The special purpose for moving this amendment is that there are areas in Orissa and the C.P. States which may not be specified as scheduled areas but there are certain Scheduled Tribes among which certain kinds of land laws are prevalent. For example, in C.P. and Orissa States, it is not permissible on the part of a non-aboriginal to acquire the lands of an aboriginal without the sanction of the Government. Now, Sir, in that case, supposing according to paragraph 5, the Governor or the Ruler of a State does not make any regulation and retains the same provisions applicable to non-aboriginals with respect to the transfer of lands; then I shall submit that there will be no use in saying that the Government is prepared to safeguard the interests of the tribal people”.

160. Shri. Brajeshwar Prasad suggested as under:-

“.....The provinces being weak in economic resources are not in a position to shoulder the responsibility. Hence I plead that the Centre should take command of the tribal areas. The Government of India has no right to exist if it cannot undertake to guarantee means of livelihood and free educational and medical facilities even for such a small number of people.....

I want, Sir, that no land in the scheduled areas belonging to an Adivasi should be allowed to be sold or mortgaged even to tribals without the permission of the Deputy Commissioner. Such a provision exists in Santhal Pargana. I am not at all in favour of dispossessing those non-tribals who have got lands or property in the scheduled areas, but no further lands should be given to non-tribals. This protection is needed in the interests of the tribals. It is also in consonance with the demands of the tribal leaders. The concession will generate a feeling of loyalty in the hearts of the tribal people.....

161. Shri Jadubans Sahay forcefully argued:-

“..... So far as land is concerned, it is not our intention, nor of the provincial Governments where the tribals (sic) have provincial Governments (sic) have made laws to see that land should not pass out of the hands of the tribal people; in our province, the Chhota Nagpur Tenancy Act was modified and altered long before 1937 in order to see that no land should pass out of the hands of the tribal people. But, there were various difficulties in the original schedule that land should not be settled by the Government to anyone except the tribal people. In the scheduled areas, there are not only the tribal people; there are Harijans also; there are other castes also who are equally backward, if not otherwise, at least economically, as the tribal people. Is it, then, Sir, our wish that in those areas there the Harijans and other backward people remain, land should not be settled by the Government to them also? Of course, the tribal people-should have the preference as well as the Harijans living in those areas. If these things are made elastic, we should have nothing to say on this point. But, the Government should see and in the future we also should see that preference is given to the tribal people and if they have no land, the landless tribal people should have the first priority.....”

162. The above portions have been extracted from the Constituent Assembly Debates to indicate the mood of the representatives of the people and the urgency they felt in protecting the land of the tribals and need for prohibiting transfer of land in the scheduled areas to non-tribals by the State Government.

163. Para 5(2) of the Fifth Schedule, as finally adopted and engrafted in the Constitution, provided as under:-

“5 (2) The Governor or Rajpramukh, as the case may be, may make regulations for the peace and good Government of any area in a State which is for the time being a scheduled area.

In particular and without prejudice to the generality of the foregoing power, such regulations may –

(a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such areas:

(b) regulate the allotment of land to members of the Scheduled Tribes in such area;

(c) regulate the carrying on or business as money-lender by persons who lend money to members of the Scheduled Tribes in such areas.

(3) In making any such regulations as is referred to in sub-paragraph (2) of this paragraph, the Governor or Ruler may repeal or amend any Act of Parliament of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and until assented by him shall have no effect.



(5) No regulation shall be made under this paragraph unless the Governor or the Ruler making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council”.

164. The word “Rajpramukh” was subsequently deleted by the Constitution (Seventh Amendment) Act, 1956.

165. The above legislative history indicates that from the very beginning, at least from the 19<sup>th</sup> Century, scheduled areas inhabited by aboriginals and tribals have been administered exclusively under the control of the Central Government through the Governor of the State by providing special statutory measures. It is obvious that from the earliest time till the making of the Constitution, it was all along felt that the transfer of land in the scheduled areas by a tribal to a person who was not a member of the Scheduled Tribe be totally prohibited and if such a transfer was made, it was to be treated as null and void. Government land in the scheduled areas could also not be allotted to persons who were not the members of the Scheduled Tribes. If such land was proposed to be allotted to them, it could be done only under the regulations made by the Governor. The basic concept was that the land of the Scheduled Tribes should be protected and should not be frittered away by transfer nor should any non-tribal be allowed to infiltrate in the scheduled area by getting an allotment of land made in his favour. In case of a transfer of land which was void, the power to restore land to a tribal or his heirs after evicting the non-tribal was also vested in the Government.

166. It has already been seen above that in the Draft Constitution, prepared by the Drafting Committee, there was a clear prohibition on the allotment of Government land to non-tribals except in accordance with the rules made by the Governor.

167. In the Constituent Assembly when the Draft Fifth Schedule was considered, no member raised any objection that the Government should be free to allot its land to the non-tribals in the scheduled areas as all the members were conscious of the fact by the tribals should not be disturbed by allowing non-tribals to enter into that area.

168. The protective measures adopted through legislation for the preservation of tribal life, for the prevention of tribal life, for the prevention of exploitation of tribals by non-tribals and money-lenders and to seal infiltration of non-tribals in the Agency Tracts or Scheduled Areas rested on three main planks:-

(a) Prohibition of transfer of land by tribal to a non-tribal with the stipulation that such transfer will be null and void.

(b) Prohibiting Government from allotting land vested in it to non-tribal.

(c) Power of Government to evict non-tribal from the tribals land coming into his possession through a void sale deed and restoring the same to the tribals or his heirs.

169. The question is whether this position is still reflection in the Fifth Schedule read with Arts. 15(4), 46 and 244 of the Constitution.

170. The Fifth Schedule as finally brought on the pages of the Constitution does not contain any specific prohibition.

171. After specifying that the executive power of the State extends to the scheduled areas therein and that the Governor shall report annually to the President regarding the administration of those areas and that the executive power of the Union extends to the giving of direction to the States above the administration of the scheduled areas and further that there shall be a Tribes Advisory Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes as may be referred to them by the Governor, the Fifth Schedule, in para 5 thereof, proceeds to speak about the applicability of laws to the scheduled areas by saying that the Governor may, by Notification, direct that an Act of Parliament or Legislature of the State shall not apply to the scheduled area or that it shall apply with such exceptions and modifications as may be specified in the Notification. These directions may also be issued with retrospective effect.

172. Under para 5(2) of the Fifth Schedule, the Governor has also been given the power to make Regulations for the “Peace and Good Government” of the scheduled area.

173. Apart from this power which is in very wide and general terms, Regulations could also be made by the Governor to: -

(a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area:

(b) regulate the allotment of land to members of the Scheduled Tribes in such area:

(c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.

174. The power to make Regulations also includes the power to repeal or amend any Act of Parliament or of the State Legislature or any existing law which may, for the time being, be applicable to the scheduled area.

175. The power to make Regulations is undoubtedly legislative in character. The power to issue directions under para 5(1) of the Fifth Schedule as to the applicability of an Act of Parliament or State Legislature with such exceptions and modifications as the Governor may direct, is also legislative in character. In *Chatturam v. Commr. Of Income-tax, Bihar* (1947) FCR 116: (1947) FLJ92: (AIR 1947 FC 32). It was laid down with reference to S.92 (I) of the Government of India Act, 1935 that when the Governor issues a Notification under S.92(1) by which Federal Law are applied to Excluded and Partially Excluded Areas (Scheduled Areas), he exercised a legislative power. So also when the Governor makes Regulations in exercise of power under para 5(2) of the Fifth Schedule, which is equivalent to S.92 of the Government of India Act. 1935 and repeals or amends any Act of Parliament or State Legislature, he exercises legislative power as the principle laid down in *Chhaturam’s case* (supra) which was followed in *Jatindra Nath Gupta v. Province of Bihar* (1949) FLJ 225: (AIR 1949 FC 175), would be applicable to this situation also.

176. The Governor has also been given the legislative power to make Regulations for the “PEACE AND GOOD GOVERNMENT” of any area in a State which is a scheduled area. The word “PEACE AND GOOD GOVERNMENT” are the words of very wide import and give wide discretion to the Governor to make laws for such purpose. In *King Emperor v. Benoari Lal Shama* (1944) LR 72 IA 57: 9AIR 1945 PC 48) and in *Attorney-General for Saskatchewan v. Canadian*

Pacific Ry.Co., 1953 AC 594, it was held that the words “PEACE, ORDER AND GOOD GOVERNMENT” are the words of very wide import giving wide power to the authority to pass laws for such purposes. In Raja Jogendra Narayan Deby. Debendra Narayan Roy (1942) LR 69 IA 76 (AIR 1942 PC \$\$), it was explained that these words, namely, “PEACE ORDER AND GOOD GOVERNMENT” have reference to the scope and not to the merits of the legislation. It was again explained in Girindra Nath Banerjee v. Birendra Nath Pal (1927) ILR 54 Cal 727: (AIR 1927 Cal 496), that these words are words of the widest significance and it is not open to a Court to consider whether any legislation made by the Governor would conduce to peace and good Government.

177. The words “PEACE, PROGRESS AND GOOD GOVERNMENT” have also been used in Art. 240 of the Constitution which empowers the President to make Regulations for certain Union territories. This Court had an occasion to consider the significance of these words in T.M. Kannian Income Tax Officer, Pondicherry (1968) 2 SCR 103: (AIR 1968 SC 637) and relying upon the above decisions as also those rendered in Riel v. Queen (1885) 10 AC 675 and Chenard and Co. v. Joachim Arissol (1949) ACT 127, it was held that the power of the President to make Regulations under Art 240 was very wide and the President could make Regulations with respect to a Union Territory occupying the same field on which Parliament could also make laws.

178. In exercise of the power conferred by para 5(2) of the Fifth Schedule, the Governor of Andhra Pradesh promulgated Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959.

179. These Regulations were amended by Regulation I of 1970, again by Regulation 1 of 1971 and by Regulation 1 of 1978.

180. The constitutional validity of these Regulations was challenged in P. Rami Reddy v. State of Andhra Pradesh, (1988) 3 SCC 433: (AIR 1988 SC 1626) and upheld by this Court.

181. Para 3(1) (a) of the Regulation which opens with a non obstante clause provides that a transfer of immovable property situate in the Agency Tracts by a person, whether or not such a person is a member of the Scheduled Tribe, shall be absolutely null and void. This puts a complete ban on the transfer of immovable properties in the Agency Tracts by any person whatsoever, whether he is a member of the Scheduled Tribes or not. There is, however, one exception to this rule as it is provided that such transfer shall not be null and void if the transfer is made in favour of a person who is a member of the Scheduled Tribe or is a Society registered or deemed to be registered under the Andhra Pradesh Co-operative Societies Act, 1964 which is composed solely of members of the Scheduled Tribes.

182. Para 3(1) (c) provides that if a person “who intends to sell his land, is not able to sell that land either because the member belonging to the Scheduled Tribe is not willing to purchase the land or is not willing to purchase the land on the terms offered to him, such person may apply to the Agent or the Agency Divisional Officer or any other Prescribed Officer (who are defined in Para 2(b) and (c) of the Regulations) for the acquisition of such land by the State Government. The Agent or the Agency Divisional Officer or the Prescribed Officer, as the case may be, shall then take over the land on payment of compensation in accordance with the principles specified in Section 10 of the Andhra Pradesh (Ceiling on Agricultural Holdings) Act, 1961. The land shall then vest, free from all encumbrances, in the State Government which shall dispose of the land in the favour of members of the scheduled Tribe or a Co-operative Society composed solely of the members of the scheduled Tribe or “in such other manner and subject to such conditions as may be prescribed”.

There cannot also be a “Benami” transaction under the Regulations and a member of the Scheduled Tribe cannot hold property in his name for the benefit of a non-tribal.

183. Para 3(2) (a) provides that if a transfer of immovable property has been made in contravention of Para 3(1) (a), the Agent, the Agency Divisional Officer or any other Prescribed Officer suo motu or on the application of the application of any one interested or on the information of a public servant, decree ejectment of the person in possession of that property claiming under such transfer. The property shall then be restored to the transferor or his heirs.

184. Para 3(2) (b) provides that if a transferor or his heirs are not willing to take back the property or their whereabouts are not known, the property shall be assigned or sold to any other member of the Scheduled Tribe or a Co-operative Society composed solely of the members of the Scheduled Tribe. The Agent or the Agency Divisional Officer or the Prescribed Officer shall have a power to “otherwise” dispose it of as if it was the property at the disposal of the State Government.

185. It may be mentioned here that Para 3(1) (b) contains a rule of presumption that if any immovable property situated in the Agency Tracts is in possession of a person who is not a member of the Scheduled Tribe, it shall be presumed, until the contrary is proved, that the property has been acquired by that person through a transfer made to him by member of the Scheduled Tribe.

186. Para 3A of the Regulation places two restrictions on a person intending to mortgage his property. The first restriction is that it can be mortgaged only in favour of a person who is a member of the Scheduled Tribe or to a Co-operative Society or a Land Mortgage Bank or any other bank or financial institution approved by the State Government. The Explanation appended to Para 3A(1) defines a “Bank”. The other restriction is that while mortgaging the property, it would not be open to that person to deliver possession to the mortgagee. Clause 2 of Para 3A provides that in case the immovable property which was mortgaged is brought to sale on account of default in payment of the mortgage money or the interest payable thereon, the said property shall be sold only to a member of the Scheduled Tribe or to a Co-operative Society composed solely of members of the Scheduled Tribe. Explanation appended to this Clause specifies as to what would be treated as Co-operative Societies. It provides that if the Government is a member of any Co-operative Society, it, namely, the said Society, shall also be deemed to be registered under the Andhra Pradesh Co-operative Societies Act, 1964.

187. Clause 5 provides that no immovable property situate in the Agency Tracts and owned by a member of the Scheduled Tribe shall be liable to be attached and sold in the execution of money decree.

188. Clause 6 creates certain offences and prescribes the penalties therefore. For example, if a person acquires any immovable property in contravention of any provision of the Regulations or continues in possession of such property after a decree for ejectment is passed, he will be prosecuted and sentenced to imprisonment for a term which may extend to one year.

189. These Regulations indicate a departure from the normal laws relating to immovable property. Normally, an owner of a immovable property is free to transfer his property to anyone he likes. But if he possesses property in the Agency Tracts or the Scheduled Areas, his right to transfer the property is restricted as he can transfer it only to a member of the Scheduled Tribe or to a Co-operative Society comprising solely of the members of the Scheduled Tribes. So also, under the

usufructuary mortgage, possession has necessarily to be transferred to the mortgagee but these Regulations prescribed that in no case shall possession be delivered to the mortgagee.

190. It will be seen from the above that at least in two circumstances, the property of the member of the Scheduled Tribe or any other person in the Scheduled Area becomes the property of the State Government: -

(1) If a person is not able to sell his property either because a member of the Scheduled Tribes is not willing to purchase the property or is not willing to purchase the property on the terms at which it proposed to be sold, then the Agent, or the Agency Divisional Officer or any Prescribed Officer can by order, acquire the property on payment of compensation. The property loses its original character and becomes the property of the State Government.

(2) If on a decree for ejectment being passed against a person in occupation of the property belonging to a Scheduled Tribe under a sale deed which is void, the property is sought to be restored to the transferor or his heirs but they are not willing to take back the property or their whereabouts are not known, it would be open to the Government to assign or transfer the property to any other member of the Scheduled Tribe or otherwise dispose it of as if it was the property, at the disposal of the State Government.

191. In all these circumstances, when the property either comes to vest in the State Government or becomes a property at the disposal of the State Government, the Government cannot, in view of the above, transfer the property to a "person" of its own choice but has to transfer, assign or sell to a member of the Scheduled Tribe or a Co-operative Society of the Scheduled Tribes.

192. The possibility of the Government disposing it of to a person who is not a member of the Scheduled Tribe is totally ruled out by the Regulations by providing that it shall be sold, assigned or transferred only to tribals or their Co-operative Society. If this applies to properties which become the Government properties, how the properties which are already the government properties could be excluded from the applicability of these Regulations? The Government has to be bounded down to the Constitutional scheme sought to be enforced through Regulations made by the Governor under Para 5(2) of the Fifth Schedule and cannot be permitted to transfer its own properties in favour of non-tribals so as to allow their infiltration into the Scheduled Area. The prohibition contained in Para 3(1) (a) that no person, whether he is a member of the Scheduled Tribe or not, shall transfer his immovable property to a non-tribal must, therefore, in its scope, cover the Government, as well, which, if it possesses land in the Agency Tracts, cannot transfer it either by sale, allotment, lease, or otherwise to a non-tribal. To this limited extent, it has to be treated as a "person" within the meaning of Clause 3(1)(a) of the Regulations.

193. It is contended by the learned counsel for the respondent that where the property is acquired by the Government on payment of compensation or it becomes the property at the disposal of the Government, such property, undoubtedly, has to be disposed of in favour of the member of the Scheduled Tribe or a Co-operative Society of the Scheduled Tribes but the Government also retains the power and choice to dispose it of in such other manner and subject to such conditions as may be prescribed. It is contended on the basis of the words "or in such other manner and subject to such conditions as may be prescribed" occurring in Para 3(1) (c) that the Government is not bound to sell the property to a member of the Scheduled Tribe or the Co-operative Society of the Scheduled Tribe. It is contended that almost similar words have been used in Para 3(2) (b) where the property,

if it is not taken back by the transferor who is a member of the Scheduled Tribe or his heirs, becomes the property at the disposal of the State Government and the State Government has the choice either to assign or sell the property to any member of the Scheduled Tribe or a Co-operative Society of the Scheduled Tribes or “otherwise dispose it of as if it was a property at the disposal of the Government”. This interpretation cannot be accepted. The words “ or in such other manner and subject to such conditions as may be prescribed” occurring in Para 3 (1) (c) and the words “or otherwise dispose it of as if it was a property at the disposal of the “State Government” have to be ‘read, not in isolation, but in the context of other words used in those provisions. The emphasis throughout in these Regulations has been that the property would be sold or transferred only to a member of the Scheduled Tribe or their Co-operative Societies. The Constitutional scheme which is sought to be enforced through Regulations is that the property of the Scheduled Tribe or the immovable property situated in Agency Tracts may be protected and be not frittered away and further that they may retain their original character and may continue to belong to members of the Scheduled Tribe or their Co-operative Societies, or that if the property belongs to a non-tribal, it may not be transferred to a non-tribal and may be transferred to a tribal alone. The words” or in any other manner” in para 3(1) (c) or the words “otherwise dispose it of as if it was a property at the disposal of the State Government” occurring in para 3(2) (b) have to be read in that contest with the result that even if the Government intended to deal with such immovable properties in any other manner” it could deal only in a manner which would ultimately benefit a member of the Scheduled Tribe or their Co-operative Societies. The Fifth Schedule including Para 5 thereof as also the Regulations made there under by the Governor of Andhra Pradesh clearly seek to implement the national policy that the custom, culture, life-style and properties of the Scheduled Tribes in the Agency Tracts and other immovable properties situate therein shall be protected. The Government being under a legal constraint to deal with the property situated in the Agency Tracts only in the manner indicated above, cannot itself act beyond the scope of the Regulations by saying that it is free to dispose of its own properties in any manner it likes. If the Government was allowed to transfer or dispose of its own land in favour of non-tribals, it would completely destroy the legal and constitutional fabric made to protect the Scheduled Tribes. The prohibition, so to say, disqualifies non-tribals as a class from acquiring or getting property on transfer. On account of this disqualification, the Government cannot, even if it is not a “person” within the meaning of Para 3 (1) (a), transfer, let out or allot its land or other immovable property to a non-tribal.

194. These Regulations have been made to give effect to the power of the Governor under Clauses (a) and (b) of Para 5 (2) of the Fifth Schedule for “Peace and Good Government” in the Agency Tracts. These Regulations also aim at ushering in an era of social equality where the most backward and isolated people who constitute the Scheduled Tribes may be rehabilitated effectively in the nation’s main-stream. The prohibition to sell the land to non-tribals and the further requirement that if the property comes to be vested in the Government or it becomes property at the disposal of the Government, it will be sold, assigned or distributed only to the tribals also is a measure, nay, a strong measure, in that direction to give effect to the philosophy of “Distributive Justice”.

195. The Mines and Minerals (Regulation and Development) Act, 1957 has already been amended by insertion of Section 11 (5) at the State level which provides that the Government land shall not be allotted for the purpose of mining to non-tribals. A lot of argument was raised on both sides whether this Amendment was retrospective or prospective. While it is contended on behalf of the respondents that the leases which had already been executed or renewed prior to the Amendment or

introduction of Section 11 (5), would not be affected the appellants in C.A. arising out of SLP (C) Nos. 17080-81 of 1995 argued that such leases, including renewed leases cannot be operated.

196. We have already held that the present scheme, set out in the Fifth Schedule and Regulations made by the Governor in exercise of the power under Para 5(2) of the Schedule, is to sell, distribute, assign or let out the Government land only to members of Scheduled Tribes. Section 11(5) introduced in the Act only seeks to give effect to what was already contained in the Fifth Schedule and the Regulations made there under. In order to set at rest the above controversy raised at various levels that the Government land could also be allotted to non-tribals, the Amendment was brought about in the Mines and Minerals (Regulation and Development) Act, 1957 so as to make it sure that it was never the intention that the Government land could be allotted to non-tribals. The Amendment only reiterates the existing position.

197. I am short of times as Brother Ramaswamy is retiring tomorrow. It is not possible for me to write out in detail on other points involved in the case. Since I am agreeing with Brother Ramaswamy on the findings recorded by him on other issues involved in the case, specially those relating to forests and Conservation of Forests Act and the environmental questions, I conclude by saying that I am in respectful agreement with him. I also agree with the ultimate directions issued in the Judgement.

198. In view of the above, I am also of the opinion that the appeals of Samatha arising out of SLP (C) Nos 17080-81 of 1995 deserve to be allowed and are hereby allowed while the other appeal arising out of SLP(C) No.21457 of 1993 is dismissed.