

## IN THE HIGH COURT OF ORISSA, CUTTACK.

W.P(C) NO.2019 OF 2006

Code No.110100

In the matter of

An application under Articles 226 and 227 of the Constitution of India, 1950.

AND

In the matter of

Election dispute under Chapter VI-A of the Orissa Panchayat Samiti Act, 1959 and the orissa Panchayat samiti Election Rules, 1991.

AND

In the matter of

Rabinarayan Hati, aged about 64 years, S/o Late Sanada Hati, Village / PO : Gapalpur, P.S: Rajnagar, Dist. Kendrapara.

(Opp.Party No.1-Appellant in the Courts below

**Petitioner**

AND

1. Nityananda Patra aged about 47 years, Son of Madhusudan Patra of Village Saar Rajendrapur, P.O.Manjulapalli, P.S. Rajnagar, Dist : Kendrapara. (Election petitioner-respondent No.1 in the Courts below)
2. Sarat Chandra Das, aged 38 years, Son of Prasanna Kumar Das of Village:Girapali, P.O: Manjulapalli, P.S. : Rajnagar, Dist : Kendrapara. (Opp.Party-Respondent No.2 in the Courts below )

**Opposite Parties**

19.05.2006 After the judgment was delivered, learned counsel for the petitioner Shri S.K. Das has made an oral prayer for issue of certificate for filling the appeal before the Hon'ble apex Court.

Since the issues decided in the instant writ petition are based on well settled principles laid down by the Hon'ble Apex Court, therefore, in our opinion, it is not a fit case for issue of certificate for filing appeal before the Hon'ble Apex Court.

The prayer is, therefore, rejected.

Urgent certified copy of this order be granted on proper application.

Sd/-I.M.Quddusi, J

Sd/- N. Prusty, J

## ORISSA HIGH COURT : CUTTACK.

W.P(C) No.2019 of 2006

In the matter of:

An application under Articles 226 and 227 of the  
Constitution of India.

.....

Rabinarayan Hati

... **Petitioner**

- Versus -

Nityananda Patra and another

... **Opp. Parties**

For Petitioner : M/s Susanta Kumar Dash,  
S.K. Mishra, S. Dash and S. Patra.

For Opp. Parties : M/s P.K. Routray, A.K. Nayak,  
N.K. Routray, A.K. Mohapatra and S. Barik.

PRESENT :

THE HONOURABLE SHRI JUSTICE I.M. QUDDUSI

AND

THE HONOURABLE SHRI JUSTICE N. PRUSTY

.....  
**Date of hearing and judgment: 19.5.2006**  
 .....

**I.M. Quddusi, J.** The instant writ application has been filed against the judgments and orders dated 13.5.2005 and 7.2.2006 passed by the learned Civil Judge (Senior Division), Kendrapara in Election Misc. Case No.1 of 2002 and the District Judge, Cuttack in Election Appeal No.4 of 2005 respectively.

2. We have heard Mr. S.K. Das, learned counsel for the petitioner and Mr. P.K. Routray, learned counsel for the opposite party No.1. No one has put in appearance on behalf of opposite party No.2.

3. The brief facts of the case are that the election in respect of the post of member of Panchayat Samiti of Rangani Grama Panchayat, Dist. Kendrapara was held on 19.02.2002 under the Orissa Panchayat Samiti Act, 1959 (hereinafter referred to as 'the Act, 1959') in which the petitioner as well as opposite parties were candidates. After the polling was over, the Presiding Officer of each booth took up the scrutiny of the ballot papers and thereafter counted the ballots in their respective booths in the presence of the candidates through their polling agents. There were 20 booths in all. The Presiding Officers prepared their respective reports regarding individual votes polled by each of the individual candidates. The particulars of the numbers of votes rejected were also recorded. The same result sheets were forwarded to the Election Officer in Form No.13 and some on plain papers along with used and unused ballot papers with other articles under the sealed cover. According to the

petitioner, an application was moved by him on 20.02.2002 before the Election Officer for recounting on the ground of improper acceptance of rejected ballot papers in some of the booths. The Election Officer fixed for 01.03.2002 for declaration of result at 10.30 A.M. and the result was declared in favour of opposite party no.1. But later on the petitioner filed another application for recounting of votes on the ground of margin of votes was less than 1% of the total numbers of valid votes polled where after the Election Officer referred the matter to the Collector and as per the direction of the Collector recounting of the ballots was undertaken and after recounting the petitioner was declared elected. However, this fact is under dispute which will be dealt with by this Court later on.

4. On 11.03.2002 the opposite party no.1 had filed the election petition under sections 44-I & 44-M of the Act, 1959 to declare himself to be the elected member of the Panchayat Samiti and for a declaration to the effect that the subsequent declaration made by the Election Officer declaring the election of the instant petitioner, as null and void together with other consequential relief. The instant petitioner had also filed recrimination petition which was dismissed.

5. The main allegation of the opposite party no.1, in the election petition which was registered as Election Misc. Case No.1 of 2002 by the Civil Judge ( Sr. Division), Kendrapara was that after the polling was over, the ballots with the result sheets were forwarded by the Presiding Officers of each of the booths and before undertaking of the above sham and mock recounting, the selected packets have been tampered with by the instant petitioner and the cover of the same with the signature of polling agents were also not available. It was also alleged that in respect of 9 out of 20 booths, foul play was practiced during the alleged sham and mock recounting and during that recounting, another rubber stamp of the completely different shape and size was fraudulently affixed on some of the ballot papers which were in favour of the instant opposite party no.1 in order to cancel his valid votes polled. He had also given the particulars of the those 9 booths along with valid votes which were polled and found valid before declaration of the result in favour of opposite party no.1. He had further alleged that in respect of same number of booths given the double stamped ballot papers found in those booths. The particulars of those booths were given as under:

Booth Nos.	Double stamped
16	20
15	8
4	4
12	3
7	2
9	2
2	1
8	1
13	1

Particulars of valid votes polled in favour of the opposite party no.1 were given as under :

Booth Nos.	Double stamped
16	85
15	11
4	149
12	169
7	158
9	228
2	152
8	142
13	82

6. It was also alleged that the double stamping was made with the connivance of the then B.D.O. ( Election Officer ) Rajanagar and also the instant petitioner who was a close confidant of one Ex-Minister hailing from Rajnagar constituency. According to him the extra stamping was done with a rubber stamp of different size than that of the one supplied to the Presiding Officers and as such the declaration of the result in favour of the instant petitioner was on the basis of fraudulent consequence of tampering.

7. A written objection was also filed by the instant petitioner and on the basis of the averments of the parties, the learned Civil Judge (Senior Division), Kendrapara framed the following issues:

#### Issues

1. Is the present Election Dispute petition of the petitioner maintainable ?
2. Is there any cause of action for the petitioner to file this petition ?
3. Is the present Election Dispute petition is bad for non-joinder of necessary and proper (property ) party ?
4. Whether any double stamping by a completely different shape and size rubber stamp has been used to stamp the disputed ballot papers either during the polling or during the alleged recounting?
5. Is the alleged recounting by the Election Officer on 01.03.02 of the result of the polling of different booths of Rangani Gram Panchayat valid in the eye of law ?
6. Whether before undertaking the aforesaid recounting the petitioner was found to have polled all total 2269 nos. of valid votes, the O.P. No.1 2263 Nos. of valid votes and O.P. No.2 had 464 Nos. of valid votes on the basis of the results of the polling in different booths submitted by the Presiding Officers of 20 Nos. of booths for the seat in question of that Grama Panchayat ?
7. To what relief, if any the parties are entitled ?
8. During trial 18 witnesses were produced by opposite party no.1 (election petitioner) and 15 were produced by the instant petitioner. After recording evidence and hearing the learned counsel for the parties, the learned Civil judge gave his

finding in respect of issue no.4 that on the basis of the evidence that It was clearly established from the evidence on record as well as the inspection of ballot papers during the inspection of rejected ballot papers that, manipulations were done by using different seals and conventional seal on the ballot papers during counting or the alleged recounting. In respect of Issue nos.5 and 6 he has given his finding that on over all analysis it was found that the alleged recounting of Election Officer on 1.3.2002 in respect of the polling In different booths of Rangani Gram Panchayat, is tainted with malafide and illegal acts, wherein manipulations have been made and the said recounting was not at all necessary and hence the same was invalid in the eye of law. Simultaneously, he also found that the result sheet prepared before the alleged recounting wherein the opposite party no.1, the instant petitioner and the opposite party no.2 had all total 2269, 2263 and 464 Nos. of valid votes respectively on the basis of the result of the polling in different booths remitted by the Presiding Officers, was correct and authentic. In respect of issue no.3 it was decided that a suit cannot fail in the absence of the fact that the suit was not bad in respect of non-joinder of the Election Officer as a party. In respect of the remaining issue nos. 1, 2 and 7, it was held by him that the Election Dispute raised through the election petition in question was maintainable and there was cause of action for filing the election petition and from the foregoing findings it was held that it became well established that the polling vide Ext. 10 of opposite party no.1 was found to be illegally and unfair way was shattered to make him to remain in the second position of the instant petitioner who was originally in the second position in the said election after opposite party no.1 vide Ext.10 and since the alleged recounting and its result sheet vide Ext.6 were found to be null and void, therefore, Ext.10 stand where the opposite party no.1, the instant petitioner and the opposite party no.2 were found to have polled all total 2269, 2263 and 464 nos. of valid votes respectively and thus the opposite party No.1 was declared as validly elected to the seat of Panchayat Samiti member of Rangani Grama Panchayat but he has been illegally debarred by an illegal recounting wherein it was found that illegal stamping seal were used on the ballot papers. As a result of his finding, the Election Dispute Petition was allowed and it was declared that the election of the instant petitioner to the office of Panchayat Samiti member of Rangani Gram Panchayat of Rajnagar Panchayat Samiti, Dist. Kendrapara was completely null and void and simultaneously it was declared by him that opposite party no.1 was the duly elected member of the said Samiti having secured the above mentioned number of votes which were the highest amongst the contestants.

9. Being aggrieved the petitioner filed an appeal before the District Judge, Cuttack which was registered as Election Appeal No. 4 of 2005. The learned District Judge vide its judgment and order dated 5.7.2005 dismissed the appeal confirming the judgment and order passed in the Election Dispute petition. Being aggrieved, the petitioner had filed a writ application in this Court registered as W.P.(c) No. 8611 of 2005 which was allowed in part. The impugned judgment and order dated 5.7.2005 passed by the District Judge, Cuttack was set aside and the matter was remanded to the District Judge to hear and dispose of the appeal again. The order dated 5.7.2005 of the District Judge in appeal was set aside on the ground that the learned District Judge on application of non-existent provisions of law that is on the basis of the law which was in existence prior to the amendment in sub-rule 7 of rule 31 of the Act, 1959 decided the appeal. Thereafter the parties appeared before the learned District Judge once again and after hearing the parties, the learned District Judge dismissed the appeal being

devoid of merit vide impugned judgment and order dated 7.2.2006, The petitioner approached this Court by filing the instant writ application challenging the orders passed in Election Dispute petition as well as in the above-mentioned appeal.

10. Before proceeding further, it is necessary to mention here that during the pendency of the Election Dispute petition, the petitioner had approached this Court by filing three writ applications, i.e. W.P.(C) No.2868 of 2003, W.P.(C) No. 8736 of 2003 and W.P.(C) No. 10497 of 2004.

The first writ application, i.e. W.P.(C) No. 2868 of 2003 was filed by the petitioner against the order dated 29.1.2003 challenging the maintainability of the election petition after rejecting his petition. In this regard by the learned Civil Judge (Sr. Division) vide orders dated 15.7.2002 and 30.9.2002. The said writ application was dismissed vide judgment and order dated 23.4.2003.

The second writ application, i.e. W.P.(C) No. 8736 of 2003 was filed by the petitioner against the impugned order dated 14.8.2003 passed by the learned Civil Judge (Senior Division), Kendrapara allowing the application for opening of ballot papers of the respective booths for inspection and reference by the concerned polling agents of opposite party no.1 at the time of their examination in the witness box. That writ application was allowed and the order of the learned Civil Judge (Senior Division), Kendrapara was set aside with the condition that he will first record the evidence of the witnesses on behalf of the opposite party no.1 and thereafter will allow the writ petitioner to laid such evidence as deem fit and proper and after evidence is led on behalf of both the parties, the court will consider the material on record and pass orders either to allow inspection or recount or not to allow inspection or recount, and If the court allows such inspection or recount, the court may examine the ballot papers and decide the dispute between the parties.

The petitioner had filed third writ application, i.e. W.P.(C) No, 10497 of 2004 against the order dated 21.9.2003 impugned therein passed by the learned Civil Judge. (Senior Division), Kendrapara after examination of witnesses was over, allowing the petition for inspection of ballot papers in the presence of the counsel for the parties. That writ application was dismissed due to availability of alternative remedy of filing an appeal.

However, the above decisions are not relevant for the purpose of the decision in the matter in dispute at this stage.

11. Learned counsel for the petitioner has argued that the instant petitioner was declared as elected after recounting of votes in accordance with law as a member of Rajnagar Panchayat Samiti from Rangani Gram Panchayat and on close reading of the election petition it would be found that recounting or inspection of rejected ballot papers had not been averred and no prayer had been made to that extent. He has further submitted that the Presiding Officers of both nos.18 & 16 of ward no.7 furnished the details of the ballot papers marked as 7 & 9 not in the prescribed form no.13 under Rule 19(2) and Rule 31 of the Orissa Panchayat Samiti Election Rules, 1991 (for short the Rules, 1991) due to the reason that the original forms were destroyed by the Polling agents of O.P.No.1. The Election Officer while making both ways counting on the basis of those reports found a difference of 6 votes only which was well within 1% of the total votes polled and, therefore, he has invoked his power under Rule 31(3) of the Rules the instruction issued by the

Election Commission dtd.31.8.2001 marked as Ext.B and found that the instant petitioner had succeeded in election by a margin of 30 votes and made a declaration accordingly.

12. With regard to double stamping on the ballot papers, the learned counsel for the petitioner has submitted that there is no averment in the election petition with regard to the shape and size of the rubber stamp. But this submission is against the record as a perusal of the election petition filed by Opp.Party No.4 shows that in paragraphs 11 to 14 thereof there is specific averment regarding double stamping. Learned counsel for the petitioner has further submitted that the learned Civil Judge issued erroneous directions for inspection of ballots which amounts to recounting of the votes and affects the secrecy of the ballot papers. He has further submitted that findings of the learned trial court are perverse.

13. With regard to the impugned judgment and order passed by the learned District Judge in appeal, the learned counsel for the petitioner submitted that the learned District Judge being the designated authority, disposed of the appeal vide the impugned judgment and order dated 5.7.2005 laying emphasis on the submission made on behalf of opposite party no. 1 that Rule 31(7) of the Rules, 1991 can operate only before declaration of the result and accordingly upheld the findings of the learned court below that the recounting was bad in law. He has further submitted that the learned District Judge has failed to exercise his jurisdiction vested in him in as much as the appellate court without indicating that the learned court below had drawn the conclusion on the basis of the pre-amended law, affirmed the findings of the learned Civil Judge on the ground that the notice of recounting was not given to the candidates or their polling agents before commencement of the recounting and as such the result after recounting is vitiated under the law. He has further submitted that there is no such requirement made under the law that any notice would be given to the party concerned or his polling agent before recounting of the votes. The relevant rule indicates only that the counting or recounting may be done in the presence of the candidate or his polling agent, if any. He has further submitted that the O.P.W. 14, the B.D.O. who was the election Officer has stated in his statement that he had not issued any notice to the candidate or their polling agents. Further the learned District Judge affirmed the judgment of the learned Civil Judge in appeal without determining any point.

14. Learned counsel for opposite party no.1 has submitted that the polling for the election of Member of Panchayat Samiti concerned was held on 19.02.2002. the initial counting was held at the polling stations by the Presiding Officers in the presence of the contesting candidates or their polling agents as per rule 31 of the Rules, 1991. There were only 20 booths and the particulars of the total votes polled were reported by the Presiding Officers of the respective polling stations, most of them reported the same in the prescribed form no.13. But few of them reported on the plain paper as they did not have the proforma. However, whatever has been required under the proforma was available in their report which was accepted by the election Officer and on the basis of his acceptance of the total votes polled, the details of ballot papers including the rejected ballot papers were counted as per rule 31(3) in the presence of the candidates and their polling agents after carefully checking the total votes polled arithmetically on 01.03.2002 which was the date fixed for declaration of the result. His further submission is that the result was announced



after received the details in form no.14. But those submission appears to be contrary to the materials on record which are being discussed below.

15. He has supported the findings of the learned Civil Judge as well as that of the learned appellate court.

16. The learned trial court has decided the issue no.4 which was the issue of fact that "whether any double stamping by a completely different shape and size rubber stamp has been used to stamp the disputed ballot papers either during the polling or during the alleged recounting. In this regard he had recorded the statements of the Presiding Officers on some polling booths besides other witnesses. The authorized election Officer in the election in question was also examined as O.P. W. No.14, viz., Sarat Chandra Mohapatra as a witness of the opposite party no.1 to the election petition who is the instant writ petitioner.

17. P.W. 8 Bharat Charan Sethi then Presiding Officer for the booth of Banipal Ward No.7 of Rangani Grama Panchayat had specifically stated as under :

"For that election, two seal sticks, each stick having one seal each on two ends of the stick were supplied by the competent authority, for the purpose of stamping the symbols on the ballot papers by the voter. The shape and size of those seals were identical in all respects and not different. It is true to say that I have submitted the original of mark 'X' before the Election Officer.

18. P.W.9 Lal Behari Mohanty then Presiding Officer, Ahirajpur polling booth no.2 had stated in his statement as under :

"Before this election, inter alia the election materials supplied by the authority, we were also supplied with two stamping sticks for the purpose of stamping on the ballot papers. Each such stick having its each end the rubber stamp for stamping purpose. I had verified those rubber head stamps, by stamping it on rough papers. Those seals were of uniform shape and size."

19. P.W.10 Duttahari Suttar then Presiding Officer of the polling booth no.8 for Ward No.8 of Keruapal Primary School had stated in his statement as under.

"All total I was supplied with two sealing sticks inter alia other materials. Each of that stick was having the sealing stamp on its each side end. The shape and size of those sealing stamps were identical as I have verified by taking in prints thereof on rough papers."

20. P.W.12-Bhagaban Patra, then Presiding Officer in booth no.12 operating in Rangani Primary School, Rangani has stated in his statement as under :

"For conducting that election, along with other materials I was supplied with two sealing sticks, each having one sealing stamp on its each end. All the sealing stamps are of similar shape and size."

21. O.P.W. 14-Sarat Chandra Mohapatra, the then Authorised Election Officer for Rajnagar Panchayat Samiti who was holding the post of B.D.O., Rajnagar, Kendrapara at that time was produced as a witness by the opposite party to the

election petition, the petitioner in the instant writ application has stated in his evidence as under :

"Since I was on over all supervision of the entire election of that Block during that election as the Election Officer, therefore, right now unless I verify the records I cannot say specifically as to how many marking seals were supplied to each booth. I think, one marking seal having one stamping head on each of the ends of a stick was supplied to each booth for the four category of elections that were simultaneously taken up on the same day in each booth. The said stamping head was made of rubber. It cannot be said accurately ( accurately) that, both the stamping heads of the sealing sticks were of equal diameter having equal circumference, but to the naked eye they seemed to be equal. Either before supply of those stamping seals or after the supply to the different booths, I have never at any time, compared the dimensions of those two stamping heads on each of the sealing sticks, either by measurement or by taking their impressions.

22. Thus on the basis of the over all evidence including the above quoted statements of the witnesses as well as after making inspection of the ballot papers and the total stamping thereon, the learned Civil Judge has given his finding in respect of issue no.4 that manipulations were done by using seal and conventional seals during counting or the alleged recounting. Needless to say that the said finding of fact was affirmed by the appellate court and, therefore, it is a concurrent finding of fact which cannot be disturbed by this Court in exercise of its powers under Article 227 of the Constitution of India.

23. In the case of *Fatima Bibi Ushmal Patel V. Manguben Pranbhai Thakkar and others*, reported in 1995(3). Supplementary Supreme Court Cases 193, the Hon'ble apex Court has held that the High Court under Article 226 has been conferred the power of superintendence and unless there was an error of law apparent on the case, there is no justification to interfere with the concurrent findings of fact.

24. There is a catena of decisions regarding the scope of this Court to be exercise under Article 227 of the Constitution of India. Some of the decisions in this regard are being discussed below:

In the case **Babutmal Raichand Oswal v. Laxmibai R. Tarte** and another reported in **AIR 1975 SC 1297** the Hon'ble apex Court has held that it was not open to the High Court to question propriety or the reasonableness of the conclusions drawn from the evidence by the District court. The High Court could not convert itself into a court of appeal and examine the correctness of the findings of fact arrived at by the District Court.

In the case of **Chandavarkar S.R. Rao v. Ashalata S. Guram**, reported in **(1986) 4 Supreme Court Cases, 447** the Hon'ble apex Court has held that the High Court should not interfere with a finding within the jurisdiction of the inferior tribunal or court except where the finding is perverse in law in the sense that no reasonable person properly instructed in law could have come to such a finding or there is miscreation in law or view of fact has been taken in the teeth of preponderance of evidence or the finding is not based on any material evidence or it resulted in manifest injustice. Except to the limited extent indicated above, the High Court has not jurisdiction.

In the case of **Mani Nariman Daruwala and Bharucha ( Deceased) through LRs. and others v. Phiroz N. Bhatena and others**, reported in AIR 1991 SUPREME COURT 1494, the Hon'ble Apex Court has held that :-

"Was the High Court justified in taking this view and in upsetting the finding recorded by the Appellate Bench ? While considering this question it has to be borne in mind that the High Court was exercising its jurisdiction under Art.227 of the Constitution of India. In the exercise of this jurisdiction the High Court can set aside or ignore the findings of fact of an inferior Court or tribunal. If there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the Court or tribunal who has come or in other words it is a finding which was perverse in law. Except to the limited extent indicated above the High Court has no jurisdiction to interfere with the findings of fact. ( See Chandravarkar Sita Ratna Rao v. Ashalata S. Guram (AIR 1987 SC 117) (supra). Applying these tests we are unable to persuade ourselves to hold that the findings recorded by the Appellate Bench suffer from such an infirmity so as to justify interference with the said finding under Art.227 of the Constitution."

In the case of **Khimiji Vidhu v. Premier High School**, reported in (1999) 9 Supreme Court Cases 264 the Hon'ble apex Court has again taken the similar view which has been taken in the above mentioned judgment that the findings of fact cannot be interfered with by the High Court in exercise of its jurisdiction under Article 227 of the Constitution of India and jurisdiction under Article 227 of the Constitution must be sparingly exercised and may be exercised to correct errors of jurisdiction and the like but not be upset pure findings of fact, which falls in the domain of an appellate court only.

In the case of **Mohan Amba Prasad Agnihotri and other V. Bhaskar Balwant Aher (Dead) through L.Rs.**, reported in AIR 2000 SC 931 the Hon'ble apex Court has held that it is the settled law that the jurisdiction of the High Court under Article 227 is not appellate but supervisory. It cannot interfere with a finding of fact recorded by lower Court/ tribunal unless there is no evidence to support the finding or the finding is perverse.

25. In respect of issue No.4, we have discussed the relevant evidence as above and the concurrent findings of fact given by the learned trial court and the learned appellate court affirming the said findings of the learned trial court, cannot be said to be perverse. Therefore, there is no scope for this Court to interfere in such findings of fact in exercise of jurisdiction conferred to it under Article 227 of the Constitution.

26. We have analysed the above evidence in view of a recent judgment of Hon'ble apex Court in the case of **Gursewak Singh V. Avtar Singh and others** reported in 2006(3) Supreme 386 in which in the matter of election to the post of Sarpanch of Grama Panchayat in the State of Punjab the Hon'ble apex Court has held that the High Court should examine the matter more closely and remitted the matter to the High court for consideration of the same afresh.

27. Now we come to the finding of the trial court given in respect of issue nos. 5 & 6 which are :

"Is the alleged recounting by the Election Officer on 01.03.2002 of the result of the polling of different booths of Rangani Grama Panchayat valid in the eye of law ?"

"Whether before undertaking the aforesaid recounting the petitioner was found to have polled all total 2269 nos. of valid votes, the O.P. No.1 2263 Nos. of valid votes and O.P. No.2 had 464 Nos. of valid votes on the basis of the results of the polling in different booths submitted by the Presiding Officers of 20 Nos. of booths for the seat in question of that Grama Panchayat. ?

28. The trial court has decided the issue nos. 5 & 6 together since the same were inter related.

29. In the above regard, the learned counsel for the petitioner has submitted that the result sheets of the Presiding Officers were not in the proper proforma with form No.13. In this regard it is necessary to peruse the proforma of form no.13 has been given along with the Rules, 1991 which is as under :

**" F O R M No.13**

**[See Rule 19(2) and 31]**

Result after counting of votes for election to the office of the Member of Samiti.

Name of Samiti Constituency .....

Name of the Samiti .....

Serial No.	Name of candidate	Total number of valid votes cast in all the Polling stations
(1)	(2)	(3)
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		

Total number of ballot papers rejected .....

Total number of ballot papers found in the ballot boxes of polling stations or total number of votes recorded as per voting machine .....

Date .....

Place .....

Signature of Presiding /Election Officer

30. In the case of non-availability of form no.13, since it is mandatory for the Presiding Officers to send the details as required under form no.13 to the Election Officer on the same day, if the requirement made in for no.13 is fulfilled by sending the information in a plain paper, it cannot be said that a wrong was committed. This is not the allegation of the instant petitioner that the required information in form no.13 was not sent by any of the polling Officers who had sent the information to the Election Officer on a plain paper. Therefore, no illegality can be said to have been committed.

31. However, in deciding these two issues ( i.e. issue nos. 5 & 6) the learned trial court has considered the old provisions of sub-rule (7) of Rule 31 of the Rules, 1991 and held that the recounting was not proper. But since the provisions of sub-rule (7) of Rule 31 were amended, the amended provisions should have been considered by the trial court.

32. The learned District Judge had also taken into consideration the old provisions in his earlier decision but that decision was set aside by this Court and the appeal was remanded for fresh decision as already mentioned above and thereafter deciding the appeal afresh, the appellate court considered the amended provisions and held that since information before the recounting was not given to the respondent, the recounting was bad in law. In view of the different findings of the trial court as well as of the appellate court with regard to the validity of recounting, it is necessary for us to consider both the orders, i.e. of trial court as well as of the appellate court for recounting of the votes on the basis of the facts and the amended provisions of rule 31(7) of the Rules, 1991.

33. Here it is necessary to reproduce the rule 31 of the Rules, 1991 along with sub-rule (7) as amended vide notification published in Orissa Gazette extra-ordinary no.1205 dated 18.11.1996 as under :

- “31(1) Immediately after close of the counting, the Presiding Officer shall prepare separate bundles of papers, reports, used and unused ballot papers in respect of the polling station of the Samiti, seal each packet, not thereon the polling station to which it relates and forward the packets to the Election Officer on the same day.
- (2) It will be open to the candidates or their polling agents to affix their seal on the aforesaid packets, if so desired.
  - (3) On the date fixed for declaring the results of the election, the Election Officer shall in presence of the candidates or their Polling Agents carefully check up the votes polled by different candidates arithmetically so as to arrive at the final assessment as to the total number of votes polled by each contesting candidate and announce the result after recording the details in Form No.14.
  - (4) The candidate securing the maximum number of votes in a Samiti Constituency shall be declared as duly elected.
  - (5) In case of equality of votes, the result shall be decided by drawing lots and the candidate whose name is drawn first shall be declared elected.

- (6) The Election Officer shall forthwith intimate the Collector of the District the name of the duly elected candidate for the purpose of the publication.
- (7) After declaration under Sub-rule (4) has been made a candidate or, in his absence, his polling agent may apply in writing to the Election Officer to recount the votes either wholly or in part, stating the grounds for such recounting.
- (8) On the application made under sub-rule (7), the Election Officer shall decide the matter and may allow the application in whole or in part or may reject it into as it appears to him to be frivolous or unreasonable.
- (9) Every decision of the Election Officer under sub-rule (8) shall be in writing and contain the reasons therefor.
- (10) If the Election Officer decides under sub-rule (8) to allow recounting of the votes either wholly or in part, he shall-
  - (a) make the recounting in accordance with Rule 30.
  - (b) make necessary corrections in the result in Form No.14 to the extent necessary after such recounting and
  - (c) announce the result on the basis of corrections so made by him."

The pre-amended sub-rule (7) of rule 31 on the basis of which the learned trial court has given his finding on the issue nos. 5 & 6, is reproduced as under :

"(7) Notwithstanding anything contained in sub-rules (3), (4) and (5) any candidate or in his absence, his polling Agent may, before declaration of result of election of the member of Samiti, request the votes and upon such request the Election Officer shall forthwith recount the votes;

Provided that nothing in this rule shall make it obligatory on the part of the Election Officer to recount the same votes more than once."

34. The difference between the pre-amended and the amended provision of rule-31(7) of the Rules, 1991, is that before amendment it was provided that request for recounting could be made by the candidate or in his absence his polling agent before declaration of the result; but after the amendment it has been provided that a candidate or in his absence his polling agent may apply for recounting only after the declaration of the result. In our opinion, "Declaration of the result" means the declaration of the result made in accordance with sub-rule (3) of rule 31, i.e., announcement of the result after recording the detail in form No.14.

Before any discussion, it is necessary to peruse the proforma of form No.14 given with the Rules, 1991 is as under :

**"FORM NO.14"****[See Rule 32(3)]**

Result for counting of votes for election to the office of the Member of Samiti.

Name of Panchayat samiti .....

Name of Samiti Constituency .....

Serial No.	Name of candidate	Total number of valid votes cast in all the Polling stations
(1)	(2)	(3)
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		

Total number of ballot papers rejected .....

Total number of ballot papers found in the ballot boxes or total number of votes recorded as per voting machine .....

Sri /Smt. .... son/ daughter / wife of ..... is declared to have been duly elected as the Member of Samiti from ..... Samiti Constituency.

Date .....

Place .....

Election Officer

**N.B.** - Separate form shall be used for every Samiti Constituency

35. Therefore, announcement of the result can be made only after recording the details of the votes polled by different candidates arithmetically so as to arrive at the final assessment as to the total number of votes polled by each contesting candidates in form No.14 and only thereafter the result could be declared in accordance with sub-rule (4) of rule 31 which provides that the candidate securing the maximum number of votes in the election shall be declared as duly elected. The stage of declaration of a candidate duly elected cannot come without recording the details of votes polled by each candidate in form no.14. According to the amended provision of sub-rule (7) of rule-31, the application for recounting of votes by the candidate or in his absence his polling agent is maintainable only after declaration of the result under sub-rule (4) of rule 31, therefore, if a candidate or his polling agent applies to

the Election Officer to recount the votes before declaration of the result under sub-rule (4), such an application is not maintainable.

36. The State Election Commission, Orissa vide its order no.Ele(GP): 148/2001-3693/SEC dated 31.8.2001 addressed to all Collectors issued directions in the General elections to Panchayats-2002 in respect of prior concurrence of the Collector-cum-Election Officer for declaration of result in case the margin of votes secured by the first two leading candidates is less than 1% of the total number of valid votes. The relevant part of the directions is quoted as under :

"Keeping the above perspective in mind, the Commission is pleased to direct that all cases where the margin of votes secured by the first two leading candidates in the election to the office of Sarpanch and member of PS and ZP is less than 1% of the total valid votes polled by all the candidates together, shall be referred to the Collector-cum-Election Officer by the authorized Election Officer in-charge of counting of votes for the above offices. As soon as the counting is over, the authorized Election Officer shall segregate all cases of the above nature and withhold declaration of result of such cases. He shall then fill up the proforma attached to this order as Annexure for each case, consolidate all the proformas in one bunch and send the entire bunch to the Collector-cum-Election Officer with a special messenger. Upon receipt of the information in the prescribed proformas, the Collector-cum-Election Officer shall carefully assess the circumstances of each case and decide whether he should allow the authorized Election Officer to declare the result of the panchayat office on the basis of the counting already done or instruct the authorized Election Officer to undertake re-counting of the votes and then declare the result on the basis of such recount. The Collector shall indicate his decision on the body of the proforma for each case by way of tick-marking the one he approves of and striking off the other he does not, of both the options printed at the bottom part of the proforma; put his signature and seal, and return all the proforma in a bunch with the same special messenger to the authorized Election Officer for compliance."

37. In the instant case, as there was margin of less than 1% votes between the first two leading candidates, i.e., the instant petitioner and the opposite party no.1, the authorized Election Officer had sent for permission to declare the result in the proforma supplied by the Election Commissioner, to the Collector-cum-Statutory Election Officer. The proforma along with its filled up columns by the authorized Election Officer in charge of counting of votes and the order of the Collector-cum-Statutory Election Officer thereon are reproduced as under :

38. "PROFORMA FOR SEEKING PERMISSION FOR DECLARATION OF RESULT

Name of the district : Kendrapara

Description of Constituency : Rajnagar Panchayat Samiti,

G.P. Constituency No. \_\_\_\_\_

P.S. Constituency No. Rangani ( Written in Oriya language)

Sarpanch of \_\_\_\_\_

1. Complaints received, if any, from candidates or their agents about any tampering with seals of ballot boxes and the manner of enquiry and disposed and decision thereon.

Nil



2. Any unusual features found during the counting leading to suspicion of irregularities and decision thereon; Nil
3. Any other unusual feature, coming to E.O's notice from the Presiding Officer's diary or other source(s); Nil
4. Break up of the votes polled
- |                                     |      |
|-------------------------------------|------|
| a) Total No. of electors            | 5950 |
| b) Total No. of valid votes polled. | 4996 |
| c) Total No. or rejected polls      | 93   |
| d) Total No. of tendered votes      | Nil  |

Sl. No.	Name of the candidate	Party affiliation	Number of valid votes polled
1.	Nityananda Patra	---	2269
2.	Rabinarayan Hati	---	2263
3.	Sarat Ch. Das	---	464

5. Request from candidates for recounting of their votes, their grounds alongwith the decision of the Returning Officer. Sri R.N. Hati has applied for recounting. Since the rejected votes, i.e., 93 and the difference is 06, recounting is necessary

Place :

Date :

Sd/-  
05.03.02  
Signature of authorized  
Election Officer.

Orders passed by the Collector-cum-Statutory Election Officer :

Declare the result / undertake recounting of the votes and then declare the result on the basis of the recounting.

Sd/- 1.3.02  
Signature of the Collector-cum-Election Officer.  
P.D., DRDA, Kendrapara  
( Authorized Officer )

38. The aforesaid instructions of the Election Commission dated 31.08.2001 has been marked as Ext.B and the permission for declaration of result sought by the authorized Election Officer in the proforma as quoted above has been marked as Ext. H and the signatures under the orders of the Collector-cum-Election Officer has been marked as Ext.H/1.

39. The orders passed by the Collector-cum-Statutory Election Officer in the effect "undertake recounting of the votes and then declare the result on the basis of the recounting", shows that the Statutory Election Officer did not allow the authorized Election Officer to declare the result before the recounting and as such it is clear that the result was not declared before the recounting was done.

40. The above fact was corroborated by the O.P.W. 14, the authorized Election Officer who has entered in the witness box as a witness of the opposite party No.1 to the election petition ( i.e. the instant writ petitioner). The relevant portion of his statement is reproduced as under :

"xx xx I conducted the aforesaid recounting of the votes prior to the declaration of the result on 1.3.2002. After the afore stated recounting, I prepared the result sheet which has been filed in this case. This is said result sheet prepared by me after recounting and is signed by me given with deate. It is now marked as Ext. G, while Ext.G/1 is my signature with date thereon. As the aforesaid stated recounting, I finally declared the result of that election on 1.3.2002 in proper form. Before the aforementioned recounting, as per the circular vide Ext.B, the permission was accorded from the Authorised Officer of the then Collector, Kendrapara. The said Authorised Officer was some Mr. Kar, who is the then Project Director District Rural Development Agency, Kendrapara. I am well acquainted with his handwritings and signatures. This is the said permission to recounting given by Mr. Kar now marked as Ext. H, while Lext. H/a is the signature of Mr. Kar thereon.

XX XX

XX XX

XX XX

Had there been no application for recounting even by the O.P. No.1, still I would have recounted the ballots due to the circular of the Election Commissioner as because the difference of margin between the two proper candidates were less than one percent of total valid votes polled in the election. During my aforesaid recounting, at no point of time the petitioner had filed any objection against the recounting.

XX XX

XX XX

XX XX

Without containing an order from the concerned Collector, I am not empowered to take up the re-counting of the votes on the simple application of any of the aggrieved parties. Under Rule 31(7) of the Orissa Grama Panchayat Samiti Election Rules, generally the re-counting of votes are undertaken. Besides the above provisions, there is one circular from the Election Commissioner to the effect as to under which circumstances also recounting can be taken up. Even for recounting as per the Circular of the Election Commissioner, prior permission of the Collector is required. In the instant election which is under dispute in this case, I have given my report to the then Collector vide Ext. H. The upper part of Ext. H contains my report and the lower part of Ext. H carry Ext. H/a is the permission of the then Collectors authorized Officers. Ext. 11 thereon are filled by myself.

XX

XX"

41. A perusal of the above statement of the authorized election Officer shows that he did not declare the result before recounting and he sought permission for declaration of result in the proforma issued by the State Election Commission by their instruction contained in letter Ext. B and as such he did not fill up form No.14 before recounting was made. After recounting was made, he filled up form no.14 and then declared the result in favour of the petitioner, viz. Rabi Narayan Hati. However, before sending the permission for declaration of result in the proforma as quoted above which has been marked as Ext. H, in view of sub-rule (3) of rule - 31 of the Rules, 1991 the Election Officer checked up the votes polled by different candidates arithmetically, prepared the result sheets and after the recounting was permitted, fresh result sheet was prepared. Both the result sheets are reproduced as under.

Sl. No.	Ward No.	Total No. of Votes Polled			No. of Valid Votes Secured by the candidate			Remarks
		Valid	Rejected	Total	Nityananda Patra	Rabinarayan Hati	Sarat Ch. Das	
1	2	3	4	5	6	7	8	9
1	1	170	2	172	133	29	8	
2	2	246	10	256	152	75	19	
3	3	256	3	259	197	44	15	
4	4	201	3	204	149	48	4	
5	5	233	4	237	94	130	9	
6	6	309	5	314	37	155	117	
7	7	261	9	290	158	67	56	
8	8	410	9	419	142	240	28	
9	9	382	10	392	228	119	35	
10	10	206	2	208	72	123	11	
11	11	180	0	180	101	71	8	
12	12	342	7	349	169	109	64	
13	13	216	4	220	82	127	7	
14	14	209	10	219	84	115	10	
15	15	236	1	237	11	220	5	
16	16	199	1	200	85	110	4	
17	17	237	2	239	127	94	16	
18	18	220	1	221	123	75	22	
19	19	274	7	281	57	201	16	
20	20	189	3	192	68	111	10	
		4996	93	5089	2269	2263	464	

SIGNATURE OF  
THE TABULATOR

CERTIFIED TO BE  
A TRUE COPY  
HEAD CLERK

ELECTION  
OFFICER & B.D.O.,  
RAJNAGAR

ELECTION  
OFFICER &  
B.D.O.,  
RAJNAGAR.

RESULT SHEET FOR THE P.S. MEMBERS OF G.P. RANGANI  
Date of Poll 19.02.02 ( RECOUNTING)

Sl. No.	Ward No.	Total No. of Votes Polled			No. of Valid Votes Secured by the candidate			Remarks
		Valid	Rejected	Total	Nityananda Patra	Rabinarayan Hati	Sarat Ch. Das	
1	2	3	4	5	6	7	8	9
1	1	170	2	172	133	29	8	
2	2	245	11	256	151	75	19	
3	3	256	3	259	197	44	15	
4	4	198	6	204	145	49	4	
5	5	233	4	237	94	130	9	
6	6	309	5	314	37	155	117	
7	7	279	11	290	156	67	56	
8	8	409	10	419	141	240	28	
9	9	378	14	392	226	119	33	
10	10	206	2	208	72	123	11	
11	11	180	0	180	101	71	8	
12	12	339	10	349	166	109	64	
13	13	215	1	216	81	127	7	
14	14	210	9	219	84	116	10	
15	15	227	10	237	3	219	5	
16	16	179	21	200	65	110	4	
17	17	237	2	239	127	94	16	
18	18	220	1	221	126	72	22	
19	19	273	8	281	57	200	16	
20	20	189	3	192	68	111	10	
	Total	4952	133	5085	2230	2260	462	

SIGNATURE OF  
THE TABULATOR

ELECTION OFFICER  
& B.D.O. RAJNAGAR

42. Now we see whether the direction of the Election Commission as per Ext. B were in consonance with the statutory provision, i.e., sub-rule (7) of rule 31 of the Rules, 1991. In this regard relevant instructions of the State Election Commission (Ext. B) and the order of the Collector on the report regarding permission for declaration of result in the proper proforma issued as Annexures to the instructions of the State Election Commission are necessary to be perused :

The relevant part of the instructions of the State Election Commission dated 31.08.2001 (Ext.B) is reproduced as under :

"Upon receipt of the formation in the prescribed proforma, the Collector-cum-Election Officer shall carefully assess the circumstances of each case and decide whether he should allow the authorized Election Officer to declare the result of the particular office on the basis of the counting already done or instruct the authorised

Election Officer to undertake re-counting of the votes and then declare the result on the basis of such amount. "

The order of the Collector-cum-Election Officer on the report of the authorised election Officer sent under the proforma for seeking permission for declaration of result under the instructions of the State Election Commission (Ext. B) is quoted as under :

"Declare the result / undertake recounting of the votes and then declare the result on the basis of the recounting.

Sd/-  
1.3.02

Signature of Collector-cum-Election Officer  
( P.D., DRDA, Kendrapara,  
Authorized Officer.

43. A comparison of the directions of the State Election Commission and the statutory rules which are quoted above shows that in the directions restrictions were imposed to declare the result without seeking permission of the Collector-cum-Election Officer where there is margin of 1% votes between the leading candidates and also it was instructed that in case the Collector-cum-Election Officer directs for recounting, the result shall not be declared without making recounting whereas in the statutory rules, recounting is permissible only after declaration of the result under sub-rule (4) and further if after declaration of result, recounting is permitted, then under Rule 10(b), necessary corrections are required to be made according to the result of recounting in form No.14 and the result is to be announced on the basis of the correction so made in form No.14, according to clause (c) of sub-rule (10) quoted above. Therefore, we have no hesitation to hold that the above quoted directions of the Election Commission ( Ext. B) are contrary to the statutory rules and the recounting was made prior to the filling of form no.14 and declaration of result in sub-rules (3) and (4) of rule 31 of the Rules, 1991 is illegal. Consequentially the direction of the Collector-cum-Election Officer as quoted above directing the authorised election Officer to undertake recounting of votes and thereafter declare the result on the basis of the recounting is per se illegal and as such the declaration of the result on the basis of the recounting is also illegal.

44. No doubt the State Election Commission has been vested the superintendence, direction and control of election to conduct the elections of the Samitis under section 16(B) of the Orissa Panchayat Samiti Act 1959. It may issue general or special order to ensure free and fair election as provided in Rule 46(E) of the Rules, 1991 but the Commission cannot issue any direction which is contrary to the statutory provisions. The powers of the State Election Commission have been mentioned in sections 16-A and 16-B of the Panchayat Samiti Act. However, the relevant for the purpose of this case is section 16-B which is quoted as under:

"Section-16 (B). Superintendence, direction and control of elections to vest in the Election Commission, (1) the superintendence, direction and control of the preparation of electoral rolls for and the conduct of, all elections to samitis shall be vested in the Election Commission).

(2) In the absence of any provision in this Act or the rules made there under the provisions contained in the Representation of the people Act 43 of 1950 and the representation of the People Act, 1951, shall *mutatis mutandis* apply for the purposes of election to samitis in the following matter, namely :

- (i) Preparation, revision and updating of electoral rolls;
- (ii) appointment of Electoral Registration Officers, Presiding Officers and Polling Officers;
- (iii) qualifications and disqualifications for registration as voter;
- (iv) such other matters which have to be, or may be required to be, deal with for the purpose of conducting free and fair election.

(3) Unless the Election Commission, by order published in the Gazette, directions other wise, so much of the electoral roll of the Assembly constituency for the time being in force as relates to a Samiti constituency shall, subject to such revision or updating as may be necessary, be the electoral roll of the Samiti constituency for the purpose of election to the Samiti.

45. The extra-ordinary powers regarding issue of directions etc. of the Commission has been given in Rule 46-E of the Rule, 1991 which is reproduced as under:

46-E : Extraordinary power of the Commissioner: - If at any time or in any case it appears to the Commissioner that circumstances exist for satisfaction that conduct of free and fair election is likely to be or has been affected the Commissioner may issue general or special order as the circumstances may require to ensure free and fair election."

46. In view of the above, in our opinion, though the Election Commission had full jurisdiction to ensure free and fair elections and it would have supplemented the provisions of the Act and the rules but could not have supplanted the same.

47. The learned District Judge in appeal has not considered the

above provisions of law and only held that as no notice was given to the candidates or their authorised agents before **recounting**, the recounting was bad. The said **finding** of the learned District Judge is not in accordance with law as there is no requirement under the law to issue notice to the candidate or his authorised agent at the place of counting where it is always expected that the candidate or his authorised agent would remain present at the place of counting till the declaration of result. Further it has been stated by O.P.W. 14 in his statement that the decision of the recounting announced through mike. Therefore, It cannot be said that after that a notice in writing was also necessary. Hence the finding of the learned District Judge in this regard is not in consonance with law.

48. There is a catena' of decisions in which the Hon'ble apex Court has held that where patent or flagrant error in procedure or law has crept, the High Court can justifiably intervene under Article 227 of the Constitution. Some of the cases of the apex Court on the point have already been referred to above.

49. In the case of **Kishore Kumar Khaitan and another v. Praveen Kumar Singh** reported in **2006 AIR SCW 1077**, the Hon'ble apex Court in a recent judgment has held that when a court asks itself a wrong question or approaches the question in an improper manner, even if it comes to a finding of fact, the said finding of fact cannot be said to be one rendered to the jurisdiction and it will still be amenable to correction at the hands of the High Court under **Article 227**. **The relevant part of the Hon'ble apex Court's Judgment is reproduced as under;**

"The jurisdiction under Article 227 of the Constitution may be restrictive in the sense that it is to be invoked only to correct errors of jurisdiction. But when a court asks itself a wrong question or approaches the question in an improper manner, even if it comes to a finding of fact, the said finding of fact cannot be said to be one rendered to the jurisdiction and it will still be amendable to correction at the hands of the High Court under Article 227. The failure to render the necessary findings to support its order would also be a jurisdictional error liable to correction. Here the jurisdiction to grant an interim mandatory injunction could be exercised on entering a finding that on the day the order for maintaining the status quo was passed, the plaintiff was in possession and a day after the interim order was passed, he was in fact dispossessed. The interim direction to maintain status quo was an ex parte order. From the order of the Additional District Court it is not possible to come to the conclusion that on a proper advertence to the relevant materials prima facie clear findings had been rendered by that court on these aspects. The prima facie infirmities attached to the letter said to create the tenancy cannot also be ignored, since that transaction is the foundation of the plaintiff's claim of possession,"

50. In the case of **J.D. Jain v. The management of State Bank of India and another** reported in **AIR 1982 SC 673** it has been held by the Hon'ble apex Court that in an application for a writ of certiorari in Article 226 of the Constitution of India for quashing an award of an Industrial Tribunal, the jurisdiction of the High Court is limited. It can quash the award inter alia, when the Tribunal has committed an error of law apparent on the face of the record or when the finding of fact of the Tribunal is perverse.

51. In the case of **Provincial Transport services v. State Industrial Court Nagpur and others** reported **AIR 1963 SC 114** the Hon'ble apex Court has been held that when it appears to an appellate court that no person properly instructed in law and acting judicially could have reached the particular decision the Court may proceed on the assumption that misconception of law has been responsible for the wrong decision. The decision of the Assistant Labour Commissioner that no enquiry had been held by the management amounts therefore, in our opinion, to a clear error in law. The Industrial Court erred in thinking that it was bound by this decision of the Labour Commissioner and this error on its part was, in our opinion, an error so apparent on the face of the record that it was proper and reasonable for the High Court to correct that error.

52. In the case of **Jijabal Vithalrao Gajre v. Pathankham and others** reported in **AIR 1971 SC 315** the Hon'ble apex Court in respect of that limitation of interference by High Court under Article 226 of the Constitution has laid down as under ;

"Mr. Sarangi in support of his first contention has drawn our attention to the principles laid down in *Nagendra Nath Bora v. Commr. of Hills Division and Appeals, Assam*, 1953 SCR 1240 = (AIR 1958 SC 398) and in *Rambhau v. Shankar Singh*, Civil Appeal No. 35 of 1966, D/-17-3-1966(SC). It is no doubt true that this Court has held in those decisions that the powers of the High Court under Article 227 are not greater than the powers under Article 226 of the Constitution. It has been further laid down that the power of interference under Article 227 was limited to seeing that the tribunals function within the limits of their authority and that the High Courts cannot stop appeal against that order of a tribunal in a petition under Article 227. In our opinion, the High Court in this case cannot be considered to have exceeded its jurisdiction under Article 227 of the Constitution. We have already stated that all findings on material facts have been accepted by the High Court. It is only on two material aspects which affect the jurisdiction of the revenue tribunals to grant the necessary relief under the Act that the High Court differed. Those were (i) the power of the mother on the facts found by the tribunals to grant the lease on behalf of her minor daughter and its legal effect; and (ii) the maintainability of the application of the appellant under Section 39 of the Act. Therefore, we cannot accept the contention of Mr. Sanghi that any error has been committed by the High Court in considering these aspects in proceedings under Article 227,"

53. In view of what has been discussed above, we have come to the conclusion that the findings given by the trial court and affirmed by the appellate court on issues no.4 that double stamping by a completely different shape and size rubber stamp has been used to stamp the disputed ballot papers and it is established from the record as well as inspection of ballot papers during the inspection of rejected ballot papers that manipulations were done by using seals or conventional seals on the ballot papers are concurrent findings of fact and no interference is required by this Court therein.

54. With regard to issue nos. 5 & 6, in so far as they relate to the findings of fact, that the result sheet prepared before the alleged recounting wherein the instant petitioner, the opposite party no.1 and the opposite party no.2 had all total 2263, 2269 and 464 valid votes respectively on the basis of the result of polling in different booths submitted by the Presiding Officers is correct and authentic and the same are not liable to be disturbed. The findings on the other issues are also not liable to be interfered with.

55. However, the part of the finding of the trial court on issue nos. 5 & 6 to the effect that the recounting was valid in the eye of law which is based on consideration of the pre-amended law and the part of the order of the learned District Judge in respect of finding that the recounting was vitiated due to non-issuance of notice before recounting are done, in our opinion, were against the law,

However, we substitute in that place that the instructions issued by the State Election Commission vide the above mentioned letter dated 31.08.2001 (Ext.B) and the orders for recounting passed by the Collector-cum-Statutory Election Officer before declaration of the result under sub-rules (3) & (4) of rule-31 of the Rules, 1991



was contrary to the amended provision of sub-rule (7) of rule 31 of the Rules, 1991 and hence the order of recounting at the stage prior to declaration of result as mentioned above was invalid.

56. Although the Hon'ble apex Court In the case of **Mahanta Ram Prakash Dass v. Ramesh Chandra and others** reported in (1999) 9 Supreme Court Cases 420 has held that the smallness of the victory margin may not be sufficient ground for recount but since we have already held that allowing the application for recounting and directing recounting prior to the stage of declaration recording total number of vote's polled by each contesting candidate in form No.14 and declaration of result thereof in accordance with rule (4) of rule 31 illegal, there was' no necessity to consider this aspect in this case.

57. We make it clear that we would not have considered the proposition of law in the matter of recounting of votes as there was already sufficient ground to dismiss the writ application on the basis of the concurrent findings of fact on issue no.4 but since we have seen that a wrong proposition of law was taken by the learned trial court in deciding part of issue nos. 5 & 6 on that basis, we felt it necessary to deal with the proposition of law with the action of the State Election Commission in issuing directions contrary to the statutory provisions and the orders for recounting passed accordingly by the Collector-cum-Statutory Election Officer and to give our decision on the same. However, our decision in this regard also goes against the petitioner.

58. Therefore, in the facts and circumstances of the case, as discussed above, the writ petition devoids merit and is liable to be dismissed with costs.

59. In the result, the writ petition is dismissed with cost which is assessed at Rs.2000/- ( Rupees two thousand). The interim order dated 28.2.2000 passed in Misc. Case No.1661 of 2006 stands discharged.

N. Prusty, J. I agree.

Sd/- I.M. Quddusi, J.  
Sd/- N. Prusty, J.

Orissa High Court, Cuttack.  
Dated 19th May, 2006/ Dutta.