
BEFORE THE HON'BLE HIGH COURT OF NIRDHAN

PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCI (PETITIONER)

v.

REPUBLIC OF GARIBA AND MAXIS BANK (RESPONDENTS)

**WRIT PETITION UNDER ARTICLE 226 OF THE
CONSTITUTION OF GARIBA**

WRITTEN SUBMISSION FOR RESPONDENT

LIST OF ABBREVIATIONS

A.I.R.	All India Reporter
All.	Allahabad
AP	Andhra Pradesh
Art.	Article
Co.	Company
Del	Delhi
Ed.	Edition
Govt.	Government
HC	High Court
Hon'ble	Honourable
J.	Justice
Kar	Karnataka
Ors.	Others
P.	Page Number
S.	Section
SC	Supreme Court
SCC	Supreme Court Cases
SLP	Special Leave Petition
UoI	Union of India
v.	Versus
¶	Paragraph

TABLE OF CONTENTS

1. INDEX OF AUTHORITIES.....	5
• STATUTES REFERRED.....	5
• CASES REFERRED.....	5
• ARTICLES AND REPORTS.....	7
• BOOKS REFERRED.....	6
• WEBSITES REFERRED.....	7
2. STATEMENT OF JURISDICTION.....	8
3. STATEMENT OF THE FACTS.....	9
4. QUESTIONS PRESENTED.....	11
5. SUMMARY OF PLEADINGS.....	12
6. PLEADINGS.....	14
• ISSUE I: WHETHER THE ORDINANCE PROMULGATED BY STATE OF NIRDHAN IS VIOLATIVE OF FUNDAMENTAL RIGHTS AND ULTRA VIRES TO THE CONSTITUTION OF GARIBA, 1950?.....	14
I. CONTENTION 1.1: FIXING OF MERITS & ELIGIBILITY CRITERIA FOR A POST IS NOT VIOLATIVE OF ARTICLE 14.....	14
II. CONTENTION 1.2: ORDINANCE IS BACKED BY EXECUTIVE & LEGISLATIVE COMPETENCE.....	15
III. CONTENTION 1.3: DOCTRINE OF REASONABLE CLASSIFICATION PROVIDES FOR DEMARCATING AND CARVING OUT JUSTIFIED DISCRIMINATION WHERE NECESSARY.....	16
IV. CONTENTION 1.4: ACT OF THE RESPONDENT IS PROTECTED BY INTELLIGIBLE DIFFERENTIA.....	16
V. CONTENTION 1.5: <i>PRIMA FACIE</i> CONDITIONS FOR APPLICATION OF ARTICLE 16 ARE NOT ESTABLISHED IN THE PRESENT MATTER.....	18
• ISSUE II: WHETHER SECTION 34 OF ARBITRATION & CONCILIATION ACT 1996 IS ULTRA VIRES TO THE CONSTITUTION BEING VIOLATIVE OF THE BASIC TENETS OF THE CONSTITUTION?.....	18

I.	CONTENTION 2.1: SECTION 34 BEING A POWER OF JUDICIAL REVIEW CANNOT BE TAKEN AWAY BY ANY ACTION WHETHER EXECUTIVE, LEGISLATIVE OR JUDICIAL.....	18
II.	CONTENTION 2.2: SECTION 34 DOES NOT AMOUNT TO EXTRA LITIGATION. IT REDUCES THE BURDEN OF UNNECESSARY APPEALS.	19
III.	CONTENTION 2.3: ABSENCE OF SECTION 34 WILL RENDER THE PARTY REMEDILESS.....	20
IV.	CONTENTION 2.4: SECTION 34 ACTS AS A SHIELD AGAINST ARBITRARY ACTIONS RESULTING FROM UNJUST AWARDS.	20
V.	CONTENTION 2.5: MERE PENDENCY OF APPLICATIONS UNDER SECTION 34 CANNOT BE TAKEN AS A GROUND TO CHALLENGE VALIDITY AS THE COURTS ARE MAKING THIR BEST EFFORTS IN DISPOSING OFF SUCH PETITIONS.	20
VI.	CONTENTION 2.6: GRANT OF AUTOMATIC STAY IN CASE OF APPLICATION UNDER S.34 IS A PROTECTIVE ACTION. IT IS AN EXTENSION OF DOCTRINE OF <i>LIS PENDES</i> WHICH IS RECOGNIZED UNDER INDIAN CIVIL LAW.	20
VII.	CONTENTION 2.7: SECTION 34 IS CONSISTENT WITH UNCITRAL MODEL LAW.....	21
VIII.	CONTENTION 2.8: ABSENCE OF SECTION 34 WILL DEPRIVE INDIVIDUALS OF RIGHT TO ACCESS TO JUSTICE.	21
IX.	CONTENTION 2.9: NEXUS BETWEEN S.34 OF THE ACT AND EFFECTIVE DISPOSAL	21
•	ISSUE III: WHETHER THE ADMISSION OF APPLICATION UNDER SECTION 34 AMOUNTS TO STAY AND WHETHER THE BANK HAS BREACHED ITS CONTRACTUAL AND LEGAL OBLIGATIONS?.....	23
I.	CONTENTION 3.1: BANK WAS NOT AT FAULT IN WITHOLDING THE PAYMENT.....	23
II.	CONTENTION 3.2: LAW IS SETTLED OVER THIS POINT.....	23
III.	CONTENTION 3.3: PENDENCY OF THE MATTER BEFORE THE COURT IS A VALID GROUND TO REFUSE PAYMENT.....	24.
IV.	CONTENTION 3.4: PROVISION OF MANDATORY STAY UNDER APPLICATION UNDER SECTION 34 CANNOT BE OVERRIDDEN EVEN BY APPLYING ARTICLE 142.....	24
•	ISSUE: IV WHETHER THE NON AVAILABILITY OF A NOTIFIED VACATION BENCH AND A NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION DURING ANY HOLIDAYS IS UNCONSTITUTIONAL?.....	25
I.	CONTENTION 4.1: THAT THE PETITIONER HAS NOT SUFFERED ANY INJURY DUE TO NON-AVAILABILITY OF NOTIFIED VACATION BENCH.....	25
7.	PRAYER	26

INDEX OF AUTHORITIES

STATUTES & CONVENTIONS

S.No.	Statute	Section/Article
1.	Arbitration & Conciliation act, 1996	S.34,S.9
2.	Constitution of India, 1950	Art. 14, 16, 21
3.	Indian Contract Act, 1872	S.126
4.	UNCITRAL Model Law	Art. 34

CASES REFERRED

S.No.	Case Citation	Page No.	Footnote No.
1.	<i>Alka Ojha v Rajasthan Public Commission</i> AIR 2011 SC 3547	15	2
2.	<i>Ameerunnissa Begum vs. Mahaboob Begum</i> AIR 1953 SC 91	26	19
3.	<i>Babulal Amthalal Mehta vs. Collector of Customs</i> AIR 1957 SC 877	17	13
4.	<i>Bidi Supply Co. v. The Union of India</i> [1956] S.C.R. 267)	19	21
5.	<i>Bihar State Electricity Board v M/s Khalsa Brothers</i> AIR 1988 Pat 304	22	25
6.	Bombay High Court in <i>Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai 2014 (1) Arb LR 512 (Bom)</i>	24	29
7.	<i>Budhan Choudhry v. State of Bihar</i> AIR 1955 SC 191	17	15
8.	<i>Chandigarh Administration v Usha Kheterpal Wale</i> AIR 2011 SC 2956	14	1
9.	<i>Clarence Pais v Union of India</i> AIR 2001 SC 1151	16	11
10.	<i>Dattatraya v State of Bombay</i> AIR 1953 Bom 311	18	18
11.	<i>E. P. Royappa v. State of Tamil Nadu & Another</i> AIR 1974 SC 555	17	17
12.	<i>In re the Special Courts Bill, 1978 (1979) 1 SCC 380</i>	17	16

13.	<i>Indira Nehru Gandhi vs Shri Raj Narain & Anr</i> Appeal (civil) 887 of 1975	19	20
14.	<i>Kedar Nath Bajoria v State of West Bengal</i> AIR 1953 SC 404	16	9
15.	<i>Kesvananda Bharti v State of Kerela</i> Writ Petition (civil) 135 of 1970	19	19
16.	<i>Kudremukh Iron Ore Co v Karola Rubber Co Ltd</i> , AIR 1987 Kant 139	24	28
17.	<i>M. Mohan Reddy v. Union of India and Ors.</i> 2000 (1) Arb LR 39 (AP)	22	24
18.	<i>M/S. Afcons Infrastructure Ltd vs The Board Of Trustees Of The Port</i> Arbitration Petition (L.) NO.752 OF 2013	24	31
19.	<i>National Aluminum Co. Ltd. v. Pressteel & Fabrications</i> (2004) 1 SCC 540	24	30
20.	<i>National Council for Teacher Education Versus Shri Shyam Shiksha Prashikshan Sansthan</i> Civil Appeal Nos.1125-1128 of 2011	17	14
21.	<i>Pratibha v State of Karnataka</i> AIR 1991 Kar 205	15	5
22.	<i>Ramjilal v I.T Officer</i> (1951) SCR 127	16	10
23.	<i>Shri Sitaram Sugar Company Ltd. v Union of India</i> AIR 1990 SC 1277	15	7
24.	<i>State of Bombay vs. Balsara</i> AIR 1951 SC 318	26	12
25.	<i>State of Himachal Pradesh v Ganesh Wood Products</i> AIR 1996 SC 149	15	8
26.	<i>State of Madras v. V.G. Row</i> [1952] S.C.R. 597	19	21
27.	<i>TPI India Limited Vs. Union of India</i> LAWS(DLH)-2000-10-12	23	26
28.	<i>U.P. Cooperative Federation Pvt. Ltd. v Singh Consultants & Engineers Pvt. Ltd.</i> [1988] IC SCC 174	23	27

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3. legalservicesindia.com
4. westlaw.in

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1. Raghunath Khushwaha, “*Scope of S.34 under Arbitration Act*”: Striking the balance, Law and Public Interest.
2. Dharmendra Mehta, *Enforcement of Bank Guarantee, ILJ Vol 3 2008*
3. Rupali Amarasinghe, *Arbitration and Court Interference, ILJ, Vol 4, 2011*

STATEMENT OF JURISDICTION

THE RESPONDENT HAVE THE HONOUR TO SUBMIT BEFORE THE HON'BLE HIGH COURT OF NIRDHAN, THE MEMORANDUM FOR THE RESPONDENT IN A WRIT FILED BY PETITIONER UNDER ARTICLE 226 OF THE CONSTITUTION OF GARIBA, 1950.

STATEMENT OF THE FACTS

[PARTIES]

1. Republic of Gariba: The State against which the Fundamental Rights are being claimed.
Maxis Bank: Guarantor bank for contract between Jeopardy Contracts Inc. & Jodhpur Gaon Panchayat Samiti.
Jeopardy Contracts Inc.(JCI): A private Construction Company which has entered into a contract with JGPS and is claiming for invocation of bank guarantee for the part performance of the contract.
Jodhpur Gaon Panchayat Samiti(JGPS): Panchayat Samiti with which JCI had entered into Contract for construction of roads as part of infrastructural development.
People's Union for Liberties & Democratic Reforms: The association which has filed writ petition challenging the validity of Section 34 of Arbitration & Conciliation Act,1996.

RELEVANT FACTS

- The Republic of Gariba is a sovereign federation of states and several Union Territories of which State of Nirdhan is the biggest of the states in the Republic.
- State of Nirdhan was considered to be one of the backward States till 2011, hence, for the Infrastructural Development of the State, the then Governor decided to privatise the Construction Work which would be delegated to and managed by Panchayat Samitis. As per the instructions of the Government, Panchayats were empowered to assign projects to the private companies through a single window system.
- Jeopardy Contracts Inc. (JCI) was one such Company which entered into a contract with the Jodhpur Gaon Panchayat Samiti on 21.9.2011 for Construction of road in the Schedule Area. The said contract was terminated by JGPS on 21.9.2013 due to issues like Land Acquisition, Design of Bridges etc.
- JCI sent a legal notice to JGPS invoking arbitration & for 'Termination Payment' of the work already done. JGPS replied through an email that the matter is covered under the Madhyastham Adhikaran Adhiniyam, 1983, and therefore the Arbitration and Conciliation Act, 1996 is not applicable, and 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.
- JCI moved the High Court of Nirdhan on 13.12.2014 by filing an urgent civil writ petition being WP (C) No. 99/2014, which was directed to be listed at 10.30 am on 15.12.2014.
- On 15.12.2014, the High Court took this matter as the first item on board, and granted an ad-interim ex-parte stay on invocation of bank guarantee if not already encashed and also directed all further action in this regard by all parties to remain subject to the outcome of the proceedings, with directions to immediately furnish copy by all means to the concerned parties.
- JCI invoked the performance bank guarantee on 15.12.2014 which was encashed by the bank but suddenly the software used by the bank by means of a cyber attack was hacked due to which transaction could not be completed.
- JGPS filed a petition before the Hon'ble High Court of Nirdhan seeking direction regarding vacation of stay order, which was rejected and the Court directed the matter before Arbitration as per the relevant clause in the contract.
- Arbitration proceedings took place under the Act of 1996, before the Council for Infrastructure Arbitration (CIA), and objections regarding maintainability filed by JGPS were dismissed by the Id. Arbitrators. The arbitration culminated into an award dated 21.1.2015 in favour of JCI, and inter alia held JCI entitled to the money under the performance bank guarantee.
- JGPS filed a petition in the High Court under Sec.34 of The Arbitration & Conciliation Act, 1996.
- On 27.1.2015, Maxis Bank informed JCI that admission of Petition under Sec. 34 amounts to a stay on the award, and therefore until the final outcome of Sec. 34 petition, it is not obliged to pay anything to JCI.
- JCI challenged the constitutional validity of Sec. 34, by way of a writ petition which was admitted by the High Court.
- Meanwhile, the Governor of the State of Nirdhan, on 20th December 2014, promulgated an Ordinance which came into effect from 24th of December 2014, regarding minimum educational qualification for election as a Panch or a Member, which subsequently amended the Nirdhan Panchayati Raj Act, 1994.
- The vires of the ordinance was challenged by People's Union for Liberties & Democratic Reforms before the Hon'ble High Court of Nirdhan, along with reliefs prayed for prejudice caused due to non-availability of a vacation bench and notified vacation officer when the matter was brought before Apex Court.

QUESTIONS PRESENTED

- I. WHETHER THE ORDINANCE PROMULGATED BY STATE OF NIRDHAN IS VIOLATIVE OF FUNDAMENTAL RIGHTS AND ULTRA VIRES TO THE CONSTITUTION OF GARIBA, 1950?
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- II. WHETHER SECTION 34 OF ARBITRATION & CONCILIATION ACT 1996 IS ULTRA VIRES TO THE CONSTITUTION BEING VIOLATIVE OF THE BASIC TENETS OF THE CONSTITUTION?
-
- III. WHETHER THE ADMISSION OF APPLICATION UNDER SECTION 34 AMOUNTS TO STAY AND WHETHER THE BANK HAS BREACHED ITS CONTRACTUAL AND LEGAL OBLIGATIONS?
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- IV. WHETHER THE NON AVAILABILITY OF A NOTIFIED VACATION BENCH AND A NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION DURING ANY HOLIDAYS IS UNCONSTITUTIONAL?

SUMMARY OF PLEADINGS

[ISSUE: I]: WHETHER THE ORDINANCE PROMULGATED BY STATE OF NIRDHAN IS VIOLATIVE OF FUNDAMENTAL RIGHTS AND ULTRA VIRES TO THE CONSTITUTION OF GARIBA, 1950?

- **CONTENTION 1.1:** FIXING OF MERITS & ELIGIBILITY CRITERIA FOR A POST IS NOT VIOLATIVE OF ARTICLE 14.
- **CONTENTION 1.2:** ORDINANCE IS BACKED BY EXECUTIVE & LEGISLATIVE COMPETENCE.
- **CONTENTION 1.3:** DOCTRINE OF REASONABLE CLASSIFICATION PROVIDES FOR DEMARCATING AND CARVING OUT JUSTIFIED DISCRIMINATION WHERE NECESSARY.
- **CONTENTION 1.4:** ACT OF THE RESPONDENT IS PROTECTED BY INTELLIGIBLE DIFFERENTIA.
- **CONTENTION 1.5:** *PRIMA FACIE* CONDITIONS FOR APPLICATION OF ARTICLE 16 ARE NOT ESTABLISHED IN THE PRESENT MATTER.

[ISSUE: II] WHETHER SECTION 34 OF ARBITRATION & CONCILIATION ACT 1996 IS ULTRA VIRES TO THE CONSTITUTION BEING VIOLATIVE OF THE BASIC TENETS OF THE CONSTITUTION?

- **CONTENTION 2.1:** SECTION 34 BEING A POWER OF JUDICIAL REVIEW CANNOT BE TAKEN AWAY BY ANY ACTION WHETHER EXECUTIVE, LEGISLATIVE OR JUDICIAL.
- **CONTENTION 2.2:** SECTION 34 DOES NOT AMOUNT TO EXTRA LITIGATION. IT REDUCES THE BURDEN OF UNNECESSARY APPEALS.
- **CONTENTION 2.3:** ABSENCE OF SECTION 34 WILL RENDER THE PARTY REMEDILESS.
- **CONTENTION 2.4:** SECTION 34 ACTS AS A SHIELD AGAINST ARBITRARY ACTIONS RESULTING FROM UNJUST AWARDS.
- **CONTENTION 2.5:** MERE PENDENCY OF APPLICATIONS UNDER SECTION 34 CANNOT BE TAKEN AS A GROUND TO CHALLENGE VALIDITY AS THE COURTS ARE MAKING THIR BEST EFFORTS IN DISPOSING OFF SUCH PETITIONS.
- **CONTENTION 2.6:** GRANT OF AUTOMATIC STAY IN CASE OF APPLICATION UNDER S.34 IS A PROTECTIVE ACTION. IT IS AN EXTENSION OF DOCTRINE OF *LIS PENDES* WHICH IS RECOGNIZED UNDER INDIAN CIVIL LAW.

- **CONTENTION 2.7:** SECTION 34 IS CONSISTENT WITH UNCITRAL MODEL LAW
 - **CONTENTION 2.8:** ABSENCE OF SECTION 34 WILL DEPRIVE INDIVIDUALS OF RIGHT TO ACCESS TO JUSTICE.
 - **CONTENTION 2.9:** NEXUS BETWEEN S.34 OF THE ACT AND EFFECTIVE DISPOSAL
-

[Issue: III] WHETHER THE ADMISSION OF APPLICATION UNDER SECTION 34 AMOUNTS TO STAY AND WHETHER THE BANK HAS BREACHED ITS CONTRACTUAL AND LEGAL OBLIGATIONS?

- **CONTENTION 3.1:** BANK WAS NOT AT FAULT IN WITHOLDING THE PAYMENT
 - **CONTENTION 3.2:** LAW IS SETTLED OVER THIS POINT
 - **CONTENTION 3.1:** PENDENCY OF THE MATTER BEFORE THE COURT IS A VALID GROUND TO REFUSE PAYMENT.
 - **CONTENTION 3.2:** PROVISION OF MANDATORY STAY UNDER APPLICATION UNDER SECTION 34 CANNOT BE OVERRIDDEN EVEN BY APPLYING ARTICLE 142.
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[Issue: IV] WHETHER THE NON AVAILABILITY OF A NOTIFIED VACATION BENCH AND A NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION DURING ANY HOLIDAYS IS UNCONSTITUTIONAL?

- **CONTENTION 4.1:** THAT THE PETITIONER HAS NOT SUFFERED ANY INJURY DUE TO NON-AVAILABILITY OF NOTIFIED VACATION BENCH.

PLEADINGS

ISSUE I: WHETHER THE ORDINANCE PROMULGATED BY STATE OF NIRDHAN IS VIOLATIVE OF FUNDAMENTAL RIGHTS AND ULTRA VIRES TO THE CONSTITUTION OF GARIBA, 1950?

CONTENTION 1.1: FIXING OF MERITS & ELIGIBILITY CRITERIA FOR A POST IS NOT VIOLATIVE OF ARTICLE 14 OR 16 OF THE CONSTITUTION.

It is humbly kept before this Hon'ble Court that the Ordinance dated 20.12.2015 passed by the Governor has been called in question by the Petitioner. The Respondent submits that the act of fixing eligibility in terms of education is not violative of any of the right of the Petitioner. It is strongly contended that in the present matter through the ordinance the state has introduced minimum qualification for election as a Panch or a member with subsequent amendment in Nirdhan Panchayati Raj Act of 1994. The provisions of the ordinance concerned cannot be held to be violative of either Article 14 or 16 because of the fact that minimum educational qualification for appointment into a constitutional post, in no way, could be said to be discrimination on the grounds of religion, race, caste, sex, descent, place of birth, residence or any of them. The ordinance is a well thought-out executive decision based on the intelligible differentia that in order to ensure effective and optimum utilization of the financial resources as well as the administrative powers conferred upon a Panch or member, it is necessary that he/she should have a minimum education qualification.

This view was reiterated by the Hon'ble Supreme Court in the case of *Chandigarh Administration v Usha Kheterpal Wale*¹, the apex court held that the qualification cannot be prescribed by the courts and tribunals nor can they entrench upon the powers of the concerned authority so long as the qualification prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provisions of the constitution, statue and rules. The prescription of Ph.D as eligibility qualification for the post of college principal was held not invalid.

¹ AIR 2011 SC 2956

Similarly in the case of *Alka Ojha v Rajasthan Public Commission*² it was held that no candidate can compete for the post of motor vehicle sub inspector, who does not possess a driving license authorising them to drive motor cycle, heavy goods vehicle and heavy passenger vehicles.

CONTENTION 1.2: ORDINANCE IS BACKED BY EXECUTIVE & LEGISLATIVE COMPETENCE.

It is most respectfully submitted before this Hon'ble Court that the executive power of the state is vested in the Governor by virtue of Constitution of India³ whereby he can either directly or through officers subordinate to him shall exercise his executive powers. Since the executive power of the State executive is co-extensive with the state legislature⁴, it follows that the state executive may make rules regulating any manner within the legislative competence of the state legislature, without prior legislative authority, except where a law is required because the rules so framed would violate any provision of the constitution which requires legislation.⁵

Furthermore the local self-government or village administration being a matter falling under legislative competence of the state,⁶ only state legislature could effectively legislate on such subject matter. In addition to that under Article 243K relating to elections to Panchayat, it has been expressly provided under sub clause 4 that legislature of a state may, by law, make provision with respect to all matters relating to, or in connection with elections to the panchayat hence by virtue of the above mentioned provision it is strongly contended that the present ordinance and the subsequent amendment to the Nirdhan Panchayati Raj Act is not ultra vires to the Constitution.

In addition to the above contentions it has been held by the apex court that, in general the court, would not exercise its power of judicial review to interfere with a policy made by the government in exercise of its powers under Article 162, particularly where it involves technical, scientific or economic expertise.⁷ The government is entitled to lay down policies and is also empowered to refuse approval for any action which is against a policy decision.⁸

² AIR 2011 SC 3547

³ Refer Article 154(1) of Indian Constitution, 1950

⁴ Refer Article 162 of the Indian Constitution, 1950

⁵ *Pratibha v State of Karnataka* AIR 1991 Kar 205 at para. 10

⁶ Entry 5, List II, Schedule VII

⁷ *Shri Sitaram Sugar Company Ltd. v Union of India* AIR 1990 SC 1277

⁸ *State of Himachal Pradesh v Ganesh Wood Products* AIR 1996 SC 149

**CONTENTION 1.3: DOCTRINE OF REASONABLE CLASSIFICATION PROVIDES FOR DEMARCATING
AND CARVING OUT JUSTIFIED DISCRIMINATION WHERE NECESSARY.**

It must also be noticed that the Supreme Court has time and again reiterated that Article 14 does not rule out classification for purposes of legislation. In *Kedar Nath Bajoria v State of West Bengal*⁹ it said “The equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all the laws must be general in character and universal in application and that the state is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation.” A legislative classification to be valid must be reasonable, it must always rest upon some real and substantive distinction bearing reasonable and just relation to the needs in respect of which the classification is made.

It is further placed before this court that it is not possible to exhaust the circumstances or criteria which may afford a reasonable classification in all cases. It depends upon the objects of the legislation in view and whatever has a reasonable relation to the object or purpose of the legislation is a reasonable basis of classification. The classification may be according to difference in time.¹⁰

In the present matter the reasoning behind the promulgation of ordinance and the subsequent amendment in the Nirdhan Panchayati Raj Act, is that, in the present context the members of the local self-government body or Panchayat are entrusted with the responsibility of local infrastructural development which involves management of government aids and huge financial resources. The soul objective behind prescribing minimum educational qualification for the members of the Panchayat is that, it will ensure effective management of these resources without any irregularities and the members can discharge their functions on their own without dependence or undue influence from private persons.

CONTENTION 1.4: ACT OF THE RESPONDENT IS PROTECTED BY INTELLIGIBLE DIFFERENTIA.

It is most respectfully placed before this Hon’ble Court that the actions of the Respondent are protected by intelligible differentia. In this connection, the Supreme Court has observed in *Clarence Pais v Union of India*¹¹: “Historical reasons may justify differential treatment of separate geographical regions provided it bears a reason and just relation to the matter in respect of which differential treatment is accorded. Uniformity in law has to be achieved, but that is a long drawn process.”

⁹ AIR 1953 SC 404

¹⁰ *Ramjilal v I.T Officer* (1951) SCR 127

¹¹ AIR 2001 SC 1151

Article 14 of the Constitution does not take away from the State or its instrumentality the power of classification, which to some degree is bound to produce some inequality.¹² Differential treatment, per se, does not constitute violation of Article 14. It denies equal protection only when there is no reasonable basis for differentiation.¹³ The Supreme Court has re-iterated that the Constitution doesn't allow class legislation but permits reasonable classification, based upon an 'intelligible differentia'.¹⁴

*Budhan Choudhry v. State of Bihar*¹⁵, after considering earlier decisions, this Court stated; "It is now well-established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like.

Intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the legislation in question is allowed.¹⁶

In *E. P. Royappa v. State of Tamil Nadu & Another*¹⁷ it was observed that the principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by

Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

¹² *State of Bombay vs. Balsara* AIR 1951 SC 318

¹³ *Ameerunnissa Begum vs. Mahaboob Begum* AIR 1953 SC 91; Also see *Babulal Amthalal Mehta vs. Collector of Customs* AIR 1957 SC 877

¹⁴ *National Council for Teacher Education Versus Shri Shyam Shiksha Prashikshan Sansthan* Civil Appeal Nos. 1125-1128 of 2011

¹⁵ *Budhan Choudhry v. State of Bihar* AIR 1955 SC 191

¹⁶ *In re the Special Courts Bill*, 1978 (1979) 1 SCC 380

¹⁷ AIR 1974 SC 555

CONTENTION 1.5: PRIMA FACIE CONDITIONS FOR APPLICATION OF ARTICLE 16 ARE NOT ESTABLISHED IN THE PRESENT MATTER

The Petitioners in the instant case contend that the said ordinance is violative of Article 14 and 16 of the Constitution, by its restrictive application on a class of people. However the word employment under Article 16 is to be read *ejusdem generes* with the word “appointment” and with relation to the expression “under the state”. These words denoted suggest that the Article has no application unless there is a relationship of employer and employee or an element of subordination to the state or local authority referred to in clause 3. The Article has, therefore, no application in the matter of election of a municipal councillor who cannot said to be subordinate to the local authority.¹⁸ Effect of the words “under the state” was considered in that case. It was held that employment or appointment to any office under the state showed that the words appointment must be read *ejusderu generis* with the word employment and such appointment or employment indicated that the person so appointed or employed held a position of subordination to the state and the same position as regards the word within “office” under Article 16(2). The expression “office under the state” is also used in connection with disqualification of members of parliament or state legislature under Article 102 & 191.

ISSUE II: THAT SECTION 34 OF ARBITRATION & CONCILIATION ACT 1996 IS NOT ULTRA VIRES TO THE CONSTITUTION OR OF THE BASIC TENETS OF THE CONSTITUTION.

CONTENTION 2.1: SECTION 34 BEING A POWER OF JUDICIAL REVIEW CANNOT BE TAKEN AWAY BY ANY ACTION WHETHER EXECUTIVE, LEGISLATIVE OR JUDICIAL.

It is worth noticing that the section 34 which has been challenged by the petitioner is essentially a power of judicial review. It has been inserted in order to provide a remedy against arbitrary and unjust action. Petition challenging the validity of S.34 should not be entertained on the grounds of being frivolous and devoid of any merits. Law being settled over this point should not be vitiated by entertaining such petitions.

The intention of the legislature behind inserting this section was to provide effective judicial supervision over disputes being settled outside court.

¹⁸ *Dattatraya v State of Bombay* AIR 1953 Bom 311

In the case of *Kesvananda Bharti v State of Kerela*¹⁹ which inter alia dealt with several other issues, one of the issues was concerned with power of judicial review. The second part of Section 3 of Constitution(25th Amendment) Act, 1971 which stated “and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy” was held to be invalid.

Simialarly in *Indira Nehru Gandhi vs Shri Raj Narain & Anr*²⁰ where the statute said that no election to either House of Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election shall be called in question, except before such authority [not being any such authority as is referred to in clause (b) of Article 329] or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matter relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned the court took strict stand with respect to judicial review.

Under the second clause the validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court. Judicial review is undertaken by the courts "not out of any desire to tilt at legislative authority in a crusador's spirit, but in discharge of a duty plainly laid upon them by the Constitution."²¹

CONTENTION 2.2: SECTION 34 DOES NOT AMOUNT TO EXTRA LITIGATION. IT REDUCES THE BURDEN OF UNNECESSARY APPEALS.

It has been further contended by the Petitioner that applications filed u/s 34 amounts to unnecessary litigation. Respondents strongly contest and counter the argument advanced by the Petitioner on the ground that S.34 is the most suitable resort against arbitrary and unjust awards. It does not result in unnecessary litigation but helps in ascertaining the correctness of the award passed by the arbitral tribunal.

¹⁹ Writ Petition (civil) 135 of 1970

²⁰ Appeal (civil) 887 of 1975

²¹ *Bidi Supply Co. v. The Union of India* [1956] S.C.R. 267) also see *State of Madras v. V.G. Row* [1952] S.C.R. 597

CONTENTION 2.3: ABSENCE OF SECTION 34 WILL RENDER THE PARTY REMEDILESS.

It is further advanced by the Respondent that the consequences of invalidating S.34 would be far much worse than the alleged unnecessary litigation. The parties under those circumstances would be rendered remediless. Further they will start resorting to S.L.P's and writ petitions in High Court which are already flooded with important matters. This will backfire on the very intent of limiting unnecessary litigation.

CONTENTION 2.4: SECTION 34 ACTS AS A SHIELD AGAINST ARBITRARY ACTIONS RESULTING FROM UNJUST AWARDS.

The intention of the legislature behind inserting this provision was to provide the parties to the arbitration proceedings an appropriate relief in case they are defrauded by unjust awards. If the parties are deprived of this relief, they will be forced to file petitions before High Court and Supreme Court who might not be within their territorial limits. This will result in wastage of time and money which is repugnant and counterproductive to the very concept of alternative dispute resolution. Removal of section 34 will shift the burden of disposing those cases to High Court and Supreme Court. Ultimately it will result in reducing the no. of courts which can adjudicate over these kind of matters.

Further it has been made one of the state obligations under the directive principles of state policy to secure equal justice for every citizen.²² State would be deviating from its responsibilities in the absence of this section.

CONTENTION 2.5: MERE PENDENCY OF APPLICATIONS UNDER SECTION 34 CANNOT BE TAKEN AS A GROUND TO CHALLENGE VALIDITY AS THE COURTS ARE MAKING THIR BEST EFFORTS IN DISPOSING OFF SUCH PETITIONS.

It is also contended before this Hon'ble Court that the argument advanced by the petitioner regarding pendency is not logical and liable to be rejected. Mere pendency of cases does not infer that the forums have failed in their duty to dispose off the cases. Courts are making all the best efforts in disposing off the cases expeditiously. The delay occurring in disposal is inevitable as court gives all the fair opportunity and hearing to both the sides. Moreover, if the Petitioner was aggrieved by the pendency of the disputes they should have filed a petition praying for directions as to opening new forums or disposal of applications in fast-track forums or

²² See Article 39A of the Indian Constitution, 1950

CONTENTION 2.6: GRANT OF AUTOMATIC STAY IN CASE OF APPLICATION UNDER S.34 IS A PROTECTIVE ACTION. IT IS AN EXTENSION OF DOCTRINE OF *LIS PENDES* WHICH IS RECOGNIZED UNDER INDIAN CIVIL LAW.

At last it is also pertinent to mention that the automatic stay granted on ground of prima facie case, balance of convenience and irreparable injury is a protective action. It is nothing but an extension of Doctrine of *Lis Pendes* in interim form. This doctrine also finds its place in Transfer of Property²³ Act and is well recognized under Indian law.

Moreover the combination of three factors tells us that it is itself a wholesome and thought-out interim measure. Court takes extreme precaution by applying all the three factors before grant of stay. Further, Petitioner has not come up with any other alternative straight jacket formula which could be mutilated in the place of these factors.

CONTENTION 2.7: SECTION 34 IS CONSISTENT WITH UNCITRAL MODEL LAW

Article 34 of the UNCITRAL model law lays down identical provision for setting aside of award. Even international instruments provides for court interference. Court interference in terms of arbitrary and unjust award is globally recognized. More than 150 Countries are signatory to this international instrument. It is quite evident that such recourse is a vital element of arbitration machinery. Therefore it would be against the spirit of arbitration to render the parties remediless.

CONTENTION 2.8: ABSENCE OF SECTION 34 WILL DEPRIVE INDIVIDUALS OF RIGHT TO ACCESS TO JUSTICE.

Article 21 of the Indian Constitution has been given a very wide interpretation. It includes several rights which do not find place by any express provision. Indian legislators have always made an effort to enact laws which provides adequate recourse to the people. Under those circumstances it

would be a negative step to repeal S.34 of the relevant Act. The National Commission for Review into the working of Constitution has recommended that the right to "access access to justice " be incorporated expressly as a fundamental right (Article 30A) in the Constitution.

CONTENTION 2.9: NEXUS BETWEEN S.34 OF THE ACT AND EFFECTIVE DISPOSAL

The constitutionality of the various provisions of the Arbitration & Conciliation Act, 1996 were challenged in the High Court by way of a writ petition on the ground that the Act was discriminatory and violative of Article 14 of the constitution of India as it did not provide right of

²³ See Section 52 of the Transfer of Property Act

appeal which is available to an ordinary litigant in the normal course of litigation. The Act was alleged to treat the party invoking arbitration differently than the party subjected to civil litigation in court.

The Intelligible differentia stares at us in providing such an appeal at the threshold, as without deciding the competence first, it is not desirable that Arbitrator should proceed with the enquiry and once the Arbitrator rules that he has got jurisdiction to deal with the matter, the party subjected to arbitration is not left remediless, but he has to wait and invoke Section 34 for Setting aside the award, if he feels aggrieved. On the other hand, if the party subjected to arbitration is given an appeal at the threshold, as is given to the party seeking arbitration, entire proceedings will be stalled and it may take year to finally decide the same because of the authorities and if ultimately it is held that the Arbitrator has competence to deal with the matter/the proceeding have to restart, which will certainly entail in delay.²⁴

In the case of *Bihar State Electricity Board v M/s Khalsa Brothers*²⁵ it was held that the jurisdiction of the court to examine correctness of arbitration award is limited by the provisions of the arbitration Act which are based on the general principle applicable to arbitration proceedings. An arbitrator is a tribunal selected by the parties and his jurisdiction is binding on them. If it were permissible for the court to re examine the correctness of award, the entire proceedings would amount to an exercise in futility. The grounds on which the award can be set aside are limited by statute.

There is no compulsion and or imposition by any statute which compels the parties to resort to arbitration in case of dispute between the parties. The constitutionality of the provision of Section 34 of the Act is to be examined keeping in view this important and relevant aspect in mind. When the parties have chosen the forum of arbitration and the Arbitrator of their choice, it is not necessary to make a provision for appeal against the Award rendered by the Arbitrator. The legislature has the power to specify the grounds on which an Award can be challenged and it would be permissible for the party to challenge the Award only on those grounds and no others. Therefore, if, the Parliament in its wisdom has prescribed certain grounds on which the Award can be challenged, it is not permissible for the petitioners to say that there should be a right to challenge the Award even on merits and in the absence of such a provision Section 34 of the Act is unconstitutional. The parties agree to the resolution of dispute by arbitration knowing fully well the limitations envisaged by Section 34 of the Act in the event of the Award rendered by Arbitrator

²⁴ *M. Mohan Reddy v. Union of India and Ors.* 2000 (1) Arb LR 39 (AP)

²⁵ AIR 1988 Pat 304

being challenged. Legally speaking such an argument has no legs to stand.²⁶

ISSUE: III: WHETHER THE DENIAL OF PAYMENT OF THE ENCASHED MONEY ON PART OF BANK IS VIOLATIVE OF CONTRACTUAL OBLIGATIONS OF THE COMPANY AND HENCE CAUSING PREJUDICE TO THEIR INTEREST?

CONTENTION 3.1: BANK WAS NOT AT FAULT IN WITHOLDING THE PAYMENT

It is most respectfully submitted before this Hon'ble Court that the denial of encashment on the part of bank was consistent with the identified norms of the Reserve Bank of India. As per the notification dated 20/08/2012 issued by the RBI, it has been made clear by the authority that the banks are not liable to encash the amount for which in case of inconsistency.

CONTENTION 3.2: LAW IS SETTLED OVER THIS POINT

Moreover, some strictures were passed by Courts in the past against banks for not honoring the guarantee commitments promptly. In this connection, an extract of a judgment pronounced by the Hon'ble Supreme Court, in a case on the issue of injunctions obtained by parties from courts restraining payment of invoked guarantees is appended:

"We are therefore, of the opinion that the correct position of law is that commitment of banks must be honored free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in case where irretrievable injustice would be done, if bank guarantee is allowed to be encashed, the court should interfere."²⁷

Since the Respondent had a reason to believe that the complications could have resulted in case the money was encashed, as the matter was pending before a forum, encashing the money would have meant abetting transfer against *lis pendes*.

²⁶ *TPI India Limited Vs. Union of India* LAWS(DLH)-2000-10-12

²⁷ *U.P. Cooperative Federation Pvt. Ltd. v Singh Consultants & Engineers Pvt. Ltd.* [1988] IC SCC 174

CONTENTION 3.3: PENDENCY OF THE MATTER BEFORE THE COURT IS A VALID GROUND TO REFUSE PAYMENT.

The Karnataka High Court has held that where a bank found that there was a pending arbitration under which the liability of all the parties had to be ascertained, the court upheld the decision of the bank to withhold the payment.²⁸

Bombay High Court in *Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai*²⁹ 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.

Hon'ble Supreme Court has also in the case of *National Aluminium Co. Ltd. v. Pressteel & Fabrications*,³⁰ has held that admission of application under Section 34 amounts to stay of suit.

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.

CONTENTION 3.4: PROVISION OF MANDATORY STAY UNDER APPLICATION UNDER SECTION 34 CANNOT BE OVERRIDDEN EVEN BY APPLYING ARTICLE 142.

The Supreme Court has also observed that there were no exceptional circumstances in that case which would compel it to ignore the statutory provisions even to exercise jurisdiction under Article 142 of the Constitution of India.³¹

²⁸ *Kudremukh Iron Ore Co v Karola Rubber Co Ltd*, AIR 1987 Kant 139

²⁹ *2014 (1) Arb LR 512 (Bom)* applied

³⁰ (2004) 1 SCC 540

³¹ *M/S. Afcons Infrastructure Ltd vs The Board Of Trustees Of The Port* Arbitration Petition (L.) NO.752 OF 2013

CONTENTION 4.1: THAT THE PETITIONER HAS NOT SUFFERED ANY INJURY DUE TO NON-AVAILABILITY OF NOTIFIED VACATION BENCH.

The contention of the petitioners that their fundamental rights were violated due to non-availability of the Vacation bench is ill-founded. The petitioner's right to be heard by competent authority has not been adversely affected in the present matter as the Hon'ble Apex court had reverted the matter back to be pleaded before the High Court of Nirdhan. Such direction is based on the principle of exhaustion of all available remedies. Further, the rules regarding vacation officer and vacation officer was complied with by the Chief Justice, as the documents on behalf of the petitioner were first submitted before the vacation officer. It is also contended that merely because a duty could have been performed in a better way, it does not lead to non-performance of the duty. The procedural delay, if any, would not affect the merit of the case of the petitioner and such procedural safeguards provided under any delegated legislations are not meant to be claimed as a matter of right, rather, it ensures smooth and effective functioning of the mechanism.

PRAYER

Wherefore, in the light of the facts presented, issues raised, arguments advanced, authorities quoted, cases cited and the foregoing reasons mentioned, the Respondent most respectfully prays that, this Hon'ble Court may be pleased to declare, that:

1. Dismiss the petition and thereby
 - a) Uphold the validity of the S.34 of Arbitration & Conciliation Act, 1996.
 - b) Uphold the validity of the Ordinance dated 20th December 2014 passed by the Governor.
 - c) Hold that the Respondent Bank was not at fault in denying encashment of the said amount.

All of which is humbly prayed.

Date: 21/02/2014

Counsel for the Respondent

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

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

Sd/-

(Counsel for the Respondent)