Volume 8, January 2020 ISSN 2581-5504

# "Testing the Anti-Profiteering Law in India to the Touchstone of the Constitution"

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## ABSTRACT

"Anti-profiteering" was remarking feature of the GST Regime implemented in India, brought from looking at the experience of countries such as Australia and Malaysia to prevent inflationary trends in the market. The positive rational was sought to be enforced, in effect, by the National Anti-profiteering Authority, which handled an ever-increasing number of complaints of transgressions and profiteering. The composition of the National Anti-profiteering Authority has faced scrutiny recently, due to the lack of a judicial member into the same. Yet, the functions performed by them are administrative- the Authority being regulatory, rather than quasi-judicial or tribunal-like. There exist similar institutions such as SEBI, RERA and Information Commissions, whose existence indicate the non-requirement of judicial members. Additionally, the appointment of experienced technical members since the determination of "profiteering" requires specialized skill. Further, the provisions under Section 171 of the CGST Act and the Rules thereunder do not define certain terms, sub-delegate the powers to decide procedure and methodology of their working in the hands of the executive. The decisions of the National Anti-profiteering Authority are contradictory, lack common methods and are therefore discriminatory in nature, failing the test of Article 14.

**Keywords:** Anti-Profiteering, GST, Administrative Functions, Commensurate, Constitutionality, Arbitrariness.

## Testing the anti-profiteering law in India to the touchstone of the Constitution

The National Anti-Profiteering Authority (NAA) had been constituted under Section 171 of the Central Goods and Services Tax Act, 2017 to counteract "anti-profiteering", i.e. to ensure that the reduction in rate of tax or the benefit of input tax credit is passed on to the recipient by way of commensurate reduction in prices. The NAA was initially established with a sunset clause, but the GST Council has given it a new burst of life with an extension of additional two years.

The Rule 122 of Central Goods and Service Tax Rules, 2017 outlines the Constitution of the NAA, whereby it states that the NAA shall consist of a Chairman, whose rank is equivalent to a Secretary, and four technical members who have held the post of Commissioners of State or

Central tax, or any equivalent position, for a period of at least one year.[1] They are nominated by the GST Council.[2]

This composition has recently seen a flurry of challenges in *Hindustan Unilever Ltd. v. Union of India* (W.P. (C) 378 of 2019), *Jubilant Foodworks Ltd. v. Union of India* (W.P. (C) 2347 of 2019) and Abbott Healthcare Private Limited & Anr v. Union of India & Ors. (W.P. (C) 4213 of 2019) which are pending before the Delhi High Court.

*Firstly*, it is purported that the composition of NAA is valid in accordance to law.

**A. There is a Presumption of Constitutionality**

The legislative intent is clear that there cannot be a vacuum in the working of a statutory body and it cannot be rendered non-existent even for a short period.[3] If it happens so, the consumers will suffer at the hands of suppliers who may indulge into anti-profiteering practices in the absence of the watchdog. It is an established law that the courts would accept an interpretation which would be in favour of the constitutionality, than an approach which would render the law unconstitutional.[4]

**B. The Composition Of NAA Is In Accordance With Law.**

*i. NAA is not a Tribunal in substitute for the court, but a statutory authority.*

A tribunal is a body entrusted solely with the judicial power of the state and is seen as a substitute for courts.[5] The Court cannot embark upon an inquiry whether there was any misuse or abuse of power in a particular case, unless relief is sought by the person who is said to have been wronged by such misuse or a bust of power. The Court cannot take upon itself the role of a commission of inquiry.[6] Investing NAA with multifarious functions, which extend to directing, investigation and fact gathering, in addition to issuing directions or orders against specific entities or companies clearly indicates that it does not fall within the ambit of a tribunal or a court. A similar opinion was held by the courts in *Mahindra Electric Mobility Limited v. CCI.*[7]

*ii. NAA is an executive- cum -administrative organ.*

The administration makes policies, provides leadership to the legislature, executes and administers the law and takes manifold decisions. Presently, NAA is empowered to determine its own procedure and methodology.[8] The primary objective of the said body is to ensure that there is compliance of Section 171 of the Act.

It is also relevant to note that the definition of "Adjudication Authority" in the CGST Act is as follows-

*"2. In this Act, unless the context otherwise requires,—*

[1] *See* Central Goods and Service Tax Rules, 2017, Rule 122, CIS (India).
[2] INDIA CONST. Art.279A.
[3] K.D Nagpur v. Union of India, AIR 2012 SC 1774[Hereinafter 'K.D Nagpur'].
[4] Union of India v. Namit Sharma, (2013) 13 SCR 96.
[5] L. Chandra Kumar v. Union of India, (1995) 1 SCC 400.
[6] S.P. Gupta v. Union of India, AIR 1982 SC 149.
[7] Mahindra Electric Mobility Limited v. CCI, 2019 SCC OnLine Del 8032[Hereinafter 'Mahindra Electricity Mobility'.
[8] Central Goods and Service Tax Rules, 2017, Rule 126, CIS (India).

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> *… (4) "adjudicating authority" means any authority, appointed or authorised to pass any order or decision under this Act, but does not include … the Authority referred to in sub-section (2) of section 171;…"*[9]

From the express exclusion of the NAA from the ambit of "adjudicating authority", the sentential legis of the NAA not exercising any adjudicating functions becomes apparent, thereby placing it within the ambit of purely administrative functions.

*iii. The NAA does not exercise judicial powers.*

The words 'judicial power' means the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision, whether subject to appeal or not is called upon to take action.[10]

The concept of a quasi-judicial act implies that the act is not wholly judicial, it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive powers.[11] The NAA is empowered by the Act merely to ensure that the benefits of the tax reductions have been passed on to the customers. It therefore falls within the definition of a statutory body exercising quasi-judicial functions. It is not vested with the powers of court, and therefore does not qualify as an authority performing judicial functions.

*iv. There is no requirement of a judicial member*

The ratio decidendi of the judgments of the Supreme Court, makes the principle of mandatory requirement of a Judge applicable only to cases where the judicial function is sought to be shifted through the process of 'tribunalisation'.[12] If the functions to be carried out within an act are not of the nature wherein the powers of judicial review which were vested in a judicial forum are sought to be transferred, it does not necessitate the presence of a judge.[13] It is not a requirement of law that in all cases where an authority discharges quasi-judicial functions, it must have judicial member as one of its members.[14]

Since NAA is a statutory body, it is not bound to follow the practices and protocols of a tribunal. Also, not all bodies exercising quasi-judicial functions can fall within the ambit of a tribunal. For instance, quasi-judicial bodies like SEBI and RERA do not necessitate the presence of Judge or a judicial member.[15] Further, administration has become a technical job, needing a good deal of expertise and technical knowledge.[16] Presently, the NAA is not set up

[9]Central Goods and Services Tax Act, 2017, § 2(4), No. 12, Acts of Parliament, 2017 (India) *amended by* the Central Goods and Services Tax (Amendment) Act, 2018; E-GAZETTE, http://egazette.nic.in/WriteReadData/2018/188986.pdf (last visited July 30, 2019).

[10] Huddart, Parker & Co. v. Moorehead, (1909) 8 CLR 330.

[11] Gullapalli Nageswara Rao v. State of Andhra Pradesh, AIR 1959 SC 1376.

[12] State of Gujarat and Ors. v. Utility Users' Welfare Association, AIR 2018 SC 4215[Hereinafter 'Utility Users'].

[13] *Id.* Utility Users at 63.

[14].Neelkamal Realtors Suburban Pvt. Ltd. v. Union of India, 2018 (1) RCR (Civil) 298[Hereinafter 'Neelkamal Realtors'].

[15] *Id.* Neelkamal Realtors at 65.

[16] MP JAIN AND SN JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, 6 (5th Ed. 2009).

to substitute any court or tribunal or to adjudicate upon matters which earlier belonged to the domain of an adjudicatory body akin to a Court or Tribunal. Further, the importance of judicial review and its sanctity is maintained, since a writ petition challenging the orders passed by the NAA can be filed by the aggrieved party.

*v. Determining "illegal profiteering" requires specialized skills.*

It is trite law that the court shall have due regard to the legislative intent manifested by the provisions of the Act.[17] A matter within the legislative competence of the legislature has to be left to the discretion and wisdom of the framers, so long as it does not infringe any constitutional provision or violate any fundamental right.[18]

Presently, the idea of constituting NAA is to prevent illegal profiteering by the suppliers. The determination of the same would entail a detailed inquiry in tax related matters which would require the expertise of a technical member. Therefore, the composition is in line with the responsibilities vested in NAA by the legislators.

vi. *The members of NAA do not exercise uncontrolled discretion.*

The Apex court has held that executive functions of the State calls for exercise of discretion.[19] Further, even if the body has been vested with discretionary powers, the abuse of such power cannot be easily assumed where the discretion is vested in such high officials.[20] Rules 122 to 137 of the CGST Rules clearly provide for the guidelines and due process to be followed by the NAA. The rules have also prescribed procedure to be followed to let a complaint be filed with the authority. Hence, there is no ambiguity in its constitution ensuring that there is no uncontrolled discretion exercised by the authority. Therefore, it can be concluded that the composition is well within the constitutional mandate and is not illegal.

### C. Drawing Parallels with the Information Commissions

The Hon'ble Supreme Court in *Union of India v. Namit Sharma*[21], had outlined the functions of the Information Commissions as purely administrative in nature. Firstly, the review petition elaborated that the lis was merely whether the information should be held or withheld in public interest or the interest under the provisions of the Act. Deciding this lis was held to be an administrative function in accordance with the Act.[22] The emphasis was on the nature of the decision by the authority and that the decision was arrived at on the basis of the relevant considerations of policy; and not on any resultant effect on the rights of the party seeking information. "If every power affecting some person's right is called judicial there is virtually no meaning left for administrative power."[23] Therefore, the decisions arrived by the NAA are administrative in nature.

[17] Mafatlal Industries Ltd. and Ors. v. Union of India, (1997) 5 SCC 536.
[18] Maneka Gandhi, *supra* note 16.
[19] Clariant International Ltd., *supra* note 70.
[20] Pannalal Binjraj v. Union of India, AIR 1957 SC 397.
[21] Union of India v. Namit Sharma, (2013) 13 SCR 96[Hereinafter 'Namit Sharma'].
[22] *Id.* Namit Sharma at 21.
[23] H. W. R. WADE, ADMINISTRATIVE LAW 450 (1982).

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Secondly, it was held that although the Information Commissioners are required to act in a fair and just manner following the statutory procedure but the Information Commissioners need not be from a judicial background with such training and acumen.[24] Analogous to this aspect of Information Commissions, the NAA is required to act in a fair and just manner, but the Chairman and Technical Members need not be from a judicial background with training and acumen. It is sufficient to establish that they have established expertise in the field, and can therefore act fairly.

Thirdly, it was held that the powers exercised by the Information Commissions were not carved out from those earlier vesting with the High Courts and other Subordinate Courts, distinguishing the case from *Union of India v. R. Gandhi, President Madras Bar Association*, and are not judicial powers. Therefore, there was no requirement to provide for the appointment of judicial members in the Information Commission.[25] An alternative decision would amount to "entrenchment in the field of legislation".[26] Analogous to this aspect of Information Commissions, the powers exercised by the NAA to deal with Anti-Profiteering did not vest earlier with the High Courts and other Subordinate Courts & are not judicial powers. By necessary corollary, there cannot be any requirement to provide for the appointment of judicial members in the National Anti-Profiteering Authority.

*Secondly,* Section 171 of CGST Act and the Rules framed thereunder are unconstitutional being violative of Article 14.

The object of Article 14 is wide and is to ensure fairness and equality of treatment.[27] The concept of equality and equal protection of laws guaranteed by Article 14 in its proper spectrum encompass social and economic justice in a political democracy.[28]

### A. Section 171 of the CGST Act and the Rules framed thereunder are Arbitrary in nature.

Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally and philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence.[29] An action must not be arbitrary but must be based on some valid principle which itself must not be irrational or discriminatory.[30] Non-arbitrariness also negatives the vesting of uncanalised or absolute discretion in any authority.[31] Hence the discretion vested by a statute is to be exercised fairly and judicially and not arbitrarily.[32] Section 171(1) of the CGST Act read as follows:

[24] *Supra* Namit Sharma at 23.
[25] *Id.* Namit Sharma at 24.
[26] *Id.* Namit Sharma at 25; *See* P. Ramachandra Rao v. State of Karnataka, (2002) 4 SCC 607.
[27] E.P. Royappa v. State of T.N., AIR 1974 SC 555.
[28] Dalmia Cement (Bharat) Ltd. v. UOI, (1996) 10 SCC 104.
[29] Maneka Gandhi v. UOI, AIR 1978 SC 597. (hereinafter ´Maneka Gandhi").
[30] Ramana Dayaram Shetty v. I.A.A.I, AIR 1979 SC 1628.
[31] D.T.C. v. Mazdoor Union D.T.C., AIR 1991 SC 101.
[32] Rakesh Kumar v. Sunil Kumar, AIR 1999 SC 9351.

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*"Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."*[33]

This section is vague, contains wide provisions and ambiguous method of valuation. It has not given any guiding principle or direction. There are no basic guidelines or method prescribed for calculation. Additionally, the scope and meaning of the phrase 'commensurate reduction' is nowhere defined giving rise to the arbitrary nature of this section. When there is no prescribed formula on how to quantify or calculate the profiteering which should be passed on to customers, trade cannot be compelled to adhere to the same and the Court can examine the decision making process and interfere, if vitiated by unreasonableness and arbitrariness.[34] When there is no prescription as to quantification of benefit, the provision cannot be implemented.[35]

A legislation which does not contain any provision which is directly discriminatory may offend against the guarantee of equal protection if it confers upon the executive or administrative authority an unguided or uncontrolled discretionary power in the matter of application of the law.[36] For, where selection is left to the absolute and unfettered discretion of the administrative authority, with nothing to guide or control its action the difference in treatment rests solely on arbitrary selection by that authority.[37] Rule 126 of the CGST Act read as follows:

> *"Power to determine the methodology and procedure.-The Authority may determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit has been passed on by the registered person to the recipient by way of a commensurate reduction in prices."*[38]

The presence of the phrase "power to determine" in the instant case clearly indicates the oppressive and uncontrolled discretion in the application of law. The Central Board of Indirect Taxes and Customs in its FAQ on Anti- profiteering provisions answered the question regarding the methodology to identify the cases of profiteering. CBIC in its FAQ states as follows:

> *"Rule 126 of the CGST Rules, 2017 vests the power to determine the methodology & procedure with the National Anti-Profiteering Authority constituted by the Central Government under Section 171 (2) of the CGST Act, 2017. The methodology and procedure adopted to identify cases of profiteering may vary from case to case."*[39]

[33] CGST Act, *supra* note 8.
[34] Air India Ltd. Cochin International Airport Ltd., AIR 2000 SC 801.
[35] Commissioner of Income Tax v. B.C. Srinivasa Shetty, AIR 1981 SC 972.
[36] State of W.B. v. Anwar Ali Sarkar, AIR 1952 SC 75.
[37] *Ibid.*
[38] Central Goods and Services Tax (CGST) Rules, 2017 Rule 126 CIS, (India).
[39] CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS, http://www.cbic.gov.in/resources//htdocs-cbec/gst/Anti-prof-FAQs-FINAL-FAQs.pdf;jsessionid=930DEF6BD7436FAF82E445B628034A46 (last visited Aug. 1, 2019).

The power to determine the methodology and procedure as to determine the profiteering varies from case to case and solely depends on the authority results in the unchecked and uncontrolled discretion of the executive. If the Act does not lay down any principle or policy for the guidance of the authority in exercising the discretion,[40] the Act itself will offend Art. 14.[41] Also, it is well settled law that unguided discretion in a Rule cannot be cured by supplying guideline in supplementary executive instructions.[42]

In the case of *Sh. Jijrushu N Bhattacharya & Director General Anti-Profiteering v. M/s. NP Foods (Franchisee M/s Subway India)*[43] the Respondent increased base prices ranging from 6% to 17% of the different items, i.e., increase in average base prices by 12.14% to neutralize the effect of denial of ITC. The NAA compared the increase in percentage of average price with the effect of denial of ITC to justify the increase.Whereas, in another case of *Sh. Ankur Jain & Director General Anti Profiteering, Central Board of Indirect Taxes & Customs v. M/s Kunj Lub Marketing Pvt. Ltd.*[44], the NAA held that benefit has to be passed on in respect of each product separately and the effect of benefit cannot be calculated as a whole for the purpose of passing off. It is abundantly clear that the NAA took two contrastingly different positions in the above mentioned cases indicating the unchecked and uncontrolled discretion. The administrative order or act will be struck down as discriminatory- if the administrative authority misuses the power by making an arbitrary selection or commits an abuse or colourable use of power,[45] or acts unfairly.[46] As discussed hereinabove, Section 171 and the Rules framed thereunder comes within the scope of 'discriminatory' due to the arbitrary methods of calculating profiteering and therefore is an abuse or colourable use of power coupled with unguided discretion which offends Article 14 and is liable to be struck down.

**B. Rules framed under Section 171 of the CGST Act amounts to excessive delegation of power to NAA.**

The vice of conferring unguided discretion on an administrative authority, which offends the Article 14 because it empowers arbitrary action, are akin to the vice of unreasonableness under Article 19 as well as of excessive delegation or abdication on the part of Legislature.[47] The Indian Legislature cannot delegate unrestrained, unanalysed and unqualified legislative power on an administrative body.[48] The Legislature can delegate legislative power subject to the condition of laying down principles, standards and policy subject to which the delegate is to exercise its delegated legislative power. In case the Legislature fails to do so, the law made

[40] Ajit Singh v. State of Punjab, AIR 1967 SC 856.
[41] Kunnathat Thathunni Moopil Nair v. State of Kerala, AIR 1961 SC 552.
[42] Senior Suptd. Of Post Office v. Izhar Hussain, AIR 1989 SC 2262.
[43] Sh. Jijrushu N. Bhattacharya v. M/s NP Foods (Franchisee M/s Subway India), 9/2018. [hereinafter "Subway case"].
[44] Sh. Ankur Jain & Director General Anti Profiteering, Central Board of Indirect Taxes & Customs v. M/s Kunj Lub Marketing Pvt. Ltd., 2018 70 GST 486 (NAA).
[45] Jiwani Kumar Paraki v. 1st L.A. Collector, AIR 1984 SC 1707.
[46] Aeltemesh Rein v. UOI, AIR 1988 SC 1768.
[47] P.N. Kaushal v. UOI, AIR 1978 SC 1457.
[48] Hamdard Dawakhana v. UOI, AIR 1960 SC 554.

by it delegating legislative power would be invalid.[49] Delegation is valid only when it is confined to legislative policy and guidelines.[50] In the case of *Gwalior Rayon Co. v. Assistant Commissioner of Sales Tax*[51], the Supreme Court observed that:

> *"the legislation cannot delegate uncanalised and uncontrolled power. Thus, while delegating legislative power, the legislature should lay down legislative policy, standards or guidelines for delegate to follow."*

In applying this test of excessive delegation to the instant case, Section 171 and Rule 126 of the CGST Act empower the NAA to adopt a methodology or procedure which may vary from case to case. A completely unlimited blanket power where there is neither any guidance to the delegate, not any procedural safeguards against improper exercise of power by the delegate, can be held invalid as excessive delegation.[52] In the instant case there is uncanalised and uncontrolled power vested with the NAA without any legislative policy, standards or guidelines in the CGST Act or Rules. Apart from considering the discretion given by an Act to delegated legislation, the courts also check the procedural safeguards contained in the Act against misuse of power.

The power to legislate carries with it the power to delegate. But excessive delegation may amount to abdication delegation which when unlimited may invite despotism unlimited. So, the theory has been evolved that the legislature cannot delegate its essential legislative function. Legislate it must, by laying down policy and principle and delegate it may to fill in detail and carry out policy.[53] The reality in present scenario being that the methodology and procedure to calculate profiteering was delegated to the NAA by Section171 and the Rules framed thereunder, which was an essential function of the legislative considering the object behind the CGST Act. If there is abdication of legislative power, or there is excessive delegation, or if there is a total surrender or transfer by the Legislature of its legislative functions to another body, then that is not permissible.[54]

In the case of *H.R. Banthia v. UOI* [55], the Supreme Court declared the Section 5(2)(b) of the Gold (Control) Act, 1968 as invalid which empowered the Gold Administrator, so far as it appeared to him to be necessary or expedient for carrying out the purposes of the Act, to regulate the manufacture, distribution, use, disposal, consumption, etc., of gold because it was very wide and suffered from the vice of "excessive delegation". The NAA, by the Section 171 and the Rules framed thereunder is vested with very wide power with no guiding principles or standards and therefore making it a case of excessive delegation.

The main function of the executive is to check the implementation of the Parliament made law. The vesting of excessive delegation to the executive by the legislature offends the spirit of Article 14 of the Constitution and therefore is not valid. Section 171 and the Rules framed

[49] State of Rajasthan v. Basant Nahata, AIR 2005 SC 3401.
[50] IK. Industries Ltd. v. Union of India, (2007) 13 5CC 673.
[51] Gwalior Rayon Silk Mfg. (Wvg.) Co. v. The Assistant Commissioner of Sales Tax, AIR 1974 SC 1660.
[52] The Registrar of Co- Operative v. Kunjabmu and Ors., AIR 1980 SC 350.
[53] *Id.*
[54] Mahe Beach Trading Co. v. Union Territory of Pondicherry, (1996) 3 5CC 741.
[55] H.R. Banthia v. UOI, AIR 1970 SC 1453.

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thereunder come within the scope of excessive delegation as discussed hereinabove and therefore are liable to be struck down.

**CONCLUSION**

Analysing the various case laws and relevant Sections of the CGST Act, it can be said that the Composition of the National Anti-profiteering Authority is constitutional since it is excluded from ambit of adjudicating authority defined under Section 2(4) of CGST Act and it is not a Tribunal that seeks to substitute Courts in 'adjudicating' the matter. Hence, it does not require the judicial member to be a part of the NAA. Further, the ambit of Goods and Services Tax is very broad and it covers various commodities and services. Many industries ranging from food industry to textile to cement etc. comes under the ambit of GST and hence there cannot be a Straight-jacket formula which can be applied blindly on every case. Every case has to be determined on case to case basis. Since determining the anti-profiteering measures requires high skills in the field of Tax, Accounts and Law, it might not be possible for judges to possess these technical skills.

Section 171 of CGST Act which states the suppliers of goods or services should pass on the benefit of any reduction in rate of taxes or benefit of availing input tax credit by way of commensurate reduction in prices to the consumers. The Anti-Profiteering provision was formed after learning from the Australian and Malaysian model, the rationale being to curb the absorption of tax benefits as profits under the garb of GST. The positive rationale, could not be translated into a successful model- implementation of which was not effective, was arbitrary and amounted to excessive delegation into the hands of executive. Further, the word "Commensurate" was not properly defined under the provision which lead to ambiguity amounting to arbitrariness. NAA while deciding the similar matters in same industries has used contradictory principles which makes the decision making process of NAA arbitrary.

As earlier said, the rationale behind Section 171 of CGST Act is positive one and beneficial for the general public i.e. consumers. But there are many shortcomings in this provision which makes the process arbitrary. The process being arbitrary leads to loss to business entities ranging from middle men to corporates. In order to overcome this problem, the legislature should take appropriate steps. The provisions lack the effective standards of enforcement and the principles whereby certain terms are to be interpreted. This creates a leeway in the hands of the executive, which has been over empowered via excessive delegation, leading to the Rules being formed without any basis and authority under the Statute.

The resolution of these shortcoming must be two-fold, firstly- by the hands of the judicature which strikes down such arbitrary provisions as being unconstitutional and secondly- at the hands of the legislature which must prescribe the standards and principles for the law to be enforced effectively in the form of an amendment.