

**HIGH COURT OF NIRDHAN
IN THE MATTER OF**

People's Union for Liberties & Democratic Reforms & Jci

Versus

Republic of Gariba and Maxis Bank

**MEMORIAL ON BEHALF OF PETETIONER
JUSTICE R.K. TANKHA MEMORIAL MOOT
COURT COMPETITION, 2015**

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- 14) UOI V. A L Rallia Ram AIR 1960 Punj 567 62 Punj CR

Statement of Jurisdiction

High court of Nirdhan has jurisdiction in this matter under –

Article – 226 of constitution of Republic of Gariba which reads as follows-

Article 226 power of High Courts to issue certain writs –

- (1) Notwithstanding anything in Article 32 every High court shall have power throughout the territories in relations to which it exercise jurisdiction, to issue to any person or authority, including in appropriate case s, and government, within those territories directions order or writs, including (units in the nature of habeas corp us, mandamus, Prohibition, quo wartanto and certiorari or any of them, for the enforcement of any of the right conferred by part III & for any other purpose.
- (2) The power centered by clause (1) to issue direction orders or writs to any government. authority or person may also be exercised by any High court exercising jurisdiction in relation to the territories within which the course of action wholly or in part arises for the exercise of such power notwithstanding that the seat o such government of authority the residence of such person in not within those territories.
- (3) Where any party against whom an interim order. Whether by way of injection or stay or in any other manner is made an in any proceedings relation to a petition under clause (1) without
 - (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order &
 - (b) giving such party an opportunity of being heard makes and application to the high court for the vacation of such order and furnishes a copy such application to the party in favor of such order has been made or the counsel of such party the High court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished. Wheichever is later or where the High court is closed on the last day of that period before the expiry of the next day after awards an which the high court is open and if the application is not so disposed of, the Interim order shall, on the expiry off that period or as the case may be, the expiry of the said next day stand vacated.

- (4) The power conferred on a High court by this article shall not be in derogation of the power conferred on the supreme court by clause (2) of article 32.

STATEMENT OF FACT

1. **Republic** of Gariba-is sovereign federation states with several union territories. The Republic got independent from imperial rule in the year 1947.By way aneeo social contract, its people decided to have a referendum to choose member of the constituent assembly.

The constituent assembly drafted an elaborated constitution ,which stood out as the longest ever written constitution an the world.

2. **The country of the Republic display** a very diverse profile, with hills in the north & the east , seas in south and the south-west & desert in the north-west these are several perennial rivers which flow throughout the temitory of Gariba which are the lifeline and sustenance for the people of Gariba.

3. **Most part of the desert is situated in nirdhan, which is the biggest of the states in the republic.**

The territory was considered as backward till 2011, when the governor of Nirdhan decided to fast pace the development of roads, highway so that the benefit of infrastructural development can be harvested by its largely rural populace.

- 1- To alleviate the liquidity crunch of the region

A new scheme was devised under which highway& arterial roads were to be constructed by private parties & the amount invested by them

_ was to be recovered as toll.

- 2- Power in this regards were delegated to all the panchayat samistis, to issue detailed project report on the official website & a single windoe sheme was provided for summation of the projects.

4. One of such company was leoparely contracts Inc. (sci)

It enters into an agreement with Jodhpur Gaon Panchayat Samitie (JGES) on 21.09.2011

For liscm roads in a scheduled area on Nirdhan.

_ At the time of culmination of culmination of the Project, certain issue cropped up regarding

_land acquisition of the bridge etc. due to which the JGPS terminated the contracts. _on 21.09.2013.

5. As per contractual mechanism sci sent a legal notice on 11/12/2014 for invoking arbitration as per contractual clause & also asked for termination payment for the work already done.

6. A reply was sent through JGPS council on 12.12.2014 informing that matter is covered under the Madhyastham Adhikaran Adhiniyam,1983 & therefore the arbitration & conciliation act 1996 is not applicable & no institutional arbitration can take place.

JGPS also invoked the performance bank guarantee on 12.12.2014 by sending an email after business hours to the maxis bank.

7. The Jcior on 13.12.2014 moved the high court of Jharkhand by filing an urgent civil writ petition being WP© No. 9.9.2014 which was directed to be listed out at 10:30 am on 15.12.2014 (after 2 days of reply of JGPS council through E-mail).

8. On 15.12.2014 the high court took this matter as the first item on the agenda and granted

1_ an ad- interim ex-parte stay on invocation of already encashed .

2_ all for their action in this regard by all parties to remain subject to the outcome of the proceeding.

3_ with the direction to immediately furnish copy by all persons to the concerned parties.

By 11 am the copies of the order were served upon JGPS the maxis bank.

However in the meantime, the branch manager of the Jodhpur Gaon branch of Maxis Bank had acted on the e-mail of JGPS & encashed the bank guarantee.

At 10.01 am there was a massive security breach in the system of the maxis bank.

This triggered the cyber security system, which instantly froze all accounts & transactions in progress.

Subsequent investigation revealed that it was due to an attack by a group of hackers.

10. Subsequently the writ petition was disposed of directly. The parties to seek appropriate interim remedies from the arbitrators.

Arbitrat proceeding took place conder the act of 1996 before the council for Infrastructure Arbitration. & objection regarding maintain ability field by the Id arbitrator.

The arbitration culminated into an award dated 21.01.2015 in favor of Jci & inter alies held Jci entited to the money under the performance bank guarantee.

11. JGPS immediately filled a petition u/s 34 of the act of 1996 before the high court of Nirdhan, on its original side on 25.01.2015.

In the mean while on the 24.01.2015 Jci wrote to maxis bank with a copy of the award

_ To return the money pertaining to the performance bank guarantee

_ Retained by it in a fixed deposit

_ With the interest accumulated there on , which was thrice the principal.

12. on 12.01.2015 Maxis bank

Informed that admission of petition order see 34 amounts to a stay on the award & therefore until the final outcome of see 34 it is not obliged to pay anything to Jci.

It also highlighted its difficulty to Jci regarding the strict complain mandated by the Apex court as well as the rernue bank. With bank guarantee norms since the invocation of bank guarantee was prior to the stay order of the high court.

(RBI norms in reduction permance of benec guarantee by banics)

13. In response on 28.01.2015

Jsi cited its concern about immediate requirement of liquidaty due to erosion and pressure of the amerasian development bank regarding the repayment of loan etc.

However maxis bank did not release any payment to Jci.

14. Realizing the difficulty Jci challenged the constitution validity of see 34. By way of W.p being W.P 999/2015 on the groonds that

1- It amounts to introduction of litigation in the arbitral process which is against the basic benets of arbitration.

2-The pendency of see 34 petition is huge & the delay there on amounts to expropriation in as much as it takes away. The fruits of award which leads to violation of country bilateral & multi lateral commitments under various convention & investment treaties.

3-And grant of dm automatic stay without adjudication on prina facie case balance of convenience & irreparable injury is persebad in low.

4-Other grounds as advised by the 1d counsel.

15. Admission of petion by jci, Bu c.v. sasp

Admitted the petion & considering the nature of issue raised, notice to the 1d attorney general.

16. In the mean while the governer of the statey Nirdhan on 20th December 2014 promulgated an ordinance which came into effect from 24th dec 2014 which amended the Nirdhan panchayat Rai act 1994 as under.

See .19 Qualification for election as a panch or a member –

- 1- Every person registered as a voter in the list of voters of a panchayat raj institution shall be Qualified for election as a panch or as the case may be
- 2- a member of such panchayati Raj institutin order such person –
 - (r) In case of a member of a zila parisad or panchayat samiti had not passed school examination of the board of secondary education, nirdhan or of an equivalent Board.
 - (s) In case of sarpanch of a panchayat in a Schedule are a has not passed class V from a school in nirdhan &
 - (t) In case of a sarpanch of a panchayat other then is a schedule area has not passed class VIII from a school in Nirdhan.

17. This was the very first time such a provision had been brought into vogue in the entire republic

People union for liberties & Democratic Reforms issued a public statement that the ordinance was replete with malice in law, it amounted to promulgating the ordinance for 5 years instead of 6 months, it is violatives of constitution since –

'We the literate people'

18. People union for liberties & democratic reforms immediately moved the Hon'ble High court of Nirdhan. It filed a pro bono petition W.PCCJ No. 121/2015 in the High court of Nirdhan seeking to challenge the vires of the ordinance & certain other relief on the ground of

(i) Non availability of a notified procedure for listing when the court is not in session is unconstitutional

(ii) Non availability of a notified vacation bench during any holidays is unconstitutional.

(iii) Non grant of listing before the issuance of election notification cannot affect the merits of the case since the court was moved well in time & *actus curiae neminem gravabit*.

(iv) The ordinance being ultra Vires part IX & retroactive,

(v) The ordinance further marginalizes women & weaker sections due to the prevailing skewed literacy standards and it is in violation of aspects of basic structure like the preamble, single citizenship and free & equal participation in democratic government & it also abridges valuable fundamental & constitutional rights.

19. The high court of nirdhan admitted the petition and given that important question pertaining to the interpretation of constitution were involved notice were issued to the 1.d attorney general as well as the republic of Gariba. given that the 1d attorney general was to appear in there two matter (i.e. wp 999/2015 & wp1021/2015) they have directed to be listed together for final hearing.

STATEMENT OF ISSUES

1. Whether the petition is maintainable or not?
2. Whether section 34 of Arbitration & conciliation Act 1996 is constitutional? Whether it is according to the basic tenets of arbitration?
3. Whether the ordinance is ultra vires of Part IX and retroactive whether it is in violation of aspects of basic structure of constitution of Republic of Gariba & it also violates fundamental & constitutional right?
4. Whether application made by JGPS to Competent court for setaside of arbitral award is valid? whether it satisfied any of the conditions laid down under section 34 of Arbitration and conciliation act 1996?

SUMMARY OF ARGUMENTS

1. Whether the petition is maintainable or not?

Yes, the petition is maintainable.

2. Whether section 34 of Arbitration & conciliation Act 1996 is constitutional? Whether it is according to the basic tenets of arbitration?

Yes, It is unconstitutional

3. Whether the ordinance is ultra vires of Part IX and retroactive whether it is in violation of aspects of basic structure of constitution of Republic of Gariba & it also violates fundamental & constitutional right?

Yes, the ordinance is ultravires of Part- IX and retroactive.

4. Whether application made by JGPS to Competent court for setaside of arbitral award is valid? whether it satisfied any of the conditions laid down under section 34 of Arbitration and conciliation act 1996?

No, it is not valid Neither it satisfied any of the conditions laid down under section 34 of arbitration and conciliation Act, 1996.

ARGUMENTS ADVANCED

1. Whether the petition is maintainable or not?

Both the petitions are maintainable because in WP 999/2015 challenges the constitutional validity of section 34 of Arbitration and conciliation Act, 1996 which violates the basic tenets of arbitration of fair and speedy justice & minimum court intervention and thus in also violates part III of the constitution.

In Bharat sewa Sansthan V. Uttar Pradesh Electronics Cooperation Limited¹. court held main objectives of the Act is to make provisions for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration and to minimize supervisory role of courts in the arbitral process and to permit an arbitral Tribunal to use mediation, conciliation and other proceedings during the arbitral proceedings in settlement of disputes etc.

Section -5 of the Arbitration and conciliation Act, 1996 deals with extends of Judicial Interventions as

"Notwithstanding anything contained in another law for the time being in force in matters governed by this part no judicial authority shall intervene except where so provided in this part.

In WP 1021/2015 there is violation of Part III, IV & Part IX of the constitution of India so the petition is maintainable. The ordinance promulgated by the governor or Nirdhan is in violation of basic structure like the preamble, single citizenship and free and equal participation in democratic government and it is arbitrary and it also abridges valuable fundamental and constitutional rights. There is violation of Right to equality on the ground of literacy, there is a discrimination with weaker section of the society.

In Minerva Mills V. Union of India²

Chandrachud C.J. held –

"part III and Part IV are like two wheels of a chariot one on less important than the other you snap one & the other will lose its efficacy. They are like a twin formula for achieving the social revolution with is the ideal which the visionary founders of the constitution set before

¹ *Bharat Sewa Sansthan V. Uttar Pradesh Electronic Corporation limited, AIR 2007 SC 2961*

² *Minerva Mills Ltd V. Union of India AIR 1980 SC 1789*

themselves. In other words Indian constitution founded on bed rock of the balance between part III & part IV to give absolute primacy to one over the other is to disturb the harmony of the constitution. The harmony & balance between fundamental rights & Directive principles is an essential feature of the basic structure of the constitution."

2. Whether section 34 of Arbitration & conciliation Act 1996 is constitutional? Whether it is according to the basic tenets of arbitration?

Yes section 34 of arbitration and conciliation Act 1996 is unconstitutional. It amounts to introduction of litigation which is against the basic tenets of arbitration.

The legislature has the power to specify the grounds and no others therefore if the party challenges the award only on those grounds & no others therefore if the parliament in its wisdom has prescribed certain grounds on which the award can be challenged.

In Bihar state Electricity Board V. M/s Khalsa Brother³ – It was held that jurisdiction of the court to examine correctness of an arbitration award is limited by the provision of arbitration proceeding. An arbitrator is a tribunal selected by the person & his adjudication is binding on them. If it was permissible for the court to reexamine the correctness of the award the entire proceeding would amount to an exercise in futility. The grounds on which the award can be set aside by the state.

The Supreme court in a case held –

"The 1996 Act makes a provision for the supervisory role of courts for the purpose of the arbitral award only to ensure fairness, intervention of the court is envisaged in few circumstances only like in the case of fraud or bias by the arbitrators violation of natural justice.

Airport authority of India V. Protective consultancy and security service Ltd.⁴

Court held there are limits to judicial reviewability verdict of the arbitrator.

Arbitration may be defined as "mechanism for the resolution of disputes which takes place usually pursuant to an agreement between two or more parties, under which parties agree to be bound by the decision to be given by the arbitrator according to law or if so agreed other consideration, after a fair hearing such decision being enforceable by law.

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⁴ *Air port Authority of India V. Protective constancy & security service Ltd (2005) 4 Raj 258*

Arbitration is considered to be an important alternative disputes redressal process which is to be encouraged because of high pendency of case in the court & cost of litigation.

In department of Economic Policy and Development of the city of Moscow V. Boanker's Trusts co.⁵

Summed up the objectives of this act in the following words ' parliament has set out in the arbitration and conciliation Act 1996 to encourage & facilitates a reformed and more independent as well as private & confidential system of consensual dispute resolution with only limited possibilities of court involvement where necessary in the interest of public and of basic fairness.

Section 1 of the Act set forth the three main principles of arbitration low viz-

- (i) Speedy
- (ii) Inexpensive
- (iii) Minimum court Intervention.

The scope of interference of the courts in an arbitral award limited by the specific wording of Sec. 34 & Sec.5 of Arbitration and Conciliation Act, 1996. The object of this section 5 is to minimize the intervention of courts in the arbitral process. It also seeks to prohibit matters. The new arbitration Act permits stay of legal proceedings but not the stay of arbitration proceedings and thus restricts the grant of interim injunctions in arbitral proceedings. Thus the arbitral proceeding cannot be interrupted by courts intervention by grant of interim injunction or stay.

Supreme court in sukanya Holding Pvt. Ltd V. Jayesh H. Pandya & another Held that section 5 would have no application in interpretation of section 6 of the Act which deals with power to refer parties to arbitration where there is an arbitration agreement between them. The reason being that section 5 only contemplates that in the matters governed by part I of this Act, judicial authority shall not intervene except where so provided in the act and notably, there is no other provision in the act except where so provided in the act and notably there is no other provision in the Act except the provisions contained in section 8 which provide that in a pending suit, the dispute is required to be referred to arbitration.

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In S.B.P & Co Vs Patel Engineering ltd and another's. ⁶

Court held High court could not interfere with order passed by the parties could approach the court only in team of Section 32 of the Act or in terms of section 34 of the Act. Hence we can say that there is violation of basic tenets of arbitration.

In Tamil Nadu state contraction corporation ltd V. Gardner landscape private limited Chennai & ors. 2005 (2) Arb LR 6226 Mad – The approach of the court when confronted with a challenge to an arbitral award section 34 has to reflect a consciousness of the legislative intent in enacting the 1996 which was to restrict & curtail extent of judicial intervention in arbitral proceeding & awards. Sec 34 of the Act 1996 Act limit the judicial intervention.

3. Whether the ordinance is ultra vires of Part IX and retroactive whether it is in violation of aspects of basic structure of constitution of Republic of India & it also violates fundamental & constitutional right?

Yes the ordinance is ultra vires of part III & part IV & part IX of the constitution.

In Nanhoo Mal V. Hira Mal

S.C. held that for proper conduct of election, proper electoral rolls are to be maintained But in extra ordinary situation writ petitions are entertained. In another case ptna H cheld that a writ petition is maintainable in case –

- 1- Where there is an infringement of fundamental right.
- 2- illegality which will render the election as no election in the eye of law.
- 3- Challenge to the validity of Section or Rule having a bearing on the result of the election.
- 4- Inadequacy or non efficaciousness of the alternative remedy.

(Dilip Kumar V. State of Bihar)⁷

And the ordinance promulgated by the governor is in violation of constitution of India.

⁶ AIR 2003 SC 2253

⁷ AIR 1972 SC

The ordinance promulgated prescribe qualification the arbitrariness of the formal education requirement and its disproportionate impact upon rural woman.

The literacy rate show's that there are no enough qualified (i.e. formally educated persons) in the village (especially women) in order to demonstrate that the ordinance will not exclude a significant section of the population.

Who did not have an opportunity of formal education could not have on opportunity of formal education could not have been denied participation in democratic institute the poor, under privileged and down trodden cannot be denied participation in a democracy merely on ground that they does not have educational qualifications.

The ordinance is arbitrary irrational & unreasonable.

If the disqualification prescribed by the ordinance deprives a large section of the society to participate in the democratic institution of Panchayati Raj and Runs counter to the objectives of the 73 rd amendment it maury be declared as unconstitutional by the court of law. Discrimination is s problem because large no of people is discriminated Article 14 states that the state shall not deny to any person equality before the law or the equal protection of the law's within the territory of India.

The right to equal treatment and right not to be discriminated against is a right vested in individual.

The constitutional freedom to vote (and run of office) as an aspect of article 19 (1) (a) is an individual freedom.

A law that that bars as a single individual citizen form participating the democratic process is as unconstitutional as a law bars every citizen from participation.

A large section of the population is affected underline the entire basis of apart III of the constitution.

The literacy requirements are designed to exclude already marginalized groups from the political democratic process is neither new nor limited.

In fact prescription of educational qualification for infusion for contesting election in any democratic institution unless there is strong nexus with the object to be achieved in an anti thesis the democratic governance as the institute is are public.

4. Whether application made by JGPS to Competent court for setaside of arbitral award is valid? whether it satisfied any of the conditions laid down under section 34 of Arbitration and conciliation act 1996?

No it is not valid because it not satisfied any of the conditions laid down U/S 34 of A&c A 1996.

Section 34 provides that an arbitral award may be set aside by acourt an contain grounds specified there in

In case of Bihar State electricity Board V M/S Khalsa Brother⁸ the court held that that grounds on which the award can be set aside are limited by the statute.

In Mandan Lal V. Hukum chand⁹

Anarbitration award cannot be upset except an the specific grounds given in Section 34. If this is not done it could not be avoided by arising a plea that it had become infruituous.

The validity of award may be challenged U/S 15 which provides for its correction or modification by court or it may be challenged U/S 16 which provides for its remission for consideration or it may be challenged U/S 30 Which provides for setting aside but not of the sections provides for making an application. It is perfectly clear that authority for making and application is each one of these cases is derived ultimately from the provisions contained U/S 33.

Award should not be set aside where the award is not defective **Lord Mac Dermott** said this for these reasons their lordship are of opinion that the awards are not defective and should not have been set aside because the manner in which arbitrator dealt with the Tawker Jewellery On these grounds their lordship consider that the awards and not lacking in any material respect and must be regarded as valid and effectual. The arbitrator was a judge of both facts and law and his findings arrived on careful consideration of circumstances cannot be legitimately assailed-

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⁹ AIR 1967 SC

UOI V Mehta¹⁰

In the case of Raghupati V. Ramgopal and Dwarka Nath V. Kedar Nath¹¹ mere fact that the arbitrators have erred in law is no ground for interference.

In case of Mahadev V. Kamala¹² it was held that a wrong view of law cannot make an award invalid.

In case of Alpi Prasad V . UOI and UOI V. Al Rallia Ram¹³ it was held that award of an arbitrator may be set aside on the grounds of an error only when in award or in any documents incorporated with it as for instance, as note appended by arbitrators stating the reasons for his decisions there is found some legal provisions which is the basis of the award and which is erroneous.

In case of LIC V. ML Dalmia¹⁴ it was observed that it may be possible that on the same evidence the court might arrive at a different conclusion than the arbitrator but that by itself is no grounds for setting aside of an award of Arbitrator on the grounds of misconduct.

In case of Secretary Irrigation Department govt of Orissa V. G.C. Roy¹⁵ the constitution bench held that an award is not liable to be set aside merely on the grounds of absence of reasons. The constitution bench further held that where the arbitration agreement itself stipulate reasons for the award the arbitrator is under a legal obligation to give reasons.

In case of Dwarka V. Kedar Nath¹⁶ it was held that No court will review the arbitrators conclusions or findings if he was acted within his authority and according to the principles of justice and behaved fairly to all parties and where there is no legal misconduct. Court has no right to review it or to consider it. section 34 sets out only the grounds on which the court may set aside an award.

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¹¹ AIR 1957 Pat

¹² AIR 1967 All 51

¹³ AIR. 1969 SC 588

¹⁴ AIR 1972 Cal 295

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¹⁶ AIR 1957 Pat 446

PRAYER

In the light of issues raised, arguments advanced and authorities cited may this Honble court be Please to declare that :

1. Writ petition is allowed.
2. In the alternative declare and adjudge –
 - (a) In WP 999/2015 that section 34 of Arbitration and conciliation Act 1996 is unconstitutional it amounts to introduction of litigation in the arbitral process which is against the basic tenets of arbitration and it leads of takes away the fruits of the award which leads to violation of country's bilateral and multilateral commitments under various conventions and Investment treaties:
 - (b) In W.P. 1021/2015 that the ordinance being ultravires of Part IX and retroactive it is in violation of aspects of basic structure like the preamble free and equal participation in democratic government and it violates fundamental and constitutional rights.

And/or

Pass any other order that it deems fit in the interest of justice, Equity and good conscience.
And for this the petitioner as in duty bound shall humbly pray.

Counsel for Petitioner