



**PESA IMPLEMENTATION – SOME ESSENTIAL PREREQUISITES
AND SUGGESTIONS FOR THE STATE OF ORISSA**

FINAL REPORT

By
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Table of Contents

1. Introduction:	4
1.1 Devolution of Powers under PESA:.....	4
1.2 Adoption of PESA by the State of Orissa:	5
2. Structure and Function of Gram Sasan	6
2.1 Panchayat law and customary law, social and religious practices and traditional management of community resources.....	6
2.2 Definition of Village and its Gram Sabha:.....	7
2.2.1 Definition of village in Orissa: Legal Issues	7
2.2.2 Notification of Villages as per PESA:.....	8
2.2.3 Orissa Gram Panchayat Act 1964: Gram Sasan and Palli Sabha in a scheduled area:-	9
2.2.4 Presiding Officer of Gram Sabha in Scheduled Areas	10
2.3 Traditions, Customs, customary resources and traditional methods of dispute resolution:.....	10
3. Powers Exclusive to Gram Sabha:	11
3.1 Approve the Plans, Programmes and Projects for Social and Economic Development	11
3.2 Identification or selection of persons as beneficiaries	12
3.3 Power to Issue certification of utilisation of funds	13
4. Powers Exclusive to the Panchayat at Appropriate Level	14
4.1 Planning and Management of Minor water bodies:	14
5. Powers of the Gram Sabha or Panchayat at Appropriate Level	18
5.1 Consultation before Land Acquisition for Development Projects and before resettling or rehabilitating persons affected by such projects	18
5.2 Prior recommendation in granting prospecting license or mining leases for minor minerals as well as grant of concession for exploitation of minor minerals by auction	20



6. Powers to Gram Sabha and Panchayat at Appropriate Level	25
6.1 Enforcing prohibition, regulation or restriction on the sale or consumption of any intoxicants	25
6.2 Ownership of Minor Forest Produce	31
6.3 Prevention of alienation of land in Scheduled Areas and taking appropriate action to restore alienated land to the Scheduled Tribe	37
6.4 Control over Institutions and Functionaries in all Social Sectors	39
6.5 Management of Village Market	41
6.6 Control over money lending	43
6.7 Control over local plans and resources for such plans including tribal sub plans	44
7. Some General Observation in Orissa Panchayati Raj Framework	46



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1. Introduction:

Scheduled areas in India are inhabited by the tribal population who have been managing their natural resources and governing their social, economic and political life through a well- knit system of ancient customs and practices. However, in the wake of modernisation these age old institutions of self governance are fast becoming extinct¹. It is a challenge to usher the tribals in the mainstream of development efforts without disturbing or destroying their cultural identity and socio- economic milieu². To achieve this objective Bhuria Committee was constituted 1994 to examine various dimensions of self rule for tribals, the constitutional requirements and to make recommendations for extending the provisions of the Constitution 73rd (Amendment) Act, 1992 to the Scheduled Areas. Following the recommendations of the committee, the Parliament extended the provisions of 73rd Amendment Act to the Scheduled Areas in the then eight states (now nine states) by passing Provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996 (hereinafter PESA).

1.1 Devolution of Powers under PESA:

PESA legally recognizes the right of tribal communities to govern themselves through their own systems of self-government and also acknowledges their traditional rights over natural resources.

In pursuance of this objective, PESA empowers Gram Sabhas (village assemblies) to play a key role in approving development plans, controlling all social sectors – including the processes and personnel who implement policies, exercising control over minor (non-timber) forest resources, minor water bodies and minor minerals, managing local markets, preventing land alienation and regulating intoxicants among other things.³ Box below highlights the devolution of powers on PRIs in PESA.

1) Mandatory Powers of Gram Sabha

- a. Management of community resources
- b. Approve all plans/projects
- c. Identification of beneficiaries

¹ Self Governance for Tribals, MoRD- UNDP Sub Program on People's Empowerment through Panchayati Raj Institutions in Schedules V Areas and Studies on Law Affecting the Poor, Singh S.K. (ed.), Vol. IV, NIRD.

² Ibid.

³Section 4, Provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996.



d. Issue certificate of utilization of funds

3) Discretionary Powers to Gram Sabha or the Panchayat at appropriate level

- e. Prior mandatory recommendation for acquisition of land and rehabilitation and reconstruction in scheduled areas.
- f. Prior mandatory recommendation for grant of prospective license or lease for mining minor minerals.
- g. Prior mandatory recommendation for grant of concession for exploitation of minor minerals by auction

4) Mandatory Powers to Panchayat at appropriate level

- h. Planning and management of minor water bodies.

5) Powers to Gram Sabha and Panchayat at appropriate level

- i. Ownership of minor forest produce
- j. Control over money lending
- k. Manage and regulate village markets
- l. Control over manufacture, sale and consumption of intoxicants, and
- m. Prevent land alienation and restore alienated lands
- n. Control over institutions and functionaries in all social sectors
- o. To control local plans and resources for such plans including tribal sub plans

1.2 Adoption of PESA by the State of Orissa:

State governments were required to amend their respective Panchayat Raj Acts within a year and not to make any law that would be inconsistent with the mandate of PESA. The State of Orissa amended its Panchayati Raj Legislations in 1997 to incorporate the provisions of PESA within the Orissa Gram Panchayat Act, 1964, Orissa Panchayat Samiti Act, 1959 and Orissa Zilla Parishad Act, 1991 (as amended in 1997), which largely constitutes the Panchayati Raj framework of the State. However, the manner in which PESA provisions have been incorporated in Panchayati Raj framework in Orissa, have been at variance with the letter and spirit of PESA. Besides, parallel provisions exist in other state laws governing the subject matters under PESA, which do not distinguish between a Scheduled Area and a non Scheduled Area. Finally, since the focus nationally is on reviewing the existing approaches to natural resource management in Scheduled Areas and to create an ideal framework for forest and Scheduled Area governance and also various key legislations on forest tribal interface such as new the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, have been enacted, therefore, the PESA framework in Orissa also needs to be updated in the light of national and global developments. With this backdrop, this report presents an analysis of the current status of



PESA implementation in the State of Orissa and our suggestions and recommendation on effective devolution of powers on each of the subject matters of PESA.

2. Structure and Function of Gram Sasan

2.1 Panchayat law and customary law, social and religious practices and traditional management of community resources

- PESA mandates that the state Panchayat Act must be made to ensure that they are in consonance with customary law, social and religious practices and traditional management practices of community resources [**Section 4(a)**]
 - Is there a clear understanding of customary law in scheduled areas? Have they been documented? If not they need to be done as early as possible and clear provision to this effect need to be added in state Panchayat law in a formulation as below:
 - Are the social and religious practices prohibited in any manner in scheduled areas? Are they required to be documented? If yes, then a clear provision to this effect is required in the respective Panchayat law. Two clear examples could be thought of in this regard: a) use of intoxicants b) hunting. While one has been inserted in the PESA, the other is missing (although covered in FRA) Further, hunting is prohibited⁴ as per provisions of the Wildlife (Protection) Act, 1972 with certain exceptions⁵ that are provided within the act. A sample formulation is pasted below which can be used by State Panchayat law.
 - What are the traditional management practices of community resources? And what constitute community resources? A clear provision to document these in the Panchayat law. Further a clear definition (perhaps an inclusive definition of what includes community resource is required). Two sample formulations are given below:
- The Orissa Panchayat laws (at any level) make no reference to customary laws, social or religious practices or traditional management practices of community resources. Although there are well documented customary laws of various Scheduled Tribes of Orissa⁶, this aspect has been missing in the panchayat or any other state law.

The Following provisions needs to be included in the Orissa Gram Panchayat Act, 1964

<i>Insert Section 5 (6-A) in Orissa Gram Panchayat Act, 1964</i>

<i>“(i) Gram Sasan shall document the customary law, social and religious practices and</i>

⁴ Section 9 Wildlife (Protection) Act, 1972

⁵ Section 11 Wildlife (Protection) Act, 1972

⁶ See for example Customary law among the Juang of Orissa by A.K. Adhikary and Customary law of the Bathudi of Orissa by Pashupati Prasad Mahato in Tribal Ethnography, Customary Law and Change/edited by K.S. Singh. New Delhi, 1993, 452 p.; Kandhas too believe in **customary laws** and go by their own codes they generally avoid referring cases to the court of **law**. (www.ankuran.in/target_group.htm); Papers on genetical demography of the Malias of Orissa has been completed by Anthropological Survey of India (<http://education.nic.in/cd50years/12/8I/6D/8I6D0G01.htm>)



traditional management of community resources in their respective jurisdiction and such customary law shall have precedence over other practices as long as they are within the constitutional mandate on similar practice. Such documentation shall be carried out with the aid of State Tribes Research Institute or any specialized authority, institute, institution working in the field of tribal affairs within a period of two years of coming into effect of this provision.

(ii) The state government shall provide aid and assistance to Gram Sasan to carry out such documentation.

Explanation: "Community resources" means and include common lands such as grazing lands, gothans, khalihans, burial grounds, skinning grounds, cattle pounds, thrashing grounds and other such areas of common usage; water commons such as ponds, lakes, water bodies, wetlands; and forest resources such as panchayat forests, village forests, adjoining reserved, protected forests and such traditional forests by whatever name called."

2.2 Definition of Village and its Gram Sabha:

- Central PESA states *"a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affair in accordance with traditions and customs"* [Section 4(b)]

The definition of village has a generic tone of **"ordinarily"** consisting of habitation or group of habitation or a hamlet or a group of hamlet as if there is a possibility of not ordinarily too! The fact has also been that most state legislation while it copies the Central PESA does not delineate the next legal or operational steps of reconstituting the village as per PESA. The definition of village should be more definitive with a "shall" clause deleting "ordinarily" to give a clear message to the states in the Central PESA.

2.2.1 Definition of village in Orissa: Legal Issues

- *The Orissa Gram Panchayat Act, 1964 states that: word "village" includes a revenue village; but in the scheduled area, a "Village" or Grama shall ordinarily consist of habitation or a group of habitations or a hamlet or a group of hamlets comprising a community or communities and managing its affairs in accordance with its customs and traditions. [Section 3 (1)(proviso)].*
- The Orissa Gram Panchayat Act, 1965 has been amended where the Grama or the village has been added in line with PESA as a proviso⁷. Infact, the State has made the definition of village more inclusive. While the Central enactment takes the village community as the basic unit, the Orissa PESA has added 'or communities' in the definition of the village⁸. This addition reflects recognition that villages in scheduled areas need not necessarily be a homogeneous community but could comprise several communities. Though, in this sense the Orissa has gone slightly beyond the mandate of PESA and has shown much more ingenuity in defining the constitution of village, it is also possible that the use of the word "community" without a clear definition gives conflicting signals whether such community includes all the members of the Gram Sabha or particular tribe or clan in such

⁷ See The Orissa Gram Panchayat Amendment Act, 1997; Section 3(1)

⁸ See Proviso to S.3 (1) of the Orissa Grama Panchayat Act, 1965



areas. In our view, this should be avoided and a clear provision may be added by replacing the word community and with adding “all the members of the Gram Sabha or particular tribe(s) in that village who are managing their affairs in accordance with tradition and customs

- Besides, the Gram Panchayat Act gives powers to the state government to cancel the notification constituting a village or to alter the area of a Grama by adding or reducing the number of villages comprised within such Grama [**Section 3(2)**].
- The Act also states that no Grama shall be constituted with a population of less than two thousand or more than ten thousand. This discretion to the State Government especially in Scheduled Areas defeats the purpose of constituting a village at hamlet or group of hamlet level on the basis of customs and traditions of the community.
- The terms “Gram Sabha” and “Village” used throughout in the Act must make a clear reference to the village as defined in the Act by using words such as follows: **“Every such village shall have a Gram Sabha and recognised as such by the concerned Panchayats within which such Village Gram Sabha exists”**

With this backdrop following amendments are suggested:

Proviso to Section 3(1), Orissa Gram Panchayat Act, 1964 -Definition of a Village- shall be amended as:

“provided that in Scheduled Areas, a village shall consist of a hamlet or a group of hamlets comprising the majority tribal members within such village who manage their affairs in accordance with traditions and customs”

Insert proviso in Section 3(2)

“Provided that in Scheduled Areas, the Governor shall cancel the notification constituting a village or altering the area of a village constituted as per PESA only at the request of the members of such village through a duly passed resolution. The procedure to be followed for such cancellation or alteration shall be as mentioned in Section 3 1(A).”

Insert the following exception in Section 3(3)

*“No Grama **“except in Scheduled Areas”**, so far as may be reasonably practicable, be constituted with a population of less than two thousand or more than ten thousand but in no event shall a village be divided and a part thereof be included in a Grama.”*

Insert the following word in Section 4(1), Orissa Gram Panchayat Act, 1964

*“ For every Grama there shall be a Gram Sasan **‘recognised as such by the concerned Panchayats within which such Village Gram Sabha exists’** and which shall be composed of all persons.....electoral roll in respect of the Grama.”*

2.2.2 Notification of Villages as per PESA:

The next step is to notify villages as per PESA. The Governor need to notify such villages at the hamlet or group of hamlets level in consultation with the respective hamlets to know



whether they are comfortable with such an arrangement or not. Here the role of the Collector becomes important to carry out the administrative and legal responsibility. Infact, in most scheduled districts such information is already available for the village level. A simple appellate mechanism or provision of filing objections to such a reconstitution in a time bound manner may be added to make it a fair process.

Insert Section 3(1-A)

“Every such hamlet or group of hamlets constituting a village shall be notified by the Governor.

Provided that the hamlet or the group of hamlets which are managing their affairs in accordance with traditions and customs so submits through a resolution to the Collector who shall then forward it to the State Government for such notification.

Before the resolution is forwarded to the state government the Collector shall cause public notice of the substance of such a resolution to be affixed at convenient places in the hamlet or group of hamlets to be so notified and at office of the District Collector.

Provided further that the Collector may also give an opportunity to any hamlet or group of hamlets to object to any such formation within sixty days of such submission.”

2.2.3 Orissa Gram Panchayat Act 1964: Gram Sasan and Palli Sabha in a scheduled area:-

For every Grama constituted under Section 3, (including in Scheduled Areas) shall have a Gram Sasan or Gram Sabha which shall be composed of all persons registered by virtue of Representation of People’s Act, 1950 in so much of the electoral roll for any Assembly Constituency for the time being in force as relates to the Gram and unless the election commission directs otherwise the said portion of the roll shall be deemed to be the electoral roll in respect of the Grama. [section 4(1)]

Besides, there is a palli sabha constituted at the ward level in Orissa. For every village within the Gram, there shall be constituted by the State Government a Palli Sabha, provided that where the area comprised within a ward constituted for the Grama under section 8 consists of one than one village there shall be only one palli sabha for such ward. [section 6(1)]

The Palli Sabha shall be composed of all persons registered by virtue of Representation of People’s Act, 1950 in so much of the electoral roll for any Assembly Constituency for the time being in force as relates to the area in respect of the Palli Sabha and the said portion of the roll shall be deemed to be the electoral roll of the Palli Sabha .[Section 6(2)]

PESA states that, every village shall have a Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level.

Since as per PESA a village comprise of a hamlet or a group of hamlets, every such village shall have a Gram Sabha. Therefore, in Orissa, in Scheduled Areas the term Gram Sasan and



Palli Sabha should be taken as co-terminus to each other. Therefore, following amendments are recommended;

Insert Section 4(1)(A) in Orissa Gram Panchayat Act, 1964

“Every village constituted as per section 3 in a Scheduled Area shall have a Gram Sabha which may be called Gram Sasan or Palli Sabha as the case may be and shall comprise of members above the age of eighteen and their names included in the electoral list and it shall be recognised as such by the respective Gram Panchayat within which such village Gram Sabha exists.”

Insert exception in Section 6(1) of Orissa Gram Panchayat Act, 1964

“For every village within the Grama “***except in Scheduled Areas***” there shall be constituted by the State Government a Palli Sabha.....”

2.2.4 Presiding Officer of Gram Sabha in Scheduled Areas

Orissa Gram Panchayat Act, 1964 states that the meeting of the Gram Sasan shall be convened by such authority, in such manner and at such time and interval as may be prescribed by the State Government. [Section 4(4)]

The above provision is inconsistent with PESA as PESA intend to give greater autonomy and control to the Gram Sabha in managing its affairs according to its customs and traditions. Whereas the above provision leave the powers of the Gram Sabha subject to rules framed by the State Government. Therefore, to correct this anomaly following amendments are recommended;

Insert proviso in Section 5 (4)

“Provided that the meeting of Gram Sabha or Gram Sasan or Palli Sabha as the case may be in Scheduled Areas shall be presided over by such, a member of the scheduled tribes who is not the Mukhia, Up-Mukhia or member of the Panchayat, and such meeting shall be presided over by a respected person according to the custom usage traditionally prevalent in that area such as Gram Pradhan, or one known by any other name, or by a person proposed by them or unanimously nominated/ supported by the members present in the meeting. There shall be at least two meetings one in February and another in June every year and such other meetings as may be decided by a majority of the members of the Gram Sabha, Gram Sasan or Palli Sabha as the case may be.”

2.3 Traditions, Customs, customary resources and traditional methods of dispute resolution:

- While the assertion of the Act that the Gram Sabha is competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution deserves praise, but what constitute “community resources” (as explained earlier) and what are the accepted customary modes of dispute resolution or atleast the principles that are used for the



adjudication in a traditional mode must be laid down or documented to avoid any confusion. A clear provision in the state law to this effect must be incorporated.

Issues that arise are as follows:

1. Documenting the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution.
2. Issuance of directives by the state government to preserve the traditional and customary ethos.

Orissa Gram Panchayat Act, 1964, provides that in Scheduled Areas, the Gram Sasan shall be competent to safeguard and preserve traditions and customs of the people, their cultural identity, community resources and customary mode of dispute resolution consistent with the relevant laws in force and in basic harmony with basic tenets of constitution and human rights [Section 5(6)].

Rephrase section 5(6) as:

“(i) In Scheduled Areas, the Gram Sasan shall be competent to safeguard, protect and preserve the traditions and customs of the people, their cultural identity and community resources and the customary mode of dispute resolution and specially those documented as per provisions of section 5(6-A) in their respective jurisdiction and also ensure that they are in accordance with the basic principles of the Constitution.

(ii) Every Gram Sabha shall document the customary modes of dispute resolution and/or the general principles that are followed within such customary modes in their respective jurisdiction and such customary modes dispute resolution shall have precedence over other practices as long as they are within the constitutional mandate on similar dispute resolution methods.”

3. Powers Exclusive to Gram Sabha:

3.1 Approve the Plans, Programmes and Projects for Social and Economic Development

The Central PESA mandates that “every Gram Sabha shall approve the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level”

Orissa Gram Panchayat Act, vests in the Gram Sasan, the power to approve plans, programs and projects for social and economic development before such plans programs and projects are taken up for implementation by the Gram Panchayat. **[Section 5(3)(a)]**

Further the Act also provides that it shall be the duty of Palli Sabha at its annual meeting in February each year to give its recommendations to the Gram Panchayat in respect of the development works and programs that may be taken up during the ensuing year by the Gram Panchayat in so far as such matter relates to the Palli Sabha area **[Section 6(6)(a)]**



As mentioned above, since in Scheduled Areas the Gram Sasan and Palli Sabha mean the same, it is recommended that the duty given to the Palli Sabha in section 6(6)(a) may be deleted and the above mentioned formulation (see box) may be added as a specific function for the Gram Sasan / Palli Sabha in scheduled areas in the Orissa Gram Panchayat Act, 1964.

1. *Delete Section 6(6)(a) of Orissa Gram Panchayat Act, 1964*
2. *Insert section 6(6)(a-1) in Orissa Gram Panchayat Act, 1964*
“In Scheduled Areas, each Gram Sasan/ Palli Sabha shall decide criteria for approval of every plans, programs and projects for social and economic development and implemented at the Panchayat level within such Gram Sabha (s) exist. Provided that full and prior information on each such plan, program and project is provided by the project proponent to the Gram Sabha (s) in a language that is easily and commonly understood preferably in a vernacular language.”
3. *Insert section 6(6)(a-2) in Orissa Gram Panchayat Act, 1964, “Every such plan, program and project shall be approved by such Gram Sabha (s) accordingly.*

In addition in Scheduled Areas, the function of preparing plans for economic development and social justice and implementation and supervision of those plan and programs have been entrusted to Gram Panchayat, Panchayat Samiti and Zila Parishad. **[Section 44(3)(a) and (b), Orissa Gram Panchayat Act, 1964; Section 20(1)(a-i and ii) Orissa Panchayat Samiti Act, 1959; Section 3(3)(ii and ii-a) Orissa Zila Parishad Act, 1991]**

However, there is no clear demarcation of the functions of each of the bodies, thus for example, it is not mentioned which of the three tiers of Panchayat shall prepare plans, and which tier shall be responsible for their actual implementation, how will the funds be disbursed, how will approval of the Gram Sasan be taken regarding the plans and programs prepared.

Insert Subsection in Section 44(2) of Orissa Gram Panchayat Act, 1964

“A mandatory consultation with the Gram Sasan be organized by the Gram Panchayat for assessing the social and economic development needs of the village. Thereafter plans and programs to addressing the needs of the village will be prepared by the Gram Panchayat under the supervision of Panchayat Samiti and Zila Parishad and approval of the Gram Sasan shall be taken before they are executed.”

3.2 Identification or selection of persons as beneficiaries

The Central PESA also mandates that *the Gram Sabha shall be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes. [Section 4 (e)(ii)]*

Orissa Gram Panchayat Act vests the function of identifying and selecting beneficiaries under poverty alleviation and other similar programs in the Gram Sasan **[Section 5(3)(b)]**

This provision is in conformity with PESA hence no change is required



3.3 Power to Issue certification of utilisation of funds

Central PESA mandates that “Every Panchayat at the village level shall be required to obtain from the Gram Sabha a certification of utilisation of funds by that Panchayat for the plans, programmes and projects referred to in, clause (e)”;**[Section 4(f)]**

The Orissa Gram Panchayat Act provides that every Gram Panchayat shall have to obtain a certificate of utilization of funds from the Gram Sasan, for the utilization of funds by the Panchayat for the plans programs and projects referred to in clauses (a) and (b) of section 5(3) of the Act.

Additional powers to Gram Sasan in Scheduled areas.

a) Powers to levy charges, fees:

The 1997 amendment Act to the Gram Panchayat Act further includes: consideration of levy of all taxes, rates, rents, and fees and enhancement of rates thereof, all such matters as may be referred to it by the Grama Panchayat for its decision, calling for such information and data from the Grama Panchayat as it considers necessary, and consideration of such other matters as are prescribed⁹.

b) Budgetary powers of Gram Sabha:

Another interesting feature in Orissa PESA concerns the provisions regarding budget. While the central PESA makes no reference to the budgetary powers of the Gram Sabha, in the Orissa PESA the Grama Sabha has the final authority to adopt its own budget- i.e. to consider and approve the annual budget of the Grama Panchayat including the supplementary and revised budget¹⁰.

This provision is in conformity with PESA, hence, no change is required. However, it is important that the format of the utilization certificate shall be developed by the Gram Sabha. Necessary provisions for the same need to be inserted in the abovementioned section as;

Insert the following in proviso to section 5(3)

“Every Gram Sasan shall also develop a format for granting utilisation certificate which shall be formally recognised as such by the respective Panchayat within which such Gram Sabha exists.”

⁹See Section 5 (3)(d)-(h) of the Orissa Grama Panchayat (Amendment) Act, 1997

¹⁰ See Section 5(3)(c) & Section 98(3) of the Orissa Grama Panchayat (Amendment) Act, 1997



Format of Utilization certificate as given in GFR, 2005 modified for use by Gram Sabha

FORM of Form of Utilization Certificate	
Amount:	
Total:	
2. Certified that we the Gram Sasan of Village _____ have satisfied itself that the specifications on which the fund was sanctioned have been duly fulfilled / are being fulfilled and that we have exercised the following checks to see that the money was actually utilized for the purpose for which it was sanctioned.	
Certified that out of Rs. of fund sanctioned during the year in favour of For utilisation towards _____ for which it was sanctioned and that the balance of Rs..... remaining unutilized at the end of the year has been surrendered to, dated	
Certified that we have satisfied ourselves that the conditions on which the funds were allocated have been duly fulfilled / are being fulfilled and that we have exercised the following checks to see that the money was actually utilized for the purpose for which it was sanctioned.	
Signature	(Mukhiya/ Head of Gram Sasan of _____village)
Date	

Note: If this form is accepted then the insertion suggested in proviso to section 5(3) of Orissa Gram Panchayat Act, 1964 shall be deleted.

4. Powers Exclusive to the Panchayat at Appropriate Level

4.1 Planning and Management of Minor water bodies:

The Central PESA mandates as follows: *Planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level; [Section 4(j)]*

Provisions relating to planning and management of water bodies entrusted to Gram Panchayat and Zilla Parishad in Orissa:

Orissa Gram Panchayat Act 1964 states that subject to the provisions of this Act and the Rules made thereunder, it shall be the duty of the Gram Panchayat within the limits of its funds to undertake control and administer and be responsible for matters among others in respect of the Grama:

- *Construction, maintenance and cleaning of drains and drainage works and all public latrines, urinals and similar conveniences and disposal of drain water and sullage.*



- *Construction and maintenance of work and means for supply of water for public and private purposes and regulation of sources of water supply for drinking purposes and storage of water supplied for drinking purposes. [Section 44(1)]*

Subject to the provisions of any other law for the time being in force Gram Sabha shall have control over waterways situated in the Grama not being private property and not being under the control of the central and state government and may do all things necessary for their repair and maintenance such as construct new bridges and culverts, maintain the existing ones, deep or otherwise improve waterways, with the sanction of the prescribed authority undertake small irrigation projects, set apart by public notice any public source of water supply for drinking or culinary purposes and likewise prohibit bathing, washing or clothes and animals or other acts likely to pollute the source of water [Section 49]

Besides, the Act also provides that the Gram Panchayat can through a written notice require the owner of or a person having control over a private water course, spring, tank well which is also used by the public for drinking or culinary purposes to take steps to maintain such source and protect it from pollution. [Section 50(1)]

Similarly, Zilla Parishad has also been entrusted with the undertake schemes and measures including giving financial assistance for the development or water supply, minor irrigation, sanitation among others [Section 3(3)(i)]

From the above mentioned provisions it is clear that there are several inconsistencies in the adaptation of PESA provisions in the state panchayat legislations such as:

- The term minor water body has not been defined or clarified either in PESA or in the State panchayat framework.
- The Orissa Panchayat laws on one hand allocate the power to manage water bodies, supply of water, protecting them from pollution among others to the Gram Panchayat and on the other hand broad powers to undertake schemes and measures including giving financial assistance for the development or water supply, minor irrigation, sanitation among others have been given to Zilla Parishad as well. Clearly, there is overlapping of functions between the two bodies.
- Besides, as mentioned above Gram Sabha has also been given the power to protect and manage its community resources which may include water bodies.

Hence, three institutions have been entrusted with the function of managing water bodies within the panchayat framework. Therefore, to bring in coordination in their functioning their roles have to be clearly defined. Following amendments are recommended:

Insert subsection in Section 2 of Orissa Gram Panchayat Act, 1964

“Minor Water Body means any water body upto 200 hectares.”

Insert clause in Section 44(2)

“Planning and management of minor water bodies upto 10 hectares has been entrusted to the Gram Panchayat.

Explanation I: Planning of minor water bodies shall also include planning and construction



of a new water body

Explanation II: Management of minor water body shall include all works of repair, restoration for maintenance, collection of lease money, levy of water rate, its collection and utilization as per annual plan prepared by Gram Panchayat in consultation with the respective Gram Sabha.”

Insert clause in Section 20(5), Orissa Panchayat Samiti Act, 1959

“Planning and management of minor water bodies between 11to 99 hectares has been entrusted to the Panchayat Samiti.

Explanation I: Planning of minor water bodies shall also include planning and construction of a new water body

Explanation II: Management of minor water body shall include all works of repair, restoration for maintenance, collection of lease money, levy of water rate, its collection and utilization as per annual plan prepared by Panchayat Samiti in consultation with the respective Gram Sabha.”

Insert clause in Section 3(6) in Orissa Zilla Parishad Act, 1991

“Planning and management of minor water bodies between 100 to 200 hectares has been entrusted to the Zilla Parishad.

Explanation I: Planning of minor water bodies shall also include planning and construction of a new water body

Explanation II: Management of minor water body shall include all works of repair, restoration for maintenance, collection of lease money, levy of water rate, its collection and utilization as per annual plan prepared by Zilla Parishad in consultation with the respective Gram Sabha.”

- In addition, Orissa Irrigation Act, 1959 also makes provisions for management of irrigation works and supply of water for irrigation. Irrigation works have been defined as ‘all reservious, tanks, anicuts, dams, wiers, canals, barrages, channels, pipes, wells, tubewells and artesian wells constructed, maintained or controlled wholly or mainly by the state government or any Panchayat Samiti constituted under Orissa Panchayat Samiti Act and Zila Parishad Act, 1959, on behalf of such government for the storage or supply of water. It includes all connected works, embankments, structures, supply and escape channels and all roads constructed for facilitating the construction or maintenance of such reservoirs, tanks, anicuts, dams, wiers, canals, barrages, channels, pipes, wells, tubewells and artesian wells among others’ [See Section 4(9), Orissa Irrigation Act, 1959]

Minor Irrigation work is defined as, “an irrigation work having a cultural command area of not more than two thousand hectares” [Section 4(10-a)]

The Irrigation Act gives the power to the state government to construct and maintain irrigation works, regulate supply of water for irrigation, levy of water rate or water cess, preventing unauthorized use of water, damage to irrigation works, imposing penalty for damaging, obstructing irrigation works among others. However, the Act does not make a distinction of between scheduled and non scheduled areas. In Scheduled Areas, as per



provisions of PESA the power of planning and management of minor water bodies is with the Panchayats at appropriate level, which means that the Panchayat can regulate the supply of water for irrigation from minor water bodies, prevent their unauthorized use, regulate fishing licenses, construct embankments, dykes, boundaries etc. among others. Therefore, irrigation Act needs to be amended to give relevant powers to the Panchayat.

To correct the above inconsistencies, following amendments are suggested.

Insert the definition of Minor Water Body in Section 4

“Minor Water Body means a water body upto 200 hectares.”

Insert proviso in Section 13

“Provided that if an irrigation work, within a Scheduled Area, falls under the definition of minor water body as defined in Section 4 of this Act, the permission to construct, extend, improve or alter shall be taken from the appropriate level of Panchayat as per the size of the irrigation work as mentioned below.

- i. If the size of the irrigation work is upto 10 hectares, then the Gram Panchayat*
- ii. If the size of the irrigation work is 11 to 99 hectares, then the Panchayat Samiti*
- iii. If the size of the irrigation work is 100 to 200 hectares, then the Zilla Parishad.”*

Insert Subsection in Section 20-A(8)

“In Scheduled Area, the Panchayat at appropriate level shall regulate the diversion, collection or consumption of water from minor water bodies as per their respective sizes, for industrial and commercial purposes, prescribe water rates and also penalty for unauthorized use of water or contaminating water sources or for damaging irrigation works”

- The most recent Act to provide for farmer’s participation in the management of irrigation systems that is the Orissa Pani Panchayat Act, 2002 also defines minor irrigation system to mean “an irrigation system under an irrigation project having irrigable commanded area up to 2000 ha. and shall include lift irrigation points and creek irrigation projects”. The Act works on the basis of the distributory system (Warabandi) and farmer’s organization (Pani Panchayat). It does not distinguish between scheduled and non-scheduled areas.

Orissa Pani Panchayat Act, 2002

Insert section 20-A

“In a scheduled Area, anything done under the provisions of this chapter, by any Farmer’s Organisation, in relation to any irrigation work upto 200 hectares which is also a minor water body as provided in Orissa Gram Panchayat Act 1964, shall not be inconsistent with corresponding rules framed by appropriate level of Panchayat depending upon the size of the irrigation work, in the exercise of its power of planning and management of minor water body within the purview of Orissa Gram Panchayat Act, 1964, Orissa, Panchayat Samiti Ac, 1959, Orissa Zilla Parishad Act, 1991, Orissa Irrigation Act, 1959 or any other law as the state government may enact.”



5. Powers of the Gram Sabha or Panchayat at Appropriate Level

5.1 Consultation before Land Acquisition for Development Projects and before resettling or rehabilitating persons affected by such projects

The Central PESA mandates as follows:

- i) the gram sabha or the Panchayats at the appropriate level shall be **consulted** before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level; (**Section 4(i)**)*

Three legal issues emerge here.

- First, what is the legal meaning of consultation in the absence of any definition in the Act.
- Second, what should be the process of such consultation.
- Third, how has the discretion of allocating such power been exercised, given that the state can choose between the Gram Sabha or the Panchayat at appropriate level for allocating such important power where the Gram Sabha is most likely to be affected.

Before, addressing these issues, it is important to examine how has the state of Orissa allocated this power.

In scheduled areas, no acquisition of land for development projects and for resettlement and rehabilitating persons affected by such projects shall be made under any law without prior consultation with the Zila Parishad. [Section 6(b), Orissa Zila Parishad Act 1991]

Orissa Zilla Parishad Act gives the power of mandatory consultation before land acquisition for development projects and for resettlement and rehabilitation of persons affected by such projects to the Zila Parishad. However, neither in PESA nor in any of the panchayat or land acquisition laws of Orissa the term “Consultation” has been defined. “Consultation” as per its Dictionary meaning is an “act of seeking advice or opinion”¹¹ which is non-binding in nature. In other words, the power of mandatory consultation does not give the right to accept or reject the proposal of acquisition or resettlement or rehabilitation, hence is inadequate to secure the rights of the village community affected by the acquisition. Therefore, it is recommended that in Central PESA and subsequently in respective Panchayat laws of Orissa that the term consultation needs to be defined on the lines of “*free and prior informed consent*”.

In light of the above gaps, clearly, the following corrective measures are required:

- First, the term “Consultation needs to be defined on the lines of “Free, Prior and Informed Consent (FPIC) affirmed by international law and standards¹²”

¹¹ Black’s Law Dictionary, 8th ed.

¹² General Recommendation XXIII of the United Nations (UN) Committee on the Elimination of Racial Discrimination, the UN General Assembly’s Plan of Action for the 2nd International Decade of the World’s Indigenous Peoples, International Labor Organization Convention 169 and many other international



- Secondly, as said earlier, the power of mandatory consultation is supposed to be given to either the Gram Sabha or any of the three tiers of Panchayats. In case of Orissa, it is being given to the Zila Parishad. Although, it is not incorrect, for the sake of protecting the rights of the communities, ideally, the village community which is directly affected by the proposed acquisition should have the power to give consent or refuse the proposed acquisition or approve rehabilitation and resettlement schemes. The Gram Panchayat, can facilitate the process of consultation.
- Thirdly, since, as of now, there is no legislation on resettlement and rehabilitation either at the Central level or at the State level, therefore, to implement the provisions of PESA, the National Resettlement and Rehabilitation policy, 2007 needs to be given legal sanctity.

The following amendments are suggested:

1. Delete Section 3(6)(b) of Orissa Zila Parishad Act, 1991

2. Insert Section, 44(3)(c) in Orissa Gram Panchayat Act, 1964,

“In Scheduled Areas, the Gram Panchayat shall facilitate the process of consultation, initiated by the Collector before land acquisition or for approval of resettlement and rehabilitation programs and schemes formulated for affected persons”.

3. Insert Section 5(7) in Orissa Gram Panchayat Act, 1964

“In Scheduled Areas, no acquisition of land or resettlement and rehabilitation of persons affected by such acquisition shall take place without prior consultation with the Gram Sasan and/or the Palli Sabha . The Collector shall convene a meeting of the Gram Sasan and/or the Palli Sabha as per the provisions of Section 5(4) of the Act and carry out a consultation process with the Gram Sasan and/or the Palli Sabha on the proposed acquisition of land or before resettlement or rehabilitation of persons affected by such acquisition.

Provided that Rehabilitation and Resettlement in Scheduled Areas shall be carried out as per the provisions of National Resettlement and Rehabilitation Policy 2007 till the time a new legislation is passed”

Provided that land compulsorily acquired for a project cannot be transferred to any other project or purpose except for a public purpose, without carrying out a fresh and prior consultation with the Gram Sasan and/or the Palli Sabha”

Insert Explanation in Section 5(7), “For the purposes of this Act, Consultation with its cognate and grammatical variations shall mean publicising the acquisition proposal by issuing of public notice in local dailies or by beat of drums in the village and nearby areas, discussion and dialogue with the concerned Gram Sabha, formal written consent of the Gram Sabha after providing full and prior information about the acquisition proposal and its impact on livelihood and conservation.”



Similar enabling provisions may be inserted in Land Acquisition Act, 1894 as applicable in Orissa, through an Amendment Act to make it consistent with PESA and State Panchayat legislations.

Land Acquisition Act. 1894 as applicable in Orissa:

Land Acquisition (Orissa) Amendment Bill, 201..

- **Insert Proviso in Section 4,**
“provided that in Scheduled areas, the smallest revenue administrative unit is a ‘village’ as defined in PESA.”
- **Insert proviso to Section 5-A -,**
“The Collector shall convene a meeting of the of the Gram Sasan and/or the Palli Sabha as per the provisions of Section 5(4) of the Act and carry out a consultation process with the Gram Sasan and/or the Palli Sabha on the proposed acquisition of land or before resettlement or rehabilitation of persons affected by such acquisition”
Rehabilitation and Resettlement in Scheduled Areas shall be carried out as per the provisions of National Resettlement and Rehabilitation Policy 2007 till the time a new legislation is passed”

5.2 Prior recommendation in granting prospecting license or mining leases for minor minerals as well as grant of concession for exploitation of minor minerals by auction

Central PESA states that : *The recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospective license or mining lease for minor minerals in the Scheduled Areas; (Section 4(k))*

Central PESA states that *“the prior recommendation of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory for grant of concession for the exploitation of minor minerals by auction”*; (Section 4(l))

In Orissa, the power to grant prospecting licence or mining lease for exploitation of minor minerals has been given to the Zilla Parishad.

“No prospecting licence or mining lease for minor minerals or concession for exploitation of minor minerals by auction shall be granted under any law on or after the commencement of the Orissa Zilla Parishad (Amendment) Act, 1997, except with the prior recommendation of the Parishad.” [Section 3(6)(a), Orissa Zilla Parishad Act, 1991].

- PESA only makes recommendation of the Gram Sabha or the Panchayat at appropriate level mandatory, prior to the grant of prospecting licence or mining lease for minor minerals or for grant of concession for the exploitation of minor minerals by auction in the Scheduled Areas. However, in law, recommendation is in the nature of opinion or view and is not binding on the party. Therefore, in order to adequately protect the interest and resources of the Gram Sabha, recommendation may be replaced with **“Free and Prior Informed Consent”**
- Besides, ideally, the power of free and prior informed consent in case of grant of mining leases shall be given to Gram Sabha instead of Zilla Parishad. It is important to ensure



participation of the communities directly affected by mining operations in the decision making process.

Suggested Amendments:

Orissa Gram Panchayat Act, 1964

Insert Subsection in Section 5(8)

The Free, prior and informed consent of the Gram Sasan and/or the Palli Sabha shall be made mandatory prior to grant of quarry lease or quarry permits or prospecting licences for exploitation of minor minerals in the Scheduled Areas and also for grant of concession for the exploitation of minor minerals by auction.”

Explanation: Free, prior and informed consent with its cognate and grammatical variations shall mean publicising the proposal for mining or quarrying by issuing of public notice in local dailies or by beat of drums in the village and nearby areas, discussion and dialogue with the concerned Gram Sasan, formal written consent of the Gram Sasan after providing full and prior information about the mining/quarrying proposal and its impact on livelihood and conservation.

(2) Every application for renewal or transfer of quarry leases, quarrying permit, or for concession shall be treated as a fresh application and a free, prior and informed consent of the Gram Sasan and/or the Palli Sabha is mandatory.

(3) The Gram Sasan and/or the Palli Sabha shall also maintain a record of the mining leases, quarrying permits, concessions for exploitation of minor minerals by auction for which consent has been given.

(4) Gram Sasan and/or the Palli Sabha may take assistance from Gram Panchayat, Panchayat Samiti or Zilla Parishad as the case may be in carrying out its functions under this section.

Explanation:

The Gram Sasan and/or the Palli Sabha shall have the authority to accept or reject the application of mining leases, quarrying permits and for concessions for exploitation of minor minerals by auction, prescribe or alter the rate of royalty/rent, promote competitive bid, prescribe conditions for mining leases, alter the area proposed for mining and period of such lease, renewal of mining leases, quarrying permits or concession for exploitation of minor minerals by auction”

Orissa Zilla Parishad Act 1991:

Delete section 3(6)(a) and instead insert,

“ The Zilla Parishad shall assist the Gram Sasan and/or the Palli Sabha in carrying out its functions regarding grant of prospecting licenses, quarry lease, quarry permit of minor minerals or concessions for exploitation of minor mineral by auction as prescribed in Section 5(8) of Orissa Gram Panchayat Act, 1964 and Orissa Minor Minerals Concession Rules, 1990”



Orissa Gram Panchayat Act, 1964,

Insert Subsection in Section 44,

“Gram Panchayat shall assist the Gram Sasan and/or the Palli Sabha in carrying out its functions regarding grant of prospecting licenses, quarry lease, quarry permit of minor minerals or concessions for exploitation of minor mineral by auction as prescribed in Section 5(8) of this Act and Orissa Minor Minerals Concession Rules, 1990”

Orissa Panchayat Samiti Act, 1959

Insert Subsection in Section 20,

“Panchayat Samiti shall assist the Gram Sasan and/or the Palli Sabha in carrying out its functions regarding grant of prospecting licenses, quarry lease, quarry permit of minor minerals or concessions for exploitation of minor mineral by auction as prescribed in Section 5(8) of Orissa Gram Panchayat Act, 1964 and Orissa Minor Minerals Concession Rules, 1990”

- **Orissa Minor Mineral Concession Rules, 1990:**

The term “minor mineral” has to be understood in the context of Mines and Minerals (Regulation and Development) Act, 1957. Section 3 (e) defines minor minerals to mean building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purpose and any other mineral which the Central Government may, by notification in the Official Gazette, declared to be a minor mineral. At the state level ordinarily Minor Mineral Concession Rules are notified for regulating the grant of quarry leases, mining leases or other mineral concessions. The Orissa Minor Mineral Concession Rules, 1990 has been enacted under the Mines and Minerals (Regulation and Development) Act, 1957. First of all there seems to be no provision under this law for prospecting. Instead there are provisions for grant quarry leases. The government has been given omnibus powers to regulate grant of quarry lease and quarry permits for extraction of minor minerals, payment of royalty and rent, specifies the maximum area to be granted for mining, specifies the period of lease, conditions of quarry lease and permits, regulates auction of minor minerals among others.¹³ The application for quarry leases or permit have to be made to the competent authority which may be the revenue department, PCCF, relevant authority in the Steel and Mines Department or the Director of Mining and Geology as prescribed in the Rules.¹⁴ Notably the Rules also provide that extraction, collection and/or removal of minor minerals by a person from his own land for normal agricultural operations or other *bonafide* domestic consumption shall not be construed as quarrying operations¹⁵. Although, the Rules does not make any distinction between scheduled and non-scheduled areas, or provide for the authority of Gram Sabha or Panchayat to make recommendations before grant of quarry lease and permits as per PESA. In this case, relevant amendments need to be incorporated in the Rules to make them consistent with PESA and Orissa Panchayat legislations.

¹³ See rules 4, 5, 8, 18, 22 of Orissa, Minor Mineral Concession Rules, 1990.

¹⁴ See rules 5 and 18, Orissa, Minor Mineral Concession Rules, 1990.

¹⁵ Section 3 of the Orissa Minor Minerals Concession Rules, 1990.



- **Administrative Response on Minor Minerals**

While there are no direct references to exploitation of minor minerals in scheduled areas, the Department of Steel and Mines has come up with the “Policy on Grant of Mining Lease and Transfer of Land for Commercial Projects in Scheduled Areas in 2003”¹⁶. The Policy was in response to the Supreme Court judgment dated 11th July, 1997 in *Samatha v State of Andhra Pradesh* where the Supreme Court observed that the Committee of Secretaries should be constituted to look into the issues discussed in the *Samatha* case in such states where total prohibition of grant of mining lease to non-tribals in scheduled areas does not exist.

The state cabinet took the following Policy decisions in respect to mining in scheduled areas. Note that the Policy or the cabinet does not distinguish major or minor minerals in respect of scheduled areas. Firstly, operation of mining lease in scheduled area should bring about encouraging socio-economic development of the tribal population. Secondly, in case land is acquired for mining industry in a scheduled area, and in order to protect the interest of tribal land, the said *mining industry should earmark up to 5% of their equity towards preferential equity shares of the company for the displaced tribal persons based on the value of their land acquired for the project. The amount of preferential equity share thus issued should however be limited to the compensation received by the oustee, subject to the amount being not less than the minimum tradable lot*”.

Finally, *“5% of the net annual profit accrued in the project should be spent for the development of health, education, communication, irrigation and agriculture of the said scheduled area within a radius of 50 kms. The amount should be spent through Societies / Trusts constituted at the district / divisional level headed by respective Collectors R.D.Cs”*.

Suggested Amendments:

Orissa Minor Mineral Concession Rules, 1990

Insert Sub- Rule in Rule 2, Minor Minerals “.....

Insert Rule 3(4),

“In a Scheduled Area, no quarry lease or quarry permit shall be granted without taking free, prior and informed consent of the Gram Sasan or Gram Sasans in case of the proposed mining area falls within the territorial jurisdiction of two or more Gram Sasans

Explanation:

Free, prior and informed consent shall with all its cognate and grammatical expressions shall mean as defined in Explanation to Section 5(8) of Orissa Gram Panchayat Act, 1964.”

Insert sub-rule in Rule 6

“If the proposed mining area falls within a Scheduled Area, after receipt of the application for mining leases the Competent Authority shall inform the Gram Sasan or Gram Sasans as the case may be, within whose jurisdiction the proposed area of mining falls, about the particulars of such application. Thereafter, the Competent Authority along with the Applicant shall organize a consultation with the Gram Sabha or Gram Sabhas as the case may be and inform about the conditions of quarry leases, area proposed for mining, period of lease, rehabilitation and resettlement plan for the persons displaced by proposed mining

¹⁶ See Notification No. S.R.O. No. 37 / 2004 dated 15th January 2004. In Orissa Gazette, dated February 20, 2004



operations and such other relevant information sought by the Gram Sasan. The Gram Sasan shall then, through a resolution decide on the proposal and inform its decision to the Competent authority which shall be binding on the Competent Authority and the Applicant.”

Insert Sub-Rule in Rule 8

“The location and size of the Area proposed for exploitation of minor minerals in Scheduled Areas shall be approved by the Gram Sasan or Gram Sasans as the case may be.”

Insert Sub-Rule in Rule 9,

“Free, prior and informed Consent of the Gram Sabha shall be mandatory on every application for renewal of mining lease in Scheduled Areas”

Insert Sub rule in Rule 12,

“Free, prior and informed Consent of the Gram Sasans shall be mandatory on every application for transfer of mining lease in Scheduled Areas.”

Insert sub rule in Rule 13

“Rent and Royalty for mining in Scheduled Areas shall be decided in consultation with the Gram Sasan. Such Rent and Royalty received from mining leases or quarrying permits shall be shared with the Gram Sasan or Gram Sasans in such proportion as decided by the Mining Department of Orissa and the Gram Sasan and Gram Sasans.”

Insert sub rule in Rule 14

“The Gram Sabha may impose such other conditions, alter of modify prescribed conditions for mining leases in scheduled areas, as it deems necessary”

Insert sub-rule in Rule 16

“Applicant seeking mining leases for exploitation in Scheduled Areas shall prepare a rehabilitation and resettlement scheme in the format prescribed by the Competent Authority, for persons affected by the proposed mining operations and present the same to the Gram Sasan for approval under Rule 6. The Gram Sasan shall consider the scheme and pass a resolution approving, rejecting or modifying the same.”

Insert Sub- rule in Rule 18,

“Free, prior and informed Consent of the Gram Sabha shall be mandatory as per the procedure prescribed in the Rules on every application for quarrying permit in Scheduled Areas”

Insert Sub Rule in Rule 18

“If the proposed mining area falls within a Scheduled Area, after receipt of the application for quarry permit, the Competent Authority shall inform the Gram Sasan or Gram Sasans as the case may be, within whose jurisdiction the proposed area of mining falls, about the particulars of such an application. Thereafter, the Competent Authority along with the Applicant shall organize a consultation with the Gram Sabha or Gram Sabhas as the case may be and inform about the conditions of quarry permit, area proposed for mining, period of lease, rehabilitation and resettlement plan for the persons displaced by proposed mining operations and such other relevant information sought by the Gram Sasan. The Gram Sasan shall then, through a resolution decide on the proposal and inform its decision to the



Competent authority which shall be binding on the Competent Authority and the Applicant.”

Insert Sub rule in Rule 20

“the Gram Sasan may impose such other conditions, alter or modify prescribed conditions for quarrying permits in scheduled areas, as it deems necessary”

Insert sub rule in Rule 24

“Revenue generated from penalty levied for unauthorized extraction and removal of minor minerals in scheduled areas shall be shared with the Gram Sasan or Gram Sasans in such proportion to be decided by the Mining department in concurrence with the Gram Sasan(s).”

6. Powers to Gram Sabha and Panchayat at Appropriate Level

6.1 Enforcing prohibition, regulation or restriction on the sale or consumption of any intoxicants

The Central PESA mandates that *“While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with, among others, the power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant [Section 4m(i)].*

In Orissa, the power to enforce prohibition, or to regulate or restrict the sale and consumption of any intoxicant in a Scheduled Area has been given to the Gram Panchayat. Further, in the exercise of this power, the Gram Panchayat shall function under the control and supervision of the Gram Sasan [Section 44(2)(a), Orissa Gram Panchayat Act, 1964]

- While the study of the excise laws dealing with intoxicants reveals that the substantial powers in this respect have been vested in government. The ***Bihar & Orissa Excise Act, 1915***, confers all the powers in respect of granting licenses for manufacture, possession and sale of any intoxicants to the Collector¹⁷. Further it is the duty of the state to regulate import¹⁸, export and transport¹⁹ of the intoxicants in the State. Thus we see that the State officials enjoy the overall control over the sale and consumption of intoxicants. However the Act casts a duty on the Panchayats to give information about the unlicensed manufacture of any intoxicant,²⁰ but the action against such erring persons shall be taken by the State officials.
- In scheduled areas of Orissa this power needs to be granted to the Gram Sabha along with the Panchayat at Appropriate Level depending on the area of influence. ***The Bihar and Orissa Excise Act, 1915*** need to be amended as follows through an amendment Act.

¹⁷ Secs 13-20

¹⁸ Sec 9

¹⁹ Sec 11

²⁰ Sec 76



Insert Chapter IV-A

Regulating Manufacture, Sale, Consumption, possession of Intoxicants in Scheduled Areas

“Notwithstanding anything contained in any part of this Act or rules framed thereunder, from the day of coming into force of this amendment, the provisions of this Chapter shall be applicable to Scheduled Areas of Orissa. All acts done previously under the provisions of this Act in Scheduled Areas shall be deemed to have been done under the provisions of this Chapter.

- a. In the Scheduled Areas, no licence for manufacture, possession or sale, or any exclusive privilege for manufacture or sale, of any intoxicant, establishment of breweries, distilleries and warehouses shall be provided, without the prior approval of the Gram Sasan. The Competent Authority to grant license for the sale, possession or manufacture of any intoxicant shall refer every proposal to the concerned Gram Panchayat along with the respective Gram Sasan within that jurisdiction for their decision, within thirty days from the date of receipt of such a reference. The Gram Panchayat along with the concerned Gram Sasan shall intimate their decision within thirty days thereafter. The competent Authority shall ensure that such intimation has been sent and also a response received conveying the decisions of the Gram Panchayat as well as the respective Gram Sasan.*
- b. Where the intoxicant is manufactured for personal consumption in the village, the Gram Sasan shall specify the quantity allowed to be manufactured per household, stored and possessed in consultation with the Collector.*
- c. The Gram Sasan shall specify the quantity for retail sale and wholesale of any intoxicants in the village in consultation with the Collector.*
- d. The Gram Sasan shall specify the licensing fee and other conditions for manufacturing intoxicants for commercial purposes only and their sale in consultation with the Collector.*
- e. The Gram Sasan shall specify the area for setting up of distilleries, breweries, outlets for sale and warehouses for intoxicants within the village in consultation with the Collector.*
- f. The Gram Sasan shall also specify the terms and conditions for employment of women and children in the manufacturing units in consultation with the Collector,*
- g. The Gram Sasan shall also specify the terms of lease, rent, time of opening and closing of retail and wholesale outlets within the village and such other conditions as the Gram Sasan may deem necessary to prescribe from time to time in consultation with the Collector.*
- h. The revenue generated from payment of licensing fee, rent, penalty shall be deposited in the funds of the Gram Sasan and shall be used for the development of the village.*
- i. The Gram Sasan shall maintain a register, to record the particulars of the licensee, manufacturing unit, retail and wholesale outlets operating in the village, terms and period of license, renewal of licenses and such other particulars as the Gram Sasan may deem necessary.*
- j. The Gram Sasan may impose prohibition on the manufacture, sale, consumption, possession of many intoxicants within the village in consultation with the Collector.*
- k. In case of violation of any of the conditions of the license or rules framed by the Gram Sasan regarding manufacture, sale, consumption or possession of any intoxicants, the Gram Sasan shall after giving the licensee a reasonable opportunity of being heard,*



impose a penalty or any other restriction as prescribed by it and shall also have the power to cancel the license. After passing a resolution to impose a penalty or cancel the license, or impose any other restriction, the Gram Sasan shall send a copy of its resolution to the Competent Authority which issued the license, and to the Gram Panchayat. The Competent Authority shall proceed to act on the decision of the Gram Sasan and recover the penalty or cancel the license of the manufacturer or the retailer or impose any other restriction specified by the Gram Sasan in its resolution, within one month of receiving the resolution of the Gram Sasan. The Gram Panchayat shall assist the Gram Sasan to carry out all functions mentioned in this Chapter”

Insert Subsection in Section 89

“For regulation of Intoxicants in Scheduled Areas, the Gram Sasan shall make rules for grant of license for manufacture and sale of intoxicants, duration of licenses, terms for renewal of licenses, fix the number of manufacturing units or retail outlets to be set up in the village, places for establishing manufacturing units or retail outlets, time of opening and closing of liquor shops, prohibition on sale manufacture and sale of certain intoxicants in the village, restriction on the quantity or retail sale of intoxicants, prohibition on sale of intoxicants to certain persons and such other rules as the Gram Sasan deems necessary. Gram Panchayat shall organise a meeting of the Gran Sasan for framing rules for regulating the above mentioned activities.”

Insert Section 89 A

“If any rule framed by the State Government for regulation of intoxicants within the purview of this Act, so far as it is applicable to Scheduled Areas, is inconsistent with a corresponding Rule(s) framed by the Gram Sasan or Gram Sasans, in that case the said rule(s) framed by the Gram Sasan or Gram Sasans shall supersede the one framed by the State Government.”

Insert Proviso in Section 94:

“provided that in Scheduled Areas, no intoxicant shall be exempted by the State Government from the purview of this Act except with the prior approval of the Gram Sasan”

Orissa Excise Privilege Rules. 1970

Insert Sub Rule in Rule 3

“Where the area of exclusive privilege falls is a Scheduled Area, the public notice shall be affixed at conspicuous places in all the villages falling within that area. A copy of the notice along with the application of exclusive privilege shall be sent to the Gram Sasan(s) and the office of Gram Panchayat(s). Within fifteen days of receipt of the public notice, the Gram Sasan shall organise a meeting to take decision on the application of exclusive privilege and invite objections from the people. A resolution shall be passed accepting or rejecting the application within a specified period. A copy of the resolution shall be sent to the Collector and the respective Gram Panchayat(s).”

Insert sub rule in Rule 4

“The Collector, before granting exclusive privilege under Section 22 of the Act for any Scheduled Area shall seek approval from the Gram Sasan or Gram Sasans of the all the



villages falling within that area. If the Gram Sasan rejects the application for exclusive privilege, the Collector shall not grant approval on the application. Where in case of two or more Gram Sasans, one of the Gram Sasans in the area of proposed exclusive privilege rejects the application, the Collector shall proceed to exclude that village from the purview of exclusive privilege and proceed with the settlement of the Privilege for the remaining area.”

Insert Sub Rule in Rule 5

“Where an exclusive privilege for manufacture or retail sale of country liquor or for both or for retail sale of any intoxicating drug is granted in a Scheduled Area, fifty percent of the consideration received shall be deposited in the funds of the Gram Sasan.”

The Orissa Excise (Exclusive Privilege) Foreign Liquor Rules, 1989

Insert Sub-rule in Rule 3,

“Where the area of exclusive privilege falls is a Scheduled Area, the public notice shall be affixed at conspicuous places in all the villages falling within that area. A copy of the notice along with the application of exclusive privilege shall be sent to the Gram Sasan(s) and the office of Gram Panchayat(s). Within fifteen days of receipt of the public notice, the Gram Sasan shall organise a meeting to take decision on the application of exclusive privilege and invite objections from the people. A resolution shall be passed accepting or rejecting the application. A copy of the resolution shall be sent to the Collector and Gram Panchayat.”

Insert sub- rule in Rule 4

“The Collector, before granting exclusive privilege under Section 22 of the Act for any Scheduled Area shall seek approval from the Gram Sasan or Gram Sasans of the all the villages falling within that area. If the Gram Sasan rejects the application for exclusive privilege, the Collector shall not grant approval on the application. Where in case of two or more Gram Sasans, one of the Gram Sasans in the area of proposed exclusive privilege rejects the application, the Collector shall proceed to exclude that village from the purview of exclusive privilege and proceed with the settlement of the Privilege for the remaining area.”

Insert Sub Rule in Rule 6

“Where an exclusive privilege for sale of foreign liquor is granted in a Scheduled Area, fifty percent of the consideration received shall be deposited in the funds of the Gram Sasan.”

Excise (Mohua Flower) Rules, 1976

Insert proviso in Rule 3

“provided that, prior to Collection of Mohua Flower from any trees within a Scheduled Area, permission of the Gram Sasan of that village or villages shall be taken”

“provided that in Scheduled Areas, the limit of retail sale shall be fixed by the Gram Sasan in consultation with the Collector”

Insert proviso in rule 4

“provided that in Scheduled Areas the permission for storing beyond the permissible quantity



for a period not exceeding a year, shall be taken from the Gram Sasan in consultation with the Collector”

Insert Sub Rule in Rule 5:

“On receipt of the Application under Rule 4, for storage of Mohua beyond permissible limits in Scheduled Areas, the Collector shall send the application within 15 days, to the Gram Sasan for its decision. The Gram Sasan shall organise a meeting and pass a resolution accepting or rejecting the application. In case the application is accepted, the Gram Sasan shall specify the place and premises where mohua flower is to be stored or possesses, total quantity of Mohua flower to be stored or possessed at any one time, the purpose for which the Mohua flower to be utilised and the period which shall not exceed more than one year for which the permit shall remain valid. The copy of the resolution shall be forwarded to the Collector. The Collector shall on receipt of the resolution complete the requisite formalities as per the provisions of the Rules”

Insert proviso in Rule 12(2)

“provided that for sale of Mohua flowers in Scheduled Areas, the license shall not be issued by the Collector without seeking prior approval of the Gram Sasan or Gram Sasans concerned. Gram Sasan shall pass a resolution accepting or rejecting the applicable for license and impose such conditions as it deems fit on the sale of Mohua flowers”. A copy of the Resolution shall be forwarded to the Collector and the Gram Panchayat. The Collector shall proceed to issue a license on the conditions imposed by the Gram Sasan if any”

Insert sub rule in Rule 14,

“Where Mohua flower is sold in Scheduled Areas, by any firm , person, cooperative society or Government establishment, details of monthly sales shall be submitted to the Gram Sasan at the end of every month”

Insert amendment in rule 15(1)

“In addition, in Scheduled Areas, the Gram Sasan and Gram Panchayat shall also have the power of inspecting any place or premises or accounts”

The Board’s Excise Rules, 1965

Insert sub rule in Rule 5

“Where any distillery is proposed to be opened in a Scheduled Area, on the receipt of such application, the Collector shall send the application for approval to the Gram Sasan(s) concerned in whose village or villages the distillery is proposed to be opened. The Gram Sasan shall pass a resolution approving or rejecting the application or imposing such conditions as it deems necessary, within 30 days of the receipt of the application by the Collector. The Resolution shall be forwarded to the Collector and the Gram Panchayat. Thereafter, the Collector shall proceed to act on the decision of the Gram Sasan. No license for opening a distillery in the Scheduled Areas shall be granted without the approval of the Gram Sasan(s) concerned.”

Insert Sub rule in Rule 61

“License for sale of denatured spirit in Scheduled Areas shall be granted by the Collector on the approval of the Gram Sasan in the manner prescribed in Rule 5.



Insert proviso in Rule 88

“provided that for cultivation and manufacturing of Ganja in Scheduled Areas, the Collector shall not allow such cultivation or manufacture without seeking prior approval of the Gram Sasan where Ganja was proposed to be cultivated or manufactured and such cultivation or manufacture is deemed necessary for medicinal purposes”

Insert Sub rule in Rule 89(1)

“If the cultivation and manufacture of Ganja is proposed in Scheduled Areas and only if such cultivation or manufacture is deemed necessary for medicinal purposes, the Commissioner shall issue a public notice and cause it to be affixed at all conspicuous places in all the villages falling within the proposed Scheduled Area and also send a copy to all the Gram Sasans falling within that area inviting their objections on such a proposal within 1 month of issuing public notice.

Gram Sasan shall pass a resolution accepting or rejecting the proposal of cultivation or manufacture of Ganja within its village and send a copy to the Collector.

The Collector shall proceed to act on the resolution of the Gram Sasan. If the proposal is rejected, the Collector shall exclude that village from the purview of the proposal and issue a fresh public notice specifying the Area for manufacture and cultivation of ganja.”

Orissa, Narcotic Drug and Psychotropic Substances Rules, 1989

Insert Sub rule in Rule 4

“The Collector shall not allow an application for selling poppy straws in a Scheduled Area without the prior approval of the Gram Sasan (s) concerned.

The Collector shall forward the applications received for sale of poppy straws to the Gram Sasan(s) concerned for approval within one month of their receipt. The Gram Sasan shall pass a resolution approving or rejecting the application or imposing such conditions as it deems necessary, within one month of receipt application and forward the copy of the Resolution to the Collector. The Collector shall thereafter proceed to act on the decision of the Gram Sasan.”

Insert proviso in Rule 20

“provided that in case a person residing in a village in a Scheduled Area is applying for license for personal consumption of opium the permission shall be taken from the Gram Sasan concerned.”

Insert proviso in Rule 24

“provided that in Scheduled Areas, the Gram Sasan shall specify the areas for establishment of depots for sale of Ganja.”

Insert Proviso in Rule 44

“provided that in case a person residing in a village in a Scheduled Area is applying for license for personal consumption of intoxicants, the permission shall be taken from the Gram Sasan concerned.”



Orissa Opium Smoking Rules, 1965

Insert Rule 25

“In Scheduled Areas, smoking and possession shall be allowed with the permission of the Gram Sasan. If any person is found in possession of opium or smoking opium against the order of the Gram Sasan, the Gram Sasan shall levy a penalty and shall inform the Collector.”

Orissa Opium Rules, 1965

Insert proviso in Rule 13

“Provided that in Scheduled Areas, the selling price of opium shall be decided by the Gram Sasan in consultation with the Collector.”

6.2 Ownership of Minor Forest Produce

Regarding Minor Forest Produce, the Central PESA provides ... *“While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the ownership of minor forest produce; [Section 4(m) (ii)]*

Besides, Forest Rights Act, 2006 (FRA) gives the right of ownership, access to collect, use and dispose of minor forest produce which has been traditionally collected within or outside village boundaries. Both FRA and PESA are key legislations of Scheduled Area governance, therefore they need to be read together. PESA endows ownership of MFP but is silent on other aspects like access and use.

In Orissa, subject to the control and supervision of Gram Sasan, the Gram Panchayat shall exercise within its local limits ownership over minor forest produce. However, the manner of exercising the power and its extent shall be prescribed by the State Government. [Section 44(2)(b), Orissa Gram Panchayat Act, 1964]

- The ownership of minor forest produce has been vested in the Gram Sasan and the Gram Panchayat. The functions carried out by the Gram Panchayat by virtue of its ownership rights over minor forest produce shall be controlled and supervised by the Gram Sasan as well the instructions issued by the State Government. PESA does not impose any condition on the enjoyment of ownership rights over MFP. Therefore the clause which makes the exercise of the right subject to instructions from the State Government shall be removed.
- Government of Orissa notified minor forest produce in the Orissa Gram Panchayats (Minor Forest Produce Administration) Rules, 2002. It explains Minor Forest Produce as any or all of the Minor Forest Produces specified in the Schedule appended to the Rules. There are 69 items listed in the Schedule. The Panchayat Rules of 2002 among others, also states that the Gram Panchayat shall have the power to regulate - obtaining and trade of minor forest produce whether it is cultivated in the land of the Government and forest lands within the limits of the Gram, or gathered from the Reserve Forests and taken into the Gram.



- The Vana Samrakshana Samiti shall have the power to regulate the collection and trading of minor forest produce, if formed in the village²¹. Further if any individual who wishes to obtain Minor Forest Produce from the primary gatherers within the limits of the Gram, in the course of any year of trading, shall register himself as a trader in the Minor Forest Produce in the Gram Panchayat. It is clear from the above analysis that the two key authorities that regulate procurement or collection are the Gram Panchayat and the Van Samrakshana Samiti. It is for the first time that any Panchayat legislation has given central role to the Vansamrakshana Samiti. This legitimizes the role of the VSS from the constitutional perspective. Under the constitutional authority of the Panchayats the VSS has been given the power to regulate the collection and trade of MFP.

a) Price of forest produce

Under the Orissa Gram Panchayats (Minor Forest Produce Administration) Rules, 2002 the Panchayat Samiti has been empowered to decide, by way of a resolution, the minimum price of procurement of various Minor Forest Produces payable to the primary gatherers in the course of the trading year. Such prices which are fixed by the Panchayat Samiti shall be applicable to all the Gram Panchayats in that block²². Some procedures have also been prescribed under the said Rules.

These Rules do not mention any role of the Gram Sasan in regulating, the access, collection, use and disposal of minor forest produce as envisaged in PESA. Therefore, the Gram Panchayat Act needs to be amended in the following manner.

Delete the following from Section 44(2), Orissa Gram Panchayat Act

“in such manner and to such extent as may be prescribed”

In consonance with Central PESA, The above provision in Orissa Gram Panchayat Act shall be amended as:

Section 44(2)(b)

“To own and have right of access to collect, use and dispose of minor forest produce within and outside the village boundaries where members of Gram Sasan of a village have had traditional access.

The Gram Sasan shall prepare a list of minor forest produce that are of important for the livelihood of the people of the village and send a copy of it to the Gram Panchayat and the Forest Department each. The Gram Sasan shall also have the power to revise this list to include or exclude any minor forest produce, as and when it may deem necessary and having due regard to its sustainability.

Explanation – for the purposes of this section, “Minor Forest Produce” includes all non-timber forest produce of plant origin including bamboo, brush, wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or tendu leaves, medicinal plants and herbs, roots, tubers and the like and ‘forest produce’ which would be notified by the State Government.

Explanation- The term ‘timber’ would be assigned the same meaning as in Indian Forest Act as applicable in Orissa except the inclusion of bamboo.”

²¹ Rule 3 (1) and (2), Orissa Grama Panchayats (Minor Forest Produce Administration) Rules, 2002

²² Rule 5 (1) (a), Orissa Gram Panchayats (Minor Forest Produce Administration) Rules, 2002



Insert Section 44(2)(b-i)

“To facilitate the integrated management and supervision of collection, storage, processing, marketing, value addition of minor forest produces through the Gram Sabha.

Gram Sabha and the Gram Panchayat shall be facilitated by the Forest Department in the overall management of MFP for its sustainable management and use especially through value addition, market linkages and minimum support price among others.”

- Besides, amendments needs to be inserted in existing legislations regulating access, use, transit, marketing of forest produce in Orissa, to bring them in conformity with PESA and Panchayat legislation.

Orissa Forest Act, 1972

Insert explanation in Section 2(g),

“Forest produce shall include minor forest produce also. “Minor Forest Produce shall include all non-timber forest produce of plant origin including bamboo, brush, wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or tendu leaves, medicinal plants and herbs, roots, tubers and the like and ‘forest produce’ which would be notified by the State Government.”

Insert Amendment in Section 2(o)

Delete “bamboo” from the definition of tree

Insert proviso in Section 15

“provided that in Scheduled Areas the bonafide right of ownership access to collect, use and dispose of minor forest produce as mentioned in PESA and Forest Rights Act, of any person or person living in and around a proposed reserved forest shall be affected by the settlement and recording of rights process carried out by the Collector.” The right shall be recorded as it is by the Collector.”

Insert proviso to Section 25(2)

“provided that in Scheduled Areas this provision shall not apply to “minor forest produce”

Insert proviso in section 27(2)

“provided that wherein a Scheduled Area, any person commits theft of any minor forest produce or collects more than the quantity permissible by the Gram Sasan , shall be punishable with such additional fine as may be prescribed by the Gram Sasan”

Insert Proviso in Section 31

“Provided that in Scheduled Areas, the constitution of a village forest shall not affect the right to own, access to collect, use and dispose of minor forest produce within and outside the village boundaries where the members of the Gram Sasan have had traditional access. This right shall continue to be exercised by the Gram Sasan and the Gram Panchayat, notwithstanding the constitution of a village forest by the State Government.”

Insert Proviso in Section 34(a)

“provided that in a protected forest falling within a Scheduled Area, the Government shall not reserve any tree which has been declared as a minor forest produce without the



approval of the Gram Sasan or Gram Sasans within whose jurisdiction notified area is situated’

Insert proviso in Section 34(b)

“provided that in a protected forest falling within a Scheduled Area, the Government shall not prohibit the collection and removal of minor forest produce without seeking prior permission from the Gram Sasan or Gram Sasans within whose jurisdiction the notified area is situated.”

Insert proviso in section 36

“provided that in Scheduled Areas, any rules framed by the state government within this section, which impacts minor forest produce shall be in conformity with any rules framed by the Gram Sasan or Gram Sasans governing, access to collect, use and dispose of minor forest produce.”

Insert Section 45(3)(a)

“In Scheduled Areas, all rules regarding the transit and possession of minor forest produce shall be framed in consultation by the Gram Sasan”

Insert proviso in Section 59

“Provided that in Scheduled Areas, in case any offence is committed regarding a minor forest produce, such power shall be exercised by the Gram Sasan. The forest officers shall render all necessary assistance to the Gram Sasan in preventing the commission of such offences.”

The Orissa Forest Contract Rules, 1966

Insert proviso in Rule 2

“Provided that, in a Scheduled Area, the State Government shall not execute a contract for sale of Minor forest produce as defined in the Orissa Forest Act, 1972. Gram Sasan shall be competent to contract the sale of minor forest produce.”

Insert Rule 32-A

“Notwithstanding anything contained in these Rules, rule 28, 29, 30, 31 and 32 shall not be applicable in Scheduled Areas”

The Schedule of Rate for Forest Produce in Orissa Rules, 1977

Insert sub-rule (4) in Rule 1

(a) “These Rules shall not be applicable to collection of minor forest produce by anyone who has a bonafide right to collect, use and dispose of minor forest produce under section 3(1)(c) of The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights Act), 2006 and section 4(m)(ii) of the Provisions of Panchayat (Extension to Scheduled Areas) Act, 1996.”

(b) The Schedule of Rate for collection of minor forest produce in Scheduled Areas may be prescribed by the Gram Sasan in consultation with the Gram Panchayat.”



Saw Mills and Saw Pits (Control) Act, 1991

Insert proviso in Section 5

“provided that in a Scheduled Area, the Gram Sasan may, through a resolution, declare an area to be a Prohibited Area within its jurisdiction, and no licenses for establishment or operation of saw mills or saw pits shall be granted by the State Government for a prohibited area so declared.”

The (Orissa) Supply of Bamboos to Artisans including Cooperative Societies Rules, 1980

Insert Section 3-A

(i) “In Scheduled Areas, the Gram Sasan and Gram Panchayat shall register all members of family or society desirous of obtaining bamboos and grant license for felling and removing Bamboo from forest and protected areas, located within the vicinity of the places where they are ordinarily resident, for the purpose of trade.

(ii) The Gram Sasan shall issue a public notification inviting applications as per subsection (3) of section 3, for registration of all members of family or society desirous of obtaining license for felling and removing bamboos for trade purposes, within one month of publication of such notification.

(iii) After receiving the applications, the Gram Sasan shall enter the name of the applicants in a register along with the quantity and such terms and conditions of license as the Gram Sasan may deem necessary. A copy of the register shall be sent to the Gram Panchayat. The Gram Panchayat shall issue the licenses to the applicants on such terms as mentioned in the Register within 3 months of receiving the register.”

(iv) The Gram Panchayat shall inform the Range forest officer of the licenses issued along within the provisions of this sections

The Gram Sasan may also decide to refuse licenses for felling and removing bamboo from any part of protected area.

Orissa Timber and other Forest Produce Transit Rules, 1980

Insert proviso in Rule 4

“provided that in Scheduled Areas, the Transit Permit for transportation of minor forest produce shall be issued by the Gram Panchayat, after taking approval from the Gram Sasan of the village from where such minor forest produce was collected.”

Insert proviso in Rule 5

“provided that in case a minor forest produce mentioned in Rule 5 is collected from a Scheduled Area, the Gram Sasan shall have the discretion to make transit permit mandatory for the transportation of such minor forest produce, if it deems necessary.”

Insert sub-rule in Rule 6

“(i) Any person desiring to remove for transit any minor forest produce from any forest in a Scheduled Area, permission shall be taken from the Gram Sasan concerned.”

(ii) Application shall be filed in form II with the Gram Sasan and a duplicate copy be sent to



the Gram Panchayat. The Gram Sasan shall organise a meeting within one month of receiving the application and take a decision to accept or reject the application or impose such conditions as it deems necessary. The Resolution shall be forwarded to the Gram Panchayat within 15 days of its passing. If the application is accepted the Gram Panchayat shall issue the permit in Form I, along with such conditions as the Gram Sasan may have prescribed.”

(iii) Gram Panchayat shall maintain a list of particulars of the persons to whom permits have been issued for removal and transit of minor forest produce.

Insert the following in Rule 17

“All forest produce imported from the State of Orissa shall be covered by a transit permit issued by the Divisional forest officer of the division from which the forest produce is exported, ‘in case of minor forest produce, issued by the Gram Panchayat and after the concurrence of the Gram Sasan of the area from where it was removed’ and in case of timber including round- wood billets.....”

Forest Produce (Control of Trade) Act, 1981

Insert proviso to section 1

“Provided that no notification shall be issued under this Act, specifying minor forest produce over which the Gram Sasan and Panchayat have ownership right as per Provisions of Panchayat (Extension to Scheduled Areas) Act, 1996 and The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and any area in relation to such minor forest produce falling within a Scheduled Area.”

Insert explanation in Section 2(c)

“Forest produce shall include minor forest produce also. “Minor Forest Produce shall include all non-timber forest produce of plant origin including bamboo, brush, wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or tendu leaves, medicinal plants and herbs, roots, tubers and the like and ‘forest produce’ which would be notified by the State Government.”

Insert Proviso in Section 4:

“Provided that in Scheduled Areas, agents for the purchase of any trade in minor forest produce referred to in proviso to section 1 of this Act shall be appointed by the Gram Sasan.” Also, that, the Gram Sasan shall make Rules for quantity allowed for transport of such minor forest produce for bonafide use or for consumption by any person referred to in subsection (b) and (d) in consultation with the Forest Department.

Insert proviso in Section 7

“provided that in Scheduled Areas, the Gram Sasan in consultation with the Gram Panchayat shall fix the price for purchase of minor forest produce referred to in proviso to section, in consultation with the Forest Department”

Insert Subsection (2) in Section 12

“All Minor forest produce referred to in proviso to section 1, gathered from a government forest, by each person of the village, shall be disposed off by the Gram Sasan in such manner as may be prescribed.”



Orissa Forest Produce (Control of Trade Rules), 1983

Insert proviso in Rule 2(g)

“provided that for minor forest produce referred to in proviso to Section 1 of the Act, the prescribed Authority shall be Gram Sasan of village within the jurisdiction of which the concerned minor forest produce is collected.”

Orissa Village Forest Rules, 1985

Insert Proviso in Rule 2(xvii) Definition of Village

“Provided that in Scheduled Areas, a village means a village as defined in PESA and Orissa Gram Panchayat Act, 1964”

Insert proviso in Rule 8

“Provided that this section shall not apply to any bonafide right of any person in a scheduled Area, over minor forest produce as per The Scheduled Tribes and Other Traditional Forest Dwellers(Recognition of Forest Rights) Act, 2006 and ownership of minor forest produce vested in Gram Sasan and Gram Panchayat as mentioned in Provisions of Panchayat (Extension to Scheduled Areas) Act, 1996”

6.3 Prevention of alienation of land in Scheduled Areas and taking appropriate action to restore alienated land to the Scheduled Tribe

The Central PESA mandates *“While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe;”*[Section 4(m)(iii)]

In Orissa, Gram Panchayat Act vests the power to prevent alienation of land and restoration of any unlawfully alienated land in the Scheduled Areas, to the Gram Panchayat, under the supervision and control of the Gram Sasan. [Section 44(2)(c)]

- However, the Act is silent on the procedure when an area falls within the jurisdiction of two Gram Panchayats. Following amendments in Section 44(2)(c) of Gram Panchayat Act are suggested:

Amend section 44(2)(c)of Orissa Gram Panchayat Act, 1964 as

“The Gram Sasan along with the Panchayat at appropriate level depending on the area of the land and their jurisdiction shall have the authority to prevent any unlawful alienation of land as well restore unlawfully alienated lands belonging to the scheduled tribe in a scheduled area as well as any land within a scheduled area.

Provided further that the Collector through the Sub Divisional Officer or any other officer so authorised shall provide all assistance in implementing the decision of the Gram Sasan along with the Panchayat at appropriate level of the concerned jurisdiction in a time bound manner preferably within a period of three months of receipt of reference from the Gram Sasan along with the concerned Panchayat.



Communal Forest and Private Lands (Prohibition of Alienation) Act, 1948

Insert proviso in Section 3

“Provided that in Scheduled Areas, Gram Sasan along with Gram Panchayat shall have the power to prevent unlawful alienation of a land and to restore any unlawfully alienated land to a Scheduled Tribe. Provided that the Collector shall provide all assistance in implementing the decision of the Gram Sabha along with the Panchayat at appropriate level of the concerned jurisdiction in a time bound manner preferably within a period of three months of receipt of reference from the Gram Sabha along with the concerned Panchayat. “

- The ***Orissa Land Reforms Act, 1960***, puts certain restrictions on the transfer of any holding or part thereof by a *raiyyat*²³ belonging to a Scheduled Tribe. However, the said restriction doesn't apply to Scheduled Areas.²⁴ Further the Act empowers the Revenue Officer to evict the unlawful occupant of the property and restore the same to the Scheduled Tribe. However even this provision hasn't been extended to the Scheduled Areas.²⁵

Orissa Land Reforms Act, 1960

Insert subsection (7) in Section 22

“Nothing in Subsection (2) shall be applicable to the power of the Gram Sasan and the Gram Panchayat to prevent alienation of land of a Scheduled Tribe or restore an unlawfully alienated land in a Scheduled Area”

- It is pertinent to mention here that, ***Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Amendment Regulation, 2000*** seeks to prevent the transfer of land by the tribals to the non-tribals in the Scheduled Areas of the State. Moreover, for speedy implementation of the punitive provisions of the Regulation, the Executive Magistrates have been vested with the Judicial Magisterial powers to try offences under the Regulation.²⁶ The said Regulation provides that proceedings for eviction of an illegal occupant of tribal land can be initiated on the report of the Gram Panchayat. Besides prior approval of the Gram Panchayat with concurrence of the Gram Sasan has been made mandatory before any land in scheduled areas can be settled under the Land Settlement Act, 1962 or Rules made there under, by competent authority with a non tribal²⁷. Further, it is also mandatory for the competent authority to inform the Gram Panchayat on all orders of ejection or restoration of land to the tribals made by them²⁸.

Another progressive suggestion was added which attempts to reverse the land of the members of ST which was transferred by fraud. A two year period was been given post the commencement of the 2000 Regulation to notify such agricultural land as to how they

²³ A Raiyyat is a person holding land or a person with whom land has been settled for agriculture or who has the right of occupancy over a land under the Orissa Land Reforms Act, 1960 (See Section 4)

²⁴ Sec 22

²⁵ Sec 23-A

²⁶ Tejavath, Ramachandra; 2004 Feb. 14; Economic and Political Weekly

²⁷ See Section 3 of the Orissa Scheduled Areas Transfer Of Immovable Property (By Scheduled Tribes) Amendment Regulation 2000.

²⁸ See Section 4(b) of *ibid*.



have come to possession of such land. The resumption, that if not notified, such land shall be deemed as unlawful possession was also added²⁹.

6.4 Control over Institutions and Functionaries in all Social Sectors

Regarding institutions and functionaries in all social sectors, the Central PESA provides “*While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the power to exercise control over institutions and functionaries in all social sectors;* [**Section 4(m)(vi)**]

There are two issues that require analysis. First is the identification of the social sectors and functionaries within those social sectors and secondly, prescribing various types of control over those social sectors. Control over social sectors can be exercised through financial and administrative mechanisms and Gram Sabha and Panchayat at appropriate level can be accorded mechanism for control over different aspects of the social sector.

Some of the indicative social sectors are as follows:

- 1. Employment*
- 2. Education*
- 3. Health*
- 4. Rural water supply and sanitation*
- 5. Women and child development*

In Orissa control over institutions and functionaries in social sector has been entrusted to all the three tiers of Panchayat:

- **Section 44(3)(b), Orissa Gram Panchayat Act, 1964**

“ subject to the provisions of this Act and the Rules made thereunder, it shall be the duty of a Gram Panchayat , within the limits of its funds to implement schemes for economic development and social justice and undertake execution of any other scheme, performance of any other act or management of any institution or organisation as the government may by order entrust to it, including those in relation to the matters listed in the Eleventh Schedule to the Constitution of India subject to such terms and conditions as may be specified in the Order.”

Further, Gram Panchayat also been specifically entrusted with various functions for social and economic development of the rural areas such as,

- To undertake control and administer soil conservation works, small scale industries including food processing, rural housing, welfare of handicapped and mentally retarded, women and child welfare, relief from famine and other calamities, establishment and maintenance of libraries, dharamshalas, rest houses, promotion of cooperative stores for seeds, public vaccination and inoculation, construction of public streets and waterways, irrigation sources, managing and controlling supply of water, maintaining cleanliness and hygiene, control over public resorts and entertainment places, markets among others. [Chapter VI, Orissa Gram Panchayat Act, 1964]

²⁹ See Section 5; ibid



- **Orissa Panchayat Samiti Act, 1959**

“Notwithstanding anything to the contrary in this Act, in the Scheduled Areas, the Samiti shall in consultation with the Gram Sasan, be competent to exercise control and supervision, the nature and extent of which shall be such, as may be prescribed, over institutions and functionaries of various social sectors in relation to the programs and measures as the government may by notification specify”[Section 20(5)(i)]

Panchayat Samiti have been entrusted with the functions of management, control and spread of primary education in the Block, management of trusts and endowments and other institutions, supervision and enforcement of laws relating to vaccination and registration of births and deaths [Section 20(1)(b)(c)(d)]

- **Orissa Zilla Parishad Act, 1991**

Section 3(3) “Every Parishad shall have the power to-

Undertake schemes or adopt measures including giving of financial assistance relating to the development of agriculture, social forestry, live-stock, industries, cooperative movement, rural credit, water supply, distribution of essential commodities, rural electrification including distribution of electricity, minor irrigation, public health and sanitation including establishment of dispensaries and hospitals, communications, primary, secondary and adult education including welfare and other objects of general public utility.

(ii-a) Implement schemes for economic development and social justice and undertake execution of any other scheme, performance of any act or management of any institution or organisation, as the government may by order entrust to it, including those in relation to the matters listed in the Eleventh Schedule to the Constitution of India subject to such terms and conditions as may be specified in the Order.”

- As noted from above, Panchayats have been given the power to exercise control over functionaries in social sector and institutions. PESA envisages that this power shall be given to Gram Sabha and panchayat at appropriate level. In Orissa, this power must also be given to the Gram Sasan. Following Amendments are suggested:

Insert Subsection in Section 5 of Orissa Gram Panchayat Act

“In Scheduled Areas, the Gram Sasan shall exercise control over institutions and functionaries in social sectors within the village.

All community workers, employees of government working in schools, dispensaries, hospitals, anganwadis, rest houses any other social institution or under any scheme initiated by the central or state government or assisting the Panchayat in carrying out its functions mentioned in the Eleventh Schedule of the Constitution and respective panchayat legislations in Orissa, functioning within the village, shall be registered with the Gram Sasan of that village.”



6.5 Management of Village Market

The Central PESA mandates: “While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the power to manage village markets by whatever name called. [Section 4(m) (iv)]

In Orissa, the Gram Panchayat Act, vests the power to manage both private and public markets in the Gram Panchayat alone. Specific powers to issue, license, providing places to establish markets, levying fee for the use of markets for sale of goods, restriction on sale in markets among others. However, for Scheduled Areas there is specific provision where the power to manage village markets by whatever name called has been given to the Gram Panchayat subject to the control and supervision of Gram Sasan. [Section 59, proviso, Orissa Gram Panchayat Act 1964]

Market has been defines as, “Market means any place set apart ordinarily or periodically used for the assembling of persons for the sale or purchase of grains, fruits, vegetables, meat, fish or other perishable articles of food or for the sale or purchase of live- stock or poultry or any agricultural or industrial produce or any raw or manufactured products or any other articles or commodities necessary for the convenience of life.” [Section 2(k), Orissa Gram Panchayat Act, 1964]

- Though the above provision covers the mandate of PESA, it does not mention the specific function of the Gram Panchayat within the “power to manage village markets” and also how will the Gram Sasan control and supervise the Gram Panchayat. Therefore, for effective exercise of this power, specific provisions related to management of village markets need to be incorporated in the Gram Panchayat Act. Following amendments are suggested:

Delete proviso to section 59 and instead insert Section 63-A , in the Orissa Gram Panchayat Act, 1964,

“In Scheduled Areas, the Gram Panchayat shall manage village markets by whatever name called, under the control and supervision of Gram Sasan. In the exercise of this power Gram Panchayat shall

- (1) Specify, with prior consultation with the Gram Sasan the place of setting up such markets,*
- (2) No shops shall be allowed to be opened a market area without a license issued by the Gram Panchayat. The person for applying license shall submit an application. The Gram Panchayat shall take approval of the Gram Sasan on the applications submitted. The Gram Sasan shall pass a resolution, within one month of receiving the application, accepting or rejecting the application and prescribing such conditions of license as it may deem necessary. The resolution shall be forwarded to the Gram Panchayat which shall then proceed to act upon the resolution.*
- (3) The Gram Sasan may also auction the shops in the market area.*
- (4) The Gram Sasan shall fix the schedule of rate of fee in respect of every such market operating within its jurisdiction such as;*
 - fee for the use of, or for exposing goods for sale in such market*
 - fee for the use of shops, stalls, stands, pens in such market,*



- iii. *Fee on vehicle (including motor vehicles as defined in the Motor Vehicles Act, 1939) or park animals bringing, or on persons carrying any good for sale in such market;*
- iv. *Fees on animals brought for sale into or sold in such market*
- v. *License fees on brokers, commission agents, weighman and measures practicing their calling in such market*

The schedule of rates shall be exhibited at the place of the market by the Gram Panchayat, at the office of the Gram Sasan or any other conspicuous place in the village.

- (5) *The Gram Sasan shall also levy such penalty or cancel the license of any person acting in contravention of any of the terms of the license or this provision.*
- (6) *The Gram Sasan shall also fix the days of operation of a village market in a month.*
- (7) *The Gram Sasan may also prohibit the display or sale of any commodity in a village market.*
- (8) *Gram Sasan shall make such Rules for the proper management of the village markets as and when it may deem necessary.*

- **Agriculture Produce Market Act, 1956:**

The Orissa Agricultural Produce Markets Act, 1956 provides for Market Committees as well as Market Boards under the Act which regulates markets including those in village or Panchayat. The Act contains provision regarding the establishment of agricultural markets and market committees. As per the Act, the Market Committee can requisite any land or building in possession of the Gram Panchayat, which immediately before the establishment of the market was being used by the said Gram Panchayat for the sale and purchase of agricultural produce. After the said requisition, the Gram Panchayat cannot continue to market the specified agricultural produce or collect tolls³⁰. However the Act does provide for sharing of the income derived from such market between the market Committee and the concerned Gram Panchayat. That means any agricultural market managed by the Gram Panchayat can be taken over by the State Government. Thus there is a clear conflict between the PESA and this Act. Further there is no representation of the Gram Panchayat or Gram Sabha members in such market committee. The Gram Panchayat can only elect two members of such Committees. The management of these markets is completely under State officials. This needs to be amended in light of the provisions of the Orissa PESA.

The Agriculture Produce Market Act, 1956

Insert proviso in Section 2(vi)

“Provided that market for the purpose of this Act does not include a village market or a gaon haat, bazaar or by any other name called, in Scheduled Areas of Orissa”

³⁰ 73 (1992) CLT 49



6.6 Control over money lending

The Central PESA mandates: *“While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the power to exercise control over money lending to the Scheduled Tribes; [Section (4) (m) (v)]*

In Orissa, the power to control money lending to the Scheduled Tribes has been entrusted to the Gram Panchayat under the control and supervision of the Gram Sasan .

“Notwithstanding anything contained in any other law, in the scheduled areas, subject to the control and supervision of the Gram Sasan, the Gram Panchayat shall exercise within its local limits, such powers and perform such functions in such manner and to such extent as may be prescribed in respect of control over money lending to the Scheduled Tribes.”[Section 44(2)(d)]

- Money lending in Scheduled Areas of Orissa is also regulated and controlled by Orissa (Scheduled Areas) Money Lender’s Regulation 1967 and Orissa (Scheduled Areas) Money Lender’s Rules 1970. Requisite amendments need to be brought in the Regulation to bring it in conformity with PESA. Following amendments are suggested:

Insert amendment in Regulation 4 (1)

Replace “prescribed authority” with “the Gram Sasan of the village in which the money lender intends to operate”. Replace “government” with “the Gram Sasan”. Replace “notification” with “resolution”

Delete sub- regulation (4) and instead insert,

“Every license shall be granted in such form as may be prescribed by the Gram Panchayat and on such conditions as may be prescribed by the Gram Sasan in consultation with the Gram Panchayat.”

Sub Regulation(6)- delete “ government or any other prescribed authority” and instead insert “ Gram Sasan and Gram Panchayat of the village in which he intends to operate”

Sub regulation (7) replace “ prescribed authority” with “ Panchayat Samiti”

Insert Sub Regulation (10)

“Provided that in Scheduled Areas, the Gram Sasan shall maintain a register of money lenders in such form and containing such particulars as may be decided by the Gram Sasan and inform the respective Panchayats.

Insert Proviso in regulation 7

“Provided that the rates of interest may be revised by the Gram Sasan periodically. The revised rates shall be publicised by affixing a notice on conspicuous places in the village, forwarding a copy to the money lenders in the village and to the Gram Panchayat.”



Insert the following in Regulation 15(4)

After ‘inspector’ insert “**or Gram Sasan**”.

Insert sub regulation (11) in Regulation 15,

“The inspector shall comply with the directions of the Gram Sasan and shall assist the Gram Sasan in controlling over money lending within its jurisdiction”

Insert in regulation 15-A(3),

“Copies of the Order shall also be sent to the Gram Sasan concerned, Gram Panchayat and Panchayat Samiti within whose local jurisdiction the money lender’s principle place of business is situated.”

Insert Sub Regulation (3) in Regulation 25

“The Gram Sasan in consultation with the Gram Panchayat shall also have the power to formulate Rules for controlling money lending in Scheduled Areas. Provided that the Rules passed by the State Government shall not be inconsistent with the Rules enacted by the Gram Sasan,”

Orissa (Scheduled Areas) Money Lender’s Rules, 1970

Insert proviso in Rule 3

“provided that in case the area of operation of a money lender is a village, the Gram Sasan and Gram Panchayat shall discharge the functions of Licensing Authority under the Regulation within their respective jurisdictions”

Insert in Rule 4(1),

“the licensing fee shall be deposited with the Gram Panchayat, in case the license is issued by the Gram Panchayat which shall be used for the development of villages.”

Insert in Rule 4(2)

The Gram Panchayat may either issue the license in form 1 given in the Rules or revise the format as it may deem fit.

6.7 Control over local plans and resources for such plans including tribal sub plans

The Central PESA mandates: *“While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the power to exercise control over local plans and resources for such plans including tribal sub-plans.” [Section 4(m)(vii)]*

In Orissa, all the three tiers of Panchayat have been entrusted with the power to exercise control over local plans, resources for such plans which includes tribal- sub plans.

Orissa Gram Panchayat Act:



“ Subject to the provisions of this Act and Rules made thereunder, it shall be the duty of a Gram Panchayat within the limits of its funds to undertake, control and administer and be responsible for the implementation of Schemes for economic development and social justice in relation to agriculture.”

Besides, in Scheduled Areas, Gram Panchayat have been assigned the function of preparing plans for economic development and social justice and also implementation of such plans. [Section 44(3)]

Orissa Panchayat Samiti Act

“A Samiti shall, subject to such terms and conditions as Government may from time to time by order specify exercise the powers and perform the functions hereinafter provided- Planning, execution and supervision of development programs, schemes and works in the Block relating to community development including those pertaining to ‘Tribal Development Blocks’ for the time being recognised by Government as such and of such other programs, schemes and works as the government may from time to time by general and special order direct in respect of any Samiti.” [Section 20(1)(a)]

Orissa Zilla Parishad Act

“Prepare, execute and supervise the district plans relating to –

- a. Monitoring and supervision of programs like Jawahar Rozgaar Yojana (JRY) to be directly implemented by Gram Panchayat and Panchayat Samiti*
- b. Implementation of anti-poverty programs and monitoring supervision thereof*
- c. Discharge of Functions and responsibilities as assigned to District Rural Development Agencies from time to time*
- d. Distribution of untied funds [Section 3(3)(xiii)]*

The power to control local plans, resources for such plans including tribal sub plans has not been given to the Gram Sasan.

Insert the following in Orissa Gram Panchayat Act, Orissa Panchayat Samiti Act and Orissa Zilla Parishad Act.

“In Scheduled areas the Gram Sasan along with the Panchayat at appropriate level within which such local plans including tribal sub plans are implemented shall have control³¹ over such plans and their resources.

Provided further that the state agencies shall facilitate implementation of all such plans and their budgets with the approval of the Gram Sasan and the Panchayat at appropriate level within which such local plans including tribal sub plans are implemented.”

³¹ Control has to be detailed



7. Some General Observation in Orissa Panchayati Raj Framework

The powers of the Gram Sasan, Gram Panchayat, Panchayat Samiti and Zilla Parishad are made subject to Rules framed by the State government or any directions issued by any officer of the State Government from time to time. Thus for example,

Section 150 of the Orissa Gram Panchayat Act states that,

“the State Government may after previous publication, make Rules, not inconsistent with the provisions of this Act to carry put all or any of the purposes thereof and prescribe forms for any matter for which they consider that a form should be provided.

In particular and without prejudice to the generality of forgoing powers such Rules may provide for

- i. Regulating the duties, functions, powers of a Gram Panchayat*
- ii. Generally determining relations between Parishad, Samitis and Gram Panchayat and for the guidance of Gram Panchayat in all matters connected with the carrying out of the provisions of this Act*
- iii. Any matter which has to be or may be prescribed under this Act.”*

Similar provisions have been made in Section 57, Panchayat Samiti Act and Section 51 of Zilla Parishad Act. In Scheduled Areas, such provisions go against the basic tenets of PESA and hence needs to be amended.

Insert proviso in Orissa Gram Panchayat Act, 1964, Orissa Panchayat Samiti Act, 1959 and Orissa Zilla Parishad Act, 1991

“provided that for Scheduled Areas, no Rule or by-law framed by the State Government shall be inconsistent with PESA or shall restrict the powers by the Gram Sasan and Panchayat at appropriate level.”

It is interesting to note here that the general powers of all three tiers of PRIs have been made subject to the availability of funds with the respective ties. The Act does not prescribe as to how different powers of the PRIs shall be accorded priority in case of paucity of funds. That has been left to the discretion of the PRI concerned.