

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 671 OF 2015.

IN THE MATTER OF:

Raj Bala and Others

...Petitioners

Versus

State of Haryana and Others

...Respondents

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONERS

1. Republicanism and Democracy are Basic Features of the Constitution of India

It is submitted that a republican and democratic form of government is a part of the basic features of the Constitution of India. The Preamble to the Constitution recognizes India as a sovereign democratic republic. It is submitted that sovereignty resides in the people of India, and it is exercised in an organized manner. This organized manner is through an election at which there is universal adult suffrage. The principle of universal adult suffrage has been enshrined in Articles 325 and 326 of our Constitution.

The Supreme Court in *Kesavananda Bharti v. State (1973) 4 SCC 225 (Para. 1159)* while scrutinizing the constitutional validity of Article 368 of the Indian Constitution, stated that the Preamble of the Indian Constitution includes the principles of a democratic sovereign republic in the following words:

“... A democratic republic that is envisaged is the one based on a

representative system in which people holding opposing view to one another can be candidates and invite the electorate to vote for them...

The Supreme Court in *Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1*, (in Paras. 563 and 578) elaborated on the concept of sovereign republic democracy by relying on theories of various political jurists, including Willis, wherein he argues that sovereign power is to be exercised on behalf of the people in the following words:

“Prof Willis, in his Constitutional Law of the United States advocates the doctrine of “sovereignty of the people” for which he finds support in Abraham Lincoln’s well-known description of the American system as “a Government of the people, for the people, by the people”... According to him, the “Sovereignty of the People” which he advocates does not mean an anarchic license given to each individual or group to do as he or it pleases, but stands for the power of the people, “organised in Government to express and adjust their will either directly or through representatives”... This concept of a nation “organized in Government” appears to me to clearly introduce the idea of a Constitution which lays down what that organization is and how it must operate. Although Prof. Willis rejects the view that the Constitution is “sovereign”, because it can be altered by the people, he is obliged to accept something resembling it because he sees that the “people”, thought of as a mere aggregation or an amorphous mass, is too nebulous. Any satisfactory theory of sovereignty must account for the power of the people to act in certain ways or to move in certain directions. A “hydra-headed” multitude or mass of people will not know how to act or in which direction to move. It is its “organization” which provides that. And, its effort to organize itself and to rationalize will produce a Constitution for it which embodies its will as organized in the form of a Government. The will of the people is thus inseparable from a Constitution which enables it to be expressed and then to govern...”.

The Supreme Court of India has repeatedly stated that the conduct of free and fair elections is the essence of democracy.

This Court in *People's Union for Civil Liberties (PUCL) and Anr. v. Union of India (UOI) and Anr.* (2013 10 SCC 1) in **Paras. 53 and 56** stated that:

*“Democracy being the basic feature of our constitutional set-up, **there can be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country. The “fair” denotes equal opportunity to all people. Universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for these millions of individual voters to go to the polls and thus participate in the governance of our country...**”*

*“ **Free and fair election is a basic structure of the Constitution** and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion...”*

The Parliament has enacted the Representation of the People’s Act, 1951 pursuant to articles in Part XV of the Constitution titled '**Elections**' read with Articles 324 and 327 of the Constitution in furtherance of the constitutional principle of universal adult suffrage and the objective of conducting free and fair elections.

This Court in *Mohinder Singh Gill & Anr v. The Chief Election Commissioner, Delhi 1978 (1) SCC 405* (in **Para. 14**) held that the Constitution and the Representation of the People’s Act, 1951 are to be read together in the following words:

*“...We may therefore have to study the scheme of Article 324 and the provisions of the Act together since they are integral to each other. Indeed, if we may mix metaphors for emphasis, **the legislation made pursuant to Article 327 and that part of the Constitution specially devoted to elections must be viewed as one whole picture, must be heard as an orchestrated piece and must be interpreted as one package of provisions regulating perhaps the most stressful and strategic aspect of democracy-in-action so dear to the nation and so essential for its***

survival...”

What is Universal Adult Suffrage

It is submitted that the sovereignty of the people as mentioned above finds its expression in the right enshrined in Articles 325,326 and read with Article 84(C) and Article 102, and in Chapter IX in relation to Panchayats.

Article 325 reads as follows:

*“No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.— There shall be **one general electoral roll** for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and **no person shall be ineligible for inclusion in any such roll** or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.”*

Article 326 reads as follows:

*“Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage--The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of **adult suffrage**; that is to say, **every person** who is a **citizen** of India and who is **not less than eighteen years of age** on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is **not otherwise disqualified under this Constitution or any law** made by the appropriate Legislature on the ground of **non-residence, unsoundness of mind, crime or corrupt or illegal practice**, shall be entitled to be registered as a voter at any such election.*

It is submitted that Articles 325 read with 326 mandates the creation of a common electoral roll and every person has a right to be on the said common electoral roll. Every person who is on the said common electoral roll has the right to and cast a vote at the election for representatives to the House of the People and the Council of States. This is the right to universal adult suffrage.

The Oxford English Dictionary defines the word suffrage as the right to vote in political elections, with its origins from the Latin *suffragium* which meant both 'support' and 'right to vote', and was formed from *suf-* meaning under or near, and *fragor* meaning din, or shout of approval.

Who is qualified to vote? Who is disqualified to vote?

By virtue of Article 326 every adult person who is a citizen has a right to vote at an election to the House of the People and the Legislative Assembly.

Hence, it is submitted that the only two qualifications for being entitled to vote to the house of the people and the Legislative Assembly are:

being a citizen;

an adult

Article 326 also prescribes the disqualifications for voting to the house of the people and the Legislative Assemblies are:

Non-residents.

For unsoundness of mind

Crime, corrupt or illegal practice.

It is submitted that there is a difference between “qualification” for being on the electoral roll which is the eligibility to be on the electoral roll, and “disqualification” from being on the electoral roll.

Right to be Chosen

Article 84 gives the right to be chosen for a member of Parliament. Article 173 gives the right to be chosen for the Legislative Assembly. Article 243(C) provides for the Composition of Panchayats.

Article 102 prescribes disqualifications for membership for either House of People. Article 191 provides disqualifications for being a member of the Legislative Assembly and Legislative Council of States. Article 243F talks about disqualifications for being chosen as and from being a member of a Panchayat.

The words “qualification” and “disqualification” must carry the same meaning in all the aforesaid Articles.

It is submitted that the qualification may be either innate or legally acquired.

It is submitted that the language in which a provision is couched is not determinative of the questions whether a provision is a qualification or a disqualification. It is the substance of the matter that must be seen.

It is interesting to note that although Article 84 (c) is negatively worded, it in fact prescribes a qualification. Hence, it is submitted that the wording; negative or positive, is not determinative of whether a condition is a qualification or a

disqualification.

This court in *Manoj Narula v. Union of India (2014) 9 SCC 1* (in **Para. 110**) has noted the same on Article 84 (c) by stated the following:

“Article 84 of the Constitution negatively provides the qualification for membership of Parliament.”

While a qualification is an attribute and a requirement of exercise of a right, disqualification is forfeiture of the exercise of that right for certain stated reasons.

It is submitted that a disqualification has the effect of removing or disabling a qualified person from getting a particular benefit entitlement or the exercise of a particular right. It is in the nature of a penal provision in the sense of being a loss or forfeiture of a benefit or of an entitlement. It is generally attributable to fault.

In *2000 (8) SCC Page 46* this Hon’ble Court distinguished the expression “disqualification”, from the expression “not being qualified”. This Court also held “so long as one is not qualified no question of disqualification arises”. (**See para 21 Page 59**). It is therefore submitted that before one can be disqualified one is required to be qualified. See also the judgment of the Allahabad High Court of the full bench *Ghulam Moinuddin Vs. Calcutta Tribunal AIR 1959 All 357* where it it was held:

“So long as one is not qualified no question of disqualification is arises. According to Murphy’s New English “Dictionary” disqualification means to deprive the qualifications required for some purpose. A disqualification is therefore not identical with the absence of qualification.”

The aforesaid judgment was approved in 2000 (8) SCC Page 46 (See Para 21 Page 59).

IS THE REQUIRMENT OF EDUCATIONAL A QUALIFICATION OR A DISQUALIFICATION.

One of the questions to be answered in this case is whether an educational requirement to be chosen is a “qualification” or a “disqualification”.

There is intrinsic evidence in the Constitution to suggest that an educational requirement is a qualification and not a disqualification. Article 171 refers to education as “a qualification” to contest from a graduate constituency. Hence it is submitted that an educational requirement must be considered a “qualification” and not a disqualification as it purports to be under the impugned amendment.

Apart form the above, on the test for determining whether education is a qualification or a disqualification, it is submitted that it is a Qualification and not a Disqualification .

It is apparent form Articles 84, and Article 173 that any additional qualification to contest for membership of Parliament or the Legislative Assembly can be made only by Parliament and not by the State Legislature. Also, there is no power to prescribe a qualification in Article 243F.

It is therefore submitted that the impugned law prescribes a qualification in the

guise of a disqualification and is a colourable exercise of powers and a fraud on the Constitution. It is ultra vires the scheme of the Constitution and of Article 243F.

It is submitted that Article 243C & 243F in part IX the gives right to be “Chosen” as a representative of the People. There is no power given to the State Government to prescribe qualifications to be chosen.

Article 243C talks about *Composition of Panchayats* and reads as follows:

“Composition of Panchayats

HYPERLINK "<http://indiankanoon.org/doc/1756813/>"(1) Subject to the provisions of this Part, the Legislature of a State may, by law, make provisions with respect to the composition of Panchayats: Provided that the ratio between the population of the territorial area of a Panchayat at any level and the number of seats in such Panchayat to be filled by election shall, so far as practicable, be the same throughout the State,

HYPERLINK "<http://indiankanoon.org/doc/79416/>"(2) All the seats in a Panchayat shall be filled by persons chosen by direct election from territorial constituencies in the Panchayat area and, for this purpose, each Panchayat area shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the Panchayat area

HYPERLINK "<http://indiankanoon.org/doc/1951868/>"(3) The Legislature of a State may, by law, provide for the representation

HYPERLINK "<http://indiankanoon.org/doc/261018/>"(a) of the Chairpersons of the Panchayats at the village level, in the Panchayats at the intermediate level or, in the case of a State not having Panchayats at the intermediate level, in the Panchayats at the district level;

HYPERLINK "<http://indiankanoon.org/doc/735851/>"(b) if the

Chairpersons of the Panchayats at the intermediate level, in the Panchayats at the district level;

HYPERLINK "<http://indiankanoon.org/doc/1458815/>"(c) of the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly a Panchayat area at a level other than the village level, in such Panchayat;

HYPERLINK "<http://indiankanoon.org/doc/647295/>"(d) of the members of the Council of States and the members of the Legislative Council of the State, where they are registered as electors within.

HYPERLINK "<http://indiankanoon.org/doc/1966120/>"(i) a Panchayat area at the intermediate level, in Panchayat at the intermediate level;

HYPERLINK "<http://indiankanoon.org/doc/1579090/>"(ii) a Panchayat area at the district level, in Panchayat at the district level

HYPERLINK "<http://indiankanoon.org/doc/1848612/>"(4) The Chairperson of a Panchayat and other members of a Panchayat whether or not chosen by direct election from territorial constituencies in the Panchayat area shall have the right to vote in the meetings of the Panchayats

HYPERLINK "<http://indiankanoon.org/doc/750213/>"(5) The Chairperson of HYPERLINK "<http://indiankanoon.org/doc/594205/>"(a) Panchayat at the village level shall be elected in such manner as the Legislature of a State may, by law, provide; and

HYPERLINK "<http://indiankanoon.org/doc/1145675/>"(b) a Panchayat at the intermediate level or district level, shall be elected by, and from amongst, the elected members thereof

Article 243F relates to *disqualifications for membership* and reads as follows:

"243F. Disqualifications for membership

*HYPERLINK "<http://indiankanoon.org/doc/996635/>"(1) A person shall be disqualified for **being chosen** as, and for being, a member of a Panchayat*

HYPERLINK "<http://indiankanoon.org/doc/45771/>"(a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned: Provided that no person shall be disqualified on the ground that he is less than twenty five years of age, if he has attained the age of twenty one years;

*HYPERLINK "<http://indiankanoon.org/doc/705435/>"(b) if **he is so disqualified by or under any law made by the Legislature of the State.***

HYPERLINK "<http://indiankanoon.org/doc/239378/>"(2) If any question arises as to whether a member of a Panchayat has become subject to any of the disqualifications mentioned in clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide.

Hence it is submitted that Part IX of the Constitution gives no power to any State Legislature to prescribe qualifications for being chosen as a Member of a Panchayat.

Article 243F gives power to State Legislature to prescribe disqualifications.

It is submitted that as mentioned above an Educational requirement is a qualification and that not a disqualification.

It is, therefore submitted that the impugned amendment to the Rajasthan Panchayat Raj Act to the extent that it adds clause(r,) to Section 19 of the said Act is ultra vires the Scheme of the Constitution and Article 243 F.

It is further submitted to the extent that the impugned legislation describes the said sub-clauses (r,) as a disqualification, it is a colorable piece of legislation and

for that reason also it is required to be quashed and set aside.

PROPERTY BASED QUALIFICATIONS DISCRIMINATORY

It is further submitted that sub-clause (s) and (t) added to the list of disqualifications are also in the nature of qualifications in that they are a pre-condition to exercise the right to be chosen as a Panch. Assuming without admitting that they are disqualifications, they are even otherwise arbitrary and discriminatory in that they are based on the absence or presence of property and have the effect of disempowering a person for being chosen only for the reason that a person does not possess property.

It is submitted that the question whether property based qualification can be added to the right to contest was discussed and rejected in the constituent assembly for obvious reasons. It is submitted that they would undercut the very notion of Adult Universal suffrage and the Universal right to contest an election. . It is therefore, submitted that the said provision also is ultra vires the constitution of India in that it is highly discriminatory and violates Article 14.

A similar process of reasoning applies to the amendment introduced by Haryana Act No. 8 of 2015 sub-clause (t) (u) to Section 175. The said provision also must be read as property-based qualification and hence violative of Article 14.

It is submitted that the High Court of Karnataka in *Vasanthakumar Shetty's* Case struck down an amendment to the Panchayat Raj Act prescribing a disqualification in Section 12F of that Act, of not having a sanitary latrine for the use of the members of the family for being a Member of the Panchayat. The said requirement was struck down on the ground that it had no nexus with the objects

sought to be achieved and was hence arbitrary and ultra vires of Article 14 of the Constitution of India. Reference was also made to Article 243F.

Article 327 and the Representation of People Act 1951.

In exercise of powers under Article 327 of the Constitution of India, Parliament has enacted the Representation of People Act 1950 and 1951.

The following sections of the Representation of People's Act 1951 relate to *qualifications for contesting*.

Section 3 talks about qualification for membership of the Council of States and states that:

A person shall not be qualified to be chosen as a representative of any State or Union territory in the Council of States unless he is an elector for a Parliamentary constituency in India.

Section 4 talks about Qualification for membership of the House of the People and states that:

A person shall not be qualified to be chosen to fill a seat in the House of the People, unless—

- (a) *in the case of a seat reserved for the Scheduled Castes in any State, he is a member of any of the Scheduled Castes, whether of that State or of any other State, and is an elector for any Parliamentary constituency;*
- (b) *in the case of a seat reserved for the Scheduled Tribes in any State (other than those in the autonomous districts of Assam), he is a member of any of the Scheduled Tribes, whether of that State or of any other State (excluding the tribal areas of Assam), and is an elector for*

any Parliamentary constituency;

- (c) *in the case of a seat reserved for the Scheduled Tribes in the autonomous districts of Assam, he is a member of any of those Scheduled Tribes and is an elector for the Parliamentary constituency in which such seat is reserved or for any other Parliamentary constituency comprising any such autonomous district;*
- (cc) *in the case of the seat reserved for the Scheduled Tribes in the Union territory of Lakshadweep, he is a member of any of those Scheduled Tribes and is an elector for the Parliamentary constituency of that Union territory;*
- (ccc) *in the case of the seat allotted to the State of Sikkim, he is an elector for the Parliamentary constituency for Sikkim;]*
- (d) ***in the case of any other seat, he is an elector for any Parliamentary constituency.***

Section 5 speaks about the qualification for membership of a legislative assembly and states that:

- (1) *Notwithstanding anything contained in section 5, a person shall not be qualified to be chosen to fill a seat in the Legislative Assembly of Sikkim (deemed to be the Legislative Assembly of that State duly constituted under the Constitution) unless —*
 - (a) *in the case of a seat reserved for Sikkimese of Bhutia-Lepcha origin, he is a person either of Bhutia or Lepcha origin and is an elector for any Assembly constituency in the State other than the constituency reserved for the Sanghas;*
 - (b) *in the case of a seat reserved for Sikkimese of Nepal origin, he is a person of Nepali origin and is an elector for any Assembly constituency in the State;*
 - (c) *in the case of a seat reserved for Scheduled Castes, he is a member*

of any of the castes specified in the Representation of S i k k i m Subjects Act, 1974 and is an elector for any Assembly constituency in the State; and

(d) in the case of a seat reserved for Sanghas, he is an elector of the Sangha constituency.]

(2) Notwithstanding anything contained in section 5, a person shall not be qualified to be chosen to fill a seat in the Legislative Assembly of the State of Sikkim, to be constituted at any time after the commencement of the Representation of the People (Amendment) Act, 1980 (8 of 1980), unless—

(a) in the case of a seat reserved for Sikkimese of Bhutia-Lepcha origin, he is a person either of Bhutia or Lepcha origin and is an elector for any assembly constituency in the State other than the constituency reserved for the Sanghas;

(b) in the case of a seat reserved for the Scheduled Castes, he is a member of any of those castes in the State of Sikkim and is an elector for any assembly constituency in the State;

(c) in the case of a seat reserved for Sanghas, he is an elector of t h e Sangha constituency; and

(d) in the case of any other seat, he is an elector for any assembly constituency in the State.

Section 6 lays out qualification for membership of a Legislative Council—

A person shall not be qualified to be chosen to fill a seat in the Legislative Council of a State to be filled by election unless he is an elector for any Assembly constituency in that State.

*A person shall not be qualified to be chosen to fill a seat in the Legislative Council of a State to be filled by nomination by the Governor I * * * unless he is ordinarily resident in the State.*

Section 7(b) defines “disqualified” as:

“disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State.”

Section 8 , to Section 11A prescribe the disqualifications.

It is submitted that all disqualifications mentioned in the Representation of People’s Act, 1951 pertain to the happening of certain events based on fault such as conviction for an offence or for the commission of a corrupt practice or for dismissal corruption of disloyalty. Others pertain to conflict of interest such as during the period of a contract entered into in the course as per trade or business with the appropriate Government in order to ensure free and fair election. Yet others relate to proven defaults following an election such as failure to lodge election expenses.

A reference to the abovementioned disqualification factors indicates that they either fall under the category mentioned in Article 326 namely Crime or Corrupt or illegal practice and / or involve some form of moral turpitude. Failure to attain educational qualifications involved no moral turpitude, rather it reflects the failure of the State to provide education to the masses.

Section 19 of the Rajasthan Panchayat Raj Act, 1994 is reproduced below:-

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

- (a) *is disqualified by or under any law for the time being in force for the purposes of election to the Legislature of the State of Rajasthan:*

Provided that no person shall be disqualified on the ground that he is less than 25 years of age if he has attained the age of 21 years;

- (aa) *is found guilty of a corrupt practice by order of a competent Court, consequent upon an election petition filed under and in accordance with the provisions of this Act or rules made there under.*
- (b) *holds a salaried whole-time or part-time appointment under a local authority ⁴[,a university or any corporation, body, Enterprises or Co-operative Society, which is either controlled or wholly or partly financed by the State Government];*
- (c) *has been dismissed from State Government service for misconduct involving moral turpitude and has been declared to be disqualified for employment in the public service;*
- (d) *hold any salaried post or place of profit under any Panchayati Raj Institution;*
- (e) *has directly or indirectly by himself or by his partner, employer or employees, any share or interest in any contract with, by or on behalf of the Panchayati Raj Institution concerned while owning such share or interest in any work done for;*
- (f) *is a leper or is suffering from any other bodily or mental defect or disease rendering him incapable for work;*
- (g) *has been convicted of any offence by a competent Court and sentenced to imprisonment for six months or more, such sentence not having been subsequently reversed or remitted or the offender pardoned;]*
- (gg) *is under trial in the competent Court which has taken cognizance of the offence and framed the charges against him of any offence punishable with*

imprisonment for five years or more;

- (h) is for the time being ineligible for election under section 38;*
- (i) has not paid, for two months from the date of the presentation of the notice of demand therefor, the amount of any tax or fees imposed by the Panchayati Raj Institution concerned;*
- (j) is employed as a legal practitioner on behalf of or against the Panchayati Raj Institution concerned;*
- (k) has been convicted of an offence punishable under the Rajasthan Prevention of Mrityu Bhoj Act, 1960; [XXX]*
- (l) has more than two children ; and*
- (m) earlier having been a Chairperson/Deputy Chairperson of any Panchayati Raj Institution has not paid dues even after the expiry of a period of two months from the date of notice, for depositing the dues of the Panchayati Raj Institution, was duly served upon such Chairperson/ Deputy Chairperson and his name is included in the list of such defaulters supplied by the State Government to the Collector (Panchayats) at least two months before the issue of notification for election to such Panchayati Raj Institution;*
- (n) in case of a seat reserved for the Scheduled Castes or Scheduled Tribes or Backward Classes of the State, is not a member of any of those Castes, or Tribes or classes, as the case may be,*
- (o) in case of a seat reserved for the women, is not a woman; and*
- (p) in case of a seat reserved for women belonging to Scheduled Caste or Scheduled Tribe or Backward Classes, is not a member of any of these Castes or Tribes or classes, as the case may be, and is not a woman.*

Provided that:-

- (i) a person shall not, by reason only of his being a share-holder in or a member of any incorporated company or a co-operative society registered under the law for the time being in force in the State of Rajasthan, be held to be interested in any contract entered between the company or co-operative society and the Panchayati Raj Institution;*
- (ia) for the purpose of Clause (aa), a person shall be deemed to be disqualified for a period of six years from the date of order referred to in Clause (aa);]*
- (ii) for the purpose of clauses (c), (g) and (k) any person shall become eligible for election after a lapse of six years from the date of his dismissal or the date of conviction, as the case may be;]*
- (iii) for the purpose of clause (i), a person shall not be deemed to be disqualified if he has paid the amount of the tax or fee due from him before the date of filling his nomination papers;*
- (iv) the birth during the period from the date of commencement of the Act, hereinafter in this proviso referred to as the date of such commencement, to 27th November, 1995, of an additional child shall not be taken into consideration for the purpose of the disqualification mentioned in clause (1) and a person having more than two children (excluding the child if any, born during the period from the date of such commencement to 27th November, 1995) shall not be disqualified under that clause for so long as the number of children he had on the date of commencement of this Act does not increase.*
- (v) for the purpose of Clause (m), a Chairperson /Deputy Chairperson shall not be deemed to be disqualified if he pays the amount due from him before filling his nomination papers.*

Explanation.-

For the purpose of clause (1) of section 19, where the person has only one child from the earlier delivery or deliveries on the date of commencement of this Act and thereafter, any number of children born out of a single subsequent delivery shall be deemed to be one entity.”

7.4 The impugned amendment making additions to Section 19 are reproduced below:

“(1). This Act may be called the Rajasthan Panchayat Raj (Second Amendment) Act,2015.

(2). It shall be deemed to have come into force on and from 20th December, 2014.

2. Amendment of section 19, Rajasthan Act No. 13 of 1994.

In Section 19 of the Rajasthan Panchayat Raj Act,1994 (Act No. 13 of 1994), hereinafter referred to as the principal Act:-

in clause (q), for the existing punctuation mark “;” appearing at the end, the punctuation mark “;” shall be substituted;

after the clause (q), so amended and before the existing proviso, the following new clauses shall be inserted, namely:-

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

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

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

It is submitted that for the reasons stated above, the impugned amendment is a qualification and hence ultra vires the powers of the State Legislature under

Article 243 F.

Is the Amendment violative of Article 14 of the Constitution of India.

This Hon'ble Court held in *State of West Bengal V. Anwar Ali Sarkar in 1952 (1) SCR 284* interpreted Article 14 to mean both equality before law and equal protection of laws.

While discussing the object of classification in Article 14 Justice Gupta held that not only but the classification be rational but it must have an intelligible differentia and a rational nexus with the object sought to be achieved. (see page 713)

It is submitted that the impugned amendments bare no rational nexus with the object of the Act. As held by the Ld. Judge the said terms derived there meaning from the social context. The social context in the current situation is that there is large scale illiteracy in the country among the electorate, there is homelessness and there is extreme poverty disabling the people from either studying and or possessing a toilet within their dwelling unit.

It is submitted that to restrict a person from contesting Panchayati Raj elections only for the reason that he or she has no educational qualification amounts to preventing a person from contesting an election for the reason only that he or she has no access to education. It is submitted that to insist that only an educated person can be "chosen" as a representative of the people is to deny to those who do not have an educational qualification an equal opportunity to be chosen and is bad in law and goes against the basic features of democracy which is part of the

Constitution.

It is submitted that similarly the addition of not possessing a toilet within the dwelling house and non-payment of arrears as a disqualification are, in the true sense and meaning of the word , an addition to a qualification to contest an election since they are in the nature of eligibility criteria to contest an election.

It is submitted that both the above-mentioned qualifications, namely possessing a functional toilet and payment of dues are purely property based qualifications and wholly impermissible as conditions for the right to vote or the right to contest election and violate the right to equality and equal protection of laws under Article 14 .

It is submitted that property based qualification is also discriminatory for the reason that not all persons are possessed of property and hence the said qualification which denies those who do not have property the right to contest is bad in law and violates Article 14. 9 See also *Municipal Council Ratlam (1980 4 SCC 162)* Para 15, 16 and 17 of Page 171.

The impugned provisions violate the right to equality and equal protection of law. It is submitted that Legislation can be held to be violative of the right to equality under Article 14 if it is manifestly arbitrary.

It is thus submitted that the impugned amendments is arbitrary and therefore, violative of Article 14.

Affirmative duty of the State to provide free and compulsory education not discharged making the impugned provision unreasonable.

9.1 It is submitted that the Legislature recognizing that there is large scale illiteracy and lack of formal qualifications among the people of the country enacted an amendment of the Constitution introducing Article 21A and enacted The right of Free and Compulsory Education Act, 2009. The said act is recognition of the constitutional legislative policy that there is affirmative duty cast on the State to provide free and compulsory education to the population. It is also a recognition of the existence of large scale illiteracy and absence of basic Primary Education in the country.

It is submitted that until the said affirmative duty is satisfactorily discharged , no such qualification of having formal education can be imposed on the right to contest an election. Hence, it is submitted that imposition of educational qualification as a condition of being chosen to be a Member of Panchayat is unreasonable and arbitrary.

It is submitted that in any event ,assuming without admitting that any such condition can be imposed either as qualification or a disqualification, it cannot be imposed for the next 10 years. The right to said Act came into force in 2009 and the rules in 2010. This means that a child who turned 6 on 2010 will complete their 8th standard when they turn 14 and will have to wait another 7 years to be able to contest .This means that such a person can only contest at an election to be held in 2025. Hence assuming such a qualification or disqualification can be imposed, it can only be done in the distant future. To do so with immediate effect is to deny equal opportunity to contest an election.

Javed Wrongly Decided:

For all the reasons stated above it is submitted that the requirement of not having not more than two children as a condition for being chosen as a Member of Panchayat is bad in law and *Javed v. State of Haryana* (AIR 2003 SC 3057) has been wrongly decided and is required to be over ruled.

Reference to a larger bench as per Article 145(3) of the Constitution

It is submitted that the matter requires to be referred to constitutional bench as:

Constitutional provisions of Articles 243 C and F have not been interpreted before;

there exists confusion on the nature of the right to vote and right to contest or be chosen as an Member of Parliament, Member of Legislative Assembly or Panchayat Member in judicial pronouncements.

It is submitted that this Petition relates to the interpretation of the Constitution of India, namely the interpretation of Article 243(C) and Article 243F on the question whether the State Legislature had the power to enact qualifications at all.

It is submitted that there exists confusion on the nature of the right to vote and the nature of the right to contest the election being a fundamental right, a constitutional right or a statutory right. The judicial pronouncements of this Court do not set out with adequate clarity the exact position and nature of the right to vote, despite the presence of such a right in Article 326.

In *Union of India (UOI) and Anr. v. Association for Democratic Reforms and Anr.*

(2002 5 SCC 294) [ADRA case], this Court while dealing with the issue of disclosure of criminal antecedents and assets of the contesting candidates held in (Para 46.7) that a voter's casting of vote is his/her freedom of expression and is guaranteed under the fundamental right of Article 19(1)(a) in the following words:

“...Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voters' speech or expression in case of election would include casting of votes that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is must. Voter's (little man-citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law breakers as law makers...”

Thereafter, in *People's Union for Civil Liberties (PUCL) and Anr. v. Union of India (UOI) and Anr.* (2003 4 SCC 399) [PUCL 2003 case], this Court while deciding upon the effective adherence of the election commission with the Delhi High Court's directions issued pursuant to the ADRA case, and particularly checking the constitutional validity of Section 33-B of the Representation of People (3rd Amendment) Act, 2002 (that limits disclosure requirements by candidates) held that (Para. 57, 123.2):

*“...There cannot be any dispute that **the right to vote or stand as a candidate for election** and decision with regard to violation of election law is not a civil right but **is a creature of statute or special law and would be subject to the limitations envisaged therein...**”*

“...The right to vote at the elections to the House of people or Legislative Assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(a). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter...”

This Court in ***Kuldip Nayar v. UOI 2006 (7) SCC 1 [Kuldip Nayar case] (Paras 361, 362 and 363)*** has held that:

*“The argument of the petitioners is that the majority view in People’s Union for Civil Liberties, therefore, was that a **right to vote is a constitutional right besides that it is also a facet of fundamental right under Article 19(1)(a) of the Constitution.**”*

*“**We do not agree with the above submission.** It is clear that a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression, while reiterating the view in **Jyoti Basu v. Debi Ghosal** that a right to elect, fundamental though it is to democracy, is neither a fundamental right nor a common law right, but pure and simple, a statutory right.”*

“Even otherwise, there is no basis to contend that the right to vote and elect representatives of the State in the Council of States is a constitutional right. Article 80(4) merely deals with the manner of election of the representatives in the Council of States as an aspect of the composition of the Council of States. There is nothing in the constitutional provisions declaring the right to vote in such election as an absolute right under the Constitution.”

Interestingly, in 2013, in ***People's Union for Civil Liberties (PUCL) and Anr. v. Union of India (UOI) and Anr.*** (2013 10 SCC 1) [**PUCL 2013 case**], this Court interpreted the ***ADRA case, PUCL 2003 case and the KuldipNayar case***. It held Rules 41 (2), (3) and 49-O of the Conduct of Election Rules, 1961 to be ultra vires and violative of Article 19(1)(a) of the Constitution of India and Section 128 of

the Representation of People Act, 1951, to the extent they violate the secrecy of voting. UOI had raised a preliminary objection to the maintainability of such writ petition submitting as under (in **Para.8 and Para.19**) that right to vote is not a fundamental right:

“..the right to vote is neither a fundamental right nor a constitutional right nor a common law right but is a pure and simple statutory right. He asserted that neither the RP Act nor the Constitution of India declares the right to vote as anything more than a statutory right and hence the present writ petition is not maintainable...”

“..It is the categorical objection of the Union of India that inasmuch as the writ petition under Article 32 would lie to this Court only for the violation of fundamental rights and since the right to vote is not a fundamental right, the present Writ Petition under Article 32 is not maintainable. It is the specific stand of the Union of India that right to vote is not a fundamental right but merely a statutory right...”

On the issue of the nature of the right to vote and the right to contest an election, the Supreme Court, on the basis of interpretation of the **ADRA case** and **PUCL 2003 case**, accepted the submission of the UOI that the right to vote is merely a statutory right and not a constitutional right nor a fundamental right as opposed to the **PUCL 2003 case** where it was held to be a statutory as well as a constitutional right (in **Para. 25**):

*“..there is no contradiction as to the fact that right to vote is **neither a fundamental right nor a Constitutional right** but a pure and simple statutory right. The same has been settled in a catena of cases and it is clearly not an issue in dispute in the present case...”*

7.9 In **Javed v. State of Haryana** (AIR 2003 SC 3057) while upholding the constitutional validity of Sections 175(1) and 177(1) of the Haryana Panchayati

Raj Act, 1994 (pertaining to disqualification of persons having more than two living children from holding or continuing in office) under Article 14 and Article 21, the Supreme Court held that the right to contest an election is neither a fundamental right nor a common law right in the following words (in **Para. 22**):

“Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right--a right originating in the Constitution and given shape by a statute. But even so, it cannot be equated with a fundamental right. There is nothing wrong in the same statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office.”

Recently in 2015 itself, in *Krishnamoorthy v. Sivakumar and Ors.* (AIR 2015 SC 1921) [**Krishnamoorthy case**], the Supreme Court relied on the *Javed case*, *ARDA case*, and *PUCL 2003 case*, while holding an election to be null and void under Section 100 of Tamil Nadu Panchayats Act, 1994 (as a result of non-disclosure of full particulars of criminal cases pending against a candidate standing for the post of the president of Thekampatti Panchayat, Coimbatore District). It further held that the right to contest is not a fundamental right but merely a statutory right and at the most a constitutional right flowing from Chapter IX (Panchayats) of the Constitution of India in the following words (in Para. 59):

“Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right--a right originating in the Constitution and given shape by a statute. But even so, it cannot be equated with

a fundamental right. There is nothing wrong in the same statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office...A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation.”

“The purpose of referring to the same is to remind one that the right to contest in an election is a plain and simple statutory right and the election of an elected candidate can only be declared null and void regard being had to the grounds provided in the statutory enactment. And the ground of 'undue influence' is a part of corrupt practice.”

In *Desiya Murpokku Dravida Kazhagam v. Election Commission of India* (2012) 7 SCC 340, this court in its dissenting opinion in Paras. 101 and 129 onwards also held the right to contest elections to be a constitutional right in the following words:

“In my opinion, therefore, subject to the fulfilment of the various conditions stipulated in the Constitution or by an appropriate law made in that behalf, every citizen of this country has a Constitutional right both to elect and also be elected to any one of the Legislative Bodies created by the Constitution - the "straight conclusion" of the Mohinder Singh Gill's case (supra), "that every Indian has a right to elect and be elected - subject to statutory Regulations", which rights can be curtailed only by a law made by the appropriate legislation that too on grounds specified under Article 326 only.”

“Notwithstanding all these changes, the constitutional right of a qualified citizen to contest an election to any one of the Legislative Bodies created by the Constitution, whether supported by a political party or not, be it a recognised or

unrecognised political party, has never been curtailed by the Legislature so far. All that a qualified voter requires to contest an election under the scheme of the R.P. Act, 1951, is to secure the support of, at least, one more elector to propose his name as a candidate if a recognised political party is willing to sponsor such a candidate, failing which, the requirement (post 1996 amendment) is, to secure the support of ten qualified voters to sign the nomination paper. The only other requirement is to make a deposit of certain amount specified Under Section 34 of the Act, which amount varies depending upon whether the candidate is contesting the election of Lok Sabha or the Legislative Assembly.

It is submitted that there is an obvious difference of opinion on the question of the status of the right to vote and consequentially the right to be “chosen” for an election in this Court which is required to be resolved by a larger bench.