AFR

ORISSA HIGH COURT : CUTTACK

W.P.(C) No.20096 of 2016

In the matter of an Application under
Articles 226 and 227 of the Constitution of India, 1950

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Subala Kumar Nayak
Aged about 36 years
Son of Sankeswar Nayak
At/P.O.: Sadeipalli
P.S.: Sadar Bolangir
District: Bolangir. ... Petitioner

-*VERSUS*-

1. Commandant-General of Home Guards, Odisha
Buxibazar, Cuttack
District: Cuttack.

2. Superintendent of Police-*cum*-Commandant
Home Guards, Bolangir
At/P.O./P.S.: Bolangir ... Opposite parties

Counsel appeared for the parties:

For the Petitioner : M/s. Manoja Kumar Khuntia, Gyana Ranjan Sethi, J.K. Digal, Ms. Babita Kumari Pattnaik, Advocates

For the Opposite parties : Mr. Dayanidhi Lenka, Additional Government Advocate

For the Interveners : M/s. Bibhuti Bhusan Swain and

Sunil Kumar Swain, Advocates

P R E S E N T:

HONOURABLE
MR. JUSTICE MURAHARI SRI RAMAN

Date of Hearing : 15.04.2025 :: Date of Judgment : 17.04.2025

JUDGMENT

The petitioner, a selected candidate in pursuance of Advertisement dated 12.04.2016, questions propriety of decision taken by the Commandant-General-Inspector General of Police, Fire Services, Home Guards and Civil Defence, Odisha), Cuttack in refusing to accord approval to the proceeding of Appointment Board/Selection Board/Enrolment Board for appointment of Home Guards (selected candidates) as sought for by the Commandant of Home Guards, Bolangir, by way of the instant writ petition invoking provisions of Articles 226 and 227 of the Constitution of India.

Facts:

2. The opposite party No.2 issued an Advertisement dated 12.04.2016 inviting application from eligible candidates for appointment of Home Guards against eighty one posts in Bolangir district. Twenty three out of eighty one posts are reserved for women candidates. The eligibility criteria provided for:

i. candidate must have attained the age of 20 years as on 01.01.2016;

ii. candidate must have passed at least Lower Primary Examination in Odia language;

iii. candidate must be physically fit.

2.1. The petitioner applied for appointment/enrolment in the post of Home Guard in response to said Advertisement. The Selection Board/Appointment Board/Enrolment Board (for convenience, "Board") constituted under the Chairmanship of Commandant, Home Guards, Bolangir, upon medical test being conducted with respect to candidates and verification of other conditions of eligibility, selected eight one candidates out of two thousand one hundred and twenty candidates who applied for enrolment as Home Guard. The name of the petitioner finds place at serial No.25 of the said list of successful candidates.

2.2. After completion of the selection process, for the purpose of enrolment/appointment, the proceeding of Enrolment Board was sent to the Commandant-General of Home Guards for approval on 13.06.2016. Nonetheless, the same has been refused on the ground that *"prior approval was not taken"* from the Directorate General.

2.3. On 26.10.2016 the Commandant of Home Guards issued further Advertisement dated 26.10.2016 inviting applications for enrolment of Home Guards against sixty seven posts.

2.4. Hence, this writ petition has been filed invoking provisions of Article 226/227 of the Constitution of India.

Counter affidavit of the opposite parties:

3. The Commandant, Home Guards, Bolangir by way of advertisement dated 12.04.2016 invited applications from the candidates without prior approval of the Commandant-General, Home Guards, Odisha as required under Section 3 of the Odisha Home Guards Act, 1961 (for brevity, "HG Act").

3.1. After obtaining prior approval from the State Home Guards Headquarters, Odisha, Cuttack *vide* Letter No.3852/HGs, dated 07.10.2016, Advertisement dated 26.10.2016 was published for enrolment of Home Guards against sixty seven vacancies for which selection process was undertaken during 18.11.2016 to 21.11.2016.

3.2. Under such circumstances, the latter Advertisement, being in consonance with *sine qua non* requirement envisaged under Section 3 of the HG Act read with

Instruction contained in Circular dated 03.07.2014, no fault can be attributed to such Advertisement, pursuant which selection process has already been completed.

Hearing:

4. This Court on 06.12.2016 passed the following order:

"W.P.(C) No.20096 of 2016

Learned counsel for the petitioner is directed to serve two extra sets of the brief on learned Additional Government Advocate for the State, who shall appear on behalf of opposite party Nos.1 and 2 and take instruction in the matter.

List this matter on 10.01.2017. Counter affidavit, if any, be filed in the meantime.

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Misc. Case No.18517 of 2016

It is directed that the result published pursuant to Order dated 30.09.2016, under Annexure-4, shall be subject to result of the writ petition.

Misc. Case is disposed of.

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4.1. Sri Dayanidhi Lenka, learned Additional Government Advocate pressed into service I.A. No.1852 of 2025 filed by the opposite parties seeking to vacate aforesaid Order dated 06.12.2016.

4.2. When the matter is taken up for consideration of said interlocutory application filed at the instance of opposite parties, Sri Manoja Kumar Khuntia, learned counsel appearing for the petitioner submitted that as the pleadings are completed and exchanged between the counsel for respective parties, the writ petition, being pending since 2016, can be disposed of on short point, *i.e.,* whether prior approval of the Commandant-General of Home Guards was required to be taken before appointment by the Commandant of Home Guards or such approval was required to be taken by the Commandant prior to initiation of enrolment process for appointment of Home Guards.

4.3. Sri Bibhuti Bhusan Swain, learned Advocate appearing for interveners by way of I.A. No.6058 of 2025, would submit that the intervention petition of Sanjib Kumar Maharana, Lokeswar Mishra, Lalit Kumar Rout and Jyoti Ranjan Naik, successful candidates whose names found place in the select list in connection with the Advertisement dated 12.04.2016, could not be issued with the appointment orders in view of the fact that the Commandant-General did not accord approval. He has, therefore, no objection for disposal of the writ petition at this stage and would support the arguments advanced by Sri Manoja Kumar Khuntia, learned counsel for the petitioner.

4.4. Hence, on the consent of counsel for the respective parties, this matter was taken up for final hearing on 15.04.2025.

4.5. Heard Sri Manoja Kumar Khuntia and Ms. Babita Kumar Pattnaik, learned Advocates for the petitioner; Sri Bibhuti Bhusan Swain, learned Advocate for the intervener-petitioners and Sri Dayanidhi Lenka, learned Additional Government Advocate representing the opposite parties.

4.6. On conclusion of hearing, the matter stood reserved for preparation and pronouncement of Judgment/Order.

Rival contentions and submissions:

5. Sri Manoja Kumar Khuntia, learned Advocate submitted that there is no requirement under the HG Act read with the Odisha Home Guards Rules, 1962 ("HG Rules", abbreviated) for obtaining prior approval to initiate recruitment/enrolment process, but it is the requirement for seeking approval of the Commandant-General by the Commandant of Home Guards for the purpose of appointment.

5.1. It is, thus, argued by Sri Manoja Kumar Khuntia, learned Advocate that the Board having initiated enrolment process for appointment of Home Guards by way of Advertisement dated 12.04.2016 and proceeded

to select eighty one candidates as per vacancy position, there was no illegality in such process. In order to comply with the terms of Section 3 of the HG Act read with Rule 4 of the HG Rules, the Commandant of Home Guards sought for approval for the purpose of "appointment".

5.2. However, the Commandant-General of Home Guards on misreading and erroneous interpretation of the statutory provisions, refused to accord approval to the selection made by the duly constituted Board.

6. *Per contra,* Sri Dayanidhi Lenka, learned Additional Government Advocate vehemently contended that "prior approval" is concomitant factor contemplated under Section 3 of the HG Act and such mandatory requirement being not satisfied by the Commandant, the selection proceeding of the Board suffers infirmity. In absence of "prior approval" of the Commandant-General entire proceeding of Board stands vitiated, being vulnerable.

6.1. The Commandant of Home Guards is not empowered to issue advertisement to fill up posts of Home Guards without "prior approval" of the Commandant-General of Home Guards in view of Instructions contained in Circular No.N-1-2012/6714/HGs, dated 03.07.2014, which clearly impressed upon all concerned for

obtaining prior approval. It is stipulated therein that absence of prior approval would render the appointment/reappointment void *ab initio.*

6.2. Therefore, he prayed for dismissal of the writ petition.

Discussions and analysis:

7. Relevant provisions of the Odisha Home Guards Act, 1961, lay down as follows:

"An Act to provide for the constitution of the Home Guards in the State of Odisha

WHEREAS it is expedient to provide a volunteer Organisation for use in emergencies and for other purposes in the State of Odisha;

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2. Constitution of Home Guards and appointment of Commandant-General and Commandant.—

(1) The State Government shall constitute for the areas notified under sub-section (3) of Section 1 a volunteer body called the Home Guards, the members of which shall discharge such functions and duties in relation to the protection of persons, the security of property and public safety and for such other functions as may be assigned to them in accordance with the provisions of this Act and the rules made thereunder.

(2) The State Government shall appoint a Commandant-General of the Home Guards in whom shall vest general supervision and control of the Home Guards

in the State and may also appoint a Deputy Commandant-General to whom the Commandant-General may delegate such of his powers as he may consider necessary for supervision, control and training of the Home Guards.

(3) The State Government shall also appoint a Commandant for the Home Guards in each district.

3. Appointment of Members.—

(1) ***Subject to the approval of the Commandant-General****, the Commandant may* ***appoint*** *as members of the Home Guards with in his jurisdiction such number of persons,* ***who are fit and willing to serve****, as may from time to time be determined by the State Government and* ***may appoint*** *any such member to any office of Command in the Home Guards.*

(2) Notwithstanding anything contained in sub-section (1) the Commandant-General may appoint any such member to any such office as aforesaid under his control.

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10. Rules.—

(1) The State Government may make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following 5 matters, namely:

(a) the exercise by any officer of the Home Guards of the powers conferred by Section 4 on the Commandant and Commandant General;

(b) the exercise of control by officers of the Police Force over members of the Home Guards ,when acting in aid of the Police Force;

(c) the Organization, appointment, conditions of service, functions discipline, arms, accoutrements ,and clothing of members of the Home Guards and the manner in which they may be called out for service; and

(d) any other matter required, or expressly or impliedly authorized, by this Act to be prescribed by rules."

8. Rules so far as relevant for the present purpose prescribed under the Odisha Home Guards Rules, 1962 read thus:

"2. Definitions.—

In these rules unless the context otherwise requires:

(i) 'Act' means the Odisha Home Guards Act, 1961;

(ii) 'Commandant-General', 'Deputy Commandant-General' and 'Commandant' respectively mean Commandant-General, Deputy Commandant-General and Commandant of Home Guards appointed under Section 2;

(iii) 'Form' means a form appended to these rules;

(iv) 'Home Guards' means the Home Guards constituted under Section 2;

(v) 'Member of the Home Guards' means a member appointed under Section 3;

(vi) 'Section' means a section of the Act.

3. Appointment of members of Home Guards.—

No person shall be appointed as a member of the Home Guards:

(a) Unless he has attained the age of twenty and has not completed the age of sixty years;

(b) Unless he has passed at least the lower primary examination in any language; and

(c) Unless he has been medically examined and is in the opinion of the Commandant physically fit:

Provided that the Commandant-General or the Deputy Commandant-General, if so authorized by the Commandant-General, may in suitable cases relax the condition prescribed in Clauses (a) and (b).

4. Application for appointment.—

A person desiring to be appointed as member of the Home Guards, shall make an application in Form 'A'.

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8. Term of office.—

The term of office of a member of the Home Guards shall be three years:

Provided that if any such member is found to be medically unfit to continue as a member of Home Guards his appointment may be terminated before the expiry of the aforesaid term of office:

Provided further that a person appointed as a member of the Home Guards shall be eligible for re-appointment.

9. Limit of age for a member of the Home Guards.—

No member of the Home Guards shall continue to be such member after completion of the age of 60 years:

Provided that the Commandant-General, or the Commandant may relax the age-limit in suitable cases.

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13. Powers of the Commandant.—

(1) The Commandant shall exercise general supervision and control over the working of all the units and co-ordinate the work of the Home Guards within the district under his jurisdiction and shall be directly responsible to the Commandant-General for the efficient working, discipline, administration and training of the member of Home Guards.

(2) Subject to the supervision and control of the Commandant, any officer of the Home Guards authorized by the Commandant in this behalf may exercise the powers conferred on the Commandant in such circumstances as the Commandant may specify.

***"

9. Harmonious reading of aforesaid provisions would lead to show that in terms of Section 3 of the HG Act members of Home Guards, who are fit and willing to serve, may be appointed by the Commandant, subject to the approval of the Commandant-General. The words "who are fit and willing to serve" makes it abundantly clear that after a candidate is found fit and willing to serve by the Commandant, the approval of the Commandant-General would be necessary for "appointment".

9.1. Further reading of Rule 3 of the HG Rules gives one to understand that certain conditions are required to be fulfilled for the purpose of appointment as a member of the Home Guards. The Commandant-General or the Deputy Commandant-General, if so authorized by the Commandant-General, is empowered in suitable cases to relax the condition(s) prescribed.

9.2. It is, therefore, unequivocal that it is for the purpose of "appointment", not for the initiation of process of selection/enrolment prior approval is a *sine qua non* condition.

9.3. Such view of this Court gets fortified by the following instructions issued by the Commandant-General of Home Guards *vide* Annexure-A/2 of the counter affidavit

as relied upon by the learned Additional Government Advocate:

"RM/FAX

To : All Commandant, Home Guards

Info : All Range IGPs/DIGs of Police

From: IGP, FS, HGs and CD, Odisha, Cuttack

*No. N-1-2012/*6714/HGs, dated 03.07.2014 U/C

Ref.: Appointment/Reappointment of Home Guards in District Home Guards Organisation.

As prescribed in Section 3(1) of the Odisha Home Guards Act, 1961, the Commandants ***shall appoint*** *the* ***members of Home Guards*** *within his jurisdiction* ***subject to prior approval of the Commandant-General****, Home Guards. As such, if there are any appointment/reappointment of Home Guards without prior approval of the Commandant-General, those shall be treated as void ab initio. Necessary action in this matter may please be taken accordingly."*

9.4. Glance at said Circular, it manifests that prior approval of Commandant-General is necessary for appointment of "members of Home Guards" [means a member appointed under Section 3 as defined under Rule 2(v) of the Home Guards Rules] by the Commandant.

9.5. Thus, there being no inhibition for proceeding with the selection of the candidates "for" appointment of

members of Home Guards by the Board chaired by the Commandant. However, conjoint reading of the provisions of Section 3 of the HG Act read with the HG Rules as extracted hitherto coupled with the Circular demonstrates that emphasis is on the word "appoint"/"appointment", but not the process of selection of members of Home Guards for appointment.

10. Section 3 of the HG Act which is pivot for argument that the selection process being conducted within the authority of Commandant, without assigning any plausible reason the Commandant-General should not have refused to accord approval.

10.1. It does, therefore, require examination of purport of "subject to" in the expression "Subject to the approval of the Commandant-General, the Commandant may appoint as members of the Home Guards" as employed in said Section 3.

10.2. Full Bench of this Court in the case of *Srinibas Jena Vrs. Janardan Jena, AIR 1981 Ori 1 = 50 (1980) CLT 337* interpreted the effect of "subject to" in the following manner:

*"No doubt, the opening paragraph of Section 4 says that the ensuing consequences are till the close of the consolidation operation, but it also says that the ensuing consequences are "subject to the provisions of this Act". **The words "subject to" mean "conditional upon".***

These words should be given a reasonable interpretation, an interpretation which would carry out the intention of the legislature*."*

10.3. In *Ashok Leyland Ltd. Vrs. State of Tamil Nadu, (2004) 3 SCC 1* the Hon'ble Supreme Court noticed the expression 'subject to' as defined in *Black's Law Dictionary, Fifth Edition, page 1278*, which is as follows:

"Liable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided, answerable for".

10.4. In *Surinder Singh Vrs. Central Government, (1986) 4 SCC 667*, it has been observed as follows:

"6. The High Court has held that the disposal of property forming part of the compensation pool was "subject" to the rules framed as contemplated by Sections 8 and 40 of the Act and since no rules had been framed by the Central Government with regard to the disposal of the urban agricultural property forming part of the compensation pool, the authority constituted under the Act had no jurisdiction to dispose of urban agricultural property by auction-sale. Unless rules were framed as contemplated by the Act, according to the High Court the Central Government had no authority in law to issue executive directions for the sale and disposal of urban agricultural property. This view was taken, placing reliance on an earlier decision of a Division Bench of that court in Bishan Singh Vrs. Central Government, (1961) 63 Punj LR 75. The Division Bench in Bishan case, (1961) 63 Punj LR 75 took the

view that since the disposal of the compensation pool property was subject to the rules that may be made, and as no rules had been framed, the Central Government had no authority in law to issue administrative directions providing for the transfer of the urban agricultural land by auction-sale. In our opinion the view taken by the High Court is incorrect. ***Where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of rules unless the statute expressly provides for the same. In other words framing of the rules is not condition precedent to the exercise of the power expressly and unconditionally conferred by the statute. The expression "subject to the rules" only means, in accordance with the rules, if any. If rules are framed, the powers so conferred on authority could be exercised in accordance with these rules. But if no rules are framed there is no void and the authority is not precluded from exercising the power conferred by the statute.***

In T. Cajee Vrs. U. Jormanik Siem, AIR 1961 SC 276 = (1961) 1 SCR 750, the Supreme Court reversed the order of the High Court whereby the order of District Council removing Siem, was quashed by the High Court on the ground that the District Council had not framed any rules for the exercise of its powers as contemplated by para 3(1)(g) of 6th Schedule to the Constitution. The High Court had taken the view that until a law as contemplated by para 3(1)(g) was made there could be no question of exercise of power

of appointment of a Chief or Siem or removal either. Setting aside the order of the High Court, a Constitution Bench of this Court held that the administration of the district including the appointment or removal of Siem could not come to a stop till regulations under para 3(1)(g) were framed. The view taken by the High Court that there could be no appointment or removal by the District Council without framing of the regulation was set aside. Similar view was taken by this Court in B.N. Nagarajan Vrs. State of Mysore, AIR 1966 SC 1942 = (1966) 3 SCR 682 and Mysore State Road Transport Corpn. Vrs. Gopinath, AIR 1968 SC 464 = (1968) 1 SCR 767. In U.P. State Electricity Board Vrs. City Board, Mussoorie, (1985) 2 SCC 16 = AIR 1985 SC 883 = (1985) 2 SCR 815 validity of fixation of Grid Tarrif was under challenge. Section 46 of the Electricity (Supply) Act, 1948 provide that tariff known as the Grid Tariff shall be fixed from time to time in accordance with any regulations made in that behalf. Section 79 of the Act conferred power on the Electricity Board to frame regulations. The contention that Grid Tariff as contemplated by Section 46 of the Electricity (Supply) Act could not be fixed in the absence of any regulations laying down for fixation of tariff, and that the notification fixing tariff in the absence of such Regulations was illegal, was rejected and this Court observed: (SCC pp. 20-21, para 7)

'It is true that Section 79(h) of the Act authorises the Electricity Board to make regulations laying down the principles governing the fixing of Grid Tariffs. But Section 46(1) of the Act does not say that no Grid Tariff can be fixed until such regulations are made.

It only provides that the Grid Tariff shall be in accordance with any regulations made is this behalf. That means that if there were any regulations, the Grid Tariff should be fixed in accordance with such regulations and nothing more. ***We are of the view that the framing of regulations under Section 79(h) of the Act cannot be a condition precedent for fixing the Grid Tariff****.'*

7. *As noted earlier Sections 8 and 20 of the Act provides for payment of compensation to displaced persons in any of the forms as specified including by sale to the displaced persons of any property from the compensation pool and setting off the purchase money against the compensation payable to him. Section 16 confers power on the Central Government to take measures which it may consider necessary for the custody, management and disposal of the compensation pool property. The Central Government had therefore ample powers to take steps for disposal of pool property by auction-sale and for that purpose it had authority to issue administrative directions. Section 40(2)(j) provides for framing of rules prescribing procedure for the transfer of property out of the compensation pool and the adjustment of the value of the property so transferred against the amount of compensation.* ***Neither Sections 8, 16, 20 nor Section 40 lay down that payment of compensation by sale of the pool property to a displaced person shall not be done unless rules are framed.*** *These provisions confer power on the Central Government and the authorities constituted under the Act power to pay compensation to displaced persons by sale, or allotment of pool property to them in accordance with*

rules, if any. ***Framing of rules regulating the mode or manner of disposal of urban agricultural property by sale to a displaced person is not a condition precedent for the exercise of power by the authorities concerned under Sections 8, 16 and 20 of the Act. If the legislative intent was that until and unless rules were framed power conferred on the authority under Sections 8, 16 and 20 could not be exercised, that intent could have been made clear by using the expression "except in accordance with the rules framed" a displaced person shall not be paid compensation by sale of pool property. In the absence of any such provision the framing of rules, could not be a condition precedent for the exercise of power.'***

***"**

10.5. The Hon'ble Supreme Court of India in *Jantia Hill Truck Owners Assn. Vrs. Shailang Area Coal Dealer & Truck Owner Assn., (2009) 8 SCC 492*[1] was pleased to make following authoritative pronouncement:

"The provisions of the Act mandate that the unladen weight and laden weight must be determined. Indisputably, weighing devices had to be provided for the said purpose. ***It is true that for the said purpose rules may have to be framed. It is, however, a well-settled principle of law that even in a case where the statute provides for certain things to be done,***

[1] The effect of "subject to" as laid down in *Surinder Singh Vrs. Central Government, (1986) 4 SCC 667* and *Jantia Hill Truck Owners Assn. Vrs. Shailang Area Coal Dealer & Truck Owner Assn., (2009) 8 SCC 492* has been referred to in *State of M.P. Vrs. Rakesh Sethi, (2020) 7 SCR 734.*

subject to rules, any action taken without framing the rules would not render any (sic. that) action invalid. If a statute is workable even without framing of the rules, the same has to be given effect to. The law itself except in certain situations does not envisage vacuum. *Non-compliance with the provisions relating to "laden weight" and "unladen weight" being penal in nature must be held to be imperative in character."*

10.6. In the light of above principle as laid down by the Hon'ble Supreme Court of India, if provisions of Section 3 of the HG Act is scrutinised, necessary corollary would be that the power of appointment of members of Home Guards is vested with the Commandant, but the same is conditional upon approval of the Commandant-General. No pre-fix like the word "prior" does appear before the term "approval" finds place. In absence of requirement under Section 3 for obtaining "prior approval" of Commandant-General for the purpose of constitution of Board and selection of members of Home Guards by it, entire proceeding cannot be said to be "irregular" as held by the Commandant-General *vide* Letter dated 09.09.2016 (Annexure-3). Reading of provisions of Section 3 of the HG Act read with Rule 4 of the HG Rules makes it clear that necessitous of approval of the Commandant-General would arise at the stage of making "appointment" of members of the Home Guards

by the Commandant, but not for the purpose of selection process/enrolment process.

11. This now takes this Court to examine legal perspective of the term "approval", as it is strenuously argued by Sri Dayanidhi Lenka, learned Additional Government Advocate, that for sole ground reflected in the Letter dated 09.09.2016 of the Commandant-General that "prior approval was not taken from this Directorate General and the Appointment Board of Home Guards was done in an irregular manner" would vitiate selection process. Stemming on instruction contained in the Circular dated 03.07.2014 of the Commandant-General addressed to all Commandants *vide* Annexure-A/2 enclosed to the counter affidavit, the learned Additional Government Advocate insisted to refuse to consider favourably the contention of Sri Manoja Kumar Khuntia, learned Advocate for the petitioner that such Circular, being not statutory in nature, the same being directory and not in consonance with the provisions of Section 3 of the HG Act, cannot be basis for refusal for according approval. It is also urged by the learned counsel for the petitioner that under misconceived notion of necessity for "prior approval" even for selection of members of the Home Guards, the Commandant-General has observed that the Appointment Board of Home Guards was formed "in an irregular manner".

Such irrational and illogical appreciation of provision of Section 3 of the HG Act would obliterate the decision communicated in the Letter dated 09.09.2016.

11.1. Having noticed the effect and impact of the expression "subject to" as discussed above, the exposition of the term "approval" needs discussion.

11.2. Section 3 of the HG Act and Rule 3 of the HG Rules emphasise the word "appoint". There is no express prohibition spelt out therein with respect to constitution of the Selection Board/Appointment Board/Enrolment Board, by whatever name called. It is also not restricted by way of express provision with respect to conduct of examination of the persons for selection of members of Home Guards for appointment. It is manifest from Rule 3 of the HG Rules, that prior to "appointment" as a member of the Home Guards a candidate must have attained the age of twenty years and has not completed the age of sixty years; he should have passed at least the Lower Primary Examination in any language (Odia language as per Advertisement); and such candidate has been medically examined and is in the opinion of the Commandant physically fit. Section 3 empowers the Commandant to appoint members of Home Guards, but subject to approval of the Commandant-General. Thus, the statutory requirement is unambiguous that prior to appointment under Section 3, a candidate must have

been found eligible in terms of conditions stipulated in Rule 3, which is the domain of the Commandant. However, at the time of "appointment" the necessity for according approval by the Commandant-General arises.

11.3. Circular dated 03.07.2014 issued by the Commandant-General makes it very clear that "the Commandant shall appoint the members of Home Guards within his jurisdiction subject to prior approval of the Commandant-General". Here also the emphasis is on the word "appoint". The word "approval" comprehends also post-facto approval. Therefore, restrictive meaning attached by way of instruction contained in the Circular for "prior" approval is to be eschewed.

11.4. Section 3 of the HG Act only employs the word "approval", which term is contradistinguished from the word "permission". There is nothing in the language of the said provision to suggest that such "approval" is required to be construed as "prior approval". This Court takes note of certain decisions to have benefit of understanding the true purport of "approval".

11.5. In *Union of India Vrs. Bhim Sen Walaiti Ram, (1969) 3 SCC 146* a Constitution Bench of the Hon'ble Supreme Court of India considered provision requiring approval by the authority concerned and held,

"On behalf of the appellants it was contended by Dr Sayed Muhammed that the respondent was under a legal obligation to pay one-sixth of the annual fee within seven days of the auction under clause 21 of Rule 5.34 and it was due to his default that a re-sale of the excise shop was ordered. Under clause 22 of Rule 5.34 the respondent was liable for the deficiency in price and all expenses of such re-sale which was caused by his default. We are unable to accept this argument. The first portion of clause 21 requires the "person to whom the shop has been sold" to deposit one-sixth of the total annual fee within seven days. But the sale is deemed to have been made in favour of the highest bidder only on the completion of the formalities before the conclusion of the sale. Clause 16 of Rule 5.34 states that "all sales are open to revision by the Chief Commissioner". Under clause 18, the Collector has to make a report to the Chief Commissioner where in his discretion he is accepting a lower bid. Clause 33 of the Conditions, Ex. D-28, states that "all final bids will be made subject to the confirmation by the Chief Commissioner who may reject any bid without assigning any reasons". It is, therefore, clear that the contract of sale was not complete till the bid was confirmed by the Chief Commissioner and till such confirmation the person whose bid has been provisionally accepted is entitled to withdraw his bid. When the bid is so withdrawn before the confirmation of the Chief Commissioner the bidder will not be liable for damages on account of any breach of contract or for the shortfall on the re-sale. An acceptance of an offer may be either absolute or conditional. ***If the acceptance is conditional the offer can be withdrawn at any moment until absolute acceptance has taken place.*** *This view is borne out by the decision of the Court of Appeal in Hussey Vrs. Hornepayne, [L.R.] 4 App. Cas. 311*

= (1878) 8 Ch D 670 at 676. In that case V offered land to P and P accepted "subject to the title being approved by my solicitors". V later refused to go on with the contract and the Court of Appeal held that the acceptance was conditional and there was no binding contract and that V could withdraw at any time until P's solicitors had approved the title. Jossel M.R., observed at p. 626 of the report as follows:

'The offer made to the plaintiff of the estate at that price was a simple offer containing no reference whatever to title. The alleged acceptance was an acceptance of the offer, so far as price was concerned, subject to the title being approved by our solicitors'. There was no acceptance of that additional term, and the only question which we are called upon to decide is, whether that additional term so expressed amounts in law to an additional terms or whether it amounts, as was very fairly admitted by the counsel for the respondents, to nothing at all, that is, whether it merely expresses what the law would otherwise have implied. **The expression 'subject to the title being approved by our solicitors' appears to me to be plainly an additional term. The law does not give a right to the purchaser to say that the title shall be approved by any one, either by his solicitor or his conveyancing counsel, or any one else.** All that he is entitled to require is what is called a marketable title, or, as it is sometimes called, a good title. **Therefore, when he puts in 'subject to the title being approved by our solicitors', he must be taken to mean what he says, that is, to make a condition that solicitors of his own selection shall approve of the title**.'

It was submitted on behalf of the appellant that the phrase "person to whom a shop has been sold" in clause 21 of Rule 5.34 means a "person whose bid has been provisionally accepted". It is not possible to accept this argument. As we have already shown the first part of clause 21 deals with a completed sale and the second part deals with a situation where the auction is conducted by an officer lower in rank than the Collector. In the latter case the rule makes it clear that if any person whose bid has been accepted by the officer presiding at the auction fails to make the deposit of one-sixth of the annual fee, or if he refuses to accept the licence, the Collector may re-sell the licence, either by public auction or by private contract and any deficiency in price and all expenses of such re-sale shall be recoverable from the defaulting bidder. In the present case the first part of clause 21 applies. It is not disputed that the Chief Commissioner has disapproved the bid offered by the respondent. If the Chief Commissioner had granted sanction under clause 33 of Ex. D-23 the auction sale in favour of the respondent would have been a completed transaction and he would have been liable for any shortfall on the re-sale. As the essential pre-requisites of a completed sale are missing in this case there is no liability imposed on the respondent for payment of the deficiency in the price."

11.6. In *Vijayadevi Navalkishore Bhartia Vrs. Land Acquisition Officer, (2003) 5 SCC 83* it has been observed that,

"From the scheme of the Act, it is seen that the power of inquiry under Section 11 vests with the Collector who has to issue notice to the interested persons and hear the interested persons in the said inquiry. He also has to determine the measurements of the land in question and on the basis of the material on record decide the

compensation which in his opinion should be allowed for the land and if need be, he can also apportion the said compensation amongst the interested persons. The nature of inquiry which statutorily requires the interested parties of being heard and taking a decision based on relevant factors by the Collector shows that the inquiry contemplated under Section 11 is quasi-judicial in nature, and the said satisfaction as to the compensation payable should be based on the opinion of the Collector and not that of any other person. Section 11 under the Act has not provided an appeal to any other authority as against the opinion formed by the Collector in the process of inquiry conducted by him. ***What is provided under the proviso to Section 11(1) is that the proposed award made by the Collector must have the approval of the appropriate Government or such officer as the appropriate Government may authorise in that behalf. In our opinion, this power of granting or not granting previous approval cannot be equated with an appellate power.***

Black's Law Dictionary, 6th Edn., defines "approval" to mean an act of confirming, ***ratifying****, assenting, sanctioning or consenting to some act or thing done by another.* ***In the context of an administrative act, the word "approval" in our opinion, does not mean anything more than either confirming, ratifying, assenting, sanctioning or consenting. It will be doing violence to the scheme of the Act if we have to construe and accept the argument of the learned counsel for the respondents that the word approval found in the proviso to Section 11(1) of the Act under the scheme of the Act amounts to an appellate power. On the contrary, we are of the opinion that this is only an administrative power***

which limits the jurisdiction of the authority to apply its mind to see whether the proposed award is acceptable to the Government or not. In that process for the purpose of forming an opinion to approve or not to approve the proposed award the Commissioner may satisfy himself as to the material relied upon by the Collector but he cannot reverse the finding as if he is an Appellate Authority for the purpose of remanding the matter to the Collector as can be done by an Appellate Authority; much less can the Commissioner exercising the said power of prior approval give directions to the statutory authority in what manner he should accept/appreciate the material on record in regard to the compensation payable. *If such a power of issuing direction to the Collector by the Commissioner under the provision of law referred to hereinabove is to be accepted then it would mean that the Commissioner is empowered to exercise the said power to substitute his opinion to that of the Collector's opinion for the purpose of fixing the compensation, which in our view is opposed to the language of Section 11 of the Act. Therefore, we are of the opinion that the Act has not conferred an appellate jurisdiction on the Commissioner under Section 15(1) proviso of the Act. This conclusion of ours is further supported by the scheme of the Act and Section 15-A of the Act which is also introduced in the Act simultaneously with the proviso to Section 11(1) under Act 68 of 1984. By this amendment, we notice that the Act has given a power akin to the appellate power to the State Government to call for any records or proceedings of the Collector before any award is made for the purpose of satisfying itself as to the legality or propriety of any finding or order passed or as to the irregularity of such proceedings and to pass such other order or issue such*

direction in relation thereto as it may think fit. Therefore it is not as if the acquiring authority, namely, the appropriate Government even if aggrieved by the fixation of compensation by the Collector has no remedy. It can very well exercise the power under Section 15-A and pass such orders as it thinks fit, of course, after affording an opportunity to such person who is likely to be prejudicially affected by such order of the appropriate Government, therefore, it is clear that the statute when it intended to give appellate or revisional power against the finding of the Collector in the fixation of compensation it has provided such power separately in Section 15-A of the Act. Therefore, in our opinion, if the Commissioner while considering the proposed award of the Collector under the proviso to Section 11(1) of the Act to grant or not to grant approval thinks that the order of the Collector cannot be approved, he can at the most on the administrative side bring it to the notice of the appropriate Government to exercise its power under Section 15-A of the Act, but he cannot as in the present case on his own exercise the said power because that power under Section 15-A is confined to the appropriate Government only. Therefore we have to negative the argument of Mr Joshi that it is open to the Commissioner while considering the grant of approval to exercise the power either found in Section 15-A of the Act or similar power exercising his jurisdiction under proviso to Section 11(1) of the Act."

11.7. The Hon'ble Supreme Court in *Sunny Abraham Vrs. Union of India, (2021) 9 SCR 892* clarified with respect to "prior approval" *vis-à-vis* "permission" as follows:

"7. The Delhi High Court in the appellant's case primarily examined the issue as to whether having regard to the aforesaid Rules, a charge sheet or

charge memorandum could be given ex-post facto approval or not. The main distinguishing feature between the case of the appellant and that decided in Union of India and Ors. Vrs. B.V. Gopinath, (2013) 14 SCR 185 is that in the facts of the latter judgment, the subject charge memorandum did not have the ex-post facto approval. Stand of the respondents is that there is no bar on giving ex-post facto approval by the Disciplinary Authority to a charge memorandum and so far as the present case is concerned, such approval cures the defect exposed in Gopinath's case. On behalf of the appellant, the expression "non est" attributed to a charge memorandum lacking approval of the Disciplinary Authority has been emphasized to repel the argument of the respondent authorities.

8. *The respondents' argument was accepted by the High Court mainly on two counts. First, there was no ex-post facto approval to the charge memorandum in Gopinath's case.* ***Approval implies ratifying an action and there being no requirement in the concerned Rules for prior approval, ex-post facto approval could always be obtained.*** *On this point, the cases of Ashok Kumar Das and Others Vrs. University of Burdwan and Others, (2010) 3 SCC 616 and Bajaj Hindustan Limited Vrs. State of Uttar Pradesh and Others, (2016) 12 SCC 613 are relevant. As regards the charge memorandum being declared non est, it was held by the High Court:*

> *'26. However, question would arise whether this ratio would be applicable for as per the respondents as in Union of India and Ors. Vrs.*

B.V. Gopinath reported as (2013) 14 SCR 185, the Supreme Court has used the term "non est". The expression non est can be used as non est inventus or non est factum, which means a denial of the execution of an instruction sued upon. Non est inventus is a Latin phrase which means "he is not found". [See Black's Dictionary 8th Edition at page 1079-1980]. Indeed it could be argued that the use of the expression would indicate that the charge sheet was illegal and void for want of approval.' (quoted verbatim from the copy of the judgment as reproduced in the paperbook)

The cases of Ashok Kumar Das (supra) and Bajaj Hindustan Limited (supra) were referred to for the proposition that the approval includes ratifying an action, which obviously could be given ex-post facto. *The following passage from the case of Bajaj Hindustan Limited (supra) was quoted in the judgment under appeal:*

'7. As is clear from the above, the dictionary meaning of the word "approval" includes ratifying of the action, ratification obviously can be given ex post facto approval. Another aspect which is highlighted is a difference between approval and permission by the assessing authority that in the case of approval, the action holds until it is disapproved while in other case until permission is obtained. In the instant case, the action was approved by the assessing authority. ***The Court also pointed out that if in those cases where prior approval is required, expression "prior"***

has to be in the particular provision. *In the proviso to sub-section (1) of Section 3-A word "prior" is conspicuous. For all these reasons, it was not a case for levying any penalty upon the appellant. We, therefore, allow this appeal and set aside the impugned judgment [Bajaj Hindustan Ltd. Vrs. State of U.P., Misc. Single No. 3088 of 1999, order dated 30-9-2004 (All)] of the High Court as well as the penalty. No order as to costs.' (quoted verbatim from the copy of the judgment as reproduced in the paperbook).*

9. *The following passage from the case of Ashok Kumar Das (supra) has also been quoted in the judgment under appeal:*

> *'11. In Black's Law Dictionary (Fifth Edition), the word "approval" has been explained thus:*
>
> *'Approval.—*
>
> *The act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another.'*
>
> ***Hence, approval to an act or decision can also be subsequent to the act or decision.***
>
> *12. In U.P. Avas Evam Vikas Parishad, 1955 Supp. (3) SCC 456, this Court made* ***the distinction between permission, prior approval and approval****. Para 6 of the judgment is quoted hereinbelow:*
>
> > *'6. This Court in Life Insurance Corpn. of India Vrs. Escorts Ltd., (1986) 1 SCC 264,*

considering the distinction between "special Permission" and "general permission", previous approval" or "prior approval" in para 63 held that:

*'63. *** we are conscious that the word 'prior' or 'previous' may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29 (1) of the Act.'*

Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous Act, it was stated in Lord Krishna Textiles Mills Ltd. Vrs. Workmen, AIR 1961 SC 860, that the Management need not obtain the previous consent before taking any action. ***The requirement that the Management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in Section 33(1)****.'*

***

15. The words used in Section 21 (xiii) are not "with the permission of the State Government"

nor "with the prior approval of the State Government", but "with the approval of the State Government". If the words used were "with the permission of the State Government", then without the permission of the State Government the Executive council of the University could not determine the terms and conditions of service of non-teaching staff. ***Similarly, if the words used were "with the prior approval of the State Government", the Executive Council of the University could not determine the terms and conditions of service of the non-teaching staff without first obtaining the approval of the State Government. But since the words used are "with the approval of the State Government", the Executive Council of the University could determine the terms and conditions of service of the non-teaching staff and obtain the approval of the State Government subsequently and in case the State Government did not grant approval subsequently, any action taken on the basis of the decision of the Executive council of the University would be invalid and not otherwise.*** *" (quoted verbatim from the copy of the judgment as reproduced in the paperbook).*

10. *As it has already been pointed out, the High Court sought to distinguish the case of B.V. Gopinath (supra) with the facts of the present case on the ground that in the case of the appellant, the Disciplinary Authority had not granted approval at*

any stage and in the present case, ex-post facto sanction of the charge memorandum or charge sheet was given when the departmental proceeding was pending. The High Court found such approach to be practical and pragmatic, having regard to the fact that the departmental proceeding had remained pending in the case of the appellant and evidences had been recorded. The High Court thus considered the fact that in the case of B.V. Gopinath (supra), the proceeding stood concluded whereas in the appellant's case, it was still running when ex-post facto approval was given. That was the point on which the ratio of B.V. Gopinath (supra) was distinguished by the High Court.

11. *We do not think that the absence of the expression "prior approval" in the aforesaid Rule would have any impact so far as the present case is concerned as the same Rule has been construed by this Court in the case of B.V. Gopinath (supra) and it has been held that charge sheet/charge memorandum not having approval of the Disciplinary Authority would be non est in the eye of the law. Same interpretation has been given to a similar Rule, All India Services (Discipline and Appeal) Rules, 1969 by another Coordinate Bench of this Court in the case of State of Tamil Nadu Vrs. Promod Kumar, IPS and Another, (2018) 17 SCC 677] (authored by one of us, L. Nageswara Rao, J). Now the question arises as to whether concluded proceeding (as in the case of B.V. Gopinath) and pending proceeding against the appellant is capable of giving different interpretations to the said Rule. The High Court's reasoning, referring to the notes on which approval for initiation of proceeding was granted, is that the*

Disciplinary Authority had taken into consideration the specific charges. The ratio of the judgments in the cases of Ashok Kumar Das (supra) and Bajaj Hindustan Limited (supra), in our opinion, do not apply in the facts of the present case. ***We hold so because these authorities primarily deal with the question as to whether the legal requirement of granting approval could extend to ex-post facto approval, particularly in a case where the statutory instrument does not specify taking of prior or previous approval.*** *It is a fact that in the Rules with which we are concerned, there is no stipulation of taking "prior" approval. But since this very Rule has been construed by a Coordinate Bench to the effect that the approval of the Disciplinary Authority should be there before issuing the charge memorandum, the principles of law enunciated in the aforesaid two cases, that is Ashok Kumar Das (supra) and Bajaj Hindustan Limited (supra) would not aid the respondents. The distinction between the prior approval and approval simplicitor does not have much impact so far as the status of the subject charge memorandum is concerned."*

11.8. The Supreme Court of India in *Ashok Kumar Sahu Vrs. Union of India, (2006) Supp.4 SCR 394* distinguished the perception of "acceptance", "approval" and "ratification" as follows:

*"**The expression 'approval' presupposes an existing order.** 'Acceptance' means communicated acceptance. A distinction exists between the expressions 'approval' and 'acceptance'. Whereas in the latter, an application of mind*

on the part of the competent authority is sine qua non, approval of an order only envisages statutory entitlement. ***Approval of an order is required as directed by the statute. It can be given a retrospective effect.*** *Even valid contract comes into being only after the offer is accepted and communicated. Where services of an employee are dispensed with, the order takes effect from the date when it is communicated and not from the date of passing of the order. [See State of Punjab Vrs. Amar Singh Harika, AIR 1966 SC 1313].*

We are, however, not oblivious of the fact that under certain circumstances, ***the expression, 'approval' would mean to accept as good or sufficient for the purpose of intent. Ratification is noun, of the verb 'ratify'. It means the act of ratifying, confirmation, and sanction. The expression 'ratify' means to approve and accept formally.*** *It means to conform, by expressing consent, approval or formal sanction. 'Approve' means to have or express a favourable opinion of to accept as satisfactory. In the instant case, there was no question of any ratification involved as wrongly assumed by the High Court. [See Maharashtra State Mining Corpn. Vrs. Sunil, son of Pundikarao Pathak, (2006) 5 SCC 96]."*

11.9. In *Mohammad Ali Vrs. State of Uttar Pradesh, AIR 1958 All 681* the concept of "approval" has been discussed as follows:

"6. When a person is employed under a power which is to be exercised subject to the approval of a higher authority or the Government, the appointment holds good so long as the higher authority or the Government has not disapproved of it. ***There is a distinction between an appointment with the***

permission of a higher authority or the Government, and an appointment subject to the approval of the higher authority or the Government. An appointment which is to be made with the permission of a higher authority or the Government cannot be made unless the permission is first obtained, but an appointment which can be made subject to the approval of a higher authority or the Government may be made and will be rendered invalid only when it is disapproved by the higher authority. *This distinction was pointed out by a Full Bench of this Court in Shakir Husain Vrs. Chandoolal, AIR 1931 All 567 (A). Sir Shah Sulaiman, Acting Chief Justice, as he then was, observed:*

'Ordinarily the difference between the approval and permission is that in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently obtained may all the same validate the previous act.'

7. ***But as the appointment is subject to the approval of the higher authority or the Government the appointment though valid till it is disapproved is nebulous and cannot be deemed to perfect and binding. In the case of such appointment the appointing authority must ordinarily have the power of rescinding the appointment before it has been approved by the higher authority.*** *In our judgment the provisions of Section 9 of the U.P. Municipalities Act do not apply such nebulous appointment, and, in the*

present case, the State Government having disapproved of the appointment of the appellant, the appellant cannot be heard to say that the order passed by the State Government should be quashed by issuing an order in the nature of a writ."

11.10. A Division Bench of this Court in *Saheed Sporting Club Vrs. Kalyan Ray Choudhury, 2008 (Supp.-II) OLR 917 (Ori)* has made the following clarification:

"The settled legal proposition referred to above, makes it clear that where there is a requirement of approval by the statutory authority, proposal/acceptance of a bid/ resolution etc. remains inoperative till it is approved. It becomes effective only after accord of approval."

11.11. The legal proposition as exposited in the foregoing discussion leaves no doubt to say that the expression 'approval' presupposes an existing order and approval of an order only envisages statutory entitlement as distinguished from the term "acceptance" which requires application of mind. Approval of an order is required as directed by the statute. It can be given a retrospective effect/post-facto. Where prior approval is required, expression "prior" has to be incorporated in the particular provision. In the context of an administrative act, the word "approval" does not mean anything more than either confirming, ratifying, assenting, sanctioning or consenting. In that process for the purpose of according approval, the Commandant-General cannot reverse the finding/decision of the Board, as he is not

vested with the power of the Appellate Authority. Needless to say that the requirement that the Commandant must obtain "approval" is distinguished from the requirement that "permission" must be obtained. In Section 3 of the HG Act the word "prior" is conspicuously absent. Therefore, no infirmity or irregularity could be imputed to the proceedings of the Board chaired by the Commandant and seeking approval after selection list is prepared could not said to be irregular. The Commandant-General under a mistaken impression that prior approval was necessary has in his Letter dated 09.09.2016 refused to accord approval. It is to be appreciated that the Commandant has sent the Selection Board/Appointment Board/Enrolment Board proceeding for approval of the Director General. Of course, till approval is accorded, the selection list remains inoperative, but it cannot be said that said selection process is vitiated, as the word "approval" can comprehend not only "pre-facto", but also "post-facto" approval.

Conclusion:

12. The crux of the matter revolves round whether the Commandant-General could refuse to accord "approval" to the Selection Board/Appointment Board/Enrolment Board proceeding after conclusion of process of selection, but before the appointment being given by the

Commandant, on the specious ground that no prior approval was taken with reference to Section 3 of the Odisha Home Guards Act, 1961?

13. To consider such question, the following communications available at Annexure-2 and Annexure-3 of the writ petition are required to be taken into account:

"Odisha Home Guards,
District Headquarters, Balangir

NO. 192/HG Date 13.06.2016

To

The Commandant-General, HGs
Odisha, Cuttack

Enrolment of outsiders as Home Guards.

Regarding submission of proceeding of the Enrolment Board for a

In inviting reference to the above cited subject, this is to intimate vacancy of Home Guards available in this district, enrolment procedure of our Homegaurds was conducted by an Enrolment Board from 03.05.2016 to 19.05.2016, Headquarters, Bolangir. As per the instructions communicated vide State Home Circular order No.24/2016, out of 87 vacancies, 06 posts of Home Guards have been kept vacant to accommodate cases of discharged Home Guards if any for re-appointment. The board recommended the cases of 81 outsiders for their enrolment as Home Guard in different PSs/Ops of the

district according to the vacancies available as on 01.05.2016.

The proceeding of the Enrolment Board is sent herewith for favour of kind necessary approval please.

Sd/-13.06.2016
Commandant
Home Guard
Bolangir

*** *** ***

Directorate General
Fire Service, Home Guards and Civil Defence, Odisha
Nuapatna, Cuttack – 753 001

No. N-128-2015/3502/HGS., Date 09.09.2016

To

The Commandant,
Home Guards, Bolangir.

Ref.: Your Letter No. 192/HG, dated 13.06.2016 and No.297/HG, dated 25.08.2016.

Sub: Regarding approval of the Selection Board proceeding for appointment of Home Guards.

I am directed to intimate that Commandant-General, Home Guards has been pleased not to approve your proposal for appointment of 81 (Eighty one) persons as Home Guards in Bolangir district Homeguards organization ***as prior approval was not taken from this Directorate General*** *and the Appointment Board of Home Guards was done in an irregular manner.*

Sd/-
L.G.P.F.S.,
HGs & CD,
Odisha, Cuttack."

13.1. As is apparent from above communications that the Commandant having completed selection process in connection with Advertisement dated 12.04.2016, submitted the proceeding of Selection Board/ Appointment Board/Enrolment Board to the Commandant-General as required under Section 3 of the HG Act for according "approval". The Commandant-General on the contrary has refused to accord "approval" on the ground that no "prior approval" was taken from the Directorate General.

13.2. Having regard to the enunciation of legal position of the terms "subject to" and "approval" as discussed *supra*, the reason as cited by the Commandant-General for not according approval is flimsy, vague and untenable inasmuch as Section 3 of the HG Act does not envisage "prior approval" of the Director General. It is at the time of appointment the Commandant (Appointing Authority) sought for approval and rightly, because of the term "subject to" contained in Section 3 of the HG Act. In view of law laid down by the Courts, it is unequivocal that the Commandant-General should not have acted as the Appellate Authority.

13.3. From the exposition of law it is untrammelled legal consequence that "approval" presupposes that there is already a statutory framework in place which grants certain rights or entitlements and when one speaks of approval in legal terms, it is about recognizing and affirming what has already been legislated or ordered. On the contrary, "acceptance" necessitates cognitive engagement and deliberation on the part of the accepting party, which involves evaluating the implications of what is being accepted and making an informed decision based on that evaluation.

13.4. Even if prior approval is not taken, the selection proceeding of the Board could be accorded post facto by ratification in view of one of the meanings of "approval" as suggested by different pronouncements is "ratification". The expression 'ratify' means to approve and accept formally. A Division Bench of this Court considered the meaning and purport of the term "ratification" in the case of *Kali Prasad Mishra Vrs. State of Odisha, AIR 2023 Ori 165* and observed:

> *"29. Black's Law Dictionary, Seventh Edition, page 1268 defines the term 'ratification' as confirmation and acceptance of a previous act, thereby making the act valid from the moment it was done. Concise Law Dictionary, by P.G. Osborn, published by Sweet and Maxwell, 1927 explains "ratification" as the act of adopting a contract or other transaction by a person*

who was not bound by it originally, e.g., because it was entered into by an "unauthorised agent". Ratification cannot take place where the party who professes to ratify a transaction was not in existence when it took place.

30. *The Latin maxim "Omnis ratihabitio retrorahitur et mandato priori aequiparatur", means that every ratification is dragged back and treated as equal to a command or previous authority. In simple terms, it means that "doctrine of ratification" comes into picture if a person has done something on behalf of another person without any authority, knowledge or consent, then if such "other person" ratifies the same, then the same result would come as if the act was done on his own."*

13.5. The argument of Sri Dayanidhi Lenka, learned Additional Government Advocate as advanced based on instruction contained in the Circular dated 03.07.2014 that the Commandant should have adhered to the terms of such Circular does not hold water. The Circular indicates requirement of "prior approval" of the Commandant-General for appointment of members of Home Guards. In this context it is to be noted that the manner in which it is sought to be read is misdirected inasmuch as there is no requirement of "prior approval" envisaged under the statute. It may require to be stated emphatically that any instruction by way of Circular which is contrary to statutory provision has no force of law.

13.6. It is trite *vide, Orient Paper Mills Ltd. Vrs. Union of India, AIR 1969 SC 48* that no authority however high placed can control the decision of a judicial or a *quasi* judicial authority. In *Union of India Vrs. Somasundaram Viswanath, 1988 Supp.3 SCR 146* it has been succinctly held that *"If there is a conflict between the executive instructions and the rules made under the proviso to Article 309 of the Constitution of India, the rules made under proviso to Article 309 of the Constitution of India prevail, and if there is conflict between the rules made under the proviso to Article 309 of the Constitution of India and the law made by the appropriate Legislature the law made by the appropriate Legislature prevails"*. See also, *SK Nausad Rahaman Vrs. Union of India, 2022 LiveLaw (SC) 266*.

13.7. It is also well-settled that executive instructions cannot amend or supersede the statutory Rules or add something therein, nor the orders be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory Rule nor does it have any force of law; while statutory rules have full force of law provided the same are not in conflict with the provisions of the Act. [*Vide, State of U.P. Vrs. Babu Ram Upadhyaya, AIR 1961 SC 751; State of Tamil Nadu Vrs. Hind Stone, AIR 1981 SC 711*].

13.8. In *Punit Rai Vrs. Dinesh Chaudhary, (2003) 8 SCC 204*; *Union of India Vrs. Naveen Jindal, (2004) 2 SCC 510* and *State of Kerala Vrs. Chandra Mohan (2004) 3 SCC 429*, it has been held that executive instructions cannot be termed as law within the meaning of Article 13(3)(a) of the Constitution of India. In *Bishamber Dayal Chandra Mohan Vrs. State of U.P., AIR 1982 SC 33* it is observed that, the difference in a statutory order and an executive order observing that executive instruction issued under Article 162 of the Constitution of India does not amount to law. However, if an order can be referred to a statutory provision and held to have been passed under the said statutory provision, it would not be merely an executive fiat but an order under the statute having statutory force for the reason that it would be a positive State made law. So, in order to examine as to whether an order has a statutory force, the Court has to find out and determine as to whether it can be referred to the provision of the statute.

13.9. Statutes are to be read in their plain language and not otherwise. Reference may be had to *M.S.P.L. Ltd. Vrs. State of Karnataka, 2022 LiveLaw (SC) 886.* In *Union of India Vrs. Hansoli Devi, (2002) Supp.(2) SCR 324*, it has been stated thus:

"Similarly, it is not permissible to add words to a statute which are not there unless on a literal construction being

given a part of the statute becomes meaningless. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into a law. At times, the intention of the legislature is found to be clear but the unskilfulness of the draftsman in introducing certain words in the statute results in apparent ineffectiveness of the language and in such a situation, it may be permissible for the court to reject the surplus words, so as to make the statute effective."

13.10. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves so alone in such cases best declare the intent of the lawgiver. In *Nairin Vrs. University of St. Andrews, 1909 AC 147*, it is held that,

"Unless there is any ambiguity it would not be open to the Court to depart from the normal rule of construction which is that the intention of the Legislature should be primarily gathered from the words which are used. It is only when the words used are ambiguous that they would stand to be examined and construed in the light of surrounding circumstances and constitutional principle and practice."

13.11. In *Ram Rattan Vrs. Parma Nand, AIR 1946 PC 51*, it is held as follows:

"The cardinal rule of construction of statutes is to read the statutes literally, that is, by giving to the words their ordinary, natural and grammatical meaning. If, however,

such a reading leads to absurdity and the words are susceptible of another meaning, the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation. In the present case, the literal construction leads to no apparent absurdity and therefore, there can be no compelling reason for departing from that golden rule of construction."

13.12. In *S. Narayanaswami Vrs. G. Panneerselyam, AIR 1972 SC 2284*, the Court held that *"where the statute's meaning is clear and explicit, words cannot be interpolated"*.

13.13. In *Ku. Sonia Bhatia Vrs. State of U.P., (1981) 2 SCC 585 = AIR 1981 SC 1274*, the Supreme Court held that a legislature does not waste words, without any intention and every word that is used by the legislature must be given its due import and significance. It is a well-settled law of interpretation that when the words of the statute are clear, plain or unambiguous, *i.e.*, they are reasonably susceptible to only one meaning, the Courts are bound to give effect to that meaning irrespective of consequences. In this regard, reference may be made to *Nelson Motis Vrs. Union of India*, *AIR 1992 SC 1981*.

13.14. In *Vemareddy Kumaraswamy Reddy Vrs. State of A.P., (2006) 2 SCC 670*, the Supreme Court held that,

"It is said that a statute is an edict of the legislature. The elementary principle of interpreting or construing a statute

is to gather the mens or sententia legis of the legislature. It is well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous."

13.15. There is nothing in Section 3 of the Odisha HG Act to read "approval" as if "prior approval". Given the principles of interpretation of statute and legal exposition as to "approval", the word "prior" could not be prefixed in the instructions by way of Circular which leads to construction of distorted meaning. Thus, to this extent the instruction that to appoint the members of Home Guards, the Commandant is required to have "prior approval" is contrary to express provisions of the statute and no power has been granted to the Commandant-General to issue such Circular by pre-fixing the word "prior" before the word "approval".

13.16. Under above premises, the reason assigned by the Commandant-General in the Letter dated 09.09.2016 that since there was absence of "prior approval", the proceeding for selection of members of Home Guards by the Selection Board/Appointment Board/Enrolment Board becomes "irregular" does not stand to reason.

14. In the wake of above discussion, analysis of factual and legal position on different aspects, the refusal to accord "approval" on solitary ground that no "prior approval" was sought for by the Commandant is bereft of

rationality and thereby the Letter dated 09.09.2016 issued by the Directorate General, Fire Service, Home Guards and Civil Defence, Odisha cannot be countenanced. Therefore, the same is liable to be quashed. Hence, this Court does so.

15. *Ergo*, the opposite parties are directed to follow the consequences of such quashment of Letter dated 09.09.2016 (Annexure-3) refusing to accord "approval" to the proceeding of the Selection Board/Appointment Board of Home Guards and carry out the consequential effect and extend benefits to the selected candidates in connection with Advertisement dated 12.04.2016 (Annexure-1).

15.1. Needless to observe that the entire process is hoped to be concluded within a period of three months from date.

16. In the result, the writ petition stands disposed of in the above terms, but in the circumstances, there shall be no order as to costs.

17. As a result of disposal of the writ petition, all pending interlocutory applications, if any, shall stand disposed of.

(MURAHARI SRI RAMAN)
JUDGE