

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

**TEAM CODE: W**

**BEFORE THE HON'BLE HIGH COURT OF NIRDHAN**

**WRIT PETITION**

WP 999/2015 AND WP 1021/2015

UNDER ARTICLE 226 OF THE CONSTITUTION OF GARIBA

IN THE MATTER OF SECTION 34 OF ARBITRATION AND CONCILIATION ACT

**PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCI .....PETITIONER**

**Vs.**

**REPUBLIC OF GARIBA AND MAXIS BANK.....RESPONDENT**

UPON SUBMISSION TO THE HON'BLE LD. ATTORNEY GENERAL AND HIS

COMPANION JUSTICES AND THE REPUBLIC OF GARIBA

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## **LIST OF ABBREVIATIONS**

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&.....	And
§.....	Under Section
AC.....	Appeal Cases
AIR .....	All India Reporter
All ER.....	All England Reporters
AO.....	Assessing Officer
App.....	Appeal
Art.....	Article
Cl.....	Clause
DB.....	Divisional Bench
Ed.....	Edition
Hon'ble.....	Honourable
ibid.....	Ibidium
ILR.....	Indian Law Reports
LR.....	Law Reports
NIA.....	Negotiable Instruments Act, 1881

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No.....Number

Ors.....Others

PC.....Privy Council

RP.....Review Petition

SC.....Supreme Court

SCC.....Supreme Court Cases

SCR.....Supreme Court Reporter

SLP.....Special Leave Petition

U/A.....Under Article

UOI.....Union of India

vs.....Versus

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## **INDEX OF AUTHORITIES**

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### CASES CITED:

1. Chola Turbo Machinery International Pvt Ltd V. Development Credit Bank, 3 BC 547 (DELHI) (2008)
2. Dwarikesh Sugar Industries Ltd V. Prem Heavy engineering Works (P) Ltd 6 SC 450 (1997)
3. General Electric Technical Services Company Inc. V. Punj Sons(P) Ltd
4. Jaisu Shipping Co. Pvt. Ltd V. Iranian Offshore Engineering & construction Co. 2 BC 130(SELHI) (2008)
5. National Thermal Power Corporation V. Flowmore P. Ltd 4 SCC 515 (1995); 2 BC 221 (1995);AIR SC 443 1996
6. Petroleum India International V. Bank of Baroda, 4 BC 259(BOM) (2008)
7. State of U.P V. Harish Chandra & Co, 1 SCC 63 (1999)
8. Svenska Handelsbanken V. Indian Charge Chrome
9. Tarapore & Co. Madras V. Tractors Export Moscow,AIR SC891 1970
10. U.P State sugar Corporation V. Sumac International, 1BC286(1997)
11. United Engineers (Malaysia) Essar Projects Ltd V. National Highways Authority of India, 3 BC 312 (DELHI)(DB) (2008)
12. Vinitec Electronics Pvt. Ltd HCL Infosystems Ltd 1 BC 170(SC) (2008)

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### BOOKS REFERRED:

1. Law of Arbitration and conciliation, Avtar Singh 10<sup>th</sup> Edition
2. Commentary on The Arbitration and Conciliation Act ,1996, P.C Markanda, 6<sup>th</sup> Edition
3. M P Jain's Indian Constitutional Law, 6th Edition 2013
4. Tannan's Banking Law and Practice in India, M.L Tannan, 23<sup>rd</sup> Edition

### LEGAL DATABASES:

1. Hein Online
2. Manupatra
3. Indiankanoon
4. SCC Online

### LEGISLATIONS:

1. The Constitution of India, 1950
2. Arbitration and Conciliation Act, 1996

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## **STATEMENT OF JURISDICTION**

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The Hon'ble Court of India has the jurisdiction in this matter under **Article 226** of the Constitution of India, 1950 which reads as follows:

Power of High Courts to issue certain writs

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

(2) The power conferred by clause ( 1 ) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause ( 1 ), without

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

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(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated

(4)The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme court by clause ( 2 ) of Article 32

**The Counsels for the Respondents most respectfully submit to this jurisdiction of the Hon'ble High Court of Nirdhan.**



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### **QUESTIONS PRESENTED**

*If it may please this Hon'ble court, in the interest of justice and on account of the reason of necessity and brevity, this Hon'ble bench is empowered to address the following issues, provided as hereunder:*

#### **Issue 1:**

Whether the Arbitration clause in the construction agreement takes away the jurisdiction of the court as much as that the parties to the dispute have to exhaust the remedy through arbitration rather directly approach the law?

#### **Issue 2:**

Whether the bank guarantee can be stayed in the manner in which it is done in the moot case or not?

#### **Issue 3:**

Whether sec 34 of Arbitration and Conciliation Act can be considered to be ultra vires in the context as pleaded in the moot case?

#### **Issue 4:**

Whether there is any effect of the ordinance on the pendency of Arbitral proceeding or application under sec 34 of the Act of 1996?

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### **STATEMENT OF FACTS**

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The Jodhpur Goan Panchayat Samiti [ JGPS ] entered into an agreement with a company called Jeopardy Contracts Inc. [ JCi ] on 21.09.2011 for 115 kms of road in scheduled area of Nirdhan at the time of culmination of project, certain issues cropped up regarding land acquisition etc due to which JGPS terminated the contact on 21.09.2013 . JGPS's council sent a mail on 12.12.2014 to JCi informing that the matter is covered under the Madhyastham Adhikaran Adhiniyam 1983 and therefore arbitration is not applicable . JGPS also invoked the performance bank guarantee on 12.12 .2014 by sending an email to the maxis bank.

On 13.12.2014 JCi moved the High Court of Nirdhan by filing an urgent civil writ petition WP (C) No. 99/2014 . The High Court granted stay on invocation of bank guarantee if not already encashed . Before the branch manager of Jodhpur Goan could act on the email of JGPS there was a massive security breach in the systems of Maxis Bank which froze all the transactions and process due to which the bank guarantee still remain in the account of JCi . The writ pititon was disposed of directing the parties to seek remedies from the Id. Arbitrarors. The Arbitrators culminated an award in the favour of the JCi. JGPS immediately filed a petition under sec 34 of the Act of 1996 before the High Court of Nirdhan.

On 27.01.2015 Maxis Bank informed to JCi that admission of petition under sec 34 amounts to a stay on the award . In response, on 28 .1 .2015 JCi cited it's concern about immediate requirement of liquidity. However Maxis Bank did not release any Payment to JCi .

The High Court of Nirdhan admitted the petition, and concerning the nature of issue raised, issued notice to Id. Attorney General.

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In the meanwhile, the Governor of the State of Nirdhan, on 20<sup>th</sup> December 2014, promulgated an ordinance which amended the Nirdhan Panchayati Raj, 1994 as under:

“19. Qualification for election as a Panch or a member”. This was the very first time such a provision has been brought into vogue in the entire Republic. The PUL moved the High Court Of Nirdhan on 29 . 12. 2014 for an urgent listing and hearing, since the election notification was to be issued on 3<sup>rd</sup> January, 2015. The PPS to the Hon’ble Chief Justice informed the council that listing has been denied. The PUL then moved to the Supreme Court under Article 32 but despite several reminders no listing was granted till the issuance of election notification. Upon listing, the Apex Court was pleased to observe that the matter can now be heard by the High Court of Nirdhan. The PUL filed a pititon in the High Court of Nirdhan to challenge the vires of the ordinance on certain grounds .The High Court of Nirdhan admitted the petition and notices were issued to the Id. Attorney General as well as the Republic of Gariba.

**SUMMARY OF PLEADINGS**

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- 1) Whether the Arbitration clause in the construction agreement takes away the jurisdiction of the court as much as that the parties to the dispute have to exhaust the remedy through arbitration rather directly approach the law?

No, the Arbitration Clause in the agreement does not take away the jurisdiction of the Court as it provides as a check to the powers and decisions of the arbitrators. Since the matter has not been decided yet and there is no violation of law whatsoever, hence the writ jurisdiction is not maintainable.

- 2) Whether the bank guarantee can be stayed in the manner in which it is done in the moot case or not?

No, the bank guarantee cannot be stayed in the manner in which it is done in the moot case because according to the banking law when the guarantee is invoked even the court cannot interfere unless there is a case of fraud.

- 3) Whether sec 34 of Arbitration and Conciliation Act can be considered to be ultra vires in the context as pleaded in the moot case?

No, it cannot be considered as Ultra Vires as it is Intra Vires and it is only a delaying tactics of the Petitioners.

- 4) Whether there is any effect of the ordinance on the pendency of Arbitral proceeding or application under sec 34 of the Act of 1996?

No, there is no relevant connection between the ordinance passed and the pendency of the Arbitral Proceeding.

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### **PLEADINGS**

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1. WHETHER THE ARBITRATION CLAUSE IN THE AGREEMENT TAKES AWAY THE JURISDICTION OF THE COURT AS MUCH AS THAT THE PARTIES TO THE DISPUTE HAVE TO EXHAUST THE REMEDY THROUGH ARBITRATION RATHER DIRECTLY APPROACH THE LAW?

During the pendency of an application under section 34 of the Arbitration and Conciliation Act, 1996, approaching the High Court is unjust. Since the application under section 34 of the Arbitration and Conciliation Act, 1996, is yet to be adjudicated, the interference of the court in the said proceeding would be against the basic tenets of arbitration.

Since the matter has not been decided yet and there is no violation of law whatsoever, hence the writ jurisdiction is not maintainable.

Mere pendency of an application under section 34 of the Arbitration and Conciliation Act, 1996, doesn't give rise to any cause of action which shall be entertained by this H'ble High Court by exercising its jurisdiction under article 226 of the Constitution of India.

**2. WHETHER BANK GAURANTEE CAN BE STAYED IN THE MANNER IN WHICH IT IS DONE IN THE MOOT CASE OR NOT?**

It is evident from the fact that the invocation of bank guarantee took place prior to the receipt of the stay order of the H'ble High Court and in a practical sense since no stay order was received to the Maxis bank, there was no actual stay at all. Hence the invocation of bank guarantee is not violative of the order of the H'ble High Court.

In the case of Hindustan Construction Co. Ltd. V. The State of Bihar<sup>i</sup>, Where the Guarantee was issued unequivocally or unconditionally, the Court will not be justified in granting an order of injunction restraining invocation of Bank Guarantee or the payment thereof.

The Courts believe that if in all mercantile matters when a person proceeds on the guarantee of an unconditional bank guarantee - staying would make the business work come to a standstill. Only in exceptional cases of fraud/irretrivable injustice/special equities do the courts stay the encashing of bank guarantees.

A bank guarantee is an independent contract whereby a bank undertakes to unconditionally and unequivocally abide by its terms and it cannot be affected by disputes between the parties to the underlying transactions. It creates an irrevocable obligation on the bank to perform the contract in terms thereof and on occurrence of the events mentioned therein, the bank guarantee becomes enforceable.

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In the case of P.D. Alkaram Pvt. Ltd. vs Canara Bank & Another, It would appear that the bank guarantee is an absolute one and irrespective of the existence of any disputes between the parties, it is invokable by the beneficiary as per stipulations therein

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3) WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT CAN BE CONSIDERED TO BE ULTRA VIRES IN THE CONTEXT AS PLEADED IN THE MOOT CASE ?

Intra Vires: Section 34 of Arbitration and Conciliation Act is Intra Vires and falls within the legal power or authority. Section 34 talks about the application for setting aside of the arbitral award. This Act is a check on the powers of the arbitrators. Therefore, to assure proper conduct of proceedings, the law allows certain remedies against an award. These remedies can be obtained through a court having jurisdiction over the matter. The court has power to avoid the award and to make the matter open for decision again.\*

Delaying tactics: It is only a delaying tactics on the part of the Petitioner as Section 34 of Arbitration and Conciliation cannot be said as ultra vires as given in the Act. It can be used as a check on the powers of the arbitrators . In the context of the moot case Section 34 of Arbitration and Conciliation Act can be used as according to the Banking Law a bank guarantee cannot be interfered when invoked according to the agreement unless there is a case of fraud. In the moot case there is no case of fraud so when the bank guarantee invoked there can be no interference. The courts power to interdict and prevent beneficiary from receiving its proceeds is to be exercised in exceptional and rare circumstances where a clear case of fraud is made out.\*

Whereas the arbitrators have given the award completely forgetting about the banking law.

The Arbitral tribunal has acted against Public Policy. The Arbitral Tribunal has not followed the rules and procedures while granting award. The Arbitral Tribunal has gone in utter disregard of the law of bank guarantee which has been properly invoked but not paid for the facts beyond the control of the Maxis Bank. In the aspect of the Bank Guarantee the payment is absolute once



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invoked. Invocation in accordance with its terms cannot be stayed. JGPS has invoked the Guarantee in accordance with the terms of guarantee so they cannot be stopped.

Reliance placed on :

United Commercial Bank AIR SC 1981

There are large number of cases to substance that payment in Bank Guarantee is absolute without demereors nearly on demand.

The arbitrator has flouted all the basic principles of law and the Honorable Supreme Court judgement and on this ground alone the award can be said against the Public Policy.

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4. WHETHER THERE IS ANY EFFECT OF THE ORDINANCE IN THE PENDENCY OF ARBITRAL PROCEEDING OR APPLICATION UNDER SEC 34 OF THE ACT OF 1996 ?

It is submitted in response to the grounds and arguments of JCI that-

For grounds I , II & III in the Factsheet, Page no 4-

The respondent cannot be held responsible as the jurisdiction in the country is free to act as per their own procedures and practices within the overall framework of the Constitution of India.

The JCI/PUL is responsible for themselves as they could have used Art 32 which talks about ***Remedies for enforcement of rights conferred by this Part*** . As they failed to approach Honorable Supreme Court under Art 32. Under no circumstances it can be said that the ordinance is ultra vires to the Constitution of India in terms of issue I and II.

Issue no I, II & III which talks about the non availability of a notified vacation bench and non availability of notified procedure for listing when court is not in session have no relevance to the present case in one way or not even remotely connected with the constitutional validity of the ordinance.

On the basis of 4rth ground:

The present case need not be taken to have any nexus with the ordinance.

The present case with JCI emerges out of contractual obligation and terms of the contract which cannot become subject matter for any writ jurisdiction. There are circumstances when retroactive ordinance are permitted say for that matter with respect to procedural matters and/or civil rights.

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As such the ordinance is not bad.

On the basis of 5th Ground :

On the issue of introducing liberty Standards for election, the Honorable Supreme Court has already dealt with the matter.

As such there is no ground for challenging constitutional validity of the ordinance more so when the ordinance will be laid before the legislature for its approval otherwise in terms of Art 213 of State legislature. Otherwise also in terms of Art 213 (2) (b) the ordinance can be withdrawn by the government. Therefore the proper remedy for the petitioner is legislature and not the Honorable High Court.

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### **PRAYER**

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IN THE LIGHT OF THE ARGUMENTS ADVANCED, CASES AND AUTHORITIES CITED, THE COUNSEL FOR RESPONDENTS HUMBLY REQUESTS THE HON'BLE HIGH COURT OF NIRDHAN:

1. DECLARE THAT SEC 34 OF ARBITRATION AND CONCILIATION ACT, 1996 IS NOT UNCONSTITUTIONAL AND SET ASIDE THE ARBITRAL AWARD UNDER SEC 34.
2. DECLARE THAT THE BANK GUARANTEE INVOKED BY THE JGPS SHALL BE ENCASHED TO THEM

**AND PASS ANY OTHER ORDER, DIRECTION OR RELIEF THAT THE COURT MAY DEEM FIT SO THAT THE MERITS OF THE CASE MEET THE ENDS OF JUSTICE, FAIRNESS, EQUITY AND GOOD CONSCIENCE.**

**FOR THIS ACT OF KINDNESS, THE RESPONDENT SHALL DUTY BOUND FOREVER PRAY.**

SD/-

**COUNSELS FOR RESPONDENTS**

REPUBLIC OF GARIBA AND MAXIS BANK

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