सलमान खुर्शीद
SALMAN KHURSHID

सत्यमेव जयते

विदेश मंत्री, भारत
MINISTER OF EXTERNAL AFFAIRS
INDIA

No 10577/EAM/2013 **December 13, 2013**

To,

The Hon'ble Chairman,
Rajya Sabha
New Delhi

Sir,

This is with reference to the letter dated 5th December, 2013 written by Shri Arun Jaitley, Leader of Opposition (Rajya Sabha) addressed to the Secretary General, Rajya Sabha expressing his opposition to the introduction of the Constitution (One Hundred and Nineteenth) Amendment Bill, 2013 regarding the Land Boundary Agreement with Bangladesh.

Shri Arun Jaitley has written that the territories of India form the basic structure of the Constitution and therefore the Parliament lacks legislative competence to amend the Constitution to alter the territories of India. However, this is incorrect since India, as a sovereign State has an inherent right to acquire foreign territories or alter or cede its territories and to suggest that it does not, would be contrary to national interest.

In light of various decisions by the Hon'ble Supreme Court on the above subject-matter, the position canvassed by Shri Arun Jaitley is entirely untenable and unsustainable in law. An 8-Judge Bench of the Hon'ble Supreme Court of India in *Berubari Union (I), Re,* (1960) 3 SCR 250 had held that cession of the territory of India in favour of a foreign State would be permissible by way of a Constitutional amendment under Article 368 of the Constitution, but it would not be possible by way of a law passed by Parliament. The relevant extracts of the judgment are as follows:

> *"**46.** We have already held that the Agreement amounts to a cession of a part of the territory of India in favour of Pakistan; and so its implementation would naturally involve the alteration of the content of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment can be made under Article 368. This position is not in dispute and has not been challenged before us; so it follows that acting under Article 368 Parliament may make a law to give effect to, and implement, the agreement in question covering the cession of a*

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part of Berubari Union 12 as well as some of the Cooch-Behar Enclaves which by exchange are given to Pakistan. Parliament may, however, if it so chooses, pass a law amending Article 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign State. If such a law is passed then Parliament may be competent to make a law under the amended Article 3 to implement the agreement in question. On the other hand, if the necessary law is passed under Article 368 itself that alone would be sufficient to implement the agreement."

Para 29 of the *Berubari* judgment may also be pointed out in support of the above position:

*"**29.** What is true about the powers is equally true about the prohibitions and limitations. Besides, it is not easy to accept the assumption that the first part of the preamble postulates a very serious limitation on one of the very important attributes of sovereignty itself. As we will point out later, it is universally recognised that one of the attributes of sovereignty is the power to cede parts of national territory if necessary. At the highest it may perhaps be arguable that if the terms used in any of the articles in the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the preamble. Therefore, Mr Chatterjee is not right in contending that the preamble imports any limitation on the exercise of what is generally regarded as a necessary and essential attribute of sovereignty."*

Further, a 5-Judge Bench of the Hon'ble Supreme Court referring to the *Berubari* judgment (1960) 3 SCR 250 in ***Union of India v. Sukumar Sengupta***, 1990 Supp SCC 545 at page 561 made the following observations:

20. As mentioned hereinbefore, it is clear from the said agreements of 1974 and 1982 that the transfer of territories which were sanctioned under the Ninth Amendment of the Constitution will not be given effect to. Berubari No. 12 which was intended to be given to East Pakistan would not be given to Bangladesh and Dahagram and Angarpota which were intended to be transferred to India would be retained by Bangladesh. The question is, whether to the extent as aforesaid, a further amendment to the Constitution was necessary. The Division Bench was of the view that the subsequent agreements of 1974 and 1982 providing for exchange of territories would have to be noted in the relevant Schedules to the Constitution before any appointed day could be notified in respect of the territories to be transferred to

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Bangladesh. This was necessary in order to retain Berubari in India, according to the Division Bench.

21. Learned Attorney General has contended before us that this was not necessary and it was not conceded before the Division Bench that such amendment of the Constitution was called for. We are of the opinion that learned Attorney General is right in his submission. *After having perused the entire judgment it appears to us that what the learned Attorney General had conceded before the Division Bench was that if the agreements of 1974 and 1982 amounted to cession of territory that would have required constitutional sanction or amendment. In view of the position in International Law for the reasons mentioned hereinbefore, the Division Bench has held that there was no cession of territory. If that is the position and we are of the opinion that it is so, and further in view of the fact that no appointed day [Ed. : For Part III of Schedule I of the Ninth Amendment] was notified and the Ninth Amendment to the Constitution has remained a dead letter and had not become effective, no constitutional amendment was required for the arrangements entered into either by the agreements of 1974 and 1982*. The Division Bench, in our opinion, was in error in expressing a contrary view.

In other words, the above judgment, consistent with the ratio of *Berubari* held that if there is any cession of territory involved, a constitutional amendment would be necessary, but since in the above case, there was no cession of territory involved as observed by the Hon'ble Supreme Court, there was no need for a constitutional amendment.

Therefore, it is the unimpeachable conclusion that the Hon'ble Supreme Court of India has upheld a universally acceptable principle that one of the attributes of sovereignty is the power to alter or cede parts of national territory, if necessary but that power can only be exercised pursuant to a constitutional amendment under Article 368 of the Constitution of India, which is sought be done in the present case by way of the Constitution (119th Amendment) Bill, 2013.

With regards,

Yours faithfully

(Salman Khurshid)

Copy for information to Secretary General, Rajya Sabha

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