

**5th NLIU Justice R.K. Tankha Memorial Moot
Court Competition 2015**

IN THE HON'BLE HIGH COURT OF NIRDHAN

IN WP NOS: 999/2015 and 1021/2015

IN THE MATTER OF

People's Union for Liberties & Democratic Reforms and JCI ...PETITIONER

V.

Republic of Gariba and Maxis Bank ...RESPONDENT

MEMORANDUM ON BEHALF OF THE PETITIONER

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2.	Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai	2014 (1) Arb LR 512 (Bom)
3.	Apollo Tyres LimitedV. National Insurance Company Ltd. and Ors	30 1986 DLT 519
4.	Mc Dermott International Inc. v. Burn Standard Co. Ltd	2006 (11) SCC 181
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6.	M/s. Markfed Vanaspati and Allied Industries v/s Union of India	AIR 2007 SC (supp) 882
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20.	R.S. Builders v. Delhi Development Authority	AIR 1995 Del 10
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23.	Des Raj & Sons v. union of India	1984 Arb LR 156
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STATUTES REFERRED

S.NO	NAME
1.	The Constitution Of India
2.	The Arbitration and Conciliation Act 1996
3.	Representation of People Act 1951

JOURNALS REFERRED

S.NO	NAME
1.	All India Reporter
2.	Supreme Court Cases
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STATEMENT OF JURISDICTION

The Hon'ble High Court of Nirdhan is empowered to hear this case by the virtue of Art.226 of the Constitution of India.

STATEMENTS OF FACTS

JCi entered into an agreement with JGPS on 21.9.2011 for 115 kms of road in Nirdhan. Certain issues arose due to which JGPS terminated the contract on 21.9.2013. In the contract, there was an arbitration clause. JCi sent a legal notice on 11.12.2014 to invoke the arbitration and also asked for 'termination payment'. JGPS invoked the performance bank guarantee on 12.12.2014 by sending an email after business hours to the Maxis bank. On 13.12.14 JCi approached the High Court of Nirdhan, and the petition was directed to be listed at 10.30 am on 15.12.14. On 15.12.2014, the High Court granted "an ad-interim ex-parte stay on invocation of bank guarantee if not already encashed" In in the meantime, at 10.00 am, Maxis bank had acted on the email of JGPS and encashed the bank guarantee. At 10.01 am, there was a massive security breach in the systems of the Maxis Bank. Therefore, the Bank guarantee still remained in the account of JCi. The High Court directed the parties to seek interim remedies from the Id. Arbitrators, under the Act of 1996. An award was passed on 21.1.2015 in favour of JCi and held it entitled to the performance bank guarantee which was challenged by JGPS in the High Court of Nirdhan. Then JCi challenged the constitutional validity of Sec. 34, being WP 999/2015. The High Court of Nirdhan admitted the petition. In the meantime, the Governor of Nirdhan promulgated an Ordinance on 20th Dec 2014, which came into effect from 24th Dec 2014 which amended the Nirdhan Panchayati Raj Act, 1994, which added the Qualifications necessary for election, being class X for member of a Zila Parishad or a Panchyat Samiti, class V in the case of a Sarpanch of a Panchayat in a scheduled area and class VIII in case of a Sarpanch of a Panchayat other than in a Scheduled Area. PULDR moved the High Court of Nirdhan on 29th Dec 2014 for an urgent listing and hearing, as election notification was to be issued on 3rd Jan, 2015. No listing was granted. PULDR moved the Apex Court under Art. 32 on 31.1.2015 through the "Vacation Officer". No listing was granted till the issuance of election notification. On listing, the matter was to be heard by the High Court of Nirdhan. As a result, PULDR filed a pro-bono petition WP (C) No. 1021/2015, seeking to challenge the vires of the Ordinance in the High Court of Nirdhan. The High Court of Nirdhan admitted the petition. The two matters. (i.e. WP 999/2015 and WP 1021/2015) are to be listed together for final hearing.

ISSUES RAISED

ISSUE 1: Whether the Section 34 of the Act is Constitutional?

ISSUE 2: Whether the Ordinance promulgated by the Governor of Nirdhan is Constitutional?

SUMMARY OF ARGUMENTS

ISSUE 1: Whether the Section 34 of the Act is Constitutional?

No, Section 34 of the Act is not Constitutional. Litigating in courts in India is a time-consuming and expensive exercise, and justice usually eludes both parties to an action. Section 34 gives the grounds under which an arbitral award may be set aside. S.34 r/w S 36 implies that there is an automatic stay if an application is filed under S.34 until that petition has been refused or the time for making an application has expired. This provision under the Act totally defeats the main purpose of arbitration.

ISSUE 2: Whether the Ordinance promulgated by the Governor of Nirdhan is Constitutional?

No, the Ordinance promulgated by the Governor of Nirdhan is not Constitutional. This ordinance debar more than half of the population of Nirdhan from participating in the Panchayat elections. There is no minimum educational qualification required in the state legislatures, the parliament and even in any other country. It defeats the very essential criteria of a Democracy, i.e. free and fair elections.

ARGUMENTS ADVANCED

ISSUE 1: Whether the Section 34 of the Act is Constitutional?

The first Indian Arbitration Act of 1899 was based on the English Arbitration Act of 1889. Then came the Indian Arbitration Act, 1940, and finally the Arbitration and Conciliation Act, 1996 (the “Act”) was enacted by the parliament based on the UNCITRAL Model Law on International Commercial Arbitration, 1985¹

The arbitral awards are final in nature.² The Section 34 of the Arbitration and Conciliation Act, 1996 talks about the recourse against the arbitral award³. Section 36 of the Act makes it clear that an arbitral award becomes enforceable as a decree only after the time for filing a petition under section 34 has expired or after the section 34 petition has been dismissed. In other words, the pendency of a section 34 petition renders an arbitral award unenforceable. The section 5 states about the extent of judicial intervention.⁴

The Supreme Court, in **National Aluminum Co. Ltd. v. Pressteel & Fabrications**⁵ held that by virtue of section 36, it was impermissible to pass an Order directing the losing party to deposit any part of the award into Court. While this decision was in relation to the powers of the Supreme Court to pass such an order under section 42, the Bombay High Court in **Afcons**

¹ K.D. Kerameus, “Waiver of Setting Aside Procedures in International Arbitration” 41(1) *The American Journal of Comparative Law* (1993), <http://links.jstor.org/sici>

² S.35. Finality of arbitral awards.- Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

³ S.34. Application for setting aside arbitral award.

⁴ 5. Extent of judicial intervention.- Notwithstanding anything contained in any other 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.

⁵ (2004) 1 SCC 540

Infrastructure Limited v. The Board of Trustees, Port of Mumbai⁶ applied the same principle to the powers of a Court under section 9 of the Act as well. Admission of a section 34 petition, therefore, virtually paralyzes the process for the winning party/award creditor.

The Supreme Court, in **National Aluminium**⁷, has criticized the present situation and recommends that such an amendment is the need of the hour.

In order to rectify this mischief, certain amendments have been suggested by the Commission to section 36 of the Act, which provide that the award will not become unenforceable merely upon the making of an application under section 34⁸. This amendment is to ensure that the mere filing of an application under section 34 does not operate as an automatic stay on the enforcement of the award.

⁶2014 (1) Arb LR 512 (Bom)

⁷(2004) 1 SCC 540

⁸In section 36,

(i) add numbering as sub-section (1) before the words “Where the time” and after the words “Section 34 has expired,” delete the words “or such application having been made, it has been refused” and add the words “then subject to the provision of sub-section (2) hereof,”

(ii) insert sub-section “(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render the award unenforceable, unless upon a separate application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of sub-section (3) hereof;”

(iii) insert sub-section “(3) Upon filing of the separate application under sub-section (2) for stay of the operation of the award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of the award for reasons to be recorded in writing.”

(iv) insert proviso “*Provided* that the Court shall while considering the grant of stay, in the case of an award for money shall have due regard to the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908.”

Therefore, under section 34, there are only 7 grounds for making an application for setting aside the tribunal award, otherwise the arbitral award is final under section 35, and it can be enforced under section 36.

The Counsel submits the case of **In Apollo Tyres Limited v. National Insurance Company Ltd. and Ors**⁹. It was adjudged that Section 34¹⁰ of the Arbitration Act, 1940, covers no automatic provision wherein the stay of suit as a matter in dispute could be covered by the arbitration - Also, the Court has a right either to grant or refuse the stay even though the matter is covered by the arbitration.

In **Mc Dermott International Inc. v. Burn Standard Co. Ltd.**¹¹ the Supreme Court observed in paragraph 52 as follows:

"The 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only like in case of fraud or bias by the arbitrators, violation of natural justice etc. The Court cannot correct errors of arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So the scheme of the provision aims at

⁹30 1986 DLT 519

¹⁰S.34. of 1940 act

Power to stay legal proceedings where there is an arbitration agreement. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

¹¹2006 (11) SCC 181

keeping the supervisory role of the Court at minimum level and this can be justified as the parties to the agreement make a conscious decision to exclude the Court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

Challenge to award can only be permitted on grounds available under S.34. Court does not sit in appeal over

award.¹² Arbitration is a mechanism or a method of resolution of dispute that unlike Court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavour of the Court should be to honour and support the award as far as possible.¹³

In **Himachal Joint Venture v/s Panalpina World Transport (India) Pvt. Ltd**¹⁴, it was held that the arbitrator is the best Judge of quality as well as quantity of evidence and it will not be for the Court to take upon itself the task of being a Judge of evidence before Arbitrator.

By treating the pending application under section 34 as automatic stay the very basic purpose of the Arbitration & Conciliation Act, 1996 stands defeated.

In the case of **Vipul Aggarwal Vs. M/s Atul Kanodia & Co.**¹⁵ an Award was passed by the Arbitral Tribunal under the Arbitration & Conciliation Act, 1996 against the Petitioner. The Petitioner filed an application under Section 34 of the said Act for setting aside the Award but the application was dismissed. An appeal against the said order was also dismissed. The Petitioner filed special leave to appeal in the Hon'ble Supreme Court of India, which is pending. Meanwhile an application for executing the Award was filed. The Petitioner

¹²P. R. Shah, Shares and Stock Broker (P) Ltd. v/s M/s. B. H. H. Securities (P) Ltd. AIR 2012 SC 1866

¹³M/s. Markfed Vanaspati and Allied Industries v/s Union of India AIR 2007 SC (supp) 882

¹⁴AIR 2009 Delhi 80 (DB)

¹⁵ AIR 2004 All 205

objected that the Appeal was pending before the Hon'ble Supreme Court against the order rejecting his application under Section 34 of the Act, therefore the Award was not final because the Appeal before the Hon'ble Supreme Court was the continuation of the proceedings. The said application was rejected by the District Judge. The High Court after discussing the facts and the law opined that since stay was not granted by the Hon'ble Supreme Court, the execution should proceed because the main purpose of legislating the Arbitration & Conciliation Act, 1996 was to give a speedy remedy. The case before us is also similar except that the Appeal in this case is pending in the High Court.

If we read the provisions of Section 35, 36 & 37 of the Act and Order XLI Rule 5 of the Code of Civil Procedure in the light of the laudable objects of the Arbitration & Conciliation Act, 1996, we find that there is no manner of doubt that the very purpose of Arbitration & Conciliation Act, 1996 is to curb the procedural delays as are inherent in the routine civil disputes in the courts.

At this stage, the Counsel would like to bring to the notice of this Court, the Introduction, Statement of Objects and Reasons and Preamble to the Arbitration & Conciliation Act, 1996. The sum and substance of these sub-headings in the Arbitration & Conciliation Act, 1996 is that the outdated Arbitration Act, 1940 was replaced by the Arbitration & Conciliation Act, 1996 to make it more responsive to contemporary requirement; to make provisions for an Arbitral procedure which is fair, efficient and capable of meeting the needs of specific arbitration; to minimize the supervisory role of the courts in the arbitral process and to provide that every final Arbitral Award is enforced in the same manner as if it were a decree of the Court.

In **NTPC Ltd. Vs. Marathan Electric Motors India Ltd.**¹⁶, the Delhi High Court wherein the Court observed, The scope of challenge to an award under Section 34 of the Act does not open to the parties to challenge the ground that the arbitrator has reached at a wrong conclusion or has failed to appreciate the facts. The appreciation of evidence by the arbitrator is never a matter which the Court considers in the proceedings under Section 34 of the Act, as the Court is not sitting in appeal over the adjudication of the arbitrator.

The Apex Court in the case of **Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.**¹⁷ held that even if interpretation of contract by Arbitrator is wrong, Court under Sec. 34 not possessing jurisdiction to interfere with same. It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.

Also, it was held that the Court cannot reassess the evidence even if arbitrator committed error.¹⁸ The Court cannot sit in appeal over the conclusions of arbitrator and re-examine the evidence which had been already considered by the arbitrator.¹⁹ However erroneous his decision may be, it cannot be interfered with by any court.²⁰

¹⁶ 194 (2012) DLT 404

¹⁷ (2009) 10 SCC 63

¹⁸ Eastern and North Frontier Railway Cooperative bank Ltd. V. B. Guha & Co. AIR 1986 Cal 146, Uttar Pradesh State Electricity Board v. Searsole Chemicals (1995) 2 Arb LR 320, National Electric Supply Trading Corporation Pvt Ltd. V. Punjab State AIR 1963 Punj 56

¹⁹ State of Orissa v. R.N. Mishra AIR 1984 Ori 42, Swaran Singh v. University of Delhi AIR 1994 Del 290, Samyukt Namrata v. Delhi Development Authority 1986 2 Arb LR 48, Sarabjit Singh v. State of Punjab AIR 1985 P&H 179, New Snow View Transport Pvt. Ltd. AIR 1994 NOC 311 (H.P.), R.S. Builders v. Delhi Development Authority AIR 1995 Del 10, Shivlal Prasad v. Union of India AIR 1975 MP 40

²⁰ Bharu Kure Jat v. Tara Lal AIR 1962 Punj 173

Unless the arbitrator disregard principles of natural justice in the arbitration proceedings such as being radically wrong or vicious in proceedings or disregarding the fundamental rules of evidence, the Court cannot interfere.²¹

ISSUE 2: Whether the Ordinance promulgated by the Governor of Nirdhan is Constitutional?

The counsel submits before this honourable court the Universal adult franchise (Adult franchise means that the right to vote should be given to all adult citizens without the discrimination of caste, class, colour, religion or sex.)²²

Article 326 of the Constitution of India states that the election to the house of the people and to the Legislative Assembly of every State shall be on the basis of adult suffrage which permits the citizen of India right to vote.²³

Section 3 of the Representation Of People Act 1951 gives the qualification for membership of the Council of States.—A person shall not be qualified to be chosen as a representative of any State * * * or Union territory in the Council of States unless he is an elector for a Parliamentary constituency 6[in India].]

Section 4.(d) of the people's representation act 1951 gives the qualifications for membership of the House of the People.

²¹Des Raj & Sons v. union of India 1984 Arb LR 156, Krishna Goyal Prasad v.

ChandiprasadDuryadhanprasad AIR 1953 Nag 309 (DB), Louis Dreyfuss Co. v. S.

BalasubbarayaChettiar& Son AIR 1961 Mad 186, Baldev Singh Sardool Singh v. Union of India AIR 1965 J&K 28, Hindustan Tea v. Sashikant& CO. AIR 1987 SC 81, Uttam Singh Duggal v. Union of India AIR 1988 MP 191, D.K.Sharma v. Union of India 1987 Arb LR 6

²² www.download.nos.org/srsec317newE/317EL17.pdf Accessed on 12-02-15

A person shall not be qualified to be chosen to fill a seat in the House of the People, unless:

(d) in the case of any other seat, he is an elector for any Parliamentary constituency

In addition to this section 5 of the same act also puts forth the qualifications for membership of a Legislative Assembly.—A person shall not be qualified to be chosen to fill a seat in the Legislative Assembly of a State unless—

(c) in the case of any other seat, he is an elector for any Assembly constituency in that State:

The constitution of India in part IX of article 243D states the reservation of seats for ST's and SC's.

Article 243D²⁴ of the constitution states that the seats shall be reserved for SC's, ST's and women in panchayats.

Even the Art.243F of the Constitution²⁵ says that the qualification to contest election in Panchayat is same as the elections to the State Legislatures, the only difference is the minimum age for panchayat is 21 yrs, while its 25 for State Legislatures.

So, it is clear that even grund norm of India, i.e., the Constitution and the ROPA 1951 does not put any bar of educational qualification. But the Nirdhan Governor did so, it is against the Constitution and the ROPA 1951. Therefore it violates the constitution.

It is given in the constitution that there shall be reservation for SC's and ST's in the house of the people²⁶ and in the legislative assembly of the state²⁷. But the governor of

²⁶ 330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People

²⁷ 332. Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States

Nirdhanpromulgated an arbitrary ordinance which infringes the right of reservation of them as guaranteed under the constitution. The right is infringed because of the minimum educational qualification in the Panchayat elections. Therefore the seats reserved for SC's and ST's will remain vacant and ultimately the reserved seats will be converted into unreserved seats.

The statistics of Rajasthan state regarding the literacy rate in ST's, SC's and women given below are evident to prove below the validity of the point that this ordinance will debar majority of the population from contesting in panchayat elections.

Rajasthan is among the bottom five states in the country in terms of the literacy level for scheduled caste (SC) and among the last six for scheduled tribes (ST) in the census data released recently.

Rajasthan is the only state that has stipulated minimum educational qualifications for candidates who want to contest Panchayat polls. There are also no such mandatory qualifications to contest elections for higher offices of MLA/MPs. In fact, 23 of your own BJP MLAs in the current Vidhan Sabha are below 10th pass, as are 2 BJP MPs from Rajasthan²⁸. At the same time, almost 20% of the Cabinet Ministers at the Center are below 12th Pass. Surely, if the Prime Minister finds MPs with such low educational qualifications suitable to devise and implement policies for the entire country, a Sarpanch of a small Gram Panchayat need not be held to such arbitrary and exclusionary standards.

Based on the 2010 Rajasthan Panchayat Polls: more than 70% of elected Panchayat Samiti members and 77% SC Panchayat Samiti representatives will now be debarred from contesting. Of the elected Zila Parishad members, 55% do not meet these educational

²⁸www.rajsthanmpmla.com Accessed on 12-02-15

standards with SC and ST worst affected with 61% and 63% respectively. The numbers of women PRI representatives affected will be even worse. Not only will your Government nullify the political careers of this entire lot in one shot, but by simultaneously excluding a majority of the population from contesting and taking away voters' right to choose their own representative, your Government is also abridging citizens' fundamental right to political participation and hence democracy.²⁹

The Counsel further submits that the impugned educational qualification was against the rights recognized by the United Nations in "The International Covenant on Civil and Political Rights"³⁰. Article 25 thereof reads as under:-

Article 25 Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:--

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

The above Clause (b) of Article 25 enshrines the right to stand for election. It may be advantageous to reproduce below the General Comment 25 given at page 663 *ibid*, which reads as under:--

²⁹<http://www.indiatvnews.com/politics/national/educational-qualifications-narendra-modi-ministers-17941.html> Accessed on 12-02-15

³⁰ (Cases, Materials, and Commentary) by Sarah Joseph, Jenny Schultz and Melissa Castan, Second Edition (Oxford University Press)

The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person's candidacy. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office.

The Counsel submits that that the impugned educational qualification was also against the United Nations Universal Declaration of Human Rights, Article 21 whereof is reproduced below:--Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The International Institute for Democracy and Electoral Assistance (International IDEA), which states the electoral standards ie., the guidelines for reviewing the legal framework of elections was established in 1995, is an intergovernmental organization (ECI is not a direct member) with a mission to support sustainable democracy worldwide. India is a founding member. Its regulation consist of clause 5 which clearly states that³¹5. The right to elect and to

³¹ Section 5 of International Electoral Standards, guidelines for reviewing the legal framework of elections:IDEA

be elected, further explains as: The legal framework should ensure that all eligible citizens are guaranteed the right to universal and equal suffrage as well as the right to contest elections without any discrimination.

Formal constitutional or statutory recognition of a citizen's right to vote, and to run for public office, is common to democratic states and plays both a substantive and a confidence-building role.

After going through the qualification/eligibility criteria of the members of Parliaments of 29 countries (including USA, UK), the Counsel found that there is no mention of minimum educational qualification in any of the 29 countries. The British Parliament, which claims to be mother of all Parliaments, does not require its members to have any educational qualification whatsoever nor does the US Congress or Senate require its members to come armed with formal education.

N P Ponnuswami v Returning Officer³² and Jyoti Basu v Debi Ghoshal³³. In these cases, the Supreme Court held that the right to elect (i.e., the right to vote) and the right to be elected (i.e., the right to contest) are both “pure and simple” statutory rights (and not fundamental or common law rights). Further the Court held, “concepts familiar to common law and equity must remain strangers to Election Law. Therefore any individual could contest elections barring certain essential norms.”

Also in another case of *In Aruna Roy v State of Rajasthan*³⁴ “the exclusion of those who did not have an opportunity of formal education, could not have been denied participation in democratic institutions... the poor, underprivileged and downtrodden, cannot be denied

³²(1952) 1 SCR 218

³³(1982) 3 SCR 318

³⁴WP (C) D No. 1 of 2015

participation in a democracy merely on the ground that she does not have educational qualifications.” In paragraph 33, the Court repeats these observations, and adds that the legislation is prima facie “arbitrary, irrational and 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 73rd Amendment, it may be declared as unconstitutional by the Court of law. A democracy is a government of the people, by the people and for the people. The requirement of educational qualification creates a separate class. Therefore, it cannot be said that such a government is a government of the people.

His Lordship Mr. Justice M.N. Venkatachaliah in the course of the Judgment rendered in **Shri Kihoto Hollohan v. Shri Zachillu**³⁵ assessing the role of democracy as "Democracy is a basic feature of the Constitution.”

The impugned law creates an elitist democracy amounting to discrimination, which is forbidden under Article 14 of the Constitution. The Advanced Law Lexicon, The Encyclopaedic Law Dictionary, 3rd Edition, Volume 2 (2005) defines democracy as under:--

One of the three forms of government; that in which the sovereign power is neither lodged in one man, as in a monarchy, nor in the nobles, as in an oligarchy, but in the collective body of the people; government by the people; state in which such a government prevails; the principle that all citizens have equal political rights.

Democracy was held one of the basic structure of the Constitution in *Indira Gandhi v. Raj Narain*³⁶. In the case of **Union of India v. Association for Democratic Reforms** it was

³⁵ MANU/SC/0101/1993

³⁶ AIR 1975 SC 2211

discussed in the constituent assembly was against of any minimum education qualification to contest elections because 3/4th of the population was illiterate and providing education as a qualification for contesting election was not accepted by the Constituent Assembly.³⁷

Peoples Union for Civil Liberties (PUCL) v. Union of India³⁸ Consistent with the principle of adult suffrage, the Constitution has not prescribed any educational qualification for being member of the House of the People or Legislative Assembly. The table³⁹ below indicates the literacy rate of Rajasthan state among males and females according to the census of 2001 and 2011.

Persons	Literacy Rate (%)					
	2001			2011		
	Total	Rural	Urban	Total	Rural	Urban
Males	75.7	72.2	86.5	79.2	76.2	87.9
Females	43.85	37.3	64.7	52.1	45.8	70.7
SC	52.2	49.86	61.35	59.7	52.3	64.7
SC (Females)	33.9	31.18	44.22	44.5	35.6	49.65
ST	44.66	43.7	60.79	52.8	45.12	64.25
ST (Females)	26.2	25.22	42.97	37.3	28.24	46.54

As per Census, a person aged seven and above who can both read and write with understanding in any language, is treated as literate⁴⁰. Hence a person who is literate may not necessarily be a class 10 pass. In **Dr D.C. Wadhwa and Ors. Vs. State of Bihar and**

³⁷ AIR 2002 SC 2112

³⁸ AIR 2003 SC 2363

³⁹ www.census.nic.in Accessed on 12-02-15

⁴⁰ www.census.nic.in Accessed on 12-02-15

Ors⁴¹, the Supreme Court emphasized that under the Constitution, the primary law making authority is the legislature and not the executive and the ordinance making power is “in the nature of an emergency power”. In the case at hand, there was no such emergency to introduce minimum educational qualification all of a sudden just before the Panchayat elections. Even, no other states (28 states) have any minimum educational qualification in Panchayat election. Therefore, it is unacceptable that there was an emergency to promulgate the Ordinance.

In a landmark judgement of Pakistan⁴², the Supreme Court of Pakistan held that a few clauses of the provisions of Article 8-A of the Conduct of General Election Order, 2002 (Chief Executive's Order No. 7 of 2002) and Clause (cc) of Sub-section (1) of Section 99 of the Representation of the People Act, 1976, which lay down that a person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) or a Provincial Assembly unless he is at least a graduate possessing a bachelor degree in any discipline or any degree recognized as equivalent by the University Grants Commission under the University Grants Commission Act, 1974 or any other law for the time being in force are to be declared to be void prospectively and hence was struck down.

⁴¹ AIR 1987 SC 579

⁴² Muhammad Nasir Mahmood and Another Vs. Federation of Pakistan through Secretary Ministry of Law, Justice and Human Rights Division, Islamabad PLD 2009 107

PRAYER

In light of the issues raised, arguments advanced and authorities cited it is most humbly and respectfully submitted that this Hon'ble Court may adjudge and declare that :

1. Sec. 34 of the Act is unconstitutional.
 2. Ordinance which amended the NirdhanPanchayati Raj Act, 1994 to be struck down.
- Or grant other such relief as the court may deem fit in the light of justice, equity and good conscience.

AND FOR THIS ACT OF KINDNESS THE PETITIONER SHALL DUTY BOUND
EVER PRAY.

COUNSELS FOR THE PETITIONER