

**HIGH COURT OF GUJARAT (D.B.)****PANDIT SANTU DARANE***Versus***STATE OF GUJARAT****Date of Decision:** 05 August 2021**Citation:** 2021 LawSuit(Guj) 2950**Hon'ble Judges:** [J B Pardiwala](#), [Vaibhavi D Nanavati](#)**Case Type:** Special Civil Application**Case No:** 8720 of 2020**Subject:** Constitution**Acts Referred:**[Constitution Of India Art 342](#), [Art 15\(1\)](#), [Art 243M](#), [Art 244](#), [Art 226](#), [Art 163](#), [Art 15](#),  
[Art 14](#)[Mines And Minerals \(Development And Regulation\) Act, 1957 Sec 15](#)[Gujarat Provisions Of The Panchayats \(Extension To The Scheduled Areas\) Rules, 2017](#)  
[R 37\(4\)](#), [R 37](#), [R 37\(2\)](#), [R 4\(3\)\(a\)](#)[Provisions Of The Panchayats \(Extension To The Scheduled Areas\) Act, 1996 Sec 4\(a\)](#),  
[Sec 4\(d\)](#)[Gujarat Minor Mineral Concession Rules, 2017 R 4\(3\)](#), [R 4](#), [R 2\(1\)\(l\)](#), [R 2\(1\)\(x\)](#)**Final Decision:** Application dismissed**Advocates:** [Dev D Patel](#), [Ayaan Patel](#), [Nanavati Associates](#), [Viral K Shah](#)**Cases Referred in (+):** 4**J.B.Pardiwala, J.**

**[1]** By this writ-application under Article 226 of the Constitution of India, the writ-applicant - a native of Nashik, State of Maharashtra has prayed for the following reliefs:-

9(A) to issue a writ of certiorari or any other appropriate writ, order or direction, quashing and setting aside the Notification impugned dated 19.06.2020 and 23.06.2020 (Annexure-J) issued by the respondents in favour of Mittalbhai Anilbhai

Chaudhary and Rathva Jayeshbhai holding the same as illegal, against the principles of natural justice and in violation of the Article 14 of the Constitution of India.

(B) be pleased to direct the respondents herein to hold auction of mineral blocks of (i) Bhamsal Ordinary Sand Block - C, (ii) Hol Ordinary Sand Block - A, (iii) Shelu Ordinary Sand Block-A, (iv) Shelu Ordinary Sand Block-B, (v) Chinchoda Ordinary Sand Plus Gravel Block - C and (vi) Chinchoda Ordinary Sand Plus Gravel Block - B, after calling upon the petitioner to participate, considering his bids to be qualified bids.

(C) pending admission, hearing and final disposal of this petition, be pleased to stay the further execution of the Notification impugned dated 23.06.2020 and 19.06.2020 issued by the respondents herein in favour of Mr. Rathva Jayeshbhai as well as auction procedure to be held for mineral blocks of (i) Bhamsal Ordinary Sand Block - C, (ii) Hol Ordinary Sand Block - A, (iii) Shelu Ordinary Sand Block-A, and (iv) Shelu Ordinary Sand Block-B.

(D) to pass such other and further order/s as may be just and necessary in the circumstances of the case.

(E) to issue a writ of certiorari or any other appropriate writ, order or direction, quashing and setting aside the letter-cum-order dated 17.09.2020 issued by Respondent No.2 and further be pleased to direct Respondent No.2 to permit petitioner to participate in the E-auction to be held with regards to of mineral blocks of (i) Bhamsal Ordinary Sand Block-C, (ii) Hol Ordinary Sand Block - A, (iii) Shelu Ordinary Sand Block - A, (iv) Shelu Ordinary Sand Block - B, (v) Chinchoda Ordinary Sand Plus Gravel Block - C and (vi) Chinchoda Ordinary Sand Plus Gravel Block - B, considering his bid as qualified bid.

(F) pending admission, hearing and final disposal of this petition, be pleased to stay the further execution of the order dated 17.09.2020 issued by Respondent No.2 and further permit petitioner to participate in the E-auction of mineral blocks of (i) Bhamsal Ordinary Sand Block-C, (ii) Hol Ordinary Sand Block - A, (iii) Shelu Ordinary Sand Block - A, (iv) Shelu Ordinary Sand Block-B.

**[2]** The facts giving rise to this writ-application may be summarized as under:-

2.1 The respondent no.1 issued tender notice dated 30.11.2019 inviting bids for the grant of quarry lease for ordinary sand and gravel mineral. Such tender notice was issued by the respondent no.1 in exercise of its powers conferred by Section 15 of the Mines and Mineral [Development Regulation] Act 1957 [for short 'The

Act'] read with the Gujarat Minor Mineral Concession Rules, 2017 [for short 'The Rules']. The Government of Gujarat identified 10 [Ten] ordinary sand and gravel mineral blocks for electronic auction and invited bids for the purpose of grant of quarry lease. These blocks for which the bids were invited are situated in the scheduled area. It has been clearly stated in the tender notice that the quarry lease would be granted only to a bidder who belongs to a scheduled tribe and is an inhabitant of the scheduled area.

2.2 It is the case of the writ-applicant that pursuant to the tender notice, he offered his bids for 06 [six] mineral blocks out of 10 [ten], namely -

- (1) Bhamsen Ordinary Sand Block-A.
- (2) Bhamsen Ordinary Sand Block-B.
- (3) Bhamsen Ordinary Sand Block-C.
- (4) Hol Ordinary Sand Block-A.
- (5) Shelu Ordinary Sand Block-A.
- (6) Shelu Ordinary Sand Block-B.
- (7) Shelu Ordinary Sand Block-C.
- (8) Chinchoda Ordinary Sand + Gravel Block-C.
- (9) Chinchoda Ordinary Sand + Gravel Block-D.
- (10) Chinchoda Ordinary Sand + Gravel Block-E.

2.3 It is not in dispute that the writ-applicant herein belongs to the Maharashtra Koli tribe which is recognized as the scheduled tribe in the State of Maharashtra. The writ-applicant is a resident of Tehsil, Igatpuri, District - Nashik, State of Maharashtra. It is also not in dispute that the place of residence of the writ-applicant has been declared as a scheduled area within the State of Maharashtra.

2.4 The bids offered by the writ-applicant for the 06 [six] blocks referred to above were not opened or in other words, were not taken into consideration on the ground that the writ-applicant is not a resident of any scheduled area within the State of Gujarat.

**[3]** As the writ-applicant was found not eligible to participate in the tender process on the aforesaid ground, he came before this Court with the present writ-application.

[4] Mr. Dev Patel, the learned counsel appearing for the writ-applicant vehemently submitted that the decision on the part of the respondents not to permit his client to participate in the tender process on the ground of he being not a resident of any scheduled area within the State of Gujarat is violative of Articles 15 and 244 respectively of the Constitution. He would submit that his client is a national of India and belongs to the scheduled tribe as recognized under Article 244 of the Constitution and the legislation formed there-under. He would submit that his client is a resident of a scheduled area i.e. Igatpuri, Nashik and in such circumstances, he could be said to be an eligible bidder in terms of Clause-5 of the tender document.

[5] Mr. Patel has a grievance to redress that his client was informed orally that his bid had not been considered as he is a resident of the State of Maharashtra. He would argue that the bare reading of the conditions stipulated in the tender document do not indicate in any manner that the person offering his bid or intending to participate in the tender process should be a resident of the Tapi District itself or any other Scheduled Area of the State of Gujarat.

[6] Mr. Dev Patel invited the attention of this Court to the term "scheduled area" as defined in the Gujarat Minor Mineral Concession Rules, 2017 [for short 'The Rules, 2017'] wherein Rule-2(1)(x) provides as under:-

**2. Definitions. - (1) In these rules, unless the context otherwise requires-**

**(x) "Scheduled Area"** includes tribal areas, and scheduled area and tribal area shall have the same meaning as assigned to them under Article 244 of the Constitution of India;

[7] Mr. Dev Patel would submit that if the definition of the term Scheduled Area referred to above is read alongwith the Clause-5 of the tender document then it is clear that to be an eligible bidder, a person should be a resident of a scheduled area recognized under Article 244 of the Constitution. He would submit that the action of the respondents could be termed as one violative of Article 15 of the Constitution. He would argue relying on Article 15 of the Constitution that his client has been found ineligible or stood disqualified only on the ground of 'place of birth'.

[8] In such circumstances referred to above, Mr. Dev Patel prays that there being merit in his writ-application, the same may be allowed and the entire auction process undertaken be set at naught and the writ-applicant may be permitted to participate and offer his bids afresh.

[9] On the other-hand, this writ-application has been vehemently opposed by Mr. Ayaan Patel, the learned AGP appearing for the State respondents. Mr. Patel would

submit that the writ-applicant being a native of Igatpuri situated in the State of Maharashtra cannot be said to be a resident of any scheduled area within the State of Gujarat. Mr. Patel would argue that the Clause-5 of the tender document provides for the eligibility criteria. He invited the attention of this Court to a Clause-5(e), which reads as under:-

## 5. Eligibility

**(e)** [A quarry lease in the Schedule Area shall:-

- (i) be granted only to a bidder who belongs to a scheduled tribe and is an inhabitant of the Scheduled Area; and
- (ii) only be transferable to a person who belongs to a scheduled tribe and is an inhabitant of the Scheduled Area.]

**[10]** According to Mr. Patel, the phrase "inhabitant of the Scheduled Area" means and should be read as the 'Scheduled Area of the State of Gujarat' because the blocks are in the State of Gujarat.

**[11]** In the aforesaid context, Mr. Patel seeks to rely on the decision of the Supreme Court in the case of [Samatha Vs. State of Andhra Pradesh And Ors.](#), 1997 8 SCC 191 more particularly, the observations made by the Supreme Court in Para - 210 with respect to Article 244 and the Fifth Schedule of the Constitution. He would argue that the Article 244(1) of the Constitution makes the provisions of the Fifth Schedule applicable to the Scheduled area and Scheduled Tribes in all States other than the Assam and Meghalaya. Article 244(1) of the Constitution read with Fifth Schedule vests with the Governor of the State, the entire governmental power in respect of the schedule areas within the State.

**[12]** Mr. Patel, thereafter, invited the attention of this Court to the definition of the term "Government" as provided in the Rules, 2017. Rule-2(1)(I) defines the term "Government" means the 'Government of Gujarat'. Thereafter, Mr. Patel invited the attention of this Court to Rule 4(3) of the Rules, 2017. Rule 4 is with respect to grant of quarry lease. The Rule 4(3) reads thus:-

**"Rule 4(3)** - In case of an auction with respect to a Scheduled Area, the Government may, subject to the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the provisions of the Panchayat (Extension to the Scheduled Areas) Act, 1996, as applicable, identify the areas, excluding areas where a mineral concession is subsisting, in which evidence of mineral resources has been established in

accordance with the parameters prescribed in Schedule I. The following conditions would apply to quarry leases granted through an auction in accordance with this Chapter in such identified areas:-

(a) A quarry lease in the Scheduled Area identified pursuant to this sub-rule shall:

(i) be granted only to a bidder who belongs to a scheduled tribe and is an inhabitant of the Scheduled Area; and

(ii) only be transferable to a person who belongs to a scheduled tribe and is an inhabitant of the Scheduled Area."

**[13]** It is argued by the learned AGP that the Rule 4(3) referred to above makes it abundantly clear that if an auction relating to grant of quarry lease with respect to Blocks situated in the scheduled area is to be undertaken of the State of Gujarat, then the same can be granted only to a bidder who belongs to a scheduled tribe and inhabitant of the scheduled area i.e. within the State of Gujarat. He thereafter invited the attention of this Court to the definition of the term "Scheduled Area" as defined under Rule-2(1)(x), which reads thus:-

**2(1)(x) "Scheduled Area"** includes tribal areas, and scheduled area and tribal area shall have the same meaning as assigned to them under Article 244 of the Constitution of India;

**[14]** The learned AGP thereafter took the Court to Page-89 of the paper-book, which is a letter dated 17.09.2020 addressed by the Office of the Commissioner, Geology and Mining, Gandhinagar, State of Gujarat to the writ-applicant informing why the writ-applicant is not eligible to participate in the tender process. The letter reads thus:-

***Office of the Commissioner of Geology & Mining***

*Block No.1, 7th Floor, Udyog Bhavan, Sector-11,*

*Gandhinagar, Gujarat 382010*

No.CGM/Lease/Auction Cell/2020-21/2703

RPAD

Date: 17th September  
2020

To,

Pandit Santu Darane

Room No.7, Station Wadi,

Sathe Nagar, Nashik Road,  
Nashik - 422101, Maharashtra

Subject: Participation In Ordinary Sand Auction, Tapi, But till today not inform to me regarding status of Auction and my Qualification in that Auction Form Your Department.

Ref.: Your letter dated 22/06/2020.

With reference to the above subject and your letter dated 22/06/2020, we are asked that you have not received any information or intimation to participate in e-auction for ordinary sand block in Tapi district. We are also asked to inform you the reason in writing for your disqualification from e-auction on your E-mail ID.

You have participated in the e-auction process of two Ordinary Sand + Gravel Mineral Blocks and four Ordinary Sand Mineral Blocks of Tapi District, are as follow: (1) Chinchoda Ordinary Sand and Gravel Block - C, (2) Chinchoda Ordinary Sand and Gravel Blcok - D, (3) Hol Ordinary Sand Block - A, (4) Shelu Ordinary Sand Block - A, (5) Shelu Ordinary Sand Block - B and Bhamsal Ordinary Sand Block - C.

As per Clause 12.9 of the tender document, Upon submission of the Technical Bid, any change affecting the Bidder regarding compliance with the eligibility conditions shall result in disqualification of the Bidder.

With reference to the above clause, you are disqualified from the e-auction process of the above said two Ordinary Sand and Gravel Mineral Blocks and four Ordinary Sand Mineral Blocks of Tapi District.

As per Clause 14.2.1(d) of tender document, The State Government, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to Independently verify, disqualify, reject and/or accept any and all submission or other information and/or evidence submitted by or on behalf of any Bidder.

As per Clause 7.1(A)(c)(i) of tender document, The State Government is not obliged to provide any explanation or clarification on their disqualification to Bidders who fail to qualify as Technically Qualified Bidders.

Additional Director  
(Dev.) Geology and  
Mining Dept.  
Gandhinagar.

**[15]** Thereafter, our attention was drawn to the bid letter dated 28.01.2020 which a bidder has to furnish to the District Collector making certain declarations like the technical condition - etc. One of the declarations sought in the bid letter is Clause-20 which reads thus:-

**Clause 20** - [I/We are resident of the same Scheduled Area where the quarry lease is proposed to be granted.]

**[16]** According to the learned AGP, the declaration sought for as aforesaid is indicative of the fact that the person should be a resident of the same scheduled area whether the quarry lease is proposed to be granted. This according to the learned AGP would go to show that the writ-applicant should be a resident of the scheduled area within the State of Gujarat, more particularly, the scheduled area where the blocks are actually situated.

**[17]** In such circumstances referred to above, Mr. Patel, the learned AGP prays that there being no merit in the present writ-application, the same be rejected.

**[18]** Mr. Viral Shah, the learned counsel appearing for the respondent no.6 in whose favour the lease has been executed for the blocks referred to above has vehemently opposed this writ-application submitting that the writ-applicant was rightly held not eligible to participate in the tender process having regard to the terms and conditions of the tender document. Mr. Shah invited the attention of this Court to Clause 1.1. of the tender document, which reads thus:-

**"Clause-1.1** - This Tender Document has been issued pursuant to notification of an area with the intent to carry out e-auction for grant of a quarry lease for Ordinary Sand Mineral pursuant to the Act and the rules framed thereunder. All information provided in this Tender Document should be read together with the Act and the rules granted thereunder. In the even of a conflict between this Tender Document and the Act or the rules, the Act or the rules (as amended from time to time), as the case may be shall prevail."

**[19]** He would argue that as per the Rule 2(1)(l) the term "Government" means 'The Government of Gujarat'. According to him, the State of Gujarat identified the "Scheduled Area" subject to the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and also, the provisions of the Panchayat (Extension to the Scheduled Areas) Act, 1996. He would



argue that reading the same, it would clearly mean that the "Scheduled Area" means the scheduled area within the State of Gujarat. He also invited the attention of this Court to Rule- 37 of the PESA Rules as regards the grant of permission for extraction of minor minerals by auction. As per Rule-37(2) of the PESA Rules, the quarry lease in the Scheduled Area can only be granted to the members of the Scheduled Tribes and local individuals residing in that area. Rule-37 of the PESA Rules reads as under:-

**"Rule-37. Grant of permission for extraction of minor minerals by auction:-**

- (1) The quarry lease for minor mineral shall be granted by way of electronic auctions only, to ensure proper and transparent process of lease allotment.
- (2) Quarry lease in Scheduled Area Shall only be granted to the members of the Scheduled Tribes and local individuals residing in that area.
- (3) The quarry lease shall be granted after the auction process, only after obtaining recommendations from the Gram Sabha.
- (4) Notwithstanding anything contended in sub-rule (2), if after reasonable attempts for auctioning of the resource, if the auction process remains unsuccessful, the said area may be open for participation for others as may be prescribed under the prevailing Minor Minerals Concession Rules."

**[20]** Thus, it is evident from the above referred Rule-37(4) of the PESA Rules that it would be permissible for a person other than the one referred to in Rule-4(3)(a) to participate only if after reasonable attempts for auctioning of the resource, if the auction process remains unsuccessful, the said area may be open for participation for others.

**[21]** In such circumstances referred to above, Mr. Shah would submit that there being no merit in the present writ-application, the same be rejected.

**[22]** Having heard the learned counsel appearing for the parties and having gone through the materials on record the following two questions fall for our consideration.

- (1) Whether the entire tender process or the policy of the Government to allot blocks by way of lease could be said to be violative of Article 15 of the Constitution as the writ-applicant was not permitted or rather was not found eligible to participate in the auction process on the ground of his place of birth or residence?
- (2) Whether the writ-applicant is right in submitting that as he resides within the scheduled area as declared by the State of Maharashtra, he is entitled to

participate in the auction process of blocks situated in a scheduled area of any other State?

**[23]** We propose to answer the Second Question first.

**[24] What are Scheduled Areas?** - It is well known that "Scheduled Tribes" are those that are scheduled as such by a Presidential Order under Article 342 of the Constitution. It may be pointed out that the creation or cessation of Scheduled Areas, as provided in paragraph-6 of the fifth Schedule, is placed at an even higher level than the declaration of Scheduled Tribes and Scheduled Castes by Presidential Orders under Articles 341 and 342, where, subsequent to the initial notifications in 1950, the Constitution empowers the Parliament to make amendments from time to time. With regard to Scheduled Areas, however, it is only the President of India, by way of a Presidential Order duly notified, who can make any alteration which will include, or exclude, any part of the territory of India from the Fifth Schedule.

The term "Scheduled Areas" are those that are scheduled as such by a Presidential Order under Paragraph 6 (1) of the Fifth Schedule, which states:

"In this Constitution, the expression 'Scheduled Areas' means such areas as the President may by order declare to be Scheduled Areas"

**[25] Criteria for declaring an area as a Scheduled Area** - The First Scheduled Areas and Scheduled Tribes Commission, also known as the Dhebar Commission (1960-61) laid down the following criteria for declaring any area as a 'Scheduled Area' under the Fifth Schedule:

- Preponderance of tribal population, which should not be less than 50 percent;
- Compactness and reasonable size of the area;
- Underdeveloped nature of the area; and
- Marked disparity in the economic standard of the people, as compared to the neighboring areas.

**[26] Role of the Governor** - In the constitutional design, just as the President is the head of the Executive at the Centre, the Governor is the head of state executive in a State Government. He is appointed by the Central Government, and under Article 163 of the Constitution, ordinarily the Governor is bound to exercise his/her powers with the 'aid and advice' of the Council of Ministers, i.e. the Cabinet of the elected State Government. However, while exercising powers under the Fifth Schedule, there is considerable debate as well as litigation on whether or not the powers conferred upon

the Governor by the Fifth Schedule can be exercised without explicit sanction from the State government, and whether he is, in fact, bound by the advice of the Central Government. It has been argued that the Governor, while exercising his powers under the Fifth Schedule, is not bound by the aid and advice of the Council of Ministers and must exercise the function independently. This position has received affirmation from the Courts as well.

Be that as it may, the Governor has been vested with enormous powers under the Fifth Schedule. Under Paragraph 4, he has rule-making powers with regard to the number of members, mode of appointment, and functioning of the Tribes Advisory Council (TAC). The TAC renders advice to him when called upon by him, never on its own.

Paragraph 5(1), which lies at the heart of the Fifth Schedule, gives the Governor the power to restrict the application of any Central or State legislation to the Scheduled Area, either completely, or subject to exceptions and modifications. It has been held by the Supreme Court that the power to make exceptions and modifications includes the power to amend these laws.

Paragraph 5(2) empowers the Governor to make Regulations for the 'peace and good government' of a Scheduled Area. This power is general in nature, and the terminology adopted by the Constitution is not only wide in terms of the subject matter covered, it is also categorically stated that this power inheres "notwithstanding anything contained in this Constitution." Clearly, therefore, the power to make regulations for 'peace and good government' extends to all subject matters which could conceivably be so described, notwithstanding the segregation of subject matters between the Central, State and Concurrent Lists contained in the Seventh Schedule. It is further stated that the Governor, while making such regulations, can amend or repeal any Central or State legislation for this purpose with regard to its application to Scheduled Areas.

Specifically, this paragraph empowers the Governor to make regulations with regard to:

(i) Prohibition and restriction of transfer of land from and between Scheduled Tribes - almost every State in the country, and certainly all States with Scheduled Areas, have enacted legislations relating to prevention/prohibition of land transfer in Scheduled Areas by tribals to non-tribals, and in some cases, even the transfer of land between tribals inter-se is restricted.

(ii) Regulation of allotment of land to tribals in Scheduled Areas;

(iii) Regulation of money-lending in Scheduled Areas to tribals.

**[27]** Part IX of the Constitution contains a large number of provisions relating to the definition and constitution of Panchayats, Gram Sabhas, their powers and functions, and elections. Article 243-M of the said chapter, however, provides that where Scheduled Areas are concerned, provisions of this Chapter will not apply unless a special law is enacted by Parliament making such exceptions and modifications as necessary. This provision is based on the understanding that with regard to Scheduled Areas, a special constitutional dispensation is in place under Article 244 read with the Fifth Schedule. Therefore governance mechanisms which may be appropriate for the rest of the country ought not to be applied to such areas without necessary changes in order to bring them in conformity with the constitutional design. This means that provisions in Part IX of the Constitution, and the existing Panchayat legislations in different States, cannot be applied to Scheduled Areas until a special law is enacted by Parliament laying down the exemptions and modifications required in the existing law for this purpose. This provision is premised on the recognition that adivasi communities in such Scheduled Areas must be provided with a governance regime which respects their constitutional right to autonomous self governance.

It is in this context that Parliament in 1996 enacted the Panchayats Extension to Scheduled Areas Act (hereafter 'PESA') to extend the panchayati raj system to the Fifth Schedule areas. PESA lays down the exceptions and modifications necessary in the law, both the constitutional provisions as well as the State panchayati raj legislations, while extending the panchayati raj institutions to Scheduled Areas. The States having Scheduled Areas were required to enact state legislation within a year of the passage of PESA in the Parliament.

**[28] The Spirit of PESA** - Section 4(a) and 4(d) of PESA, which encapsulate the essential spirit of the law, recognise the supremacy of customary law, traditional management practices for community resources, and traditional methods of dispute resolution in Scheduled Areas. These provisions state as follows:

(a) a State legislation on the Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;

...

(d) every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution.

It is apparent, therefore, that PESA makes it a duty of the State to ensure that any law enacted for the Scheduled Area on panchayats must give primacy to existing customary law and traditional mechanisms, and also give primacy to the community in the management of its community resources. It is generally agreed that these clauses encapsulate the essential ingredients of the approach of PESA for all law relating to panchayats and local self governance in the Scheduled Areas. The critical elements of such an approach are:

- (i) The centrality of traditional mechanisms, whether with respect to law, dispute resolution, or resource management;
- (ii) The necessity to protect these traditional mechanisms, including cultural identity, customs and religious practices of the community;
- (iii) The centrality of the Gram Sabha, or the village community in this function, and the vesting of power in such Gram Sabha for this purpose.

PESA requires the State laws in the Scheduled Areas to be amended within one year to ensure that every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resource and customary mode of dispute resolution.

**[29]** In the aforesaid context, we may refer to and rely upon a decision of the Supreme Court in the case of [Union of India Vs. Rakesh Kumar & Ors.](#), 2010 4 SCC 50: (2010) 1 Scale 281, wherein, the Supreme Court has given more than a fair idea about Article 244 of the Constitution. We quote as under:-

2. For a considerable period during the British Rule, special laws were made applicable to certain 'backward areas' in India that were predominantly occupied by tribal people. These backward regions covered an area of more than 1,20,000 square miles. However, the characteristics of these areas and their populations varied widely. By Act XIV of 1874, Santhal Parganas and Chutia Nagpur Division (now known as Chhotanagpur Division) were created and in these 'Scheduled districts', tribal communities were accorded a certain degree of autonomy to regulate their affairs on the basis of their own conventions and traditions. Many of these communities chose their leaders through an informal consensus among other customary methods for selection. When the Constitution was enacted, these areas were designated as 'Scheduled Areas'. Article 244 of the Constitution explicitly states that the provisions of the Fifth Schedule shall apply in respect of the administration and control of the Scheduled Areas in any State other than the States of Assam, Meghalaya, Tripura and Mizoram. The provisions of the Sixth Schedule guide the administration of tribal areas in those States.

3. Paragraph (4) of the Fifth Schedule states that there shall be in each State having a "Scheduled Area", a 'Tribes Advisory Council' consisting of not more than twenty members of whom, as nearly as may be, three- fourths shall be the representatives of the Scheduled Tribes in the Legislative Assembly of the State. It was the duty of the 'Tribes Advisory Council' to advise on matters pertaining to the welfare and advancement of the Scheduled Tribes in the State. Paragraph (5) of the Fifth Schedule states that the Governor of the State may by public notification direct that any particular Act of Parliament or the Legislature of the State shall not apply to a Scheduled Area or would apply subject to such exceptions and modifications as he may specify. The Governor of the State may also make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area. The Governor of the State has also been given the power to repeal or amend any existing Act of Parliament or of the Legislature of the State which is for the time being applicable to the area in question.

4. Hence, it is evident that the framers' intent behind including the Fifth Schedule was that of a separate administrative scheme for Scheduled Areas in order to address the special needs of tribal communities. During the debates on the floor of the Constituent Assembly, some members had criticized such differential treatment for Scheduled Tribes. In response to such criticisms, Shri K.M. Munshi had said that 'Adivasis' or tribes were many in number belonging to different "ethnic, religious and social groups" and he explained the object of the Drafting Committee's proposals in the following words:

"We want that the Scheduled Tribes in the whole country should be protected from the destructive impact of races possessing a higher and more aggressive culture and should be encouraged to develop their own autonomous life; at the same time we want them to take a larger part in the life of the country adopted. They should not be isolated communities or little republics to be perpetuated for ever.... object is to maintain them as little unconnected communities which might develop into different groups from the rest of the country.... and that these tribes should be absorbed in the national life of the country."

**[30]** We now straightway go to The Gujarat Provisions of Panchayats (Extension to Scheduled Areas) Rules, 2017. Rule 37 is relevant for our purpose. The same reads thus:-

**Rule 37 - Grant of permission for exploitation of minor minerals by auction:-**

(1) The quarry lease for minor mineral shall be granted by way of electronic auction only, to ensure a proper and transparent process of lease allotment.

(2) Quarry lease in Schedule Area shall only be granted to the members of the Scheduled Tribes and local individuals residing in that area.

(3) The quarry lease shall be granted after the auction process, only after obtaining recommendations from the Gram Sabha.

(4) Notwithstanding anything contented in sub-rule (2), if after reasonable attempts for auctioning of the resource, if the auction process remains unsuccessful, the said area may be open for participation for others as may be prescribed under the prevailing Minor Minerals Concession Rules.

**[31]** Thus, the plain reading of the aforesaid Rule-37 would indicate that the quarry lease in scheduled area has to be granted only to the members of the Scheduled Tribes and the local individuals residing in that area. The word "residing in that area" would indicate the intent that only those individuals i.e. the members of the Scheduled Tribes residing in the Scheduled Area, where blocks are situated, to be given on lease can participate in the auction process. This appears to be the mandate under the rules and also in accordance with the policy of the State of Gujarat to protect the interest of the tribals residing in the scheduled area falling within the State.

**[32]** We now proceed to answer the First Question as regards Article 15 of the Constitution and the alleged discrimination.

**[33]** Having regard to our discussion with respect to the Question No.2 - could it be said that the action on the part of the State in not permitting the writ-applicant to participate in the auction proceedings is violative of Article 15 of the Constitution. It is sought to be argued by the writ-applicant that he has been ignored or rather declared not qualified to participate in the auction proceedings only because of his place of birth. In other words, only because he is a native of the State of Maharashtra. Article 15 of the Constitution says that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

**[34]** We have no hesitation in rejecting the argument of the writ-applicant with regard to Article 15 of the Constitution as it cannot be said that the eligibility criteria of the writ-applicant was fixed based only upon his 'place of birth'. If a law is based upon several factors and the place of birth etc. of a person is only one of the factors concerned, then Article 15 of the Constitution will have no application. The most important word in Article 15 is "only". It is difficult for us to accept the argument

canvassed on behalf of the writ-applicant that the writ-applicant was held disqualified "only" because he is a native of the State of Maharashtra.

**[35]** In Article 15 there are two words of very wide import - (1) "discrimination" and (2) "only". The expression "discriminate against", according to the Oxford Dictionary means, "to make an adverse distinction with regard to; to distinguish favourably from others". The true purport of the word "discrimination" has been very well explained by the Supreme Court in a Constitution Bench decision of five judges in [Kathi Raning Rawat v/s. State of Saurashtra](#), 1952 AIR(SC) 123.

"All legislative differentiation is not necessarily discriminatory. In fact, the word 'discrimination' does not occur in Article 14. The expression 'discriminate against' is used in Article 15(1) and Article 16(2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others". "Discrimination" thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, 'it may well be that the statute will, without more, incur condemnation' as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those Articles. But the position under Article 14 is different."

**[36]** A very interesting decision on the significance of the word "only" (as used in Article 29(2) also relating to fundamental rights) is that of the Full Bench in - [Srimati Champakam Dorairajan and another v/s. The State of Madras](#), 1951 AIR(Mad) 120. In that case the Madras Government, finding that there were not sufficient vacancies for admission of students to Medical College, issued a circular making, what it considered, an equitable division of the vacancies available among the various classes of citizens of the State. Out of every 14 seats, 6 were to be filled by nonBrahmin Hindus, 2 to backward Hindu communities, 2 to Brahmins, 2 to Harijans, 1 to Anglo-Indians and Indian Christians and 1 to Muslims. The Circular was challenged by various persons on the ground that it decided admission to persons only on the ground of religion or caste. It was sought to support the circular on the ground that the denial was not only on the ground of religion or caste, but as a matter of public policy based upon the provisions of Article 46 together with the paucity of the vacancies. It was held that much significance could not be attached to the word 'only' because even reading the Article without that word, the result would be the same. It was further held that the Circular was bad because it infringed the clear and unambiguous terms of Article 15(1) since it discriminated against citizens only on the ground of religion, race, caste, sex, place of birth or any of them. The judgment states :



"Discriminate against' means 'make an adverse distinction with regard to'; 'distinguish unfavourably from others' (Oxford Dictionary). What the article says is that, no person of a particular religion or caste shall be treated unfavourably when compared with persons of other religions and castes merely on the ground that they belong to a particular religion or caste. Now what does the Communal G.O. purport to do ? It says that a limited number of seats only are allotted to persons of a particular caste, namely Brahmins. The qualifications which would enable a candidate to secure one of those seats would necessarily be higher than the qualifications which would enable a person of another caste or religion, say, Harijan or Muslim to secure admission."

It was, therefore, held that the Communal G.O. was void.

**[37]** The learned counsel appearing for the writ-applicant argued that the term "only" in Article 15 of the Constitution means "because of". On the other hand, the contention of the learned AGP is that the emphasis must be laid on the word "only" and according to the canons of interpretation of the statutes the word must be given a meaning appropriate to the context and it cannot be ignored in the construction unless it would lead to an absurdity.

**[38]** In our opinion, the learned AGP is right in his submission that the writ-applicant has not been discriminated in any manner only on the ground of his place of birth or residence. We are of the view that the term "only" in Article 15 of the Constitution was included for emphasizing that the denial or discrimination should not be on the sole ground of caste etc. and that circumstances in each State or carrying out certain Policies may involve denial or discrimination on the ground of caste etc., but such denial or discrimination would not be in contravention of Articles 15(1) of the Constitution. It is neither possible nor necessary for us to state what are those circumstances or facts or policies, which the State may legitimately take into account or pursue or adopt.

**[39]** In such circumstances referred to above, we find no illegalities in the decision of the respondents while holding the writ-applicant not eligible to participate in the auction proceedings.

**[40]** For the forgoing reasons, this writ-application fails and is hereby rejected.