

AGENDA NOTE

**For 16th Meeting of the National Commission for Scheduled Tribes to be held on
17.11.2009**

Sub: Proposal of the Govt. of Orissa for seeking assent of the President of India to the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Amendment Regulation , 2009.

Background

The Govt. of Orissa had sent a proposal to Ministry of Home Affairs in March, 2009 for obtaining the assent of President of India under Sub-paragraph 4 of Paragraph 5 of the Fifth Schedule of the Constitution of India. Secretary, Ministry of Tribal Affairs had sought to discuss the above proposal of the Govt. of Orissa, received by them from Ministry of Home Affairs before sending comments. The proposal alongwith forwarding letter of Ministry of Tribal Affairs was circulated among all Members and Sr. Officers of the Commission vide letter No. 14/6/09/Devl./Orissa/Policy/RU-III dated 03/11/2009.

2. Paragraph 5 of Fifth Schedule of the Constitution is recapitulated for ready reference:

5. **Law applicable to Scheduled Areas.**—(1) Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

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

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

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

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

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

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

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

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

3. It may be noted that Sub-paragraph 2 of Paragraph 5 of the Fifth Schedule empowers the Governor to make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area and such regulations may prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area. In view of this

the Land Transfer Regulations in the States having Scheduled Areas provide total ban on transfer of land from Scheduled Tribes to non-Scheduled Tribes in Scheduled Areas. The Orissa State is also having such a Regulation viz; the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation, 1956 (Orissa Regulation 2 of 1956).

4. The forwarding letter of Govt. of Orissa clearly mention that the said Regulation has been amended from time to time but the problem relating to land alienation still remains partly unsolved for some reasons or the other. Nevertheless, the State Govt. has proposed amendment of the Regulation providing indirect alienation of the tribal land in favour of non-tribals. The proposed amendment, *inter-alia*, provides for transfer of immovable property by the member of Scheduled Tribes for the purpose of securing a loan for agriculture, construction of residential house, higher studies of children, self employment, business or establishment of small scale industries with prior permission in writing from the Sub-Collector in favour of any public financial institution and such land may be sold by public auctioned to the non-ST highest bidder in case his bid is not matched by any ST purchaser. These provisions were not there in the original regulation. It has also been stated that the proposal has been concurred by the Tribes Advisory Council of the State, as provided under Paragraph 5 of the Fifth Schedule of the Constitution.

5. In the above context, it is relevant to mention about two case files in the Commission initiated on the basis of a reference from Ms. Mamta Madhi, ex-MLA and Shri Bhagirathi Majhi presently MLA and ex-MP from Orissa. In both the references, it was stated that the tribals were not able to obtain loan from Banks for educational, housing and entrepreneurship because the Banks were not accepting the land mortgage as the land was not transferable from tribals to non-tribals. In the case file w.r.t. to Ms. Mamta Madhi, State Govt. of Orissa had informed the Commission that the State Govt. has taken the initiative to amend the Regulation. However, State Govt. did not provide copy of the proposed amendment despite reminders by the Commission. The letter from Shri Bhagirathi Majhi, however, mentioned that the State Govt. has already sent the proposal, facilitating mortgage of tribal land to the Public Financial Institutions, to the Govt. of India in the Ministry of Home Affairs but the Ministry of Home Affairs was not clearing the proposed amendment. However, copy of the proposed amendment was not enclosed with the letter received from Shri Majhi. In view of the duty vested with the Commission to safeguard the rights of Scheduled Tribes under the Constitution, under any law for time being in force or under any order of the Govt. the Govt. of Orissa was requested to send a copy of the proposed amendment, particularly w.r.t. the provision under Article 338A (9) of the Constitution whereby it is mandatory on the part of the Union and every State Government to consult the National Commission for Scheduled Tribes on all major policy matters affecting Scheduled Tribes. The State Govt. has, however, not responded to various communications from this Commission.

Examination of the proposal for amendment of the Regulation

6. By the proposed amendment, the State Govt. has envisaged to amend the provision under Section 3(1) and 3(1)(ii) of the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation, 1956 (Orissa Regulation 2 of 1956) as already amended in the year 2000, and also add Explanation III and Explanation IV after Explanation II in Sub-Section (1) of the Regulation. As per the existing provision under Section 3(1) of the Regulation, any transfer of immovable property by a member of a Scheduled Tribe, except by way of mortgage executed in favour of any public financial institution for securing a loan granted by such institution for any agricultural purpose shall be absolutely null and void and of no force or effect whatsoever, unless such transfer is made in favour of another member of a Scheduled Tribe. Proviso (ii) under Section 3(1) of the Regulation further state

(ii) in execution of any decree for realization of the mortgage money, no property mortgaged as aforesaid shall be sold in favour of any person not being a member of a Scheduled Tribe

7. It will be seen from above that the mortgage of land belonging to Scheduled Tribe for the purpose of obtaining loan from a public financial institution for agricultural purpose only, with the above proviso, is permitted under the existing regulation. This proviso does not allow transfer of land from Scheduled Tribe to non-Scheduled Tribe. The amendment carried out in the year 2000 further talk of restoration of land alienated since 1956 and also provide for punishment to the non-Scheduled Tribe having possession of alienated ST land, for not informing the competent authority about the possession. Thus, transfer of land from ST to non-ST was totally prohibited given in the case of realization of mortgage money by a public financial institution.

8. The Govt. of Orissa has now proposed to amend Section 3(1) and also Proviso (ii) under Section 3(1) for allowing transfer of land from a Scheduled Tribe to non-Scheduled Tribe. The proposed Section 3(1) provides that any transfer immovable property by a member of a Scheduled Tribe, except by way of gift or exchange for public purpose or mortgage executed in favour of any public financial institution for securing a loan granted by such institutions for the purpose of agricultural, construction of residential house, higher studies of children, self employment, business or establishment of small scale industry, shall be null and void and of no force or effect whatsoever unless such transfer is made in favour of another member of Scheduled Tribe. The Proviso (ii) is also proposed to be amended by allowing the public financial institution to recover the mortgage money by selling land through public auction to the non-ST highest bidder in case his bid is not matched by a purchaser belonging to a Scheduled Tribe (effectively permitting indirect transfer of the land from ST to non-ST). The new Explanation III, to be inserted in the Regulation, define the term higher studies of children as education intended to be given to the children after their passing of High School Certificate Examination.

9. The Commission has examined the issue of land alienation by tribals in its previous Reports to the President. Relevant extracts from those Reports are enclosed at **ANNEX – I**. The recommendations of the Commission suggested total ban on transfer of land, by whatever manner from a Scheduled Tribe to a non-Scheduled Tribe.

10. After receipt of the proposal in the Ministry of Tribal Affairs, Secretary, Ministry of Tribal Affairs held a meeting on 11/11/2009 with the representatives of Planning Commission, Ministry of Rural Development (Department of Land Resources), Ministry of Panchayati Raj and National Commission for Scheduled Tribes. The recommendations made by National Commission for Scheduled Tribes on the subject in its 1st and 2nd Report suggesting total ban on transfer of tribal lands were referred to in the meeting by the officers of Ministry of Tribal Affairs. The basic objective of making proposal for amendment of the Regulation by the Govt. of Orissa was w.r.t. obtaining loan by a Scheduled Tribe from the public financial institutions. The purposes for loan mentioned in the amendment did not find any merit, since various schemes of State Govt. as well as Government of India were available to meet the needs of the tribals mentioned in proposed Section 3(1). Regarding higher studies (above high school level) the scheme of Government of India PMS, Merit Schemes, Top Class Education for Scheduled Tribes, National Overseas Scholarships were available for all Post Matric Students (including meritorious students), and there was no need for parents of such students to obtain loan for such purposes. As regards raising loan for opening a retail outlets (for various petroleum products) it was a common feeling that in most of the cases relating to retail outlets the ST loanees finally found himself as daily wage earners in the same outlets, generally dispensing the petroleum product/ helper and the land and the business had been transferred in the hand of a non-tribal businessman/ partner. Representative from Ministry of Panchayati Raj had also pointed out that the amendment would contravene the provisions of Clause 4(m) of the Panchayats (Extension to the Scheduled Areas) Act, 1996, vesting the Panchayats with the powers to prevent alienation of tribal lands.

11. In view of above and the recommendations made by the Commission in its earlier Reports, it is proposed that the Commission may not support the proposal of the Govt. of Orissa to amend the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation, 1956 (Orissa Regulation 2 of 1956) as per draft amendment Regulation, 2009. In stead of permitting transfer of tribals's lands it may be possible to facilitated landing for financial institution to Scheduled Tribes through other means like setting up public re-finance institution and Constitution of a National Level Credit Guarantee Fund to provide additional security as has been done for credit facilities extended to micro and small enterprises (note at **ANNEX – II**)