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**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)**

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

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**WRITTEN SUBMISSION FOR PETITIONER**

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## LIST OF ABBREVIATIONS

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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

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5.	Consumer Protection Act, 1986	S.2(1)(o)
4.	Indian Contract Act, 1872	S.126
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6.	Supreme Court Rules, 2013	Order II Rule 6

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S.No.	Case Citation	Page No.	Footnote No.
1.	<i>Adhunik Steels Ltd vs. Orissa Manganese and Minerals Pvt. Ltd</i> (2007) 7 SCC 125	21	15
2.	<i>Amrok Logistics Trading Pvt. Ltd v Digvijay Cement Co. Ltd.</i> AIR 2001 Guj 299	21	18
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5. M.P. Jain, Indian Constitutional Law, Lexis Nexis Butterworths Wdhawa, 5<sup>th</sup> Edn, 2009
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3. legalservicesindia.com
4. westlaw.in

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1. Hon'ble Mr. Justice Y. K. Sabharwal, "*Fundamental Rights and Pendency*, National Conference: Striking the balance, Law and Public Interest.
2. Dharmendra Mehta, *Banking Complications and law*, *ILJ Vol 3 2008*
3. Rupali Amarasinghe, *Arbitration and Court Interference*, *ILJ, Vol 4, 2011*
4. Law Commission 246<sup>th</sup> Report

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**STATEMENT OF JURISDICTION**

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THE PETITIONER HAS THE HONOUR TO SUBMIT BEFORE THE HON'BLE HIGH COURT OF NIRDHAN, THE MEMORANDUM FOR THE PETITIONER UNDER ARTICLE 226 OF THE CONSTITUTION OF GARIBA, 1950.

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## STATEMENT OF THE FACTS

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### [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.

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**QUESTIONS PRESENTED**

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- 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?
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- 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?

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## SUMMARY OF PLEADINGS

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**[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:** THAT THE PRESENT ORDINANCE IS VIOLATIVE OF ART 14 & 16 OF THE CONSTITUTION OF INDIA, 1950
- **CONTENTION 1.2:** NO SUCH EDUCATIONAL QUALIFICATION HAS BEEN PRESCRIBED FOR ELECTION INTO STATE LEGISLATURE OF PARLIAMENT VIDE REPRESENTATION OF THE PEOPLE ACT 1951.
- **CONTENTION 1.3:** ORDINANCE VIOLATES CARDINAL RULES PRESCRIBED UNDER DIRECTIVE PRINCIPLES OF STATE POLICY

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**[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:** THAT SECTION 34 UNDERMINES THE VERY PURPOSE OF THE ACT.
- **CONTENTION 2.2:** HON'BLE SUPREME COURT ACKNOWLEDGES THE DIFFICULTY OF STAY IN CASE OF APPLICATION UNDER SECTION 34 OF THE ACT.
- **CONTENTION 2.3:** LAW COMMISSIONS 246<sup>TH</sup> REPORT HAS PROPOSED AMENDMENTS TO THE EXISTING LAW.
- **CONTENTION 2.4:** PRESENCE OF SECTION 34 REFLECTS THE INCONSISTENCIES OF THE OLD ACT.
- **CONTENTION 2.5:** APPLICATION UNDER SECTION 34 INTRODUCES TIRESOME LITIGATION & DELAY THEREBY HARASSING THE PARTY WHICH TRYING TO ENFORCE A VALID AWARD.
- **CONTENTION 2.6:** THAT THE STATE IS OBLIGED TO RESPECT THE INTERNATIONAL INSTRUMENTS SIGNED BY IT UNDER ARTICLE 51(C) OF THE CONSTITUTION.

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

- IV. **CONTENTION 3.1:** THE GRANT OF AUTOMATIC STAY AMOUNTS TO BYPASSING THE STAGE OF BALANCE OF CONVENIENCE.
- V. **CONTENTION 3.2:** SUPREME COURT HAS ALREADY PASSED JUDGMENT CONCERNING THIS AND THE LAW IS SETTLED OVER THIS POINT.
- VI. **CONTENTION 3.3:** ADVERSE EFFECT ON RESPONDENT BEING MEASURABLE IN TERMS OF MONEY MAKES THE STAY AN IMPROPER COURSE.
- VII. **CONTENTION 3.4:** AUTOMATIC STAY CANNOT COME INTO PLAY IN THE LIGHT OF EXPRESS PROVISION BEING PRESENT FOR THE SAME.
- VIII. **CONTENTION 3.5:** THAT DENIAL OF PAYMENT OF THE ENCASHED MONEY IS BREACH OF CONTRACT ON PART OF BANK.
- IX. **CONTENTION 3.6:** APPLICATION UNDER SECTION 34 IS NO GROUND TO DENY PAYMENT DUE UNDER BANK GUARANTEE.
- X. **CONTENTION 3.7:** THE REFUSAL TO ENCASH THE AMOUNT HAS CAUSED HUGE INCONVENIENCE AND INJURY TO THE PETITIONER.
- XI. **CONTENTION 3.8:** DISPUTE BETWEEN THE PARTIES IS NOT A GROUND FOR STAY AGAINST ENCASHMENT OF BANK GUARANTEE.
- XII. **CONTENTION 3.9:** ABSENCE OF FRAUD AND MISREPRESENTATION LEAVES NO OTHER GROUNDS FOR SUCH REFUSAL.
- XIII. **CONTENTION 3.10:** RESPONDENT'S FAILURE TO HONOUR THE BANK GUARANTEE AMOUNTS TO DEFICIENCY IN SERVICE.
- XIV. **CONTENTION 3.11:** THE OBJECT OF BANK GUARANTEE BEING COMMERCIAL SAFEGUARD FOR PROVIDING INSTANT RELIEF TO BENEFICIARY SHOULD NOT BE PREJUDICED BY COURT INTERFERENCE.
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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?

- XV. **CONTENTION 4.1:** ABSENCE OF VACATION BENCH IS INFRINGES RIGHT TO SPEEDY JUSTICE UNDER ARTICLE 21 OF THE CONSTITUTION.
- XVI. **CONTENTION 4.2:** ABSENCE OF VACATION BENCH INFRINGES RIGHT TO ACCESS TO JUSTICE.
- XVII. **CONTENTION 4.3:** NON APPLICABILITY OF THE PRESCRIBED PROCEDURE.

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## PLEADINGS

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**ISSUE I:** THAT 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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**CONTENTION 1.1:** THAT THE PRESENT ORDINANCE IS VIOLATIVE OF ART 14 & 16 OF THE CONSTITUTION OF INDIA, 1950.

It is most respectfully submitted that ordinance in contention is violative of the principles of equality laid down under Article 14 & 16 of the constitution. The principle of equality of law denotes, not that the same law should apply to everyone but that a law should deal alike with all in one class; that there should be an equality of treatment under equal circumstances. It means that equals should not be treated unlike and unlike should not be treated alike. Likes should be treated alike.<sup>1</sup> A legislature is entitled to make reasonable classification for purposes of legislation and treat all in one class on an equal footing. It does not however operate against rational classification.

The apex court, has time and again given a new orientation to Article 14. In *Bachhan Singh v State of Punjab*<sup>2</sup> Bhagwati.J held rule of law which permits the entire fabric of the Indian Constitution excludes arbitrariness. “Wherever we find arbitrariness or unreasonableness there is a denial of rule of law.” Article 14 enacts primarily a guarantee against arbitrariness and inhibits state action, whether legislative or executive, which suffers from the vice of arbitrariness. “Every state action must be non-arbitrary and reasonable otherwise the court would strike it down as invalid. In the present matter the concerned government has advanced no evidence to establish the reasonable nexus between the minimum educational qualification to the object behind such enactment.

The historically disadvantaged groups were always given social protection so then they can be uplifted from their poverty and low social status.<sup>3</sup> Clause (3) of Article 15, which permits special provision for women and children, has been widely resorted to and the courts have upheld the validity of the special measures in legislation or executive orders favoring women. However the

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<sup>1</sup> *Gauri Shankar v Union of India* AIR 1995 SC 55 at pg. 58

<sup>2</sup> AIR 1982 SC 1336

<sup>3</sup> *Kailas v State of Maharashtra* AIR 2011 SC 598

present ordinance is squarely against this principle of protective discrimination whereby the ordinance specifying minimum educational qualification for election into local self government would result in adversely affecting the chances of women and marginalized groups, provided the status of literacy and in particular the level of attainment of elementary education in the country.

**CONTENTION 1.2: NO SUCH EDUCATIONAL QUALIFICATION HAS BEEN PRESCRIBED FOR ELECTION INTO STATE LEGISLATURE OF PARLIAMENT VIDE REPRESENTATION OF THE PEOPLE ACT 1951.**

The qualifications prescribed for membership of parliament under the constitution<sup>4</sup> read with the provisions of Representation of the People Act, 1951<sup>5</sup> does not lay down any provision relating to minimum educational qualification of the people's representatives in either of the houses. The reasoning behind these intentional omissions are the historical and social aspects which includes literacy and inclusive participation of the marginalized sections of the society in the democratic system of government. The continuing gap between the male and female literacy rates and low literacy in villages as compared to urban areas can be effectively established through various census reports. Further, the Right of Children to Free and Compulsory Education Act (RCE), which guaranteed free and compulsory elementary education was enacted in the year 2005, reflecting the need of elementary education to achieve social equality.

The present ordinance overlooks all these social aspects and upon its application, it would arbitrarily affect the rights of the women and other marginalized sections, as being a part of governance in a democratic system through local self government has no reasonable nexus with the educational qualification.

**CONTENTION 1.3: ORDINANCE VIOLATES CARDINAL RULES PRESCRIBED UNDER DIRECTIVE PRINCIPLES OF STATE POLICY**

Directive Principles of State Policies which act as guidelines for government in effective implementation of legislative and executive functions direct the state to secure a social order for promotion of welfare of people and that of educational and economic interest of the weaker sections of the society.<sup>6</sup> The Directive Principle of State Policy are now not only enforceable at the

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<sup>4</sup> See Article 84 of the Indian Constitution, 1950

<sup>5</sup> See Section 5 of the Representation of the People Act, 1951

<sup>6</sup> See Article 38 & 46 of Indian Constitution, 1950

behest of a citizen, but a constitutional obligation of the state to be performed on its own, without waiting for a citizen to demand for it.<sup>7</sup> By promulgating the ordinance in question and the subsequent amendment in the Panchayati Raj Act, the state has not only violated the principle of securing social order but also closed the gates for the participation of the marginalized class in local self government.

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**ISSUE II:** THAT SECTION 34 OF ARBITRATION & CONCILIATION ACT, 1996 IS ULTRA VIRES TO THE CONSTITUTION OR OF THE BASIC TENETS OF THE CONSTITUTION.

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**CONTENTION 2.1:** THAT SECTION 34 UNDERMINES THE VERY PURPOSE OF THE ACT.

It is humbly presented before this Hon'ble Court that the spirit of Section 34 of the Act is against the very basic purpose of the Act. The Act was incorporated to provide for an alternate dispute resolution process. The long and expensive courtroom proceedings were sought to be avoided by this mechanism. The idea was to make court interference as less as possible. However, the strongest power of interference was granted to courts in the form of S.34 which sets aside the award passed by the tribunal.

**CONTENTION 2.2:** HON'BLE SUPREME COURT ACKNOWLEDGES THE DIFFICULTY OF STAY IN CASE OF APPLICATION UNDER SECTION 34 OF THE ACT.

The Supreme Court, in *National Aluminium Case*,<sup>8</sup> has criticized the present situation in the following words:

“However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law.”

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<sup>7</sup> *Juhi Kumari v State of Bihar* 2011 (59) BLJR 2662

<sup>8</sup> *National Aluminum Co. Ltd. v. Pressteel & Fabrications*, (2004) 1 SCC 540

**CONTENTION 2.3: LAW COMMISSIONS 246<sup>TH</sup> REPORT HAS PROPOSED AMENDMENTS TO THE EXISTING LAW.**

The Law Commission of India, led by its Chairman Justice A.P. Shah<sup>9</sup>, has released its proposed amendments<sup>10</sup> (“Law Commission Report”) to the Arbitration & Conciliation Act, 1996 (“the Act”). The Law Commission Report was handed over to the Ministry of Law and Justice suggesting a radical overhaul of the Act.

Under Section 34 of the Act, an automatic stay of the award operated once an application to set aside the award was filed before an Indian court. The court was not permitted to impose terms upon the applicant for such stay. This situation is proposed to be rectified by: (a) requiring an applicant to specifically seek stay of an award; and (b) permitting a court to put a party to terms, keeping in mind the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908. If implemented, one could see applicants being directed to deposit the award amount or portion thereof prior to any stay of the award being granted, thus reducing the incentive to litigate.

**CONTENTION 2.4: PRESENCE OF SECTION 34 REFLECTS THE INCONSISTENCIES OF THE OLD ACT.**

One of the major defects of the 1940 Arbitration Act was that the party could access court almost at every stage of arbitration - right from appointment of arbitrator to implementation of final award.<sup>11</sup> Though the 1996 Act has been reasonably drafted to carve out earlier inconsistencies yet the presence of S.34 singularly outweighs all the positive aspects which have been brought.

**CONTENTION 2.5: APPLICATION UNDER SECTION 34 INTRODUCES TIRESOME LITIGATION & DELAY THEREBY HARASSING THE PARTY WHICH TRYING TO ENFORCE A VALID AWARD.**

It is well-settled principle of law that right to speedy justice is an integral component of the right to life as ensured under Article 21 of the Indian Constitution.<sup>12</sup> Introduction of unnecessary

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<sup>9</sup> Former Chief Justice of the Madras and the Delhi High Courts

<sup>10</sup> Law Commission Report No. 246 dated August 05, 2014

<sup>11</sup> See <http://www.ficci-arbitration.com/htm/whatisarbitration.html> as visited on 10/02/2015

<sup>12</sup> *Dilip Kumar Mukherjee vs . Central Bureau of Investigation and Ors.* 2007 (4) CHN 278

litigation makes this right a farce concept. Hence Section 34 of the Act is violative of Article 21 of the Constitution.

**CONTENTION 2.6: THAT THE STATE IS OBLIGED TO RESPECT THE INTERNATIONAL INSTRUMENTS SIGNED BY IT UNDER ARTICLE 51(C) OF THE CONSTITUTION.**

The pendency of Sec. 34 petitions is huge and the delay thereon amounts to expropriation, in as much as it takes away the fruits of the award which leads to violation of country's bilateral and multilateral commitments under various conventions and investment treaties which violates Article 51(c) of the Constitution.

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**ISSUE: III: THAT THE APPLICATION U/S 34 OF THE ACT DOES NOT AMOUNT TO AUTOMATIC STAY AND HENCE THE DENIAL OF PAYMENT OF THE ENCASHED MONEY ON PART OF BANK IS VIOLATIVE OF CONTRACTUAL OBLIGATIONS OF THE BANK.**

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**CONTENTION 3.1: THE GRANT OF AUTOMATIC STAY AMOUNTS TO BYPASSING THE STAGE OF BALANCE OF CONVENIENCE.**

It is also pertinent to mention that the grant of automatic stay amounts to bypassing of proving "balance of convenience." Under general circumstances, the petitioner who prays for an injunction/stay has to prove that such stay will not cause prejudice and irreparable harm to the other side. However if the application under Section 34 is given the status of stay it will amount to pre-trial relief which is itself against natural justice.

**CONTENTION 3.2: APPLICATION UNDER SECTION 34 MUST BE ACCOMPANIED BY INTERIM ORDER UNDER SECTION 9 TO BE TREATED AS A STAY.**

It is worth noticing that despite of an express provision dealing exclusively with the interim relief in arbitration proceedings, the same were never utilized by the respondent. Section 9 (i) (c) expressly lays down provision for applying for interim relief before an appropriate court for the purpose preservation of the property or thing which is the subject matter of the dispute.<sup>13</sup>

**CONTENTION 3.3: ADVERSE EFFECT ON RESPONDENT BEING MEASURABLE IN TERMS OF MONEY MAKES THE STAY AN IMPROPER COURSE.**

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<sup>13</sup> See Section 9 (i) (c) Of the Arbitration & Conciliation Act, 1996

The security amount which was being liquidated from the bank were in exactly in numbers. It would be an unsustainable argument to say that cashing out the security would have caused irreparable damage to the respondent. If the adverse effect of the injunction on the respondent is measurable in financial terms then the court should be more content to grant the injunction.<sup>14</sup> Since the applicant's inconvenience in failing to obtain the injunction could be adequately compensated by damages after the trial the court must have refused the grant of stay.

**CONTENTION 3.4: AUTOMATIC STAY CANNOT COME INTO PLAY IN THE LIGHT OF EXPRESS PROVISION BEING PRESENT FOR THE SAME.**

The reason behind inserting express provision for interim relief by courts was not only to limit court interference but also to limit automatic application of stay. The spirit of arbitration being different from that of regular litigation does not attract the provision of stay which exists otherwise.

In the case of *Adhunik Steels Ltd vs. Orissa Manganese and Minerals Pvt. Ltd.*<sup>15</sup>, it was observed that the power under section 9 of the Arbitration and Conciliation Act 1996 is not totally independent of the well-known principles governing the grant of an interim injunction and generally, the courts are governed by the general principles relating to the grant of injunction in the matter of enforcing bank guarantee. Hence no injunction can be granted from invoking the bank guarantee and therefore, these applications are liable to be dismissed.

**CONTENTION 3.5: THAT DENIAL OF PAYMENT OF THE ENCASHED MONEY IS BREACH OF CONTRACT ON PART OF BANK.**

The bank was at fault in denying payment to the Petitioner as it was obligated under Section 126 of the Indian Contract Act, 1882 to furnish the guarantee on first demand. In terms of bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It is an undisputed fact that the three parties were in beneficiary-guarantor relationship. Incompetence of the Respondent to pay the amount directly lead to shifting of liability on the bank. Under those circumstances the bank was not in a position to treat the

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<sup>14</sup> See <http://www.out-law.com/topics/dispute-resolution-and-litigation/injunctions/interim-injunctions/> as visited on 10/02/2015

<sup>15</sup> (2007) 7 SCC 125

encashing orders of the Petitioner as per its discretion. It is not dependent upon the result of the decision in the dispute between the parties in case of breach.<sup>16</sup>

**CONTENTION 3.6: APPLICATION UNDER SECTION 34 IS NO GROUND TO DENY PAYMENT DUE UNDER BANK GUARANTEE.**

The argument of the bank that it declined payment of guarantee on account of stay order is not sustainable. It is worth noticing that the money was already encashed on paper. Therefore the Petitioner had already done away with the formalities. Under those circumstances, the bank had no right to use the court order as a shield to deny payment.

**CONTENTION 3.7: REFUSAL TO ENCASH THE AMOUNT HAS CAUSED HUGE INCONVENIENCE AND INJURY TO THE PETITIONER.**

The financial status of the company due to its expenditures was rendered unstable. JCI cited its concern about immediate requirement of liquidity due to erosion of net worth, expenses for litigation, and pressure of the Amerasian Development Bank regarding the repayment of loan etc.<sup>17</sup> The company being fund deficit was in urgent need of money. The same was communicated to the bank too. However the bank refused to honor the request of the beneficiary. Under those circumstances it becomes breach of contract on the part of bank. This breach has caused huge inconvenience to the Petitioner. Therefore it is entitled to be compensated for the same.

**CONTENTION 3.8: DISPUTE BETWEEN THE PARTIES IS NOT A GROUND FOR STAY AGAINST ENCASHMENT OF BANK GUARANTEE.**

A dispute between the parties by itself will not provide a ground for grant of stay against encashment of bank guarantee. If this is permitted to be done, the purpose behind resting transaction on the basis of bank guarantee marred which would ultimately affect trade and commerce and economic development.<sup>18</sup>

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<sup>16</sup> *Bharat Electricals v Standing Conference of Public Enterprises* 1997 (1) Arb LR 402 (Del)

<sup>17</sup> See para 13 of the Moot Proposition

<sup>18</sup> *Amrok Logistics Trading Pvt. Ltd v Digvijay Cement Co. Ltd.* AIR 2001 Guj 299

**CONTENTION 3.9: ABSENCE OF FRAUD AND MISREPRESENTATION LEAVES NO OTHER  
GROUNDS FOR SUCH REFUSAL.**

The issuing bank is bound to honor a bank guarantee when demand was made and there was no allegation of fraud. Bank has nothing to do with the internal problems or disputes between the parties of agreement.<sup>19</sup> Assuming that there is a dispute between the two parties cannot be a reason for not honoring the bank guarantee. The law is settled on the question of obligation of bank under a bank guarantee.<sup>20</sup>

Further the court has also opined that the commitment of banks must be honoured free from interference by the Courts, and that in order to restrain the operation of bank guarantee, there should be a serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties.<sup>21</sup>

**CONTENTION 3.10: RESPONDENT'S FAILURE TO HONOUR THE BANK GUARANTEE  
AMOUNTS TO DEFICIENCY IN SERVICE.**

It is an undisputed fact that the services rendered by the banks are covered within the Consumer Protection Act.<sup>22</sup> Complainant who is beneficiary under terms of bank guarantee is a consumer. The failure of bank to honor bank guarantee as soon as demand is made is deficiency in service.<sup>23</sup>

Where the bank fails to discharge its obligation, it is liable to compensate.<sup>24</sup> National Commission has also ruled that the banks are liable to pay the interest for the delay in releasing the payment.<sup>25</sup>

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<sup>19</sup> *D.L.F Cement Ltd. v Inspector of Police*, AIR 1999 AP 359

<sup>20</sup> *Indian Bank v Metallurgical Engineering Consultants (India) Ltd.*, 1994 (2) Bank CLR 539 at pg. 544 (Cal)

<sup>21</sup> *U.P. Co-operative Federation Ltd. v Singh Consultants and Engineers (P) Ltd.*, (1988) 1 SCC 174

<sup>22</sup> See Section 2(1) (o) of the Consumer Protection Act, 1986

<sup>23</sup> *Z. Babellioni Singapore Pvt. Ltd v Central Bank of India*, O.P. No. 164 of 1998 decided on 25-10-2004

<sup>24</sup> *Punjab National Bank v Lt. Col. D.R. Aggarwal (Retd)* 2006 (2) CPR 105 (NC)

**CONTENTION 3.11: THE OBJECT OF BANK GUARANTEE BEING COMMERCIAL SAFEGUARD FOR PROVIDING INSTANT RELIEF TO BENEFICIARY SHOULD NOT BE PREJUDICED BY COURT INTERFERENCE.**

It is also pertinent to mention that the parties involved in contracts incorporate the services of bank guarantee to save beneficiary not only from being left unpaid but also prejudicial delays. These transactions are critical ones where the beneficiary is susceptible to face injuries as a result of delay in payment. Therefore beneficiary becomes totally dependent on the guarantor banks to reconstitute them in case of incompetence of the main party to pay. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee.<sup>26</sup>

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**ISSUE IV: THAT THE NON AVAILABILITY OF A NOTIFIED VACATION BENCH AND A NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION BENCH DURING ANY HOLIDAYS IS UNCONSTITUTIONAL?**

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**CONTENTION 4.1: ABSENCE OF VACCATION BENCH IS INFRINGES RIGHT TO SPEEDY JUSTICE UNDER ARTICLE 21 OF THE CONSTITUTION.**

Speedy trial is a fundamental right implicit in the broad sweep and content of Article 21. The Article confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with procedure prescribed by law. The procedure so prescribed must ensure a speedy trial, but if the period of deprivation pending trial becomes unduly long, fairness assured by article 21 would receive a jolt.<sup>27</sup> Quick justice is now regarded a sine qua non of Article 21. Inordinately long delay may be taken as presumptive proof of prejudice. While determining whether undue delay has occurred one must have regard to all attendant circumstances. It is true that it is the obligation of the state to ensure a speedy trial with a fair chance of being heard.

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<sup>25</sup> *Executive Engineer, Upper Ganga Canal Modernization Unit, Division I, U.P. v Punjab & Sind Bank*, (1994) 2 CTJ 207 (NC)

<sup>26</sup> *U.P. State Sugar Corpn. v. Sumac International Ltd.* [(1997)1 SCC 568]

<sup>27</sup> *Surinder Singh v State of Punjab* AIR 2005 SC 3669

**CONTENTION 4.2: ABSENCE OF VACATION BENCH INFRINGES 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 highly prejudicial and constitutionally offensive that there was no vacation bench at the time when the petitioner approached the court. 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 4.3: NON APPLICABILITY OF THE PRESCRIBED PROCEDURE**

It is now established after *Maneka Gandhi v UOI* that procedure for the purpose of Article 21 must be just, fair, reasonable and not arbitrary, fanciful or oppressive. The expression "procedure established by law" extends both to substantive as well as procedural law. A procedure not fulfilling these attributes is no procedure at all in the eyes of Article 21.<sup>28</sup> However, even in case of availability valid procedure, Article 21 would be severely hit, if there is no application of such procedure.

In the present context the procedural safeguard for availability of a notified vacation officer and vacation bench are expressly provided under the Supreme Court Rules, 2013.<sup>29</sup> This has been duly notified by the relevant notification.<sup>30</sup> However the petitioners were deprived of their right of fair opportunity of being heard due to non listing of the petition and subsequent direction to revert back to the Hon'ble High Court. Time is of essence in the present matter wherein the petition was stalled due to unreasonable delay and official miscommunication.

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<sup>28</sup> *Kartar Singh v State of Punjab* (1994) 3 SCC 569

<sup>29</sup> See Order II Rule 6 of the Supreme Court Rules 2013

<sup>30</sup> See General Notification G.S.R.368(E) as notified in 27th May, 2014

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**PRAYER**

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

- a) Hold Section 34 of the Arbitration & Conciliation Act, 1996 ultra vires to the constitution and thereby strike it down.
- b) Hold the ordinance dated 20th December 2014 violative of Article 14 & 16 and thereby strike it down.
- c) Hold the bank liable for breaching its legal obligation and thereby award compensation along with interest @ 12% per annum so accumulated in the favour of Petitioner.
- d) Lay down strict guidelines for vacation bench.

*All of which is humbly prayed.*

**Date: 21/02/2015**

*Counsel for the Petitioner*

*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 Petitioner)