5TH JUSTICE R.K. TANKHA MEMORIAL MOOT COURT COMPETITION – 2015

IN THE HONORABLE HIGH COURT OF THE STATE OF NIRDHAN

Writ Petition (Civil) No. _____ / 2015

(Filed under Article 226 of the Constitution of India, 1950)

PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCi

(PETITIONERS)

Versus

REPUBLIC OF GARIBA AND MAXIS BANK

(RESPONDENTS)

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LIST OF ABBREVIATIONS

1. AIR ……..…….All India Reporter
2. Ed..…… Edition
3. HC …….High Court
4. Hon'ble ……...Honorable
5. Ltd……1……...Limited
6. No……Number
7. Pg……..Page
8. SC …….Supreme Court
9. v…….….Versus
10. Art……..Article
11. JCi…….Jeopardy Contracts Inc.
12. JGPS……..…Jodhpur Gaon Panchayat Samiti
13. SCC……...…Supreme Court Cases
14. BITS……...…Bilateral Investment Treaties

LIST OF STATUTES:

- Civil Procedure Code, 1908.
- The Limitation Act, 1963.
- The Panchayati Raj Act, 1994.
- The Arbitration and Conciliation Act, 1996.
- Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983.
- Constitution of India, 1950.
- Right of Children To Free and Compulsory Education Act, 2009.
- The Representative Peoples Act, 1951.

BOOKS REFERRED:

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LIST OF CASE

1. Anand Prasad Agarwalla v. State of Assam vs. Tarkeshwar Prasad & Ors. AIR 2001 SC 2367
2. Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd. AIR 1999 SC 3105
3. Devi Das Gopal Krishnan v state of Punjab AIR 1967 SC 1895
4. Hindustan Engg. & Industires Ltd V. Container corp. of India ltd. 2005 (1) RAJ 662 2005 (Supp) Arb LR 80 (Del)
5. Javed and Others v state of Haryana, (2003) 8 SCC 369
6. Mandal Lal v Sundar Lal AIR 1967 SC 1233 overruling Mohandas v Kesumal AIR Ajmer 47
7. Som Raj v. State of Haryana, 1990 AIR 1176
8. State of Andhra Pradesh v McDowell and Co. 1996 3 SCC 709
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11. TPI Ltd., v Union of India, (2001) 3 RAJ 70
12. Union of India v. Raghubir Singh, 1989 AIR 1933
13. Zenit Mataplast P. Ltd V. State of Maharashtra and Ors. CIVIL APPEAL OF 2009 (Arising out of SLP (Civil) No. 18934 of 2008)

STATEMENT OF JURISDICTION

The Petitioner has approached the Hon'ble High Court of Nirdhan under Art. 226 of the Constitution of India, 1950. The Respondents reserve the right to contest the jurisdiction of this Hon‟ble Court.

STATEMENT OF FACTS

The Republic of Gariba is a sovereign federation of states with several union territories. Nirdhan (one of the biggest states in the Republic of Gariba) was considered as backward till 2011, when the then Governor of Nirdhan decided to fast pace the development of roads and highways so that the benefits of infrastructural development can be harvested by its largely rural populace. Powers in this regard were delegated to all the Panchayat Samitis.

One company JCi entered into an agreement with JGPS on 21.9.2011 for 115kms of road in a Scheduled area in Nirdhan. At the time of culmination of the project, certain issues cropped up regarding land acquisition, design of the bridgesetc. due to which the JGPS terminated the contract on 21.9.2013. As per the contractual mechanism, JCi sent a legal notice on 11.12.2014 forinvoking arbitration as per contractual clause and also asked for 'terminationpayment' for the work already done. JGPS' counsel on 12.12.2014 informing 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.

On 13.12.2014, JCi moved the High Court of Nirdhan. 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…",

The JGPS also left no stone unturned to ensure vacation of the stay order, however it was confirmed. Subsequently, the writ petition was disposed of directingthe 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), and objections

regarding maintainability filed by JGPS were dismissed by the ld. 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 immediately filed a petition under Sec. 34 of the Act of 1996, before the High Court of Nirdhan, on its original side on 25.1.2015. In the meanwhile on 24.1.2015, JCi wrote to Maxis Bank with a copy of the award, to return the money with the interest accumulated thereon, which was thrice the principal.

On 27.1.2015, Maxis Bank informed that admission of Petition under Sec. 34 amounts to a stay on the award, and therefore until the final outcome of Sec. 34, it is not obliged to pay anything to JCi. It also highlighted its difficulty to JCi regarding the strict compliance mandated by the Apex Court as well as the Reserve Bank with bank guarantee norms, since the invocation of bank guarantee was prior to the stay order of the High Court.

Realizing the difficulty, JCi challenged the constitutional validity of Sec. 34, by way of a writ petition, being WP 999/2015. The High Court of Nirdhan admitted the petition, and considering the nature of issues raised, issued notice to the ld. Attorney General.

In the meanwhile, the Governor of the State of Nirdhan, on 20th December 2014, promulgated an Ordinance which came into effect from 24 th of December 2014, which amended the Nirdhan Panchayati Raj Act, 1994 regarding Qualification for election as a Panch or a member

People's Union for Liberties & 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 grounds 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 curaie 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.

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 ld. Attorney General as well as the Republic of Gariba. Given that the ld. 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 section 34 of arbitration and conciliation act 1996 is unconstitutional?

   Section 34 is constitutional on the grounds of qualifying the constitutionality test as well as with faith being placed in legislative wisdom and in upholding the principles of constitutionalism via judicial review.

2. Whether the non-availability of a notified vacation bench and procedure during vacations and when the court is not in session unconstitutional?

   Under article 225 of the constitution, the high court has the powers to formulate rules for its functioning.

3. Whether the ordinance is ultra vires the constitution?

   The ordinance is in adherence with principles of legislative wisdom, public policy as well as non violation of fundamental rights.

SUMMARY OF ARGUMNETS

- **Whether section 34 leads to introduction of litigation in arbitration and thereby violates the basic tenets of arbitration?**

Section 34 has been proved to unconstitutional as its redundant application in arbitration cases is resulting in the delay of justice thereby denial of justice. As a consequence, it is in violation of the rule of law doctrine and hence unconstitutional in all aspects.

- **Whether the pendency of section 34 suits is huge and the delay thereon amounts to expropriation, and leading to the violation of country's bilateral and multilateral commitments under various investment treaties?**

The pendency of suits under section 34 is resulting in the denial of access to justice and resulting in huge repercussions in the economic arena as well as a violation of bilateral and multilateral treaties that the country has entered into.

- **Whether the grant of an automatic stay with adjudication on prima facie case, balance of convenience and irreparable injury is per se bad in law?**

The court's interference with regard to bank performance guarantee is unwarranted for as judicial precedents have established the same. Such an automatic stay also has negative impact on commercial transactions.

- **Whether the non availability of a notified vacation bench and procedure during vacations and when the court is not in session unconstitutional?**

The non availability of a vacation bench and notified procedure is a violation of article 21 of the constitution, since it is denying an indic=vidual the access to justice. Thereby, pleaded that that such a non availability is unconstitutional.

- **Whether the ordinance is ultra vires the constitution?**

The ordinance is ultra vires on the ground of having violated the fundamental right of right to equality under article 14 along with violating the basic structure of the constitution.

ARGUMENTS ADVANCED

1. **Whether section 34 leads to introduction of litigation in arbitration and thereby violates the basic tenets of arbitration?**

In order to evaluate the basic tenets of arbitration, it is important to also delve into the understanding of the source of the Arbitration and Conciliation Act, 1996, which was the UNICTRAL model. This UNICTRAL model, as its "resolutions adopted by the General Assembly", states the following, "Recommends that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice." Ultimately, the objective of the statute as was set out in the legislative assembly debates too was that the act will seek to eliminate the delay in disposing of disputes. It was also sought to be cheaper more expedient, but equally efficacious.

With regard to the challenging of the constitutional validity of the section it is rather pertinent to note that, Section 34 is not an omnibus kind of a section that it is free under any relevant or irrelevant clause. It is very specific in what exactly are the conditions in which the arbitration award may be set aside by the Court. This is as such because Section 34(2) very categorically says, `an arbitral award may be set aside by the Court only if' - it says that the arbitration may be set aside `only if' and thereby, it is the wisdom of the legislature. The arbitrator cannot be given the sole right, or the veto power. No further demur or protest, no challenge, no appeal, no application is not possible in adherence with the principles of rule of law and natural justice. If it were to be done, it would be against the spirit of the entire arbitration legislation as well as that of the UNICTRAL model.

Section 34 provides for setting aside of arbitral awards on certain specific grounds. This includes arbitration agreement not being valid or the party has not given proper notice and a number of procedural or technical grounds. But it does not provide for setting aside of an arbitral award if there is a point of law involved.

This law has come in response to demands - apart from the U.N. Organisations - from the trading community and professionals dealing with such disputes. They all feel that there should be some provision for challenging or appealing or setting aside the arbitral award if there is a point of law. It is because under the present system, many of the arbitrators are going to be technocrats, going to be industrialists, going to be professionals who may not be lawyers. Therefore, it is quite natural that they might commit errors of law. What they decided may not be fully consistent with the prevailing law or the laws in force. Therefore, there should be some provision for setting aside the arbitral awards where there are points of law involved.

in the case of the enforcement of the award, the court cannot suo motu raise this particular question. The court can go into the question only when one of the parties seeks to set aside the award and not otherwise.[1]

(Judicial review)

Moreover, it is important to subject the provision to the constitutionality test in order to actually determine if the provision is unconstitutional. For the same, there are certain parameters that are ought to be qualified which are as thus:

a. Contravention of any fundamental right specified in part III of the constitution.[2]

[1] Mandal Lal v Sundar Lal AIR 1967 SC 1233 overruling Mohandas v Kesumal AIR Ajmer 47.

b. Legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made by & the schedule, read with the connected articles.[3]

c. Contravention of any of the mandatory provisions of the constitution which impose limitations upon the powers of a legislature[4]

d. In the case of a state law, it will be invalid as so far as it seeks to operate beyond the boundaries of the state.[5]

e. That the legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has or has made an excessive delegation of that power.[6]

So, here when all these are examined, it is pretty much clear that none of the above mentioned situations take place, thereby it is humbly pleaded before this honourable court that the challenge against constitutionality does not stand in any case at all.

But in the other, it is humbly submitted that such a provision is in fact in adherence to the basic structure of the constitution for the reason that it is promoting and upholding the constitutionality, by judicial review.

2. Whether the pendency of section 34 suits is huge and the delay thereon amounts to expropriation, and leading to the violation of country's bilateral and multilateral commitments under various investment treaties?

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[2] State of Andhra Pradesh v McDowell and co. 1996 3 SCC 709.

[3] State of West Bengal v EITA India Ltd., 2003 5 SCC 239

[4] Ibid.

[5] State of Bombay v Chamarbaugwala RMD AIR 1957 SC

[6] Devi Das Gopal Krishnan v state of Punjab AIR 1967 SC 1895.

The legislature has the power to specify 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 only on those grounds and no others.[7] The understanding of the objective shows that though, the arbitration and conciliation act 1996, does call for judicial intervention, it is to be noted that it is only limited in nature and moreover, such an interference is in fact for achieving meaning of rule of law is that the government should be conducted within a framework of recognized rules and principles which restrict discretionary powers. The main point putting section 34 in the act was to limit the power of the arbitral tribunal. The Supreme Court observed in *Som Raj v. State of Haryana* [8]that the absence of arbitrary power is the primary postulate of Rule of Law upon which the whole constitutional edifice is dependant. Discretion being exercised without any rule is a concept which is antithesis of the concept.

Another meaning of rule of law highlights the independence of the judiciary and the supremacy of court and section 34 deals with this only and gives every person the right to appeal and seeks his right. It is rightly reiterated by the Supreme Court in the case *Union of India v. Raghubir Singh* [9]that it is not a matter of doubt that a considerable degree that governs the lives of the people and regulates the State functions flows from the decision of the superior courts.

If this kind of section is not available in the arbitration and conciliation act the arbitral tribunal would have the whole discretionary power over all the matter relating to arbitration and it will definitely affect the bilateral and multilateral investment

[7] TPI Ltd., v Union of India (2001) 3 RAJ 70.

[8] 1990 AIR 1176

[9] 1989 AIR 1933

agreements of the country and this section will not take the award of the parties under the BITs and MITs it will save the rights under the parties.

3. Whether the grant of an automatic stay without adjudication on prima facie case, balance of convenience and irreparable injury is per se bad in law?

In the case of *Zenit Mataplast P. Ltd Versus State of Maharashtra and Ors*[10] When the applicant approaches the Court complaining against the Statutory Authority alleging arbitrariness, bias or favouritism, the court, being custodian of law, must examine the averments made in the application to form a tentative opinion as to whether there is any substance in those allegations. Such a course is also required to be followed while deciding the application for interim relief. Such order is passed as a temporary arrangement to preserve the *status quo* till the matter is decided finally, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing.

In the case of *Anand Prasad Agarwalla v. State of Assam vs. Tarkeshwar Prasad & Ors.*[11] *And Barak Upatyaka D.U. Karmachari Sanstha* The object of the interlocutory injunction is, to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.[12] The automatic stay under the section 34 of the Arbitration and Conciliation Act 1996 works as such as the interim relief works, the only difference is that under the interim relief the

[10] CIVIL APPEAL OF 2009 (Arising out of SLP (Civil) No. 18934 of 2008)

[11] AIR 2001 SC 2367

[12] (2009) 5 SCC 694)

suffered party seeks the court and asks for the stay but under this act the Section 36 clearly says that "Enforcement.—Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court" under this as soon as the aggrieved party files the case under the Section 34 the award will be automatically stayed under the section 36 and the award cannot be enforced till the time when the arbitral award is expired or the application is been refused the reason why this is done is to maintain a proper status quo of the subject matter, to save the irretrievable injustice to happen.

In *Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd.*[13] this court observed that the other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below:

(i) Extent of damages being an adequate remedy;

(ii) Protect the plaintiff's interest for violation of his rights though however having regard to the injury that may be suffered by the defendants by reason therefor ;

(iii) The court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others;

(iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case- the relief being kept flexible;

[13] AIR 1999 SC 3105

(v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;

(vi) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) Whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise."

In the case of *Hindustan Engg. & Industires Ltd V. Container corp. of India ltd.*[14] The contention that the supplies to the extent of 80% had been made and thus invocation of bank guarantee could be only for the balance unsupplied part was not acceptable because once the petitioner was found to be in default, the respondent was entitled to invoke the bank guarantee regardless of the extent of the supplies made to it. It was also held that amount so recovered could be utilized for the balance purchase since it would be too premature for any of the parties to estimate the excess expenditure that may be required to be reassured on account of risk purchase.

The term of irreparable losses is not a rhetoric phrase for incantation, but words of width and elasticity, to meet myriad situations presented by man's ingenuity in given facts and circumstances, but always are hedged with sound exercise of judicial discretion to meet the ends of justice. So under this case of section 34 the automatic stay is given by the act itself for the protection of the aggrieved party and it is totally justifiable.

[14] 2005 (1) RAJ 662 2005 (Supp) Arb LR 80 (Del)

4. Whether the non-availability of a notified vacation bench and procedure during vacations and when the court is not in session unconstitutional?

The high courts are required to work for 210 days a year and the Supreme Court for 185 days. In a single year, the high courts are required to work for 210 days a year and the Supreme Court for 185 days. All authorities, civil and judicial, in the territory of India shall act in the aid of the Supreme Court as ordained by article 144. The power to make rules for regulating the practice and procedure of the Supreme Court vests in it under article 145. The jurisdiction of the High Courts in relation to the administration of justice in the court including power to make rules of court is preserved by article 225 of the Constitution, which states thus:

" Jurisdiction of existing High Courts" - Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction."

Thereby, it is humbly stated that under the powers vested in the High Court under section 225, the high court has the power to formulate rules with regard to vacations therein. Moreover, it is pertinent to note that a mere seven day absence does not result in unconstitutionality, for such a measure is in turn for better and effective judicial administration.

5. Whether the High Court of Nirdhan has the jurisdiction to hear the petition?

Article 329 (b) of the Constitution of India provides that "no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for, by or under any law made by the appropriate Legislature." The Representation of the People Act, 1951, which made detailed provisions for election to the various Legislatures of the country also contains a provision (sec. 80) that no election shall be called in question except by an election petition presented in accordance with the provisions of the Act.

The restriction reflected under Article 329(b), has also been incorporated in Part IX of the Constitution, inserted vide 73rd Amendment in Article 243-O of the Constitution, which reads as follows: "243-O. Bar to interference by courts in electoral matters.- Notwithstanding anything in this Constitution:

(a) The validity of any law relating to delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243K, shall not be called in question in any court;

(b) No election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State."

Moreover, any interference in the elections will cause difficulty in holding elections, for which all preparations have been made, Officers trained and deputed and programme finalised, for which any delay is not permissible at this stage, nor is advisable for which the Supreme Court has cautioned the Courts against interference in the elections . The power of delimitation is absolutely legislative in character and thereby the apex court refused to interfere with the elections for the local bodies on the ground that mandatory procedure for delimitation was not followed. In the principles laid down by the Supreme Court, it was held that Article 243-C, 243-K and 243-O, in place of Article 327 and Sections 2(kk), 11F and 120BB of the Act in place of Sections 8 and 9 of the Delimitation Act, 1950, makes it obvious that neither the delimitation of the panchayat area nor of the constituencies and the allotments of seats to the constituencies could have been challenged, or the Court could have entertained such challenge, except on the ground that before delimitation, no objections were invited and no hearing was given .

6. **Whether the ordinance is unconstitutional?**

Even though the high court does not have the jurisdiction to hear this pro bono petition, despite such absence of jurisdiction, the ordinance cannot be held to be unconstitutional on the following grounds therein mentioned:

I. Legislative powers

The ordinance is valid and constitutional on the ground that the Legislative powers of the Governor, exercised by him under Article 213 of the Constitution of India, cannot be challenged on the ground that no such circumstances existed, which rendered it necessary to promulgate the Ordinance. The satisfaction of the Governor in such matters, in issuing an Ordinance is not subject to judicial review. A disqualification can be prescribed under Article 243F (1) (b) of the Constitution by the legislature of the State. The powers of the Governor to promulgate an Ordinance during the recess of Legislature under Article 213, is a legislative

power. Any doubt on the proposition, has been cleared by clause(2) of Article 213 of the Constitution, which provides that an Ordinance promulgated under the Article, shall have the same force and effect as an Act of Legislature of the State assented to by the Governor.

II. Not violative of fundamental rights?

The order is also not violative of the fundamental rights under article 14 and 21 on the following along with the aid of the following judicial precedents:

An ordinance was challenged on the same grounds, namely that there existed no emergency which called for the Governor to promulgate the Ordinance, in 1999, and that the impugned amendment is hit by Article 14 and 21 of the Constitution of India, as it provides an unreasonable restriction on a person to contest the elections for the post of Panch and Sarpanch. The Division Bench held that the satisfaction of the Governor regarding emergency was not justiciable, in view of the in view of a judgement of the supreme court , and that the disqualification of a person who has been convicted of any offence by a competent court and sentenced to imprisonment for six months or more, and a person who is under trial in the competent court, in which charges have been framed against him of any offence punishable with imprisonment for five years or more, was in public interest. The fact that similar disqualification has not been provided for the MLA's and MP’s cannot be held to be discriminatory. The Ordinance was not violative of either Article 14 or Article 21 of the Constitution of India. The Ordinance in the year 1999 was also promulgated, on the eve of elections.

III. Not violative of single citizenship?

With regard to the argument based on the premise that such an ordinance is against the one of the basic features of the Indian Constitution i.e., single citizenship for the reason that it is legislating different laws and subsequent rights on different citizens of the country. But it is

pertinent to note at this juncture that the each state has the powers conferred on it by the Constitution via entry V of list II of the VII schedule.

Moreover, it is necessary to plead here that such an ordinance is not against the basic structure of the constitution envisaging single citizenship. This is because "... the division of internal sovereignty by a distribution of legislative powers is an essential feature of federalism, and our constitution possesses that feature..." (Page 301- Seervai) On the whole, consequently, it is abiding by the basic structure doctrine of federalism.

The test for unconstitutionality has been certain in laying down certain standards as such which have been enunciated in the following cases as such under the following grounds:

(a) Contravention of any fundamental right specified in part III of the constitution.[15]

(b) Legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made by the & schedule, read with the connected articles.[16]

(c) Contravention of any of the mandatory provisions of the constitution which impose limitations upon the powers of a legislature [17]

(d) In the case of a state law, it will be invalid as so far as it seeks to operate beyond the boundaries of the state. [18]

(e) That the legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has or has made an excessive delegation of that power[19].

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[15] State of Andhra Pradesh v McDowell and co. 1996 3 SCC 709

[16] State of West Bengal v EITA India Ltd., 2003 5 SCC 239

[17] Ibid.

[18] State of Bombay v Chamarbaugwala RMD AIR 1957 SC

[19] Devi Das Gopal Krishnan v state of Punjab AIR 1967 SC 1895.

The question that is to be considered here is whether the non-availability of a notified bench or a procedure during vacations is unconstitutional, but since such a "non availability" does not affect any of the constitutional tests laid down as such.

IV. Not voilative of free and equal participation in a democracy?

It is thereby claimed that the ordinance does not allow for "free and equal participation in democratic government", since the ordinance prescribes a minimum educational qualification in order to be able to become a member of zila parshid, sarpanch or member of panch. But, the council would like to state that such a right to contest in elections is only a statutory right[20], and is thereby subjected to certain limitations and the state is entitled to legislate as such.[21] For in the case of. It was held as such on similar grounds, "They merely prescribe conditions which must be observed if he wants to enter Parliament. The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute. The appellants have no fundamental right to be elected members of Parliament. If they want that they must observe the rules."

Subsequently, it was in the case of. Wherein a provision barring leprosy patients from contesting elections was upheld to be constitutional, the apex court placed faith in the wisdom of the legislature in the following ratio decidendi, "the Legislature in its wisdom has thought it fit to retain such provisions in the statute". Thereby, it has been pleaded on similar grounds that the legislative wisdom be respected in this case and not a violation if the statutory right to contest elections, but on the other hand, the state's power to impose reasonable restrictions in the same

[20] Representation of people's act 1951

V. In Adherence to public policy.

The Government, in order to promote education amongst rural masses, and to ensure that those who have to lead, must lead by example and for ensuring mandatory education qualification at the grass root level of the democracy sought to bring about such an ordinance. It is merely an election reform with the object to improve the working of the Panchayati Raj Institutions.

The Supreme Court in Javed and Others v state of Haryana[22] did not sustain the argument that the two children norm is discriminatory, and is violative of Article 14 of the Constitution of India, especially on grounds of public policy.

Moreover, the ordinance shall have to held valid, if the fundamental premise upon which it proceeds has been accepted as fair and reasonable incomparable situations, if its provisions bear nexus with public interest and if it does not offend against the Constitutional limitations either on legislative competence or on the legislative power to pass laws which bear on fundamental rights. [591G-H: 592A]

[22] (2003) 8 SCC 369

PRAYER FOR RELIEF

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

a. Section 34 of Arbitration and Conciliation Act 1996 constitutional.
b. The non-availability of a notified procedure and vacation bench as constitutional.
c. The ordinance as intra vires the constitution.

The Court may also be pleased to pass any other order, which the court may deem fit in light of justice equity and good conscience.

All of which is respectfully submitted,

SD/

Counsels for the Respondent