

(1993) 01 OHC CK 0021

In the Orissa High Court

Case No : Misc. Case No's. 8253, 8258 and 8265 of 1992

State of Orissa and Others

APPELLANT

Vs

Janamohan Das and etc. etc.

RESPONDENT

Date of Decision : 08-01-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 11
Commissions of Inquiry Act, 1952 — Section 3, 3(1), 7
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 115

Citation : AIR 1993 Ori 180 : (1993) 75 CLT 352

Hon'ble Judges : B.L. Hansaria, C.J.;B.N. Dash, J

Bench : Division Bench

Advocate : B.M. Patnaik, A. Patanaik, P.K. Choudhury and S. Mohanty, for the Appellant; Party in Person, Jayant Das, B.S. Tripathy and J.M. Das, for the Respondent

Final Decision : Dismissed

Judgement

Hansaria, C.J.—The mighty says to the meek that you cannot command me to act; I shall act if I like, I shall not act if I choose not to act. The meek says that I possess the strength of law to give you the command; the law, which is no respecter of person and which does not allow anybody to rise so high as to be above it. This could be the scenario if what has been submitted by Shri Patnaik, learned Counsel appearing for the State, were to be accepted by us fully.

2. In the background of the present case, the point involved may be pithily put, on our going whole hog with Shri Patnaik, as to whether the Presiding Officer of a small munsifi in a small hamlet of Orissa (say, Nowrangpur in the district of Koraput) can call upon the all powerful Prime Minister of India to appoint a Commission of Inquiry, as visualised by Section 3 of the Commissions of Inquiry Act, 1952 (for short, "the Act") (hereinafter referred to as the "judicial inquiry"), if the small Munsiff be of the view that any matter relating to Union affair is of such public importance as to warrant the same.

3. We have opened the judgment with the aforesaid prefatory remarks as the State prays for recalling our directions to hold judicial inquiry and to pay compensation of Rupees 15,000/- to the kith and kin of each person who died in the "liquor tragedy at Cuttack". This approach has been made, not to serve any narrow gain, according to Shri Patnaik, but to take care of the injury caused to the polity by our aforesaid directions, which are said to be without jurisdiction and really gross transgression into the fields reserved for the executive as well as the legislature. It has been urged that our directions have seriously affected the balance of power so finally laid down in the Constitution that nothing short of recall of the two directions is demanded. It is not ordering a judicial inquiry here or a Commission of Inquiry there which has led the State to file the present petitions, but conferment of sweeping power even to the lowest rung of the judiciary to call upon the highest in the executive, the President of India, in whose name the Central Government functions, to act as per the direction of the former. Shri Patnaik has taken great pains to submit that our aforesaid directions have caused so deep a wound to the constitutional health of the country that we should rise to the occasion to heal it by retracing our steps in the larger public interest.

4. The aforesaid submissions have been advanced with all sincerity and emphasis at the command of Shri Patnaik, according to whom, if the judiciary can order for constituting Commission of Inquiry under the Act in a case of the present nature, even a Munsif of a far flung place of the State could call upon even the Prime Minister of the country to discharge his Government's duty to constitute a Commission of Inquiry for any other matter of public importance, of which there is no dearth, say, the recent scam and the Ayodhya upsurge, because if the view taken by us that the power conferred on the appropriate Government by Section 3 of the Act is one coupled with duty, any public-spirited citizen of the country can knock at the door of even a Munsif by pressing into service the provisions of the Specific Relief Act directing the Prime Minister of India to constitute a Commission of inquiry relating to matters of Union affairs. The "enormity of consequences" following from the direction given by us, which according to the learned Counsel was without jurisdiction, demands recalling of the same in exercise of the power which inheres in every court, when an injury is caused to anybody due to its mistake. We are reminded about the nobility of the judiciary, which has not felt shackled or declined to rectify mistakes of the present magnitude.

5. This is the high pedestal from which Shri Patnaik has addressed us, and addressed persuasively, assiduously, laboriously, painstakingly and at the same time submissively and with perseverance, tact and using all court-crafts. Shri Das appearing for one of the writ petitioners has also with vehemence, sobriety and sagacity, tried to bring home to us that the present was a case where the power was coupled with duty and so mandamus was rightly issued to recall which no case has been made out. Shri Pradhan too reinforce the submissions of Shri Das.

6. The argument about the direction being outside jurisdiction has been built up on these premises:--

(1) The appropriate Government has unfettered judgment/discretion in the matter of constituting a Commission of inquiry under the Act and no direction by a judicial organ can be given.

(2) There was gross misconstruction of Section 3 of the Act inasmuch as this section permits only the House of the People or the Legislative Assembly of the State, as the case may be, to give a direction to the appropriate Government to constitute a Commission of Inquiry under the Act.

(3) The present was a case of non-action on the part of the State Government because of which a writ of mandamus on the ground that the power conferred by the Act is coupled with duty could not have been issued.

(4) All the aforesaid having resulted in a "vital error", the direction to hold judicial inquiry was without jurisdiction.

7. This apart, it is contended that it was not open to this Court to take judicial notice of the fact that the tragedy could not have taken place without political patronage by taking the same as a "notorious" fact. A subdued submission is that our direction to pay compensation as aforesaid was also without jurisdiction. The final shot in the arm is that we had directed for judicial inquiry suo motu, which could not have been done.

8. The picture has thus been painted on a broad canvas. We also added hue and colour. We desired to know the following from the learned Counsel of the parties, more particularly Shri Patnaik :--

(1) Whether the question of our acting suo motu in giving the direction to hold judicial inquiry can at all be raised ? To put it differently, is the State not estopped from doing so in the facts and circumstances of the case?

(2) Has this Court any power of recall, as distinguished from the power of review?

(3) Is the case at best not one of error within jurisdiction, instead of being error of jurisdiction, in which case power of even review would not be available?

(4) Is the submission regarding usurpation of the power of the State Legislature not barred by constructive res judicata?

9. We would, before undertaking our journey, indicate the long path we have to traverse. "Long" indeed it is, as we have been called upon to answer the following:--

(1) Did this Court order suo motu to hold judicial inquiry ? Is it open to the State to raise this point ?

(2) Has this Court any power of recall as distinguished from the power of review? If so, when can the power of recall be exercised and whether the present is such

a case ?

(3) Did this Court act without jurisdiction in directing the State Government to hold judicial inquiry ? Or, was this direction at best a case of error within jurisdiction, instead of error of jurisdiction ?

(4) Was it within the jurisdiction of the Court to take judicial notice of political patronage of illicit trading of liquor as going on at Cuttack by regarding the same as a "notorious" fact?

(5) Was the present a case where a positive direction to hold judicial inquiry, as distinguished from asking the State Government to consider the question of holding judicial inquiry, could have been given?

(6) Was the order to pay compensation without jurisdiction ?

(7) Did the Court usurp the power of the State Legislature in giving the direction to hold judicial inquiry ? In this plea not barred by constructive res judicata ?

(8) Can the writ issued by the Court be made futile by the Government ?

9A. Let us note the relevant facts to enable us to answer the aforesaid questions. This Court was approached by two public-spirited lawyers, namely, Shri Janamohan Das and Shri Anukul Chandra Pradhan, followed by Utkal Gandhi Smarak Nidhi in O.J.Cs. 3676, 3820 and 4150 of 1992 drawing the attention of the Court to the death of a large number of persons in Cuttack on or about 7-5-1992 due to consumption of spurious country liquor. In O.J.C. No. 3676 of 1992 the prayers, inter alia, were : (i) to direct for a judicial inquiry by a sitting Judge of this Hon"ble Court; (ii) to direct opposite party No. 2 to pay adequate and reasonable compensation to members of the deceased's family within a stipulated time; and (Hi) to pass any such other order/ orders or direction as this Hon"ble Court may deem fit and proper for the ends of justice. In O.J.C. No. 3820 of 1992, the relevant prayers were : (i) to pass an order directing the Government to pay proper compensation to the family of the dead persons as well as to the affected persons; and (ii) to pass such order/direction as this Hon"ble Court may deem fit and proper in the interest of justice. In the third writ petition, i.e., O.J.C. No. 4150, the prayer made was that let there be a judicial inquiry into the liquor tragedy at Cuttack by the Hon"ble Court.

10. The aforesaid cases came up for admission on 12-5-1992 when it was ordered to list the same after the ensuing Summer Vacation. On this being done, an order was passed on 20-7-1992 paragraph 4 of which reads as below:--

"4. Learned Advocate-General would also receive instruction as to whether after receipt of the report (meaning report of the Revenue Divisional Commissioner (R.D.C.), who had been appointed to enquire into certain aspects of the aforesaid tragedy) the Government would like a judicial inquiry in the matter to be instituted and if not, why not ? It would be open for the learned Advocate-General to take a stand that the Government cannot be asked to disclose the

reasons. On this being done, we shall examine the point. If reasons would be disclosed, we would like the learned Advocate-General to address us whether the reasons are relevant and germane and if it would be found that these are not so, whether this Court in exercise of its writ power can direct the Government to exercise its power conferred by the Commissions of Inquiry Act to institute a judicial inquiry into the matter."

11. The cases were listed thereafter on some occasions and on these coming up on 20-9-1992, we directed to list them for final disposal on 26-10-1992 stating that no further time to enable the Government to take a decision in the matter would be given. Before the cases were taken up for hearing on 26-10-1992, an additional counter-affidavit on behalf of the opposite parties had been filed on 23-10-1992, in paragraph 8 of which, the following also found place :--

"A Commission of Inquiry can be set up

(a) if the Government intends to do so; and

(b) if a resolution in this behalf is passed by the two Houses of Parliament or in the Legislature of the State. The R.D.C. has very carefully examined different aspects of the incidents. No new fact of public importance has come to light warranting enquiry under the Commissions of Inquiry Act."

12. The cases were thereafter heard from 26-10-1992 to 29-10-1992 and judgment was delivered on 5-11-1992 directing the State Government to hold judicial inquiry (about which expression it was stated in paragraph 3 of the judgment that a Commission of Inquiry as visualised by the Act is colloquially so called) and to pay a sum of Rs. 15,000/- to the kith and kin of each of the victims, with the further direction that this amount shall be paid within two months from the date of receipt of this Court's writ.

13. On 4-12-1992, the State filed the present applications praying for recalling the two directions on the sole ground that this Court had no jurisdiction to do so. In view of the importance of the matter, the cases were heard on 16th December, 1992 and from 21st to 23rd December, 1992.

14. Let us now answer the questions seriatim.

(1) Did this Court order suo motu to hold judicial inquiry ? Is it open to the State to raise this point?

15. In the background of the facts noted above, it may sound strange to many ears that the State has even taken the stand that the Court ordered for judicial inquiry suo motu. As, however, the point has been urged and not without vehemence, we shall advert to the same. But, before that is done, we shall apply our mind to the second part of the question, namely, whether it is open to the State to raise this point.

16. In view of what was stated by this Court in paragraph 4 of its order dated 20-7-1992 followed by the statement in the additional affidavit filed on

23-10-1992 (both of which have been noted above), even if there was any doubt in any mind as to what the petitioners meant by demanding "judicial inquiry", nothing was left to guess in this regard, as it became crystal clear that what they prayed for was appointment of a Commission of Inquiry under the Act. Not only this, the entire case was thereafter argued on this basis and relevant submissions were made. Having invited the Court to give its decision on the question whether a case for ordering "judicial inquiry", as understood above, has been made out, and having found that the order of the Court has gone against the State, we are of the view that it is really not open to the State to advance a submission that the petitioners, who had approached this Court had not prayed for appointment of a Commission of inquiry as visualised by the Act. In such a situation, we are of the opinion that the ratio of *G. Sarana Vs. University of Lucknow and Others*, is squarely applicable. Therein, the question of bias being raised in the petition challenging the decision of the Selection Board, the Court observed as below in paragraph 15 :--

"We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before it and taken a chance of having favourable recommendation from it. Having done so, it is now not open to him to turn round and question the constitution of the Committee....."

17. Similar view had been taken earlier in *Manak Lal Vs. Dr. Prem Chand*, in which the following observations were made (at p. 432, para 9) :--

"It seems clear that the appellant wanted to take a chance to secure a favourable report from the Tribunal, which was constituted, and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point."

Because of the above, it was stated that the failure of the appellant to raise the point at the earlier stage of the proceeding created an effective bar of waiver against him.

18. The only answer to the plea of estoppel given by Shri Patnaik is that no question of acquiescence or consent would arise where the question of jurisdiction is involved, as stated in *The United Commercial Bank Ltd. Vs. Their Workmen*. This is a well settled principle because nobody can confer jurisdiction on a Tribunal or Court by consent if it has none. The same, however, applies when the jurisdiction is patent, as distinguished from latent. The present is apparently not a case of patent lack of jurisdiction. Further, lack of latent jurisdiction, as this expression is commonly understood, arises when any of these conditions exist: (i) there is improper constitution of the Tribunal; (ii) the nature of the subject-matter does not permit the Tribunal to take cognizance of

the same, for instance, when a Labour Court or Industrial Tribunal deals with a reference which is not related to "industrial dispute", (iii) absence of any preliminary proceeding or condition precedent, which would arise where, say, the statute requires performance of any act, or existence of any fact, before jurisdiction can be acquired. To illustrate, before an assessee is reassessed under the Income Tax Act, 1961 for income escaping assessment, notice u/s 148 of the Act has to be served, and non-service of such a notice would render the reassessment proceeding without jurisdiction; or (iv) there is wrong decision on jurisdictional fact. We do not think if any of these conditions is attracted in the present case. We would, therefore, hold that the State is really estopped from raising this question.

19. Even so, we would examine the merit of the grievance. The sole ground on which this submission has been made is that there was lack of prayer for directing the State to appoint a commission of inquiry under the Act. According to the learned counsel, by the aforesaid prayer what the petitioners wanted was an independent inquiry by an Hon'ble Judge of this Court, not a commission of inquiry under the Act by giving a direction to the State Government to do so. There is hardly any merit in this submission, because this Court is never approached, indeed cannot be, for the sole purpose of holding any inquiry by itself in a matter of public importance. It is a different matter that to dispose of a case pending before it, it likes to get itself informed about some matters relevant for disposal of the case, for which purpose it orders for holding inquiries of different types by such persons as deemed fit and proper. But there had been no case where it has been approached to get its Judge(s) appointed by itself for holding inquiry into any matter of public importance, for which purpose the Act has been enacted.

20. Shri Patnaik would not further agree that the expression "judicial inquiry" is commonly used for an inquiry under the Act. We do not think if Shri Patnaik lives in a different world; according to us, he has really advanced this argument; to add further teeth to his submission that this Court had acted without jurisdiction in having given the direction in question, so much so that it even did it suo motu.

21. No can, however, do no better to demolish this submission than to refer to reportings in three important national dailies of the country - the same being (1) The Times of India, (2) The Indian Express and (3) The Hindustan Times, relating to some very recent events. In the first two dailies of December, 10, 1992, the news about the Prime Minister's announcement to set up a commission of inquiry headed by a sitting Judge of the Allahabad High Court (to enquire into recent Ayodhya matters) was published in the front page with these headlines "Judicial Probe into demolition" (Indian Express), and "Judicial probe on demolition" (Times of India). In the Hindustan Times of December 15, 1992, at page 3, there is a report from Gauhati dated December 14, the first sentence of which reads : "The Assam Government today ordered a judicial inquiry, to be conducted by a sitting or retired judge of the Gauhati High Court into the

communal disturbances....." (Attention of Shri Patnaik had been drawn to all the three paper-cuttings.)

22. The aforesaid leaves no manner of doubt that a commission of inquiry under the Act is colloquially known as "judicial inquiry" and this was one of the prayers of the petitioners, as already noted above. Thus it cannot just be said by any reasonable person that this Court had ordered suo motu for judicial inquiry. This is not all. As already noted, one of the prayers made in two writ petitions (O.J.C. 3676 and 3820 of 1992) was to pass any other order/orders or direction as this Court may deem fit and proper. Now, it is the well settled law that a writ court has ample power to modify reliefs to make that relief available which would meet the ends of justice. We do not propose to burden this judgment with the various rulings of the apex Court on this subject inasmuch as the decision of the Gauhati High Court in Smt. Narmada Choudhury and Others Vs. Motor Accident Claims Tribunal and Others, , to which one of us (Hansaria, C..I.) was a party, brings home this aspect eloquently, In that case, what happened was that an award by the Motor Accident Claims Tribunal was passed ordering payment of Rs. 2,000/- by the insurer and Rs. 13,000/- by the owner of the vehicle. On the amount not being paid by the owner, which was a limited company, the same was sought to be realised from two of its directors, who came before the Court with the prayer that the amount due from the company could not be realised from them. The Court accepted this submission. But, in view of there being a prayer to "pass such further order or other order or direction as the Court may deem fit and proper", the Court moulded the relief and ordered the insurer to pay the entire amount of Rs. 13,000/- which had been made payable by the Tribunal by the company by stating that a total exoneration of the company will give full relief to the petitioners. Absence of a specific prayer to this effect was not deemed sufficient to deny the relief to do complete justice between the parties. (Sec para 18). In taking this view, reference was made to Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, ; Sri Satya Narain Singh Vs. District Engineer, P.W.D. and Another, ; The State of Haryana Vs. The Haryana Cooperative Transport Ltd. and Others, ; and B.R. Ramabhadriah Vs. Secretary, Food and Agriculture Department, Andhra Pradesh and others, . In all the above cases, the apex Court had stated about the wide discretion of a writ court in the matter of framing writs to suit the exigencies of a particular case and not to throw out a case simply on the ground that a proper writ or direction had not been prayed for, also by observing that non-asking for a named writ in so many words would not be sufficient to deny that writ if facts necessary for issuance of the writ had been averred, with the further observation that there was no magic in use of a formula and that a relief should not be denied on purely technical and narrow procedural grounds.

23. So, even if the prayer was to appoint an Hon'ble Judge of this Court, dehors the provisions of the Act to inquire into the matter, and if it was thought by this Court that the appropriate relief to be granted would be a direction of the aforesaid nature, it was well within its competence to do so, after hearing the

parties about it, as had been done.

24. Because of all the above, it would really be doing injustice to this Court to allege (as the submission virtually amounts to an allegation) that it had suo motu ordered for judicial inquiry. By running amok?

25. So, we answer the first question by stating that the Court had neither directed for holding of a judicial inquiry suo motu nor is it really open to the State to raise this point.

(2) Has this Court any power of recall, as distinguished from the power of review? If so, when can the power of recall be exercised and whether the present is such a case?

26. In the petitions as filed, the main prayer is to recall the two directions, particularly the one relating to holding of judicial inquiry. It has, therefore, to be seen whether this Court has any power to recall as such, independently of the power of review. Shri Patnaik's submission is that every court has inherent power of recall if the court be satisfied that it had acted without jurisdiction in passing the order in question. This submission has been advanced by solely relying on the case of A.R. Antulay Vs. R.S. Nayak and Another, . Let us, therefore, see whether the ratio of that case would warrant the conclusion that in a case where the court were even to feel satisfied that the order passed by it earlier can be said to be one which was without jurisdiction, it can recall this order.

27. The Constitution Bench of seven Judges in the aforesaid case was called upon to decide whether the direction given by a five-Judge Constitution Bench earlier in R.S. Nayak Vs. A.R. Antulay, , for trial of Antulay by the Bombay High Court itself after having withdrawn suo motu the special cases in question pending in the court of the Special Judge, Bombay, and by transferring the same to the High Court with a request to the Chief Justice to assign the cases to a sitting Judge of the High Court for holding the trial, was one which could be recalled. The majority opined in favour of the withdrawal, being of the view that the direction in question had caused injury to Antulay, as, apart from Antulay alone, being selected for speedier trial by the High Court for an offence, which the High Court had no jurisdiction to try, the trial by the High Court eliminated the right of the accused to file appeal to the High Court, after whose decision in appeal, the accused would have had further right to appeal to the Supreme Court under Article 136 of the Constitution. The majority, therefore, felt that the direction given by the earlier Constitution Bench needed to be recalled, because the maxim "*actus curiae neminem gravabit*" (meaning an act of the court shall prejudice no man) required rectification of the injustice, as otherwise injustice noticed would have remained for ever as a blot on justice. The aforesaid was the main reason for the majority agreeing to recall the aforesaid direction.

28. This would appear clear from paragraphs 83, 84, 85, 100, 101 and 105 of the majority judgment, in which strong reliance was placed on the observations

of Lord Cairns in *Alexander Rodger v. Comptoir D'escompte De Paris* (1869) LR 3 IndAp 465, made at page 475 reading as below;--

"Now, their Lordships are of opinion that one of the first and highest duties of all Courts is to take care that the act of the Courts does no injury to any of the Suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of whole of the proceedings does an injury to the suitors in the Court."

29. In *A.R. Antulay Vs. R.S. Nayak and Another*, , the majority opined that the power of recall for the aforesaid purpose inheres in all courts and is independent of Section 151, CPC(See paragraph 105). In this connection it was noted in para 81 by Sabyasachi Mukharji, J. (as he then was), who delivered the judgment on behalf of himself, G. L. Oza and S. Natarajan, JJ. that the direction in question had been given by the apex Court itself "having no Court superior to it", and so, it was ultimately felt that the legal wrong that had been done to the Appellant should be remedied, and let right be done, and in doing so, let no more further injury be caused to public purpose. The aforementioned observation cannot perhaps be taken to mean that according to these learned Judges, the direction was being recalled because it had been issued by the apex Court. Ranganathan, J. who was in minority, however, clearly stated in para 190 (at p. 1612) that where a mistake is committed by a subordinate court or a High Court, there are ample powers in the Supreme Court to remedy the situation, but where the mistake is by the apex Court itself, there is no way of having it corrected except by approaching that Court. Such a power, according to the learned Judge, could be traced either in Article 142 of the Constitution or to the powers inherent in that Court as the apex Court as the guardian of the Constitution. Having stated thus in para 190, the learned Judge stated in para 191 that such a power has to be exercised in the "rarest of rare" of cases. Justice Venkatachalia also, who was in minority, took the view that inherent powers do not confer or constitute a source of jurisdiction. They are to be exercised in aid of a jurisdiction that is already vested. The learned Judge said that this view appeared to be both "good sense and good law". (See paragraph 140).

30. From what has been stated by the majority, it may be assumed that every court has inherent power to recall its order if by any wrong done by it an injury is caused to a suitor. But then, this power has to be exercised, if not in "rarest of rare" cases as pointed out by Ranganathan, J. definitely only in exceptional cases. This apart, the wrong which would call for invocation of this power has to be one which does not relate to any and every injury caused to a suitor, and would definitely not include any and every mistake committed by it. It has to be such a mistake as causes very substantial injury to the suitor. Any liberality in

this regard would open flood gates, as, even if it would be that the power of review is not available which is circumscribed either by the provisions contained in Order 47, Code of Civil Procedure, or similar limitations imposed by writ courts on the exercise of their power (as would appear from the decisions cited by Shri Patnaik in his written submission No. 5 -- the same being Babboo alias Kalyandas and Others Vs. State of Madhya Pradesh, ; Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, ; and Sow Chandra Kante and Another Vs. Sheikh Habib,), a court would be invited to exercise its power of recall on a ground not available for review, which would be totally against the principle of finality, so very assiduously preserved by circumscribing the power of review, which does not permit re-hearing of a case to satisfy the court that it had committed a mistake -- may be of law, may be of fact, because of which it has always been held that erroneous decision is not a good ground for review.

31. So, while conceding the power of recall available to this Court, we would say that the same would be exercisable only in exceptional cases where the mistake committed by the court is palpable and is such which, by its own force, has caused substantial injury to a suitor.

32. Let us now see whether a case of exercise of this power has been made out. Shri Patnaik submits that a substantial injury has been caused to the polity because of our direction to hold judicial inquiry and, as such, the present is a fit case where the power of recall should be exercised. For reasons which we shall give later, it would be found that the present is not a case of any injury to the polity and, not only that, no mistake had been committed by this Court in ordering for judicial inquiry.

33. So, we hold that though this Court has power of recall, as distinguished from the power of review, the same has to be exercised only in exceptional cases of the types about which reference has been made earlier and the present is not such a case.

34. (3) Did this Court act without jurisdiction in directing the State Government to hold judicial inquiry or was this direction at best a case of an error within jurisdiction, instead of an error of jurisdiction?

This is the most vital question and needs our careful consideration because, according to Shri Patnaik, if ordering of judicial inquiry in the present case could be regarded as an order within the jurisdiction of this Court, the consequences of the same would be enormous which would injure the polity in a big way.

35. Before we answer the question, we have to understand the meaning of the word "jurisdiction". Shri Patnaik has strongly relied on what was stated by Mathew, J. in this regard in para 10 of Shri M.L. Sethi Vs. Shri R.P. Kapur, , which opens by stating ; "The word "jurisdiction" is a verbal cast of many colours". The learned Judge then referred to the historic decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission II (1969) ACC 147, and after quoting some passages from Lord Reid's and Lord Pearce's judgments

stated as below in paragraph 11 :---

"The dicta of the majority of the House of Lords, in the above case would show the extent to which "lack" and "excess" of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or "addressing themselves to a wrong question". The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the Court is prepared to allow. In the end it can only be a value judgment (See H.W.R. Wade, "Constitutional and Administrative Aspects of the Anisminic case", Law Quarterly Review, Vol. 85, 1969, p. 198). Why is it that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional error and liable to be interfered with in revision? It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the Court. And there is no yardstick to determine the magnitude of the error other than the opinion of the Court."

36. Shri Patnaik submits that the direction to hold judicial inquiry was "a vital error", and so, was one about which it could be said that it was "without jurisdiction".

37. The aforesaid decision was referred by some of the learned Judges in the aforesaid case of A.R. Antulay Vs. R.S. Nayak and Another, . Sabyasachi Mukharji, J. (as he then was) was one of them to do so (See paragraph 39 of that judgment) and at page 1559 of that judgment, the learned Judge stated as below in paragraph 81:--

"We recognise that the distinction between an error which entails absence of jurisdiction and an error made within the jurisdiction is very fine. So fine indeed that it is rapidly being eroded..... Having regard to the enormity of the consequences of the error..... there is nothing..... which detracts the power of the Court to review its judgment ex debito justitiae....."

38. Relying on the aforesaid decision, Shri Patnaik first submits that the "enormity of the consequences" calls for recalling our direction and secondly "the

vital error" which crept into the judgment would show that this Court acted without jurisdiction.

39. Let us first see what consequences really follow from our direction. According to Shri Patnaik, if this Court could direct the State Government to hold a judicial inquiry only because of the need for the same exists, according to any "reasonable man reasonably instructed in law" as stated in para 10 of our judgment, even a Munsif could order the Central Government to do so in exercise of his power under the Specific Relief Act to do so if the former be of the opinion that in a matter relating to Union affair is of public importance, which would clothe a Munsif with tremendous power and the consequences of the same shall be enormous because matters of public importance do appear in the scene very often and if the test of "reasonable man reasonably instructed in law" could be the yardstick for ordering for a judicial inquiry, there would be no end to such orders. According to us, this is a misconceived submission inasmuch as we had not ordered for holding judicial inquiry only because of our being satisfied about the aforesaid test but because we had come to the conclusion that the denial of the same by the Government was to serve an "alien purpose", as would appear from paragraph 10 itself. This shows that the direction was given by this Court in exercise of its writ power which includes the power to issue writ or mandamus conferred by Article 226 which is just not available to a Munsif. To put it differently, the direction was issued in the present case in exercise of the power of judicial review given to this Court by Art. 226 which power, apart from High Court is available to the apex Court under Article 32 of the Constitution. So, a Munsif does not come into picture at all. Let us, therefore, forget about the enormity of the consequences.

40. This takes us to the second submission relating to "vital error" which is indeed a vital question. As already stated, according to Mathew, J. if a Court commits "a vital error" it could be said that it had acted "without jurisdiction". Of course, the learned Judge had stated that there is no yardstick to determine the magnitude of the error other than the opinion of the court. This is precisely what Lord Denning in a different context had stated in *Pearlman v. Governors of Harrow School* (1979) 1 AllER 365, in which as to the distinction between errors of jurisdiction and an error within jurisdiction, it was stated that the same was very fine, so fine indeed that it was rapidly being eroded. It was then observed that : "in truth the High Court has a choice before it whether to interfere with an inferior court on a point of law. If it chooses to interfere, it can formulate its decision in the words : The court below had no jurisdiction to decide it wrongly as it did". Softly, be it stated, that that is the reason of the difference between the decision of the Court of Appeal in *Anisminic* and the House of Lords."

41. Let us now see whether this Court did commit a vital error. Shri Patnaik submits that the error was indeed vital because (1) the State Government had unfettered discretion in the matter, (2) there was gross misconstruction of Section 3 of the Act, and (3) the present was not a case where it could be said,

has held by us in the judgment under question, that the power was coupled with duty.

Point No. 1 : The State Government had unfettered discretion in the matter.

42. According to Shri Patnaik, it is so because the Constitution Bench of the apex Court in A.K. Roy and Others Vs. Union of India (UOI) and Others, , held it to be so which decision had been noted by us in our judgment at hand, but was understood wrongly. As this submission rests solely on what was stated in A. K. Roy (the reliance by Shri Patnaik on this decision is So much that it can be said that he almost rises and falls with it.), we have to quote again the relevant portion of that judgment despite our having noted the same in para 8 of our earlier judgment. The relevant portion finds place in para 52 and is as below :--

".....But we find ourselves unable to interfere in a matter of this nature by issuing a mandamus to the Central Government obligating it to bring the provisions of Section 3 into force. The Parliament having left to the unfettered judgment of the Central Govern-ment the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the Court to compel the Government to do that which, according to the mandate of the Parliament lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can ensure the executive. It would be quite anomalous that the inaction of the executive should have the approval of the Parliament and yet we should show our disapproval of it by issuing a mandamus..... But, the Parliament has left the matter to the judgment of the Central Government without prescribing any objec- _ tive norms. That makes it difficult for us to substitute our own judgment for that of the Government on the question whether Section 3 of the Amendment Act should be brought into force..... It is for these reasons that we are unable to accept the submission that by issuing a mandamus, the Central Government must be compelled to bring the provisions of Section 3 of the 44th Amendment into force..... If only the Parliament were to lay down an objective standard to guide and control the diseretion of the Central Government in the matter of bringing the various provisions of the Act into force, it would have been possible to compel the Central Government by an appropriate writ to discharge the function assigned to it by the Parliament." (Emphasis supplkd)

43. Shri Patnaik has very strongly contended that the discretion conferred by Section 3 of the Act on the State Government in the matter at hand has to be regarded as "unfettered" because in A.K. Roy and Others Vs. Union of India (UOI) and Others, , the view taken was that the Central Government had been given the "unfettered judgment" in the matter. This apart, the learned counsel submits that no norms had been provided in Section 3 to guide the discretion. Further, the State Legislature has approved the action of the State Government in not holding judicial inquiry relating to the tragedy at hand because despite two

sessions of the Assembly having taken place after the tragedy, no resolution had been passed by it requiring the Government to do so which it was competent to do u/s 3 of the Act. In support of the submission that the Assembly had not passed any resolution in this regard, an affidavit was filed on 23-12-1992.

44. Relying on these three aspects, it is submitted that the case is squarely covered by the decision in A. K. Roy in which the apex Court had held that a positive writ in the nature of mandamus asking the Central Government to bring into force the constitutional amendment could not be given for which reason this Court also ought to have held that mandamus could not be issued asking the State Government to exercise its power of constituting a Commission of Inquiry by directing it to do so.

45. Before we examine the soundness of the contentions advanced by Shri Patnaik, one very important aspect relating to A. K. Roy deserves notice which missed the learned counsel for both the sides -- the same is that in A.K. Roy and Others Vs. Union of India (UOI) and Others, the apex Court was examining the question of issuing mandamus to exercise a conditional legislative power which had been conferred on the Central Government by the Parliament leaving it to decide when to bring into operation an Act by stating as below:--

"It (meaning the Constitution (Forty-fourth Amendment) Act) shall come into force on such date as the Central Government may by notification in the Official Gazette appoint....."

Now, this type of provision in a statute is called "conditional legislation" and the validity of which was upheld by the Privy Council as early as 1878 in Queen v. Burah, 5 Ind App 178, and was affirmed in many later decisions including AIR 1945 48 (Privy Council) , and was noted in abundance in the decision rendered by the Supreme Court in In re : Article 143 of the Constitution of India AIR 1951 SC 332.

45A. In a case of conditional legislation, where the Parliament leaves to the Central Government the right to decide when to bring into force the statute, the same is left to the judgment of the Central Government. It is because of this that A.K. Roy and Others Vs. Union of India (UOI) and Others, has used the word "judgment" which dealing with this aspect of the matter, as distinguished from "discretion". Further, as the relevant section had not circumscribed the power given to the Central Government by any condition, the judgment was said to be "unfettered".

46. Now, we would address to the three points highlighted by Shri Patnaik. The first is of the use of the expression "unfettered judgment" which led Shri Patnaik to mention in innumerable places of his written submission that the discretion given by Section 3 of the Act to the State Government was "unfettered". In this context, we think it would be enough to say that the apex Court could not have gone to the extent of saying in 1984 that a discretion could be unfettered. This would have run against a firmly entrenched principle of administrative law that

no discretionary power conferred on a functionary is unfettered. According to us, that "heresy was scotched" to borrow the expression of Lord Denning used in a different context in *Regina v. Gaming Board, Ex parte Banain*, (1970) 2 WLR 1009 in *Padfield* (1968) ACJ 997, in which the contention advanced by the Minister of Agriculture that either he has no discretion in the matter or has unfettered discretion was rejected by the House of Lords, which aspect of the matter has been noted in para 6 of our earlier judgment.

47. As Shri Patnaik has repeatedly submitted that the discretion is unfettered, we would re-quote what was observed in *United States v. Wunderlich* (1951) 342 US 98, in which while dealing with the discretionary power it was stated :--

"Law has reached its finest moments when it has freed men from unlimited discretion of some ruler, some..... official, some bureaucrat..... Absolute discretion is a ruthless master. It is more destructive to freedom than any one of man's other inventions."

48. We cannot even imagine that the Constitution Bench in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, was oblivious of the aforesaid principle of administrative law. Its use of the unfettered judgment cannot, therefore, be taken advantage of to say that even a discretion can be regarded to be unfettered. The expression "unfettered judgment" was used in *A. K. Roy*, according to us, because the Parliament had left the matter to the judgment of the Central Government without prescribing any objective norms.

49. In this context, Shri Das has referred to the discussion of this aspect by Wade in his "Administrative Law", 4th Edn., pp. 340-45, accordingly to which there is no unfettered discretion in public law. The author has also quoted at page 344 Lord Denning saying in *Breen v. Amalgamated Engineering Union* (1971)2QB 175 at p. 190 that the discretion of a statutory body is never unfettered. This was said to have been established by *Padfield* which was described as a "landmark of modern administrative law".

50. To continue this discussion, we would say that to equate the expression "unfettered judgment" used in *A. K. Roy* (the reason of which we have already explained) with "unfettered discretion", as Shri Patnaik has done in his written submissions by describing the power u/s 3 being within the "unfettered judgment/discretion" of the State Government is to place two strangers in one bed. To state in the language of Bhagwati, J. (as he then was) used in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, they are "sworn enemies" as one belongs to the realm of considered decision and the other to arbitrary action/inaction. It does not even need mention that no discretionary power is unfettered or can be arbitrarily exercised, and it has to be so done reasonably, which makes it amenable to judicial review. There are hundreds of decisions of the apex Court on this point, if the number be not in four figures. We can boldly say that there is not, indeed cannot be, any decision taking a contrary view.

51. This is not all. Endorsement of Shri Patnaik's view of the expression

"unfettered discretion" in this regard would indeed render Section 3 of the Act violative of Article 14, as in that case it would have conferred uncanalised and unguided power, which it has not, as was held in *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, , to which our attention has been drawn by Shri Das.

52. Because of all the above, we say that the discretionary power conferred by Section 3 of the Act is not "unfettered".

52A. The second ground for submitting that A.K. Roy squarely applies to the case at hand is that there are no "norms" in the present case also as there were none in that case. Let us see whether this submission merits acceptance. For this purpose, we have to note the language of the section which came up for consideration in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, , the same being (to quote again) :--

"It (meaning the Constitution (44th Amendment) Act) shall come into force on such date as the Central Government may by notification in the Official Gazette appoint....."

53. The aforesaid does show that there is absolutely no norm or guidance or objective standard as to when the Act is to be brought into force. Section 3 of the Act, however, contains sufficient guideline which can be regarded as the norm prescribed by the Parliament as to when the appropriate Government has to act. This would be apparent from the reading of Section 3 of the Act which is as below:---

"3. Appointment of Commission.-- (1) The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the House of the People or, as the case may be, the Legislative Assembly of the State, by notification in the official Gazette, appoint a commission of inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such function and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly:

Provided.....

xxxxx"

The aforesaid shows that the Parliament has indicated the circumstances under which the appropriate Government has to exercise its power, which is apparent from the fact that the section speaks about the permissibility or necessity of appointing a Commission of Inquiry when there is any "definite matter of public importance". Section 3(I) of the Act cannot, therefore, be said to have contained no norms.

54. The third reason ascribed by Shri Patnaik in pressing into service *A.K. Roy* is that like that case, in the case at hand also the State Legislature has approved

the decision of the State Government in not appointing a Commission of Inquiry which follows from the fact that the State Assembly despite it having met twice after the tragedy in question -- once from 10-7-1992 to 30-7-1992 and then from 27-10-1992 to 12-11-1992 (which sessions have been characterised as 8th and 9th in the additional affidavit filed on behalf of the State Government on 23-12-1992) -- had not passed any resolution directing the State Government to appoint a Commission of Inquiry. This non-action on the part of the State Legislature has been regarded as a positive action of approval of Government's decision. We have two comments to make in this regard. The first is that this particular aspect of the matter is not relevant, because A.K. Roy dealt with a provision which had conferred on the Central Government the power of conditional legislation, as already noted, whereas we are concerned with the executive power of the Government. Shri Das has, however, met this aspect by submitting that the non-approval by the Parliament had weighed with the Constitution Bench in A.K. Roy and Others Vs. Union of India (UOI) and Others, because of the facts of that case, one of which was that despite the constitutional amendment having been passed, the National Security; Act which was amended subsequently was not in accordance with the amendment made by the constitutional amendment Act, which itself showed that the Parliament had not approved the provision contained in the constitutional amendment, and so, the inaction of the executive had the approval of the Parliament. We do not, however, think if A.K. Roy can really be distinguished on this ground. However, the strikingly distinguishing feature to which we have adverted would make the non-approval aspect noted by A.K. Roy irrelevant for the case at hand, because, legislature is not required either to approve or disapprove an executive function, though qua legislative function -- be it conditional or delegated -- this aspect has its importance. A.K. Roy having dealt with a provision relating to conditional legislation, mention was made about Parliament's approval, which has no relevance for an executive function.

55. Another distinguishing feature of A.K. Roy is that was not a case where the donee of the power was to advance the object of the statute, inasmuch as the statute itself had not been brought into force, whereas in the present case the statute is in force, which has conferred a power on the donee and the donee is obviously required to advance the object of the Act. What is the object of the Act and how far the donee has failed to advance the object are, however, different matters, to which we shall advert later. What we desire to point out here is that A.K. Roy has not laid down that a functionary invested with some power to advance the object of the statute can refuse to do so at his will. In A.K. Roy, the statute not having come into force, this question really did not arise for consideration.

56. The second observation we would make regarding the third submission of Shri Patnaik is that it is a matter of doubt how far non-passing of resolution by the State Assembly regarding appointment of Commission of Inquiry can really be held to be approval of the action of the State Government in not having done

so. We do not, however, propose to pursue this matter because the power conferred on the State Government by Section 3(1) of the Act is an independent power, according to us, and is not controlled by the power given to the State Legislature in this regard.

57. Far from the present case being contrary to what was said in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, we would rather say, to the disappointment of Shri Patnaik, that the direction in question given by us is in full consonance with the thinking of the apex Court in that case, which would appear from the following observations made therein, which forms part of the portion already quoted by us:--

"If only the Parliament were to lay down an objective standard to guide and control the discretion of the Central Government in the matter of bringing the various provisions of the Act into force, it would have been possible to compel the Central Government by an appropriate writ to discharge the function assigned to it by the Parliament."

58. In the present case, the Parliament has laid down a standard, which is objective -- the same being that the question to be enquired into has to be of a "definite matter of public importance", though whether such a matter is there or not has been left to the subjective opinion of the appropriate Government. The objective standard mentioned in the Act is to guide and control the discretion of the appropriate Government, and so, it is permissible to compel the Government by an appropriate writ to discharge the function entrusted to it by the Parliament. *A. K. Roy*, therefore, does not assist the Government; it rather comes in aid of the writ-petitioners.

59. So, Shri Patnaik falls insofar as *A.K. Roy* is concerned and Shri Das rises. It follows that the first reason ascribed by Shri Patnaik to regard our direction as an instance of "vital error" cannot be accepted.

60. Point No. 2: There was gross misconstruction of Section 3 of the Act.

Shri Patnaik has made this submission because, according to him, a proper construction of Section 3 of the Act would show that it is the legislature alone which can give a positive direction to the Government to appoint a Commission of Inquiry; this cannot be done by any judicial body. When Shri Patnaik made this submission, a very clear question was asked to him as to whether he wished to contend that a statutory provision like the one contained in Section 3(1) of the Act can take away the constitutional power conferred on this Court by Article 226. Shri Patnaik very fairly stated that he would not advance that contention. The learned counsel was apparently right because a statute, even if enacted by the Parliament, cannot take away the power conferred on this Court by Article 226, to effect which even a constitutional amendment requires ratification by Legislatures of not less than one-half of the States, as would appear from clause (b) of the proviso to Article 368(2) of the Constitution, as that clause includes Chapter V of Part VI in which Chapter Article 226 appears. There is no necessity

to cite any decision on this point, but if one is required, reference may be made to Builders Association of India and Others Vs. Union of India (UOI) and Others, , which attracted clause (c) of the aforesaid proviso because of which the constitutional amendment in question was required to receive ratification by the required number of State Legislatures. (It seems that at one point of time, the amendment was almost going to be struck down on this ground, but the Attorney General saved the situation by belatedly producing documents showing ratification by the required number of State Legislatures).

61. We may also refer in this connection to State of Rajasthan and Others Vs. Union of India and Others, , in which despite clause (5) of Article 356 at this relevant time reading: "Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned by any court on any ground", the apex Court stated that the satisfaction of the President (relating to imposition of President's rule) could be set aside, inter alia, if the same be mala fide. This shows that even a constitutional provision cannot take away the power of judicial review conferred on higher courts in certain circumstances mala fide being one of them. May we state here that in the present case a direction was given to the State Government to hold a judicial inquiry because this Court came to the conclusion that refusal to hold inquiry was to serve "an alien purpose" which amounted to misuse of power a facet of mala fide, of course, evincing malice in law, and not malice in facts.

62. Shri Patnaik had advanced his submission regarding the State Legislature only having exclusive power to give direction of the present nature because, according to him, the scheme of Section 3 of the Act speaks about it -- the same being that if the Government do not appoint Commission of inquiry, the Legislature can command it to do so which would indicate, as per the learned counsel, that the Legislature alone can command. We would have occasion to discuss this aspect later also when we would address ourselves on the seventh question regarding usurpation of the power of the State Legislature in giving the direction to hold judicial inquiry. Nonetheless, it may be stated here that ouster of this Court's power of issuing mandamus for the purpose at hand cannot at all be read in the language of Section 3 of the Act. The two powers visualised by Section 3(1) of the Act are not dependant on each other but are independent -- the one does not control the other -- this Court's direction had related to the discretionary power conferred on the State Government, which is akin to the discretionary power conferred by any other statute, relating to the exercise of which writ of mandamus can undoubtedly be issued on a case for the same having been made out. No ground exists for treating the power conferred by the first part of Section 3 on the Government, which is discretionary in nature, in any way different from discretionary powers conferred by so many statutes on Government(s).

63. For the reasons aforesaid, we hold that it cannot be said that by

misconstruing Section 3, we had issued the direction in question.

64. Point No. 3 : The power was not coupled with duty.

Law permits us to assume that no law-making body legislates unnecessarily. (See paragraph 9 of *Utkal Contractors and Joinery Pvt. Ltd. and Others Vs. State of Orissa and Others*, . Let us, therefore, understand what is the purpose of the Act, Shri Patnaik would state that the power has been conferred only to enable the Government to inform its mind relating to some matter of public importance. The question is, is it an empty exercise with no purpose?. It just cannot be, because in that case the time, money and energy spent for the conduct of the inquiry would be a wasteful expenditure, which no Government can incur. Shri Das rightly submits that the purpose, say, for the inquiry at hand, is to enable the Government to find out as to what were the reasons which led to the tragedy; so that both remedial and preventive measures can be taken to put it in the language used by us in the judgment, to "protect the people from those who trade in the blood of the people". This is so noble a purpose that we just cannot conceive of anybody taking a stand that holding of judicial inquiry is a paper exercise, which would result in allowing the report to gather dust in the shelves of the Secretariat. May we say that it is to take care of this attitude being shown by Governments when the findings go against them that the Parliament amended the Act in 1971 and made it obligatory on the Government to cause to be laid before the House the report together with a memorandum of the action taken thereon, within a specified time. Section 3(4) of the Act contains this command.

65. Now, let us see whether the power given to the Government to constitute a commission of inquiry under the Act is coupled with duty. The leading decision on this aspect of the matter is *Julius v. Bishop of Oxford* (1880) 5 AC 214, which can be described as a locus classicus on this branch of law. which has been noted in paragraph 13 of our earlier judgment. What was stated in *Julius* by Lord Cairns, LC., has resounded on innumerable occasions through the corridors of different courts of the country and the same is as below -

"There may be something in the nature of the thing empowered to be done, something in the object for which it is done, something in the condition under which it is to be done, something in the title of a person or persons for whose benefit the power is to be exercised, which may couple the power with a duty and make it a duty of the person, in whom the power is reposed, to exercise that power when called upon to do so."

66. *Julius* has been cited in innumerable decisions of the apex Court. It is not necessary to refer to many of them, as, according to us, what was stated just in the next year of the commencement of the Constitution would be enough for the purpose of the case at hand and this is what was stated in this regard in paragraph 28 (after quoting the above observations of *Julius* in paragraph 27) of *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, (which was decided on 23-11-51), while dealing with discretionary power which had been vested in the

Commissioner of Police for public reasons which had come up for consideration in that case :--

"an enabling power of this kind conferred for public reasons and for public benefit is, in our opinion, coupled with duty, to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved, nor it be evaded; performance of it can be compelled...."

67. What further is left to state that the present was pre-eminently a fit case where the power was coupled with duty, inasmuch as public benefit demanded it, because of which the Government could not have shirked or evaded to perform the same? We do not read, indeed cannot in view of what was stated in *Gordhandas Bhanji*, that what was stated in *Julius* regarding a power being coupled with duty applies only when the power has been conferred for the benefit of a named person. That would be too narrow a reading of *Julius*, which is not permissible, inter alia, because what was stated in *Gordhandas Bhanji*, not to speak of Lord Cairns himself having stated about "the object for which" the thing has to be done or power is conferred by the statute, which would couple the power with duty. The object in the case at hand is so very noble, so very utilitarian, so very pressing that there cannot just be any escape from saying that the power is coupled with duty. Shri Patnaik's strenuous attempt in this regard has to fail, because what Lord Penzance said in *Julius*, to which our attention has been invited in this context, the same being that "all powers conferred by statute on individuals in general public Acts are for the public benefit, or they could not have been conferred does not mean that when only an individual is to be benefited, he can come forward seeking a writ of mandamus, as is the contention of Shri Pat-naik. In fact, there is no such sequitur.

68, The above become clear is the aforesaid observation of Lord Penzance is read in its full setting. This observation was made while Lord Penzance was dealing with what Coleridge, J. had said in *R. v. Tithe Commrs.* (1849) 14 QB 459, which was to the following effect :--

"The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom that in public statutes words only directory, permissive, or enabling may have a compulsory force where the thing to be done is for the public or in advancement of public justice." (P- 474)

As to the aforesaid statement of Coleridge, J., Lord Penzance stated :--

"It is surely not enough that the thing empowered to be done should be for the public benefit in order to make it imperative to exercise that power on all occasions falling within the statute. It may be assumed that all powers conferred by statute on individuals in general public Acts are for the public benefit, or they would not have been conferred."

After saying so, Lord Penzance stated that had the words of Coleridge, J. been more precise they would hardly justify the use that has been made of them that

the permissive or enabling words "have a compulsory force where the thing to be done is for the public benefit", but only that such words "may" in some cases have that effect. So, what Lord Penzance wanted to state was that in all cases where the thing to be done is for public benefit, compulsion may not be read; it would be so in some cases only. Lord Penzance did not say that only the individual for whose benefit the power was conferred can come forward to seek the enforcement of the same by seeking a writ of mandamus. In the quoted portion of Lord Penzance, reference to "individuals" is not referable to the donees of the power, but to the donors," Which is quite apparent from the fact that the word "individuals" was used while dealing with the conferment of power by the statute, which can only mean that the individuals referred to were donors of the power and not donees.

69. On the question of the power being coupled with duty, Shri Pradhan appearing in person (he is the petitioner in O.J.C. No. 3820/92 and has appeared as counsel for the petitioner in O.J.C. No. 4150/ 92) has brought to our notice two very appropriate decisions. These are: (1) State of Bombay v. K. P. Krishnan AIR 1960 SC 223; and (2) State of Uttar Pradesh Vs. Jogendra Singh, . In the first of these decisions, the court was concerned with the "discretion" conferred on the Government by Section 12(5) of the Industrial Disputes Act, 1947 to refer industrial disputes for adjudication. The Court stated in paragraph 14 that though the word used in this connection is "may", that power is coupled with duty, because of which the word "may" must mean "shall". This shows that when a power is coupled with duty, its exercise almost ceases to be discretionary and it becomes mandatory. In the similar vein is the decision in the second case, wherein it was stated that when a discretion is conferred upon a public authority, which is coupled with an obligation, the word "may", which denotes discretion, should be construed to mean a command. This is what finds place in paragraph 8 of the judgment, where the court further stated that the Legislature uses the word "may" out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed. But the word "may" in such a situation is capable of meaning "must".

Conclusion on point No. 3.

70. Having dealt with the three grounds advanced by Shri Patrick in support of his submission that the direction given by the Court to hold judicial inquiry is without jurisdiction, we may conclude our views on this aspect of the matter. As already noted, Shri Patnaik has advanced this argument because, according to him, a "vital error" had been committed by us in giving the direction in question. But in our view, the present was not even a case of error, as the three submissions advanced in this regard have not found our acceptance. We may say here a few words about the "vital" character of the error said to have been committed by us. The "enormity of the consequences" has made the error "vital", as per the learned counsel. Let us see, what are the consequences which the counsel visualises. He states that the consequence is injury to the polity

itself, because by giving the direction in question, we have upset the entire balance of power visualised by the Constitution and further its wide ramifications is that even a small Munsif can order the mighty Prime Minister of India to hold a judicial inquiry about a matter which the former were to think is of public importance there being no dearth of such matters, a la, Ayodhya, scam etc.

71. In our opinion, however, there is neither disturbance of balance of power, nor would our decision clothe the Munsif with the power to press into provisions of the Specific Relief Act to issue mandatory injunction against even the Chief Minister of the State, not to speak of the Prime Minister of the country to hold judicial inquiry. We have taken this view because our direction transgresses neither on the executive power (for reasons already alluded) nor legislative power, as would appear from what is being stated later. As to clothing the Munsif with the power, we may say that we had exercised our power given by Article 226 of the Constitution having come to the conclusion that the refusal to exercise the power in the present case was to serve an alien purpose, which permits a High Court to issue a writ of mandamus, which power apparently is not available to a Munsif. The mere fact that some other High Courts of the country had refused to issue a writ of mandamus in a case of the present nature, as per the decisions noted in the Written Submission No. I (which decisions were, however not placed when we had heard the main case) is of no moment, even if the present decision of ours comes to be cited in similar cases coming up before the courts in future.

72. Shri Patnaik in his effort to bring home to us the enormity of the consequences has also stated that the power conferred by Section 3 of the Act on the Central Government can be exercised not only for Union affairs but also for State affairs, the result of which would be that if a direction of the present nature is given, the Central Government could be directed even to enquire into matters of State affairs. That the power u/s 3 can be invoked by the Central Government to get matters relating to State affairs enquired into is an accepted position, as would appear from the decision of the apex Court in *State of Karnataka Vs. Union of India (UOI) and Another*, . But then, this power has been conferred by the Act itself, and we cannot cut down its width; nor can we refrain from exercising our power under Article 226 of the Constitution if a case for the same were made out.

72A. As to "enormity of consequences", may we also say that this Court had not directed for holding of judicial inquiry only because of any "reasonable person reasonably instructed in law" would have come to the conclusion that the need for judicial inquiry exists, on which ground it may be that even a Munsif can issue mandatory injunction with the aid of the Specific Relief Act; but because the denial of the inquiry in the present case came to be regarded by us as serving an "alien purpose". In such a situation, the power of judicial review permits a writ court of issue mandamus. This power admittedly is not available to anybody else than those courts on which writ power has been conferred they being High

Courts of the country and the Supreme Court. So, the consequences of the direction given may not be taken at all as alarming or even enormous to pray for recall of the direction in larger public interest.

73. In conclusion, we say that the present was not a case of any "vital error" having been committed in giving the direction at hand, and so, even if it were permissible to say (we do not express our opinion, as it is not necessary to do) that when a court commits a "vital error" it acts without jurisdiction, the present was not such a case.

74. (4) Was it within the jurisdiction of the court to take judicial notice of political patronage of illicit trading of liquor as going on at Cuttack by regarding the same as a "notorious" fact?

Shri Patnaik submits that the main reason of our direction to hold the inquiry was our acceptance of the submission of Shri Das that the tragedy at hand indicated political patronage, which, without any proof, this Court accepted by regarding such political patronage as a "notorious" fact. The learned counsel has two submissions to make in this regard. The first is that none of the petitioners had mentioned about this aspect in his/its petition, because of which the State did not get an opportunity to have its say in the matter, and so, acceptance of the aforesaid aspect only on the oral submission of Shri Das advanced at the time of argument violated the principles of natural justice. The finding arrived at on such a premise has to be regarded as without jurisdiction. Another submission is that it was not open to this Court to take judicial notice of this fact by regarding it as "notorious".

75. We would accept the first submission in so far as denial of opportunity to the State to meet this aspect of the matter is concerned. We would not, however, go to the extent of saying that the direction given to hold judicial inquiry merits to be recalled on this ground inasmuch as in one of the cases (O.J.C. No. 3676/92) an averment had been made in paragraph 21(b) that the inquiry was not being held because of the fact that "certain Minister and persons with powers are involved in this illicit liquor trade." Of course, that this fact should be taken as "notorious" was not pleaded, and it may be that because of this that the State Government did not come forward to have its say regarding this aspect.

76. Whether the aforesaid can be taken to be a notorious fact shall be dealt by us later. We may state here that what we stated in this regard in paragraph 24 was that the fact of political patronage, specially of persons in power, seems to be an unpleasant truth; at least, this is "how people at large" feel. Shri Patnaik submits as to how this Court could know as to how people at large feel, having no means of its own to know this. This argument of Shri Patnaik can be well met by referring to what was stated in the conference of Chief Ministers on the subject of administration of criminal justice which was held in November, 1992, wherein serious concern was voiced over "criminalisation of politics and politisation of criminals", as reported in the Hindusthan Times of November 15,

1992. The persons who had assembled in the aforesaid conference being Chief Ministers who were addressed by the Prime Minister of the country can well be said to be those who know how people feel, as they are the choicest representatives of the people. In this connection Shri Das has put on record recent news items published at page 70 of "India Today" (December 15, 1992) and page 42 of "Sunday" (22-28 November, 1992) -- the subject matter of the first being pressure on the Government to act against politicians who have links with the local henchmen of an international crime syndicate; and the second focussing the news about an M.L.A. having been arrested under TADA (Terrorist and Disruptive Activities (Prevention) Act) in Maharashtra. The aforesaid news items make us feel assured that people at large do feel about political patronage of crimes like the one at hand.

77. The question is whether law permits taking of judicial notice of such a fact. Shri Patnaik refers us to who has been stated on this aspect by Wigmore in his book on Evidence. According to the learned author, judicial notice can be taken of those facts only which are certain and universal, in which case proof of the fact is dispensed with allowing the court to take the fact in question as established without evidence. It has been stated at page 544 that the scope of this doctrine is narrow and it is strictly limited to a few matters of "elemental experience in human nature, commercial affairs, and everyday life". At page 576, the learned author has enumerated three material requisites required by the rules: (1) the matter must be of "common and general knowledge"; (2) the same must be "well established and authoritatively settled, not doubtful or uncertain"; and (3) the same has to be "within the limits of the jurisdiction of the Court". These requirements were stated to be dictated by the "reason and purpose" of the rule which is to obviate the formal necessity of proof when the matter does not require proof.

78. To the same effect are the observations in *Corpus Juris Secundum*, Vol. 66, pages 678-679, to which our attention has been invited by Shri Das, inasmuch as, while speaking about "Notorious" in those pages, it has been stated that the same means, "generally known and talked of by the public" or as meaning "conspicuous; evident, manifest to the world; universally recognized; universally believed to be true; forming a part of common knowledge; noted, well, widely, or commonly known."

79. In his written submission filed on 25-12-1992, Shri Das has, however, urged that even as per what has been stated in Wigmore, the present was a fit case where judicial notice of the fact in question could have been taken. In this connection, the learned counsel refers to what was stated at pages 537-8 of Wigmore, as per which the Judge is entitled to aid himself in reaching a decision, by consulting any source of information that serve the purpose official records, encyclopaedias, any books, or articles, or indeed any source whatsoever that suffices to satisfy his mind in making a rule. In so far as the matter being one "upon which men in general have a common fund of experience and knowledge

through data notoriously accepted by all", the jury is allowed to resort to this information in making up their minds, as stated at page 542. Reference to some observations at page 576 is also relied upon, wherein it has been stated that for a matter to be taken judicial notice of, the same must be of "common and general knowledge". By referring to these statements in Wigmore, Shri Das has contended in his written submission that this Court was well within its bounds in having taken note of the fact of political patronage for the type of crimes in question treating it as a "notorious" fact.

80. We do not think if we can agree with Shri Das, as, for a fact to be taken as "notorious", some very stringent requirements must be satisfied. We would agree that such requirements cannot be said to exist in the present case on the basis of materials placed before us. But then, this would at best make our taking the question of political patronage as an error of fact, which would definitely be an error within jurisdiction, having nothing to do, with error of jurisdiction. And it is well settled that mere error committed by a court while exercising its jurisdiction does not permit a court to review a decision based on the same. This proposition is not disputed by Shri Patnaik.

81. (5) Was the present a case where a positive direction to hold judicial inquiry, as distinguished from asking the State Government to consider the question of holding judicial inquiry, could have been given?

As is known, mandamus is a command issuing from the High Court of justice directing any person to do a particular thing specified therein which appertains to the office of the person commanded, and is in the nature of a public duty, as stated in Halsbury's Laws of England, 4th edition, paragraph 89. This position in law is not disputed. Shri Patnaik submits that what could have been done at best is to ask the State Government to consider the question of holding a judicial inquiry and leaving the final decision to the Government. We would agree that this is the normal command contained in mandamus. Question is despite this, why positive direction was given and, if so, was this Court right in doing so?

82. To answer the above, we have to know what had happened in the present case. The facts which have been narrated above would show that the learned Advocate General was asked to receive instruction as to whether the Government would like to hold a judicial inquiry, and if not, why not. In the additional affidavit filed on behalf of the state on 23-10-1992, it was stated that no need for holding a judicial inquiry was felt because after the report of the Revenue Divisional Commissioner had been received "(n) a new fact of public importance has come to light". So, the present was a case where the Government was asked to consider whether it would like to hold judicial inquiry and for reason noted above it had refused to do so. The present was thus a case of refusal, and not of mere inaction. In such a situation, a direction to consider the question of holding judicial inquiry would have been a meaningless exercise, and so, a positive direction was given after having examined whether the refusal to hold inquiry could be held justified in law and having found that the real cause for refusing to

hold the inquiry was not what has been stated in the affidavit but was to serve "an alien purpose", because of which the Court was satisfied that the law permitted it to give a positive direction to hold judicial inquiry.

83. In this connection, we may refer again to *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, where it was pointed out that if the present power were to be exercised for an "oblique or unworthy" purpose, the arms of the court will be long enough to reach it and strike down the same (see paragraph 16 at page 551). We would add that similarly, if power is not used to serve an "alien purpose", the court can command to use it to serve the object of the statute, and this is precisely what we have done.

84. It is not the first occasion where a positive direction has been given by a Court clothed with the power to issue mandamus. This would be apparent from what was stated in paragraph 20 of the *Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another*, , in which case itself a positive direction had been given to promote some persons instead of only asking the functionary to consider the question of promotion. This is what finds place in that paragraph;--

"There is thus no doubt that the High Courts in India exercised their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

For the sake of record, we may state that the aforesaid is not the only case known to us where a positive direction had been given inasmuch as the same was the position in *Y. Mahaboob Sheriff and sons, Y. Mahaboob Sheriff and Others and S. Shamsoddin and Others Vs. Mysore State Transport Authority, Bangalore and Others*, , in which a direction was given to renew the permit for the required number of years. In *Harminder Singh Arora Vs. Union of India (UOI) and Others*, , also a positive direction was given to accept the tender of the appellant.

85. Even if for the sake of argument it is accepted that the present was a case of inaction of non-action, as contended by Shri Patnaik, such an attitude can also in certain circumstances amount to positive action of refusal. To put it differently, in the facts and circumstances of a case, silence may also amount to speaking. This is so for these reasons; (i) saying does, "Maunam Swikrity Lakshanam"; (ii) a mother's silence as a reaction to the misdeeds done by a child speaks volume about her feeling of extreme displeasure; she speaks through her silence and the voice of this silence at times is more powerful than that of the mother who rebukes her child for a misdeed similar to the one which had led the first mother to keep silent saying merely to the child that she would not speak to it; (iii) the greatest example which this country can give about the power of silence is of undertaking fast unto death by Gandhiji as a protest against great" wrong which had been committed according to him; Gandhiji did not speak, but his fasting made the nation feel extremely uneasy and the required result was produced; and (iv) in this case, even Shri Patnaik had argued that the silence of the Legislature in not having passed any resolution directing holding of judicial inquiry should be taken as an act of approval of Government's non-action by the State Legislature.

86. In view of all the above, we are of the opinion that the present was a fit case to give a positive direction to hold judicial inquiry and no wrong at all was committed by this Court in doing so.

87. (6) Was the order to pay compensation without jurisdiction?

Shri Patnaik himself submits that his case in this regard is not so strong as that of the direction relating to holding of judicial inquiry. The learned counsel's principal submission in this regard is that this Court's direction to pay compensation on the ground that the State was vicariously liable for the tortious acts of its officials needs recall because the Court did not name any particular official or officials to have committed negligence in exercise of their duties. According to us, in a case of vicarious liability of the State, as distinguished from individual liability, to pay damages for tortious acts, coming of an official is not material inasmuch as it is not the law that if Government official "A" commits negligence State is vicariously liable and not if Government official "B" does it. We need not dilate on this point because in the Supreme Court case of Peoples' Union for Democratic Rights Vs. State of Bihar and Others, , which had been referred in paragraph 40 of our earlier judgment, compensation had been awarded against the State in a police firing case without naming or specifying the, officials who were responsible for the firing.

88. As to whether Government officials were at all negligent is a question of fact and in coming to this conclusion we had relied on the findings arrived at by the Revenue Divisional Commissioner in his report which had been made available to us for our perusal, as would appear from paragraph 37 of the earlier judgment. Shri Pradhan has referred us further to some of the findings of the Revenue Divisional Commissioner as finding place at page 13 of the Summary of the

report prepared by the Revenue and Excise Department. We do not propose to quote what finds place at that page. It would be enough to state that the portion of the Revenue Divisional Commissioner's report which has been sought to be pressed into service by Shri Pradhan speaks about the need for a detailed investigation to find out the extent of culpability, inter alia, because of the very large number of entries relating to payments made to different "Government functionaries, police-stations, out-posts and similar other Government establishments".

89. In this connection Shri Patnaik in his written submission No. 10 has stated about the State having discharged the sovereign function because of which it would not be vicariously liable in view of what has been stated by the Constitution Bench in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, which had been noted by us in paragraph 35(4) of the earlier judgment. This need not detain us because the submission relating to the State having discharged sovereign function is built up on the ground that illicit trade in liquor is an offence under the Bihar and Orissa Excise Act and prevention of offence is a sovereign function. While appreciating this ingenuity on the part of Shri Patnaik to take out the case from the fold of tortious liability on the part of the State, we would observe that we had not made the State liable in the present case because of its failure of preventing offences under the aforesaid Act, but because of the negligence of its officials in which case vicarious liability is undisputed; in fact, Shri Patnaik himself has not denied this, apart from saying that the Court did not find any named or definite official having been negligent, which, according to us, was not necessary for the reason given above. The submission in this regard that the officials had no statutory duty to prevent illicit trade in liquor has to be stated to be rejected.

90. Before concluding, it would be apposite to refer to *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, to which our attention has been invited by Shri Das, in which case while dealing with the privilege granted to trade in liquor by the State, it was stated in paragraph 106, after referring to Articles 21 and 47 of the Constitution, that the privilege doctrine has not conferred right to the State to trade in goods obnoxious to health. The following observations finding place in that paragraph are pertinent;

"It sounds contradictory for a State which is duty bound to protect human life, which is duty-bound to improve public health and for that purpose is expected to move towards prohibition claims that it has the privilege of manufacture and sale of alcoholic beverages which are expected to be dangerous to human life and injurious to human health, transferring this privilege of selling this privilege on consideration to earn huge revenue without thinking that this trade in liquor ultimately results in degradation of human life even endangering human life and is nothing but moving contrary to the duty cast under Articles 21 and 47 and ideal of prohibition enshrined in Article 47...."

91. (7) Did this Court usurp the power of the State Legislature in giving the

direction to hold judicial inquiry? Is this plea not barred by constructive res judicata?

The second part of the question may be taken up first and this arises because when the case was heard earlier this plea had not been taken. Shri Patnaik in his Written Submission No. 9 has stated that the principle of res judicata is not applicable because res judicata does not apply when a question of jurisdiction is involved. To substantiate this submission, Shri Patnaik has referred to Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, . We do not propose to advert to this decision because, as already pointed out by us, the present was not a case where it can be said that the Court had acted without jurisdiction. As the present is a case of continuation of earlier proceeding, the real question is as to whether res judicata applies in subsequent stages of the same proceeding. This question has been answered in the affirmative in Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, , though on facts the plea of res judicata was rejected. In the facts of the present case, we would hold that as the question relating to usurpation of legislative power was available when the cases were heard first, this plea is barred by constructive res judicata.

92. Despite the above, we would examine the submission on merits. Indeed, by our order dated 12-11-1992 we had ourselves desired to do so having read a news item in "Indian Express" dated 7-11-1992, published from Vijayanagaram under the bold-heading "Orissa legislature set to defy HC order". We had expressed the above desire in larger public interest which requires that the three wings of the State must work in perfect harmony and people must not think that the Court has done something to disturb this harmony in any way". The basis of the submission has been noted earlier while dealing with question No. 4, and, as stated above, the statutory provision contained in Section 3(1) of the Act cannot be said to have ousted the jurisdiction of this Court conferred by Article 226 to issue a writ of mandamus in appropriate cases. To what has been stated earlier, we would add here that the power conferred on the Legislature by Section 3(1) of the Act is an independent power and has no connection with the power vested in the appropriate Government to appoint a Commission of Inquiry if it be of the opinion that it is necessary to do so. In our earlier judgment, we had dealt with this power conferred on the Government and had directed it to exercise that power. We had in no way transgressed into the arena reserved by Section 3(1) of the State Legislature, because the power conferred on the State Legislature, to repeat, is an independent power having no connection at all with the power conferred on the State Government itself. We, therefore, do not entertain any doubt that the present was not a case at all of usurpation of the power of the State Legislature in giving the direction in question.

93. (8) Can the writ issued by the Court be made futile by the Government?

This is the last submission of Shri Patnaik and is founded on the provision contained in Section 7 of the Act, according to which, the appropriate

Government may declare that a commission shall cease to exist, if it is of the opinion that continued existence of the commission is unnecessary. Shri Patnaik submits that despite the direction issued by the Court to hold judicial inquiry, it would be open to the Government to exercise that power and stop the functioning of the commission, which would make the writ issued by the Court futile, and courts do not issue futile writs. We do not agree with Shri Patnaik's reading of Section 7, because that section itself would show that in a case where a commission is appointed, pursuant to a resolution passed by the House of People or, as the case may be, the State Legislature, the same ceases to exist if a resolution for discontinuance of the commission is passed by the appropriate House. According to us, the same would be the position if a commission is appointed pursuant to the direction of this Court, and in such a case, Section 7 power conferred on the Government would be exercisable only with the concurrence of this Court.

94. Apart from the language of Section 7, which permits us to reach this conclusion, we may further say that a judicial order emanating from a constitutional court cannot be set at naught by any statutory functionary, even if recourse to the power conferred by the statute were bona fide. This proposition emerges from the principle that no statutory provision can override a constitutional provision to which aspect of the matter we have adverted earlier. If the submission of Shri Patnaik were taken to its logical end, the same would run riot because even if in a statute there may not be any specific provision of setting at naught the action taken pursuant to the power conferred by that statute, Section 22 of the Orissa General Clauses Act, 1937 (whose parallel provision in the Central Act X of 1897 General Clauses Act is Section 21) permits even rescission of any notification, order, scheme, rule, bye-law by the authority who could issue these instruments. The result would be that even if a High Court, or for that matter the Supreme Court, issues a writ of mandamus asking a functionary to do certain thing required by the statute, pursuant to which some order or notification is issued, that functionary in exercise of its power u/s 22/21 of the aforesaid Acts could rescind the same suo motu. Such a submission has not ever been made to our knowledge, and indeed, it would be monstrous to make such a submission. So, we hold that the writ issued by the Court directing holding of a judicial inquiry could not have been made futile by the State by taking recourse to Section 7 of the Act.

Conclusion

95. We conclude by saying that of the eight submissions advanced by Shri Patnaik in support of his prayer to recall the two directions given by us, we reject all of them except those relating to submission No. 2, as to which we have stated that this Court has an inherent power of recall as distinguished from the power of review, and submission No. 4 regarding which we have observed that this Court might have erred in taking judicial notice of political patronage of illicit trading of liquor in Cuttack, which, however, cannot be a ground to review our earlier order

giving the two directions, not to speak of exercising our power of recall to withdraw the same. The petitions are, therefore, dismissed.

96. Before parting, we put on record our appreciation for the very laborious work done by Shri Patnaik, which we have already acknowledged. We had also received valuable assistance both from Shri Das and Shri Prad-han.

B.N. Dash, J.

97.1 agree.