

BEFORE

THE HON'BLE HIGH COURT OF NIRDHAN

WRIT PETITION FILED UNDER ARTICLE 226 & 227 OF THE CONSTITUTION

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

v.

Republic of Gariba and Maxis Bank.....Second Side

MEMORIAL ON BEHALF OF FIRST SIDE

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LIST OF ABBREVIATIONS

§.....	Section
¶.....	Paragraph
JGPS.....	Jodhpur Gaon Panchayat Samiti
AIR	All India Reporters
Arb.....	Arbitration
Art.....	Article
Corp.....	Corporation
Gov.....	Government
JCi.....	Jeopardy Contracts Inc.
HC.....	High Court
WP.....	Writ Petition
Inc.....	Incorporation
Ors.	Others
SC.....	Supreme Court
SCC.....	Supreme Court Cases
CIA.....	Council for infrastructure Arbitration
v.....	Verses
Id.....	learned

INDEX OF AUTHORITIES

CASES

Konkan Corporation Ltd v. Mehul Construction Company 2000(7)SCC 201

State of J&K v. Dev Dutt Pandit (1999) 7 SCC 399.

Bharat Sewa Sansthan Vs. U.P. Electronics Corporation Limited Para 23 AIR2007 SC 2961

Steel Authority of India Ltd Vs. AMCI Pty Ltd. and Anr. 2011(3)ARBLR502(Delhi)

*Bhanumati And Others vs State of Utter Pradesh through its principal secretary and others 2010(12) SCC 1
(para13,22,23,24 and 26)*

Dulari Devi & Ors. Vs. State of Rajasthan & Ors. CIVIL WRIT PETITION NO. 375/2015

*People's Union for Civil Liberties (PUCL) And Another Vs. Union of India And Another, (2003) 4 SCC
399(para 122)*

Union of India And Others Vs. Rakesh Kumar And Others (2010) 4 SCC 50 (para 45)

Anokh Singh Vs. Punjab State Election Commission (2011) 11 SCC 181(para 36 and 37)

State of Tamil Nadu And Others Vs. K.Shyam Sunder And Others (2011) 8 SCC 737 (paras 50-53)

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STATUTES AND NOTIFICATIONS

CONSTITUTION OF INDIA

ARBITRATION AND CONCILIATION ACT 1996

United Nations Commission on International Trade Law (UNCITRAL) in 1985

BOOKS REFERRED

- Supreme Court on ARBITRATION, CONTRACTS & TENDERS by Hon'ble Justice S.N. PHUKAN, 2011 EDITION.
- Commentary on Law of ARBITRATION AND CONCILIATION by Justice R.P. Sethi, Volume 1.
- H.M Seervi,. Constitutional Law of India Vol. I & II, III
- Durga Das Bassu Commentary on the Constitution of India
- Indian Constitutional Law by MP JAIN 7th Edition
- C R Datta, Law of Arbitration and Conciliation (Including Commercial Arbitration),2008

STATEMENTS OF JURISDICTION

The counsel appearing on behalf of second side (Republic of Gariba and Maxis Bank) humbly submits the dispute concerning Constitutional Validity of Sec.34 of Arbitration and Conciliation Act, 1996 & Ordinance dated 20.12.2014 amending the Nirdhan Panchayati Raj Act, 1994 to the Original Writ Jurisdiction of the Hon'ble High Court of Nirdhan, pursuant to Article.226 & 227 of the Constitution of Republic of Gariba. Thereby, the Counsel on behalf of Second Side submits this memorial which sets forth the facts & the laws on which the disputes are based.

THE PRESENT MEMORIAL SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN THE
PRESENT CASE

MEMORIAL ON BEHALF OF FIRST SIDE

STATEMENT OF FACTS

The Republic of Gariba is a sovereign federation of states with several union territories. Nirdhan is the biggest of states in the Republic of Gariba. The territory of Nirdhan was considered backward till 2011, when the then governor of Nirdhan decided to fast pace the development of roads and highways. Powers in this regard were delegated to Panchayat Samitis, to issue detailed project report on the official website and a single scheme was provided for sanction of the projects.

21.09.2011:- Jeopardy Contracts Inc.(JCI) entered into an agreement with Jodhpur Gaon Panchayat Samiti (JGPS) for 115km of road in a scheduled area in Nirdhan.

21.09.2013:- At the time of culmination of project, certain issues cropped up regarding land acquisition, design of bridges etc. due to which JGPS terminated the Contract.

11.12.2014:- JCI sent a legal notice for invoking arbitration as per contractual clause and also asked for the termination payment for the work already done.

12.12.2014:-JGPS' counsel informs that Arbitration & Conciliation act, 1996 is not applicable as the matter is covered under the Madhyastham Adhikaran Adhiniyam, 1983. Also, an e-mail was sent after business hours to maxis bank for invoking performance bank guarantee.

13.12.2014:-JCI moved the High Court of Nirdhan by filing an urgent Civil Writ Petition WP (C) No. 99/2014, which was directed to be listed at 10:30am on 15.12.2014.

15.12.2014:- At 10:30 am High Court granted ad-interim ex parte stay on invocation of bank guarantee if not already encashed. Meanwhile at 10:00am, the branch manager of Jodhpur Gaon Branch of Maxis Bank had acted on e-mail of JGPS and encashed the bank guarantee but at 10:01am there was a massive security breach in the system of Maxis Bank which instantly froze all accounts and transactions-in progress. Therefore, till the

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Order copy was served on the maxis bank, the amount under the bank guarantee still remained in the account of JCi.

Stay order was vacated by the High Court of Nirdhan directing the parties to seek appropriate interim remedies from the Ld. Arbitrators. Arbitration proceedings took place under the Act of 1996 before the council for Infrastructure Arbitration (CIA).

21.01.2015:- Arbitration culminated into an award in favour of JCi and inter alia held JCi entitled to the money under the performance bank guarantee.

24.01.2015:- JCi wrote to Maxis Bank with a copy of award, to return the money pertaining to the performance bank guarantee, retained by it in a fixed deposit, with the interest accumulated thereon, which was thrice the principal.

25.01.2015:- JGPS filed a petition under sec.34 of the Act of 1996, before the High Court of Nirdhan, on its original side.

27.01.2015:- Maxis Bank informed that admission of petition under sec.34 amounts to stay on the award, and therefore until the final outcome of sec.34, it is not obliged to pay anything to JCi.

28.01.2015:- JCi cited its concerns about immediate requirements of liquidity due to erosion of net worth, expenses for litigation, and pressure of the Amersian development bank regarding the repayment of loan etc. however, Maxis Bank did not release any payment to JCi.

JCi challenged the constitutional validity of Sec.34, by way of writ petition, being WP 999/2015 on the grounds that:-

- i. It amounts to introduction of 'litigation' in the arbitral process which is against the basic tenets of arbitration;

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- ii. The pendency of Sec. 34 petitions is huge and delay thereon amounts to expropriation, in as much as it takes away the fruits of the award which leads to violation of country's bilateral and multilateral commitments under various conventions and investment treaties;
- iii. And grant of an automatic stay, without adjudication on prima-facie case, balance of convenience and irreparable injury is per se bad in law;
- iv. Other grounds as advised by the Id. Counsel.

The High Court of Nirdhan admitted the Petition, and considering the nature of issues raised, issued notice to the Ld. Attorney General.

20.12.2014:- In the meanwhile, the Governor of state of Nirdhan promulgated an ordinance.

Ordinance came into effect from 24th December, 2014 and amended the Nirdhan Panchayati Raj, 1994 as under:-

“19. Qualification for election as a Panch or a member- Every person registered as a voter in the list of voters of a Panchayati Raj Institution shall be qualified for election as a Panch or, as the case may be, a member of such Panchayati Raj Institution unless such person-

(r) In case of a member of a Zila Parishad or a Panchayat Samiti, has not passed school examination of the Board of the Secondary Education, Nirdhan or of an equivalent Board;

(s) In case of Sarpanch of a Panchayat in a Scheduled Area, has not passed class V from a school in Nirdhan; and

(t) In case of a Sarpanch of a Panchayat other than in a Scheduled Area, has not passed class VIII from a School in Nirdhan;”

People's Union for Liberties and Democratic Reforms issued a public statement that the ordinance was replete with malice in law.

29.12.2014:- People's Union for Liberties and Democratic Reforms moved the High Court of Nirdhan through its counsel during the annual winter holidays, for an urgent listing and hearing, since the election notification was to be issued on 3rd January 2015. The PPS to the Hon'ble Chief Justice informed the counsel that listing has been denied.

31.12.2014:- With its counsel's affidavit, the People's Union for Liberties and Democratic Reforms moved the Hon'ble Apex Court under Art.32 through vacation officer. The vacation officer accepted the papers and informed the counsels that instructions from the Hon'ble Chief Justice are awaited. After a wait for 48 hours, it was informed by the Id. Vacation officer that he can only speak to the Id. Registrar (Judicial). On being approach, the Id. Registrar (Judicial) informed that he has put in a message with the PPS to the Hon'ble Chief Justice. However, despite several reminders, no listing was granted till the issuance of the election notification. Upon listing, the Apex Court was pleased to observe that the matter can now be heard by High Court of Nirdhan.

Therefore, left with no time, People's Union for Liberties and Democratic Reforms immediately moved the Hon'ble High Court of Nirdhan. It filed a pro-bono Petition WP (C) No. 1021/2015 in the High Court of Nirdhan seeking to challenge the vires of the Ordinance, and certain other reliefs on the ground of:

- i. Non availability of a notified vacation bench during any holidays is unconstitutional;
- ii. Non- availability of a notified procedure for listing when the Court is not in session 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 and *actus curiae neminem gravabit*,
- iv. The ordinance being ultra vires part IX, and retroactive;
- v. The ordinance further marginalizes women and 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 and equal participation in democratic government and it also abridges valuable fundamental and constitutional rights.

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The High Court of Nirdhan admitted the Petition, and given that important questions pertaining to the interpretation of constitution were involved, notices were issued to the Id. Attorney General as well as the Republic of Gariba. Given that the Id. Attorney General was to appear in these two matters, (i.e. WP 999/2015 and WP 1021/2015) they have been directed to be listed together for final hearing.

STATEMENT OF ISSUES

1. **Whether Sec.34 of the arbitration and conciliation act, 1996 defeats the basic tenets of the Arbitration & Conciliation Act, 1996 or not?**
2. **Whether admission of petition under section 34 of Arbitration and conciliation act amounts to stay on the enforcement of Arbitral award?**
3. **Whether the Ordinance Promulgated by the Hon'ble Governor is ultra vires the Part IX of the Constitution of India or not?**
4. **Whether the Ordinance promulgated by the Hon'ble Governor violates the Constitutional provisions like Preamble, Article 14 and Article 40?**

SUMMARY OF PLEADINGS

ISSUE 1: Whether Sec.34 of the arbitration and conciliation act, 1996 defeats the basic tenets of the Arbitration & Conciliation Act, 1996?

Your honour it is humbly submitted to the bench that basic tenets of Arbitration being speedy disposal of dispute and to avoid long and cumbersome procedure of judicial Courts. Whereof, the Section 34 of Arbitration & Conciliation Act, 1996 introduces the interference of Courts, thereby making difficult for the parties to Achieve justice. Therefore, your lordship, Sec.34 of Arbitration and Conciliation Act defeats the basic tenets of the Act.

ISSUE 2: Whether JCI is entitled to an interim award, in case of automatic stay on the enforcement of Arbitral award or not?

Your honour the counsel humbly wants to submit to the court that in cases where after the pronouncement of an Arbitral Award if any of the party involved in the Arbitral proceedings is not satisfied with the Arbitral Award and then files an application under Section 34 of the Arbitration and Conciliation Act, 1996 then this results to stay on the enforcement of Arbitral Award. Also, until the application is pending under the Section 34 of Arbitration and Conciliation Act, 1996 the Arbitral Award cannot be enforced. Therefore, in such a situation to avoid from irreparable injury, interim award can be given.

ISSUE 3: Whether the Ordinance Promulgated by the Hon'ble Governor is ultra vires the Part IX of the Constitution of India or not?

The Ordinance passed by the Governor is ultra-vires of Part IX of the Constitution of India because the impugned ordinance is plainly against the objective of self governance, which is basic highlight behind giving the Constitutional status to Part IX of the Constitution of India. The Ordinance prescribed by the Governor deprives a large section of Rural society from participating in the democratic institution of Panchayati Raj.

XIV**ISSUE 4: Whether the Ordinance promulgated by the Hon'ble Governor violates the Constitutional provisions like Preamble, Article 14 and Article 40?**

Your honour, the counsel humbly wants to submit to the bench, in the present case the impugned Ordinance is violative of the core constitutional philosophy of democratic governance in India, which is based upon equality of status and opportunity featuring in the Preamble of the Constitution of India.

Secondly, the impugned Ordinance violates the Article 14 as it does not make the constitutional test of equality before the law as there is no object to be served & it does not sustain on the ground of object-nexus test.

Thirdly, the impugned Ordinance violates the Article 40 featured in Part IV (Directive principle of State Policy) as it fails to serve the objective of functioning as the unit of self Governance.

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ARGUMENTS ADVANCED

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1. Whether Sec.34 of the arbitration and conciliation act, 1996 defeats the basic tenets of the Arbitration & Conciliation Act, 1996 or not?
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Appearing on behalf of the first side, the counsel humbly submits before the Hon'ble bench that the section 34 is not according to the basic tenets of the arbitration and conciliation act, 1996 as it defeats the basic purpose and objective of legislature in laying such act.

Your lordship the basic object of the act was to have speedy disposal of civil disputes so as to avoid long and cumbersome process of litigation and also to remove the burden from the court of long lasting case. Your lordship, the legislative intent in passing the Act of 1996 was to have minimum judicial interference otherwise the basic objective in passing such Act would be defeated. Also, if each and every decision of the arbitrator would be challenged under Section 34, then it results to interference of judiciary which further results into the situation where the parties have to wait for long time to get their awards and further results in the frustration of award as due to huge number of petitions are pending under Section 34 of Arbitration and Conciliation act, 1996.

Your lordship the counsel would like to retrace some cases where the basic objectives of the Arbitration and Conciliation Act, 1996 have been interpreted by the Hon'ble Court:-

- It was held by the Hon'ble Court in the case of Konkan Corporation Ltd v. Mehul Construction Company¹

¹2000(7)SCC 201

2.

The intention of the legislature in framing the 1996 Act was to provide speedy solution of commercial disputes and to limit the intervention of the Court in Arbitral process. It was not an intention of the legislature that each and every order passed by the Authority under the new Act would be subject matter of judicial scrutiny by the code of law.

➤ *State of J&K v. Dev Dutt Pandit*,²

"Arbitration is considered to be an important alternative dispute redressal process which is to be encouraged because of [the] high pendency of cases in the courts and [the high] cost of litigation. Arbitration has to be looked up to with all earnestness so that the litigant public has faith in the speedy process of resolving their disputes by this process".

➤ *Bharat Sewa Sansthan Vs. U.P. Electronics Corporation Limited*³

The main objectives of the Arbitration Act is to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration and to minimize the supervisory role of courts in the arbitral process and to permit an arbitral Tribunal to use mediation, conciliation or other procedures during the arbitral proceedings in settlement of disputes, etc. etc.

So it is quite transparent from the cases mentioned above that the legislative intent of passing such an Act was to have minimum judicial interference and not a case where to misuse the judiciary interference to frustrate a award and to cause hardship to another party which further results in delay of justice and justice delayed is justice denied.

Justice as mentioned in the basic structure and is featured in the Preamble of our constitution is of immense importance.

² (1999) 7 SCC 399.

³ Para 23 AIR2007 SC 2961

3.

The founding fathers of our Constitution placed “Justice” at the highest pedestal and our Preamble to the Constitution placed justice higher than all other features like liberty, equality and fraternity. Judicial responsibility, accountability and independence are in every sense inseparable. Credibility of the judiciary is at stake now due to mounting arrears of cases, delays in disposal and also high cost of obtaining justice. The denial of justice through delay is the biggest mockery in law. It does not amount to mere mockery; the delay in fact kills the entire fabric of justice delivery system of the country.

It is humbly submitted to the Hon’ble Court from the aforesaid reasons mentioned above that the effect that Section 34 of Arbitration and Conciliation Act, 1996 effects are drastic in itself, as it shakes the pillar of justice delivery system by causing delay in enforcement of the arbitral award.

Furthermore, the effects lead to the violation of constitution as justice is the basic structure of constitution and any such act or any provision of a Act which is against the basic structure of constitution is sought to be struck down and must be declared unconstitutional.

2. Whether JCI is Entitled to any interim award, in case automatic stay on the enforcement of Arbitral award?

It is humbly submitted to the Hon’ble bench, Grant of an automatic stay on the Arbitral Award under Section 34 of Arbitration and Conciliation Act, 1996 without adjudication in a prima-facie, balance of convenience and irreparable injury is per se bad in law and in such a case the aggrieved party is entitled to an interim award under Section 9 (ii) (b) of Arbitration and Conciliation Act, 1996.

It is further submitted to the Hon’ble bench that grant of an application by court under Section 34 of Arbitration and Conciliation Act, 1996 amounts to stay on award which further frustrates the basic fruits of the award without even adjudication on prima facie case and where if award not enforced will result into the

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Irreparable injury to the party in whose favour award has been given. For the aforesaid reasons mentioned above, the council would like to bring to the light of Hon'ble Court an important case in which similar situation has arisen where the decision was given by the arbitrator in favour of one party but other party challenged the award taking advantage of Section 34 of Arbitration and Conciliation Act, 1996 thus causing delay in enforcement of arbitral award. In effect of this the aggrieved party whose financial conditions were poor prayed before the Hon'ble Court for an interim relief so that the company could be survived in such a financial hardship condition and its interest could be preserved.

Hon'ble court ordered interim relief exercising its powers under Section 9 of Arbitration and Conciliation Act, 1996 by deposition of security sum, so the essence and fruits of the award does not get frustrated and also because it was necessary to protect the interest of the company otherwise it would have suffered an irreparable injury.

9. Interim measures, etc. by Court. :- A Party may, before or during arbitral proceedings or at any time after the making of the Arbitral award but before it is enforced in accordance with Section 36, applied to a court-

(ii) For an interim measure of protection in respect of any of the following matters namely

(b) Securing the amount in dispute in the Arbitration.

➤ The important paragraphs are relevant for the judgement of the Hon'ble Court in the case of *Steel Authority of India Ltd Vs. AMCI Pty Ltd. and Anr.*⁴

Para 28:- The court held that the ingredient of a prima-facie case is made out once an arbitral award has found a case in favour of a party.

⁴ 2011(3)ARBLR502(Delhi)

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Para 29:- Justice and equity would not countenance a judge standing by as a mute spectator while a party renders an award worthless and practically unenforceable and non implementable furnish security for the amount in dispute.

Para 45:- The bottom line, in my views that the court should be satisfied that the furnishing of security by the respondent is essential to safeguard the interests of the Petitioner.

Para 46:- The award is detailed and prima-facie case appears to be comprehensive. The first round in this legal battle has gone in the favour of the petitioner. Therefore, the Petitioner has made out a prima-facie case in its favour.

Para 65:- accordingly for the reasons aforesaid, then lordships allowed the petition and directed the respondent to furnish security in the sum.

Balance of convenience was in favour of grant of interim measure of protection. Petitioner should suffer irreparable injury if interests of petitioner were not adequately protected

Ratio Decendi:- therefore it was held that company shall suffer irreparable injury if interest of company are not protected.

Similar facts exist in our Case also; JCI is in a situation of financial hardship and if interim relief is not granted irreparable injury would be suffered by JCI.

Therefore, it is humbly submitted to the Hon'ble court to grant an interim relief.

Also it can be retraced from Para 13, the financial hardships that JCI was facing. JCI stated its concerns about immediate requirement of liquidity due to erosion of net worth, expenses for litigation, and pressure of the Amersian development bank regarding the repayment of loan etc. your lordships this etc. is subjected to interpretation and includes financial hardship to pay wages to the labour class employed by the JCI for construction work and also includes the salary to be given to the engineers and technical staff. Your lordship

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The effect caused by the Section 34 of the Act of 1996 has made the award unenforceable which worsens the financial condition to a great extent resulting in no liquidity of fund. Thus, it has resulted into a situation where survival of corporate body and its labour class is at stake. Since, It is the foremost priority of the corporate body to save the interest of the working and labour class.

The counsel relies upon the Judgement of the Hon'ble Supreme Court,

The apex court was hearing petitions filed by the State Bank of India (SBI) and Punjab National Bank (PNB), which had challenged the high court order. The banks had petitioned the SC on the grounds that as creditors, they had the first right over the proceeds realised from the sale of hypothecated sugar if mills failed to repay their loans. SC, however, held that right to life of farmers prevailed over the right of banks to do business.

Your Lordship, this has made a serious question on the survival of the company and the workers employed. The stay on bank guarantee has further worsened the conditions.

This leads to violation of constitutional right under Article 21 which guarantees the, the right to livelihood. Thus Section 34 Arbitration and Conciliation Act, 1996 causing the delay in the enforcement of award violates the Article 21.

3. WHETHER THAT THE ORDINANCE PROMULGATED BY THE HON'BLE GOVERNOR IS ULTRA VIRES PART IX OF CONSTITUTION OF INDIA OR NOT?

Appearing on the behalf of first side the counsel is humbly submitted before this Hon'ble court that the impugned ordinance is plainly against the objective of the main act, providing for representative democracy for the weaker section of society.

The 73rd amendment act,1992 of the constitution of India gives the panchayati raj institutions a constitutional status , by inserting part IX-The Panchayats, in the constitution of India, containing Article 243,243A and 243O, defining 'panchayat' to mean an institution of self governance constituted under article 243B, of the rural

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areas .It is stated that the panchayati raj institutions are the representative institutions,to give equal opportunity to all including those, who do not have formal education in schools to represent in local governance. The entire body of villagers are given rights to participate in the meetings of panchayat for inclusive self governance, self rule and self determination for social upliftment,which is not dependent on any educational qualification.

To support the above submission the Counsel have relied upon the observations of the Hon'ble Supreme Court, in introducing the 73rd amendment in the Constitution of India, providing for inclusive governance at the grass root level, in *Bhanumati And Others vs State of Utter Pradesh through its principal secretary and others*,⁵ (supra), :-

“13. The constitution quest for an inclusive governance voiced in the preamble is not consistent with panchayat being treated merely as a unit of self- government and only as part of directive principles . if the relevant constituent assembly debates are perused one finds that even that constitutional provision about panchayat was inducted after strenuous efforts by some of the members . from the debates we do not fail to discern a substantial difference of opinion between one set of members who wanted to finalise the constitution solely on the parliamentary model by totally ignoring the importance of panchayat principals and other groups of members who wanted to mould our constitution on gandhian principles of village panchayat .

22. Under the seventy-third amendment of the Constitution, panchayat became an “institution of self governance” which was previously a mere unit, under Article 40, the seventy third amendment heralded a new era but it took nearly more than four decades for our parliament to pass the epoch-making seventy-third constitution amendment a turning point in the history of local self – governance with sweeping consequences in view of decentralisation , grass –root democracy , people’s participation , gender equality and social justice.

23. Decentralisation is perceived as a precondition for preservation of the basic values of a free society. Republicanism which is the “sine qua non” of this amendment is compatible both with democratic socialism

⁵ 2010(12) SCC 1 (para13,22,23,24 and 26)

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and radical liberalism. Republicanism presupposes that law should be made by active citizens working in concert price of freedom is not merely eternal vigilance but perpetual and creative citizen's activity.

24. This seventy-third amendment is a very powerful "tool of social engineering" and has unleashed tremendous potential of social transformation to bring about a sea change in the age old, oppressive, anti-human and status quo traditions of Indian society. It may be true that this amendment will not see a quantum jump but it will certainly initiate a thaw and pioneer a major change, may be in a painfully slow process

26. What was in a nebulous State, as one of the directive principles under Article 40, through the seventy third constitutional amendment metamorphosed to a distinct part of constitution dispensation with detailed provision for functioning of panchayat. The main purpose behind this is to ensure democratic decentralisation on guardian principle of participatory democracy so that the panchayat may become viable and responsive peoples bodies as an institution of governance and thus it may acquire the necessary status and function with dignity by inspiration respect of common man. In our judgment, this seventy third amendment of the constitution was introduced for strengthening the Preambular vision of democratic republicanism which is inherent in the constitution framework.

It is further submitted by the counsel that the disqualification for membership, under article 243F of the constitution, to be prescribed by the legislature of the state, could not have provided for any such condition attached, which may have taken away the rights of the self governance except for disqualification, which have material object to achieve, such as character, integrity or morality of the person to represent. Therefore this disqualification negate the object of self governance at grass root level, peoples participation, and social justice.

It is admitted that it may be desirable for the elected representatives in the panchayati Raj institutions to have formal education but to provide for eligibility without any rational of having educational qualification is violative of the objective of self governance at the grass root level as conferred by the act.

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The requirement of formal education is not essential for effectively discharging the duties and functions, vested in the Panchayats and zila parishads as panchayat is provided with secretariat, which includes a panchayat assistant, an accountant and a junior Engineer. It is, therefore not necessary for a sarpanch to have minimum educational qualifications for representation of her people in the panchayat, or Zila parishad.

Therefore in the light of the argument advanced, it is pleaded by the counsel that this court must declare this impugned ordinance as ultra-vires the part IX of the Constitution of India.

4. WHETHER THE ORDINANCE PROMULGATED BY HON'BLE GOVERNER VIOLATES THE CONSTITUTIONAL PROVISIONS LIKE PREAMBLE, ARTICLE 14 AND ARTICLE 40 OF THE CONSTITUTION OF INDIA OR NOT?

4.1 Appearing on behalf of the first side the counsel humbly submits before this Hon'ble court that the impugned ordinance issued by the Hon'ble Governor of the state of Nirdhan was promulgated only to defeat the constitutional process. It violates the core constitutional philosophy of Democratic governance in India, which is based upon equality of status and opportunity, featuring in the preamble of India and it certainly takes away the rights of many people living in rural area specially the women and weaker sections due to skewed literacy standards in the state of Nirdhan. Therefore it violates the basic structure like preamble, free and equal participation in democratic government and it also abridges valuable fundamental and constitutional rights.

It is humbly submitted by the counsel that the impugned ordinance also violates the Article 40 in part IV (directive principles of state policy) of the constitution of India, Which provides for an organisation of village Panchayats. The state is under an obligation to take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self governance. The disqualification thus added by the Governor through the Ordinance which amended the Nirdhan Panchayati Raj Act, 1994 will negate the object of self governance at grass root level, peoples participation, and social justice

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as the impugned ordinance disqualify and exclude a large section of population living in the rural area from the election process.

In furtherance of the reasons cited above, the Ordinance promulgated by the Hon'ble Governor Violates the Article 40 of the Constitution and is thus unconstitutional.

4.2 Your lordship, it is submitted that the impugned ordinance also violates the article 14 of the constitution of India, which guarantees to every person equality before law. The impugned ordinance cannot be sustained on the ground of object-nexus test as the disqualification does not make the constitutional test of equality before the law in as much as there is no object to be served in providing for educational qualification for contesting the elections. Article 14 of the constitution of India strikes at arbitrary in any form.

The requirement of Formal Qualification is not essential for effectively discharging the duties and function, vested in the Panchayats and zila parishadas as in order to lead in a democratic governance, a person is required to understand the needs of social development and require the mental attribute of being wise in the estimation of the people, who elect them for representation.

The constitution of India or the representation of people act, 1951, do not provide for disqualification on the ground of any educational qualifications for contesting the elections for the members of the legislative assemblies and the members of parliament. There is no educational qualification prescribed for the cabinet ministers, prime minister or even for the president of India.

Further the Counsel relies upon the observations of the Hon'ble High Court of Rajasthan in the case of *Dulari Devi & Ors. Vs. State of Rajasthan & Ors.*⁶ the Hon'ble court is of the view that "The ordinance, however, is the law which can be tested on the touchstone of article 14 of the constitution of India. If the disqualification prescribed by the ordinance deprives the large section of the society to participate in the democratic institution

⁶ CIVIL WRIT PETITION NO. 375/2015

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of Panchayati Raj and runs counter of the object of the 73rd amendment, it may be declared as unconstitutional by the court of law”

The Counsel relies upon the judgement of the Supreme Court in *People's Union for Civil Liberties (PUCL) And Another Vs. Union of India And Another*⁷, *Union of India And Others Vs. Rakesh Kumar And Others*⁸, and in *Anokh Singh Vs. Punjab State Election Commission*⁹, in which the disqualification in elections was struck down by the Hon'ble Supreme Court.

The counsel has also relied upon a judgment of the Supreme Court in *State of Tamil Nadu And Others Vs. K.Shyam Sunder And Others*¹⁰, in support of his submissions that the Courts can, while exercising powers of judicial review, declare any legislation as violative of Article 14 of the Constitution of India on the ground that it is arbitrary and unreasonable.

⁷ (2003) 4 SCC 399(para 122)

⁸ (2010) 4 SCC 50 (para 45)

⁹ (2011) 11 SCC 181(para 36 and 37)

¹⁰ (2011) 8 SCC 737 (paras 50-53)

12.

PRAYER

Wherefore it is prayed, in light of the issues raised, arguments advanced, and authorities cited, that this Hon'ble Court may be pleased to:

1. To declare Section 34 unconstitutional and provide an interim relief till the disposal of the dispute.
2. To declare Ordinance Unconstitutional.
3. And to prevent the state governor and Hon'ble Governor of the State of Nirdhan from promulgating the Ordinance in haste.

And Pass any other Order, Direction, or Relief that it may deem fit in the

Best Interests of Justice, Fairness, Equity and Good Conscience.

For This Act of Kindness, the Respondent Shall Duty Bound Forever Pray.

(Counsel for the First Side)

MEMORIAL ON BEHALF OF FIRST SIDE
