
IN THE HON'BLE HIGH COURT OF NIRDHAN

WRIT PETITIONS
UNDER ARTICLE 226 OF THE CONSTITUTION OF GARIBA

IN THE MATTER OF

People's Union for Liberties & Democratic Reforms and JCi _____ *Petitioners*

v.

Republic of Gariba and Maxis Bank _____ *Respondents*

WRIT PETITIONS NO. 999 OF 2015 & 1021 OF 2015

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONERS

Most Respectfully Submitted to the Hon'ble High Court of Nirdhan

TABLE OF CONTENTS

TABLE OF CONTENTS[ii-iii]

INDEX OF AUTHORITIES.....[iv-v]

STATEMENT OF JURISDICTION[vi]

STATEMENT OF FACTS[vii]

STATEMENT OF ISSUES.....[viii]

SUMMARY OF ARGUMENTS[ix]

ARGUMENTS ADVANCED.....[1-15]

[I] THE INSTANT PETITIONS ARE MAINTAINABLE[1]

[I.A] Independent of any alternate remedy.....[1]

[I.B] Writ Petition is maintainable when there is infringement of fundamental rights.....[1]

[II] § 34 OF THE ARBITRATION & CONCILIATION ACT, 1996 STANDS ULTRA VIRES TO THE
CONSTITUTION[2-9]

[II.A] It amounts to introduction of ‘litigation’ in the arbitral process which is against the basic
tenets of arbitration.....[2-5]

[II.B] The pendency of § 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.....[5-7]

[II.C] Grant of an automatic stay, without adjudication on prima-facie case, balance of convenience and irreparable injury is per se bad in law.....[7-9]

[III] THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN TO AMEND THE NIRDHAN PANCHAYTI RAJ ACT, 1994 IS ULTRA VIRES TO THE CONSTITUTION[9-15]

[III.A] Non availability of a notified vacation bench during any holidays is Unconstitutional.....[9-10]

[III.B] Non availability of a notified procedure for listing when the Court is not in session is unconstitutional.....[10-12]

[III.C] Non grant of listing before the issuance of election notification cannot affect the merits of the case since the court was moved well in time and actus curiae neminem gravabit.....[12-13]

[III.D] The Ordinance is ultra vires to Part IX of the Constitution and retrospective.....[13-14]

[III.E] The Ordinance further marginalizes women and weaker §s due to the prevailing skewed literacy standards, and it is in violation of aspects of basic structure like the preamble, single citizenship, and free and equal participation in democratic government, and it also abridges valuable fundamental and constitutional rights.....[14-15]

ARGUMENTS ADVANCED.....[x]

INDEX OF AUTHORITIES

Judicial decision	Citation	Footnote no.
A.R. Antulay v. R.S. Nayak	(1992) 1 SCC 225	21,60
Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai,	2014 (1) Arb LR 512 (Bom)	26
Anokh Singh v. Punjab State Election Commission	(2011) 11 SCC 181	69
Bhanumati v. State of Uttar Pradesh	2010 (12) SCC 1	66
Bharat heavy electricals ltd. Andanr. v. DPC Engineering Projects Pvt. Ltd.	2011 (184) DLT 292	39
Bharu Kure Jat v. Tara Lal,	AIR 1962 Punj 173	25
Charan Lal Sahu v. Union of India,	AIR 1990 SC1480	05
Common Cause v. Union of India,	(1996) 4 SCC 33	49
DLF Limited and another v. Koncar-Generators and Motors Limited	2014 Indlaw PNH 1670	16
E.P. Royappa v. State of Tamil Nadu & Another	AIR 1974 SC 555	27
Eastern and North East Frontier Railway Cooperative Bank Ltd. v. B. Guha & Co.	AIR 1986 Cal 146	41
Food Corporation of India v. Joginder Pal Mohinder Pal	AIR 1989 SC 1263	23
Francis Klein Pvt. Ltd. v. Union of India	1995 2 Arb LR 298	42
Furest day Lawson ltd. v. jindal exports ltd.	AIR 2001 SC 2293	14
International Thunderbird Gaming Corporation v. The United Mexican States	TDM 5 (2007)	32
Jagat Dhish Bhargava v. Jawahar Lal Bharyana	AIR 1961 SC 832	62
Jagdish Chander v. Hind Vegetable Oils Corporation	AIR 1990 Del 204	44
Konkan Railway's Corp. Ltd. v. Mehul Construction Co.	(2000) 7 SCC 201	15
Maneka Gandhi v. Union of India	AIR 1978 SC 597	37
Mitchell v. Overman,	103 U.S. 62	63
Monahan Estate v. Nelson,	2000 BCCA 297	
National Aluminium Co. Ltd v. Pressteel & Fabrication (P) Ltd. And Anr.	(2004) 1 SCC 540	22
Naz Foundation v. Government of NCT	(2009) 160 DLT 277	57
People's Union for Civil Liberties v. Union of India	2003 (4) SCC 399	64,69
Rai Ramkrishna and Ors. v. The State of Bihar	AIR 1963 SC 1667	67
Shivram Poddar v. ITO	AIR 1964 SC 1095	01
South Eastern Coal Fields Limited v. State of MP	(2003) 8 SCC 648	61
State of Bombay v. United Motors Ltd.	AIR 1953 SC 252	04
State of Orissa v. R.N. Mishra	AIR 1984 Ori 42.	43
State of Tamil Nadu and Others v. K. Shyam Sunder and Others	(2011) 8 SCC 737.	68
Sunder Shaekhar v. Shamshad Abdul Wahid Supariwala & Others	Civil appeal no. 948 of 2013	38
Tecnicas Medioambientales Tecmed v. United Mexican States	(2004) 32 ILM 133	30
Trade Marks v. Ashok Chandra Rakhil	AIR 1955 SC 558	55
Union of India & Others v. Rakesh Kumar & Others	(2010) 4 SCC 50	69

Union of India and others v. Uttar Pradesh State Bridge Corporation Limited	2014 (12) SC 188	12
Union of India v. Hidalgo Industries	(2003) 5 SCC 194 (198)	02
Union of India v. Bajaj Tempo Ltd.,	(1998) 9 SCC 281	02
Vide Mury Exportation v. Khaitan & Sons	AIR 1956 Cal 644,648	08
Vitol S. A. v. Bhatia International Limited.	2014 Indlaw MUM 1131	13
Volt Information Sciences Inc v. Leland Stanford University	489 US 468(1989)	09
Whirlpool Corporation v. Registrar of Trade Marks	(1998) 8 SCC 1 (11)	03
White Industries Australia Limited v. The Republic of India	ICSID Review (Fall 2012) 27 (2):274-280	35
Wilkes v. Wood	(1763) 19 St Tr 1153	54
Yeshwantrao Ganpatrao v. Dattarayarao Ramachandranrao	AIR 1948 Nag 162 (D.B.)	24
DOCUMENTS AND PUBLICATIONS	FOOTNOTE NO.	PAGE NO.
Anupa V. Thapliyal, "Central Administrative Tribunals and Their Power to Issue Directions, Orders or Writs Under Art.s 226 and 227 of the Constitution", (1992) 4 SCC (Jour) 18	53	11
Justice S.B. Sinha, Judicial Reform in Justice Delivery System, (2004) 4 SCC (Jour) 35.	19	04
Law Commission of India, 14th Report, 1958, Vol. 1, p. 129	18	03
Law Commission of India, 246 th Report on Amendments to the Arbitration and Conciliation Act, 1996 published in the year 2014.	36	07
Law Commission of India, 246 th Report on Amendments to the Arbitration and Conciliation Act, 1996 published in the year 2014.	17	03
Law Commission of India, Report No. 154 (August 1996).	20	04
Law Commission of India, Report No. 245 (July 2014).	48	09
Nathubhai Bhat, Accountability of Judiciary to Bar and Society at Large, 28 INDIAN BAR REVIEW 163 (2001).	58	11
Report of Committee of Nyaya Panchayat prepared by the Union Minister of Panchayati Raj, 2007.	65	14
Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law 134 (Oxford University Press 2008).	29	06
Supreme Court of India, Manual of office procedure on judicial side, Chapter VI – Mentioning and Listing of urgent Matters	52	10

STATUTES

1. International Covenant on Civil and Political Rights, 1973
2. Supreme Court of India Rules, 2013
3. The Arbitration and Conciliation Act, 1996
4. The Constitution of India
5. United Nations Commission on International Trade Law [UNCITRAL], 1985
6. Universal Declaration of Human Rights, 1950

BOOKS

1. ALBERT V. DICEY, “ *An Introduction to the Study of the Law of the Constitution*”, 10th edition, Oxford University Press, 1885
2. Aristotle, Vol-XII Sir David Ross 1966 Reprint *Ethica Nicomchea*, Book V Chapter VI, In the works of
3. AVTAR SINGH, “*Law of Arbitration and Conciliation including Alternative Dispute Resolution Systems*”, 10th Edition, Eastern Book Company.
4. Black's Law Dictionary, 6th edition. (1990), West Publishing Co.
5. DR. J. N. PAMDEY, “*Constitutional Law of India*”, 51st Edition, Central Law Agency.
6. IAN BORWNLIE, “*Principles of Public International Law*”, 6th edition, Oxford University Press.
7. M.P. JAIN, “*Indian Constitutional Law*”, 7th Edition, Lexis Nexis, Wadhawas.
8. P. C. RAO AND WILLIAM SHEFFEILD, “*Alternative Dispute Resolution: What it is and how it works*”, Universal Law Publishing Pvt.Ltd.
9. RUDOLF DOLZER AND CHRISTOPH SCHREUER, “*Principles of International Investment Law*” 2nd edition, Oxford University Press
10. V.R.KRISHNA IYER, “*Law, Freedom and Change*” Affiliated East, West Press Pvt. Ltd.
11. YESHWANT VISHU CHANDRACHUD, “*p ramanatha aiyar’s :the Law Lexicon;An Encyclopedic Law Dictionary and Legal Maxims, Latin Words and Phrases* ”, 2nd edition, Pinayur Ramanatha Aiyer, Wadhwa and Company,1997

DYNAMIC LINKS

1. www.jstor.org last accessed on 02 February 2015
2. www.lexisnexus.com last accessed on 05 February 2015
3. www.manupatra.com last accessed on 13 February 2015
4. www.sconline.co.in last accessed on 11 February 2015
5. www.supremecourtfinida.nic.in last accessed on 07 February 2015
6. www.westlawindia.com last accessed on 12 February 2015

STATEMENT OF JURISDICTION

THE HON'BLE HIGH COURT OF JUDICATURE AT NIRDHAN EXERCISES JURISDICTION TO HEAR AND ADJUDICATE OVER THE MATTER UNDER ARTICLE 226 (1) OF THE CONSTITUTION OF GARIBA. THE PROVISION UNDER WHICH THE PETITIONER HAS APPROACHED THE HONORABLE COURT IS READ HEREIN UNDER AS:

ARTICLE 226 – POWER OF HIGH COURTS TO ISSUE CERTAIN WRITS

NOTWITHSTANDING ANYTHING IN ARTICLE 32 EVERY HIGH COURT SHALL HAVE POWERS, THROUGHOUT THE TERRITORIES IN RELATION TO WHICH IT EXERCISE JURISDICTION, TO ISSUE TO ANY PERSON OR AUTHORITY, INCLUDING IN APPROPRIATE CASES, ANY GOVERNMENT, WITHIN THOSE TERRITORIES DIRECTIONS, ORDERS OR WRITS, INCLUDING WRITS IN THE NATURE OF HABEAS CORPUS, MANDAMUS, PROHIBITIONS, QUO WARRANTO AND CERTIORARI, OR ANY OF THEM, FOR THE ENFORCEMENT OF ANY OF THE RIGHTS CONFERRED BY PART III AND FOR ANY OTHER PURPOSE.

STATEMENT OF FACTS

1. The Republic of Gariba is a sovereign federation of states with several union territories.
2. One of the economically backward state is Nirdhan. To elevate the liquidity crunch of Nirdhan, one company named Jeopardy Contracts Inc. [JCI] entered into an agreement with Jodhpur Gaon Panchayat Samiti [JGPS] on 21.9.2011 for developing 115 km. of road in a Scheduled area of Nirdhan.
3. At the time of culmination of the project, certain issues cropped up regarding land acquisition, design of the bridges etc. due to which the JGPS terminated the contract.
4. Arbitration proceedings took place under the Act of 1996, before the Council for Infrastructure Arbitration (CIA), and objections regarding maintainability were filed by JGPS which were subsequently dismissed by the Id. Arbitrators.
5. The arbitration culminated into an award in favor of JCI, and inter alia held JCI entitled to the money under the performance bank guarantee. JGPS immediately filed a petition under Sec. 34 of the Act of 1996, before the High Court of Nirdhan and this amounted to automatic stay on the award.
6. 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. However, Maxis Bank did not release any payment to JCI by the reason of pendency of Sec. 34 petition.
7. Subsequently, JCI challenged the constitutional validity of Sec. 34, by way of a writ petition vide no. WP 999/2015 in the High Court of Nirdhan
8. In the meanwhile, the Governor of the State of Nirdhan, on 20th December 2014, promulgated an Ordinance which came into effect from 24th of December 2014, which amended the Nirdhan Panchayati Raj Act, 1994 laying down the certain educational qualifications for being eligible to contest the elections of Panchayati Raj Institutions. Aggrieved from this, People’s Union for Liberties & Democratic Reforms on 29.12.2014 moved to the High Court of Nirdhan for an urgent listing. However, the same was denied.
9. Then after, People’s Union for Liberties & Democratic Reforms moved the Hon’ble Apex Court under Art. 32 on 31.12.2014 through the “Vacation Officer” as notified on the website. The Vacation Officer accepted the papers and informed the counsels that instructions from the Hon’ble Chief Justice are awaited.
10. Upon listing, the Apex Court was pleased to observe that the matter can now be heard by High Court of Nirdhan. People’s Union for Liberties & Democratic Reforms immediately moved the Hon’ble High Court of Nirdhan filing a writ petition vide no. WP 1021/2015.
11. Given that the Id. Attorney General was to appear in these two matters, (i.e. WP 999/2015 and WP 1021/2015) they have been directed to be listed together for final hearing before the High Court of Nirdhan.

STATEMENT OF ISSUES

[1] WHETHER THE INSTANT PETITIONS ARE MAINTAINABLE ?

[2] WHETHER § 34 OF THE ARBITRATION & CONCILLATION ACT, 1996 STANDS ULTRA VIRES TO THE
CONSTITUTION ?

[3] WHETHER THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN TO AMEND THE
NIRDHAN PANCHAYTI RAJ ACT, 1994 IS ULTRA VIRES TO THE CONSTITUTION ?

SUMMARY OF ARGUMENTS

[1] THE INSTANT PETITIONS ARE MAINTAINABLE.

It is humbly submitted before the Hon'ble Court that both the writ petitions are maintainable as they independent of any other alternate remedy as Section 34 being unconstitutional and there is prima facie infringement of fundamental rights by the virtue of promulgation of the ordinance.

[2] SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT 1996 IS ULTRA VIRES TO THE CONSTITUTION.

It is humbly submitted before the Hon'ble Court that the Arbitration and Conciliation Act, 1996 is *ultra vires* to the Constitution as it amounts to introduction of 'litigation' in the arbitral process which is against the basic tenets of arbitration; 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 and grant of an automatic stay, without adjudication on prima-facie case, balance of convenience and irreparable injury is per se bad in law.

[3] THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN TO AMEND THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS ULTRA VIRES TO THE CONSTITUTION.

It is humbly submitted before the Hon'ble Court that the ordinance promulgated by the Governor of Nirdhan to amend the Nirdhan Panchayati Raj Act, 1994 is *ultra vires* to the Constitution as the non availability of a notified vacation bench during any holidays is unconstitutional. Further, non availability of a notified procedure for listing when the Court is not in session is unconstitutional. Moreover, non-grant of listing before the issuance of election notification cannot affect the merits of the case since the Court was moved well in time and *actus curiae neminem gravabit*. Apart from this, the Ordinance is *ultra vires* to Part IX, and retroactive. Lastly, the Ordinance further marginalizes women and weaker sections due to the prevailing skewed literacy standards, and it is in violation of aspects.

ARGUMENTS ADVANCED

[I] THE INSTANT PETITIONS ARE MAINTAINABLE

1. It is humbly submitted before the Hon’ble Court that both the writ petitions are maintainable as they are:
[I.A] Independent of any alternate remedy.
2. The existence of an alternative remedy does not operate as an absolute bar on the writ court¹ as it is a process that the court chooses to opt out of convenience and discretion.² Under special circumstances the High Court may grant writ remedies to a petitioner even with the existence of an alternative remedy.³ Where there is well-founded allegation that fundamental right has been infringed alternative remedy is no bar for entertaining writ petition and granting relief.⁴ However, there being non-availability of any alternate remedy, the writ jurisdiction can be invoked.
[I.B] Writ Petition is maintainable when there is infringement of fundamental rights.
3. It is humbly submitted by the petitioner that § 34 of the Arbitration and Conciliation Act, 1996 introduces litigation in the arbitral process which leads to delay in the arbitral award process, automatic stay on the execution of the arbitral award and adjudication of dispute without prima facie case, balance of convenience & irreparable injury *prima facie* violate the Art. 14 and 21 of the Constitution.
4. Further, the impugned ordinance by the governor of Nirdhan rendering certain educational qualifications to contest the elections abridges the fundamental rights of the people enshrined under Article 14, 15, 19 and 21 of the Constitution.

¹ *Shivram Poddar v. ITO*, AIR 1964 SC 1095; Also see Justice B. L. Hansaria and Vijay, “Writ Jurisdiction under the Constitution” (3rd edition, Universal Law Pub. Co. 2005)

² *Union of India v. Hidalgo Industries* (2003) 5 SCC 194 (198); *Union of India v. Bajaj Tempo Ltd.*, (1998) 9 SCC 281.

³ *Whirlpool Corporation v. Registrar of Trade Marks*, (1998) 8 SCC 1 (11)

⁴ *State of Bombay v. United motors Ltd.*, AIR 1953 SC 252

5. Under the well-established doctrine of *Parens Patriae*, it is the obligation of the State to protect and take into custody the rights and the privileges of its citizens for discharging its obligations.⁵

**II. SECTION 34 OF THE ARBITRATION & CONCILIATION ACT, 1996
IS *ULTRA VIRES* TO THE CONSTITUTION.**

6. It is humbly submitted before the Hon'ble Court that the § 34 of the Arbitration & Conciliation Act, 1996 stands *ultra vires* to the Constitution. In pursuance of the pleadings, the submission here is three fold: *Firstly*, **[II.A] It amounts to introduction of 'litigation' in the arbitral process which is against the basic tenets of arbitration.**
7. 'Litigation' is a Judicial controversy, a contest in a Court of law; a judicial proceeding for the purpose of enforcing a right.⁶ 'Arbitration' means, a process of dispute resolution in which a neutral third party called arbitrator, renders a decision after a hearing at which both parties have an opportunity to be heard.⁷ In *Vide Mury Exportation v. Khaitan and Sons*⁸, it was held that the litigation and arbitration are both methods of resolving disputes, one in a Court of law while the other through a private tribunal.
8. Moreover, Arbitration is a consensual process. It is not a matter of coercion. No arbitration statute can require parties to arbitrate when they have not agreed to do so. Nor can it prevent them from excluding certain claims from the scope of arbitration agreement in any manner they choose. It requires Courts just to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.⁹

⁵ *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480

⁶ Yeshwant Vishnu chandrachud "P. Ramanatha Aiyar's the Law Lexicon :The Encyclopedic Law Dictionary and Legal Maxim, Latin Words and Phrases"(2nd Edition, Pinayur Ramanatha Aiyer, Wadhwa & Co. 1997) p.1135.

⁷ Black's Law Dictionary, 6th edition, West Publishing Co. 1990, p.105.

⁸ AIR 1956 Cal 644,648.

⁹ *Volt Information Sciences Inc v. Leland Stanford University*, 489 US 468(1989).

9. The Arbitration and Conciliation Act¹⁰ [herein after referred to as the Arbitration Act] based on the UNCITRAL Model Law¹¹ is essentially conceived to provide expeditious adjudication of disputes with minimal interference by courts, and to provide for efficacious and speedy enforcement of arbitral awards, without the trappings of a cumbersome litigation process.¹² The object of the Arbitration Act is to minimize the supervisory role of the Court and to give speed justice.¹³
10. The Supreme Court of India in *Fuerst Day Lawson Ltd v. Jindal Exports Ltd.*¹⁴ case held that, as the object of the Arbitration and Conciliation Act, 1996 is to provide speedy and alternative solution to the dispute.
11. In *Konkan Railways Corp. Ltd. v. Mehul Construction Co.*¹⁵, the Supreme Court of India stated that the Arbitration and Conciliation Act, 1996 was introduced in order to attract the ‘international mercantile community’ and at the time of interpretation, regard must be had to the objectives behind the enactment of the Arbitration Act.
12. The Arbitration Act was enacted with objective of ensuring speed disposal of cases as well as to encourage Arbitral Tribunal to get the party to settle the dispute through the use of mediation and conciliation.¹⁶
13. However, after or even during arbitration, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the courts. After the award, a challenge under § 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick Alternative

¹⁰ The Arbitration and Conciliation Act, 1996. (No. 26 of 1996).

¹¹ United Nations Commission on International Trade Law, 24 ILM 1302 (1985).

¹² *Union of India and others v. Uttar Pradesh State Bridge Corporation Limited*, 2014 (12) SC 188.

¹³ *Vitol S.A. v. Bhatia International Limited*, In the High Court of Bombay, and Case No: Notice No. 618 Of 2011 And Execution Application No. 240 Of 2011 and decided on September 15, 2014

¹⁴ AIR 2001 SC 2293

¹⁵ (2000) 7 SCC 201

¹⁶ *DLF Limited and another v. Koncar-Generators and Motors Limited*, In the High court of Punjab and Haryana, and case no. 5957 of 2010 and decided on October 15 2010

14. Disputes Resolutions frequently stands frustrated.¹⁷ Moreover, if the course of trial is inordinately long, the chances of miscarriage of justice and the expenses of litigation increase alike¹⁸. A procedure which does not provide trial and disposal within a reasonable period cannot be said, to be just, fair and reasonable. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible.¹⁹
15. There is societal interest in providing speedy justice. This right has been actuated in the recent past and the courts in a recent series of decisions opened new vistas of fundamental rights.²⁰ It was held in the case of *A.R. Antulay v. R.S. Nayak*²¹, that the right to speedy justice is part of just and reasonable procedure implicit in Art. 21 of the Constitution.
16. The Supreme Court, in *National Aluminium Co. Ltd v. Pressteel & Fabrications (P) Ltd. and Anr.*²², 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 § 34 of the Arbitration 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.*”
17. Further, the Supreme Court of India has also observed that the law of arbitration must be “*simple, less technical and more responsible to the Arbitration Actual reality of the situation... [and]...responsive to the canons of justice and fair play.*”²³ One can only imagine the plight of a successful claimant in arbitration,

¹⁷ Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation, August 2014.

¹⁸ Law Commission of India, 14th Report 1958, Vol. 1, p. 129.

¹⁹ Justice S.B. Sinha, Judicial Reform in Justice Delivery System, (2004) 4 SCC (Jour) 35.

²⁰ Law Commission of India, Report No. 154, August 1996.

²¹ (1992) 1 SCC 225

²² (2004) 1 SCC 540

²³ *Food Corporation of India v. Joginder Pal Mohinder Pal*, AIR 1989 SC 1263.

who cannot enjoy the award until such challenge procedures are exhausted (which may well take several years) and the delight of the vanquished party who enjoys unconditional stay of execution.

18. However, the Arbitration Act puts a premium on defaulters who can merrily, and unconditionally, evade the enforcement of an award by merely filing an application under § 34. *Not everyone takes defeat in their stride.* Therefore, the arbitration experience particularly for the successful claimant can prove rather painful, prolonged and lopsided.
19. It is further contended that Arbitrators are judges of fact as well as law and has jurisdiction and authority to decide wrong as well a right, and thus, if they reach a decision fairly after hearing both sides, their award cannot be attacked.²⁴ However erroneous his decision may be, it cannot be interfered with by any Court.²⁵
20. Thus, admission of a § 34 petition virtually paralyzes the process for the winning party/award creditor.²⁶ Further, ‘from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute Monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore infringement of Art. 14 of the Constitution’²⁷.
21. To recapitulate, it is established that induction of litigation in the arbitration process frustrates the fundamental tenets of the arbitration and infringes the fundamental rights of the parties as well.

[II.B] *The pendency of § 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.*

22. *‘Expropriation in international law connotes the deprivation of a person’s use and enjoyment of his property, either as the result of a formal act having that consequence, or as the result of other actions which*

²⁴ *Yeshwantrao Ganpatrao v. Dattarayarao Ramachandranrao*, AIR 1948 Nag 162

²⁵ *Bharu Kure Jat v. Tara Lal*, AIR 1962 Punj 173

²⁶ *Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai*, 2014(1) Arb LR 512(Bom).

²⁷ *E.P. Royappa v. State of Tamil Nadu & Another*, AIR 1974 SC 555.

de facto have that effect'.²⁸ For expropriation to be legal, whether direct or indirect, it must satisfy certain conditions which take the form of limitations on a host country's power to take property: (i) non-discrimination, (ii) public interest, (iii) compensation, and (iv) due process.²⁹

23. Moreover, it has long been recognized that the 'fair and equitable' treatment requirement in international law requires the host State to provide to investments treatment that does not affect the legitimate expectations which the investor had at the time of making the investment.³⁰ The protection of legitimate expectations by international investment law is firmly rooted in arbitral practice³¹ as a self-standing subcategory³² and one of the major components of the fair and equitable treatment standard.³³
24. Furthermore, by reason of Art. III and V of the New York Convention³⁴, and in the light of its object and purpose, there is a strong presumption in favor of enforcement of arbitral awards. Under the New York Convention, an arbitral award must be recognized as binding and enforced by a Contracting State, subject only to limited exceptions. In signing the New York Convention, India has accepted that this is the standard of conduct to be applied by its courts for the enforcement of awards.

²⁸ Ian Borwnlie, "Principles of Public International Law"(6th edition, Oxford University Press 2003) 508-509.

²⁹ UNCTAD, Taking of Property, UNCTAD series on issues in international investment agreements (UNCTAD/ITE/IIT/15), UN, 2000, Pg. 12.

³⁰ *Tecnicas Medioambientales Tecmed v. United Mexican States*, (2004) 32 ILM 133.

³¹ Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law(2nd edition, Oxford University Press 2008).

³² *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Separate Opinion of Professor Thomas Walde, para 37 (December 2005).

³³ See Dolzer and Schreuer (n 2) 135; Abhijit PG Pandya and Andy Moody, 'Legitimate Expectations in Investment Treaty Arbitration: An Unclear Future' (2010–11) 15 Tilburg L Rev 93, 105.

³⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 ILM 1046 (1968).

25. However, in *White Industries Australia Limited v. The Republic of India*³⁵, the enforcement application was in abeyance for over nine years pending the resolution of the jurisdictional dispute under § 34 of the Arbitration Act. Thus, by preventing *White* from enforcing its Award in the courts of India in a fair and
26. reasonably timely manner, India had denied *White* fair and equitable treatment and thus such exercise amounted to expropriation of its investment.
27. The award of the Arbitral 18 Tribunal in *White Industries Australia Ltd. v. the Republic of India*, UNCITRAL, Final Award, serves as a reminder to the Government to urgently implement reforms to the judicial system in order to avoid substantial potential liabilities that might accrue from the delays presently inherent in the system.³⁶ Furthermore, Art. 300 A of the Constitution provides that ‘*no person shall be deprived of property save by authority of law*’. The submission here is that no law will be valid unless it is fair, just or reasonable.³⁷ Any law which does not provide for adequate award is neither fair nor just nor reasonable and, therefore, liable to be struck down on that ground.
28. Thus, delay of the petitions under § 34 of the Arbitration Act *prima facie* tantamount to expropriation which leads to the violation of country’s bilateral and multilateral commitments under various conventions and investment treaties. Unfortunately, this provision of the Arbitration Act prevails at such a juncture where the nation is in dire necessity to seek Foreign Direct Investment to secure sustainable growth in the economy.

[II.C] Grant of an automatic stay, without adjudication on prima-facie case, balance of convenience and irreparable injury is per se bad in law.

29. The judicial exercise of discretion of the Court is required to be exercised within the framework of law and the record and the same should be on the foundation of (i) a prima facie case, (ii) the balance of convenience,

³⁵ ICSID Review (Fall 2012) 27 (2):274-280.

³⁶ Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996, August 2014.

³⁷ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

(iii) an irreparable injury and (iv) equity.³⁸ Further, the Hon’ble Delhi High Court in *Bharat Heavy Electricals Ltd. and Anr. v. DPC Engineering Projects Pvt. Ltd.*³⁹ set aside the order of injunction under § 9 of the Arbitration Act on being failure to withstand the triple tests of prima facie case, balance of convenience and irreparable injury.

30. However, § 34 of the Arbitration Act makes a mere challenge to an award operate as an automatic stay even without an order of the court, thereby encourage many parties to file petitions under that provision to delay the execution proceedings. Further, every award would be subjected to challenge as it enables the party to prevent execution of the award, without any requirement like giving security to prevent its enforcement and so on.

31. Moreover, the Arbitration Act puts a premium on defaulters who can merrily, and unconditionally, evade the enforcement of an award by merely filing an application under § 34. The aim of every party to arbitration (domestic or foreign) now is: “Try to win if you can; if you cannot, do your best to see that the other side cannot enforce the award as long as possible.”⁴⁰ In that sense, Arbitration Act as a means of settling dispute under such provision is a failure though it is being increasingly regarded as a useful mechanism for resolving disputes. Further, the Court cannot reassess the evidences even if arbitrator committed error.⁴¹

32. The Court has no jurisdiction to substitute its own valuation of conclusion on law/fact.⁴² It cannot sit into the appeals over the conclusions of the arbitrator and reexamine evidence which had been already considered by

³⁸ *Sunder Shaekhar v. Shamshad Abdul Wahid Supariwala & Others*, In the High court of Bombay, and civil appeal no. 948 of 2013 decided on Nov. 20, 2013

³⁹ 2011 (184) DLT 292

⁴⁰ P.C. Rao and William Sheffeld, “Alternative Dispute Resolution: What it is and how it works”, Universal Law Publishing Pvt.Ltd. p. 49.

⁴¹ *Eastern and North East Frontier Railway Cooperative Bank Ltd. v. B. Guha & Co.*, AIR 1986 Cal 146.

⁴² *Francis Klein Pvt. Ltd. v. Union of India*, 1995 2 Arb LR 298.

33. the arbitrator.⁴³ To investigate misconduct, Court may simply see the record before the arbitrator but not examine it.⁴⁴

**[III] THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN TO AMEND
THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS *ULTRA VIRES* TO THE CONSTITUTION.**

34. It is humbly submitted before the Hon'ble Court that the ordinance promulgated by the governor of Nirdhan to amend the Nirdhan Panchayati Raj Act, 1994 is *ultra vires* to the Constitution. In pursuance of the pleadings, the submission here is fivefold: *Firstly*,

[III.A] Non availability of a notified vacation bench during any holidays is unconstitutional.

35. The entire legal profession has become so mesmerized with the stimulation of the courtroom that we tend to forget that we ought to be healers of conflicts. As healers of human conflicts, the obligation of the legal profession is to provide mechanisms that can produce an acceptable result in the shortest possible time, with the shortest possible expense and the minimum of stress on the participants. That is what justice is all about.⁴⁵ Further, the Preamble of the Constitution inscribes 'Justice' as the first promise of the republic which means that state power will execute the pledge of justice in favor of the millions who are the republic. In the words of Aristotle, '*Injustice arises when equals are treated unequally and unequals are treated equally. Justice arises when equals are treated alike.*'⁴⁶ However, Denial of 'timely justice' amounts to denial of 'justice' itself. Two are integral to each other. Timely disposal of cases is essential for maintaining

⁴³ *State of Orissa v. R.N. Mishra*, AIR 1984 Ori 42.

⁴⁴ *Jagdish Chander v. Hind Vegetable Oils Corporation*, AIR 1990 Del 204

⁴⁵ Warren E. Burger, Former Chief Justice of the Supreme Court of the United States of America, in a 1984 address to the American Bar Association.

⁴⁶ *Ethica Nicomchea*, Book V Chapter VI, In the works of Aristotle, Vol-XII Sir David Ross 1966 Reprint.

the *rule of law*⁴⁷ and providing access to justice which is a guaranteed fundamental right.⁴⁸ On the judicial side, setting of mandatory time limits was attempted by the Supreme Court in a series of cases⁴⁹

36. Non-availability of vacation bench during the holidays is *prima facie* violation of the constitutional mandate of speedy justice enshrined under Art. 21 of the Constitution. It also leads to the transgression of Art. 14 with respect to the availability of the bench on the days other than the vacations. Justice V.R. Krishna Iyer visualizes justice as a '*Special concern for the backward human sector of the lowliest and the lost, and activist, affirmative state action for their advancement as a democratic imperative, plus the organization of a sensitive and creative milieu which offers, as of right, social, economic and cultural opportunities, dignity of personhood and individuality to every human, regardless of seeming or real disparities to unfold his full mental, moral and physical potential.*'⁵⁰
37. Moreover, the rules of Supreme Court of India specifically provides that during the vacation, the Vacation Judge sitting singly may, in addition to exercising all the powers of a Judge in Chambers under these rules, exercise the powers of the Court in relation to the issue of a rule nisi in urgent applications under Art. 32 of the Constitution which involve a substantial question of law as to the interpretation of the Constitution.⁵¹
38. However in the case at hand, in spite of involvement of substantial question of law as to the interpretation of the Constitution, the non-availability of the vacation bench runs *ultra vires* to the Constitution.

[III.B] Non availability of a notified procedure for listing when the Court is not in session is unconstitutional.

⁴⁷ Albert V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edition, Oxford University Press, 1885).

⁴⁸ Law Commission of India, Report No. 245, July 2014.

⁴⁹ *Common Cause v. Union of India*, (1996) 4 SCC 33.

⁵⁰ V.R.Krishna Iyer, "Law, Freedom and Change" Affiliated East, West Press Pvt. Ltd., New Delhi 1979.

⁵¹ Supreme Court of India Rules 2013, Order 2 Rule 6.

39. The procedure lays down that an administrative order asking the advocates/In Person to approach the vacation officer who shall after screening the papers, seek direction from Hon'ble Chief Justice of India and thereafter inform the advocates concerned about the direction. Further, the matter relating to and of public importance are considered to be of urgent nature and may be heard during vacations after filing of affidavit.⁵²
40. As Edmund Burke said, "all persons in positions of power ought to be strongly and lawfully impressed with an idea that they act in trust, and must account for their conduct to one great master, to those in whom the political sovereignty rests, the people".⁵³
41. Moreover, accountability is an essential part of the rule of law. It is essential for another reason, referring to *John Wilkes's case*⁵⁴, that conferment of any discretion tends to arbitrariness and therefore, there is something inconsistency with the rule of law. The area of discretion should be the minimum possible, and set norms, standards or guidelines should regulate it, so that it does not tend to become arbitrary.⁵⁵ Thus, judicial governance in India is inevitable, as it is mandated by the Constitution by which the Supreme Court has been given specific powers to do so. Article 142 of the Constitution gives the Supreme Court, and the Supreme Court alone, the power to pass any order, decree or direction in the interest of justice.
42. However, in the existing procedure, the substantial discretionary power conferred upon the chief justice so as to admit the case during the vacations runs contrary to the interest of justice and the constitutional mandate. Judiciary, as one understands, is the edifice of a strong democracy as it endeavors not merely to interpret the black letter of the law but also adopting an activist stance of creatively interpreting it to suit the needs of the

⁵² Supreme Court of India, Manual of office procedure on judicial side, Chapter VI – Mentioning and Listing of urgent Matters, p. 58-60.

⁵³ *Anupa V. Thapliyal*, "Central Administrative Tribunals and Their Power to Issue Directions, Orders or Writs Under Art.s 226 and 227 of the Constitution", (1992) 4 SCC (Jour) 18.

⁵⁴ *Wilkes v. Wood*, (1763) 19 St Tr 1153.

⁵⁵ *Trade Marks v. Ashok Chandra Rakhil*, AIR 1955 SC 558.

society.⁵⁶ The office of the robed brethren is based on the great trust reposed by the citizens who seek recourse to judicial powers to defend their democratic rights.⁵⁷

43. Hence, Non availability of a notified procedure for listing during vacation is in violation of Art. 14 & 21.

[III.C] Non grant of listing before the issuance of election notification cannot affect the merits of the case since the court was moved well in time and actus curiae neminem gravabit.

44. The principle of *actus curiae neminem gravabit*⁵⁸ is founded upon justice and good sense and affords a safe and certain guide for the administration of law.⁵⁹ In *South Eastern Coal Fields Limited v. State of M.P.*⁶⁰, the apex Court held that no one shall suffer for an act of the court is not a rule confined to an erroneous act of the court; the act of the court embraces within its sweep all such acts as to which the court may form an opinion in any legal proceeding that the court would not have so acted had it been correctly appraised of the facts and the law. Further, in *Jagat Dhish Bhargava v. Jawahar Lal Bhargava*⁶¹ the Hon'ble Supreme Court has stated the litigant deserves to be protected against the default committed or negligence shown by the court or its officers in the discharge of their duties.

45. In the words of Justice John Marshall Harlan I of the Supreme Court of United States, '*where the delay in rendering judgment or a decree arises from the act of the court, that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the leaches of the parties, the judgment or the decree may*

⁵⁶ *Naz Foundation v. Government of NCT*, (2009) 160 DLT 277.

⁵⁷ Nathubhai Bhat, Accountability of Judiciary to Bar and Society at Large, 28 INDIAN BAR REVIEW 163 (2001).

⁵⁸ 'The maxim *actus curiae neminem gravabit* expresses the concept that what the court does ought not to prejudice a litigant', in *Monahan Estate v. Nelson*, 2000 BCCA 297.

⁵⁹ *A.R. Antulay v. R.S. Nayak*, AIR 1988 SC 153.

⁶⁰ (2003) 8 SCC 648

⁶¹ AIR 1961 SC 832

*be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim ‘actus curiae neminem gravabit’, which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice. It is the duty of the court to see that the parties shall not suffer by the delay’.*⁶² Thus, the erroneous procedure of the court cannot operate to the prejudice of the petitioner, who successfully demonstrated before this Court that the non-availability of the vacation bench and notified procedure for listing during vacation were unconstitutional.

[III.D] *The Ordinance is ultra vires to Part IX of the Constitution and retrospective.*

46. It is submitted that the ordinance amending § 19 of Nirdhan Panchayati Raj Act, 1994 is in violation of Art. 14, 15, 19, 21, 40 and Part IX of the Constitution.
47. That in spite of several representations, the Respondent State has failed to take into consideration that this ordinance would deny the opportunity of the majority of the rural population to contest the election in a backward state of Nirdhan. It is further submitted that bringing in this ordinance is against the inclusive spirit of the 73rd Amendment and the 74th Amendment of the Constitution and that the government had brought this changes without holding any debate on it in the public domain or discussing it in the legislative assembly which was against the core constitutional philosophy of democratic governance in India. The impugned ordinance was hurriedly promulgated knowing completely well that elections to Panchayati Raj Institutions [hereinafter referred to as PRIs] in the State are round the corner and that the Hon’ble court is in vacation. The issuance of the impugned ordinance is *mala fide*, in so far that there was no emergency and was issued only to bypass democratic scrutiny by the legislative assembly of the State and avoid debate, which is also envisaged under Art. 243 F of the Constitution. In *Peoples Union for Civil Liberties v. Union of India*⁶³ the apex Court observed as follows: ‘*Consistent with principle of adult suffrage, the Constitution has not*

⁶² *Mitchell v. Overman*, 103 U.S. 62.

⁶³ 2003 (4) SCC 399

prescribed any educational qualification for being a member of the House of the people or legislative assembly.’ Thus, information relating to educational qualification of contesting candidates does not serve any useful purpose in the present context and scenario.

48. The same being the intention of the Parliament in the following words: *‘The Indian Constitution does not wisely enact a literacy qualification for adult suffrage, meaning both the Right to Contest and Vote at elections. The Panchayati Raj Institutions, as constitutionally conceived, provide for no literacy/ numeracy thresholds (and rightly so) for the Constitutionally mandated task of democratic decentralize forms of local governance.’*⁶⁴

49. The Hon’ble Supreme Court in *Bhanumati v. State of Uttar Pradesh*⁶⁵, observed that *‘the 73rd Amendment metamorphosed to a distinct part of the Constitutional dispensation with detailed provision for functioning of Panchayat. The main purpose behind this is to ensure democratic decentralization on the Gandhian principle of participatory democracy so that the Panchayat may become viable and responsible people’s bodies as an institution of governance and thus it may acquire the necessary status and functions with dignity by inspiring respect of common man’.* Moreover, the retrospective legislation must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional.⁶⁶ Thus, the promulgated ordinance runs *ultra vires* to the Constitution.

[III.E] *The Ordinance further marginalizes women and weaker section due to the prevailing skewed literacy standards, and it is in violation of aspects of basic structure like the preamble, single citizenship, and free and equal participation in democratic government, and it also abridges valuable fundamental and constitutional rights.*

50. It is submitted that the whole purpose of reservation for women is to take them to the private sphere to that public sphere and the condition impugned vide the impugned ordinance negates the object and purpose of

⁶⁴ Report of Committee of Nyaya Panchayat prepared by the Union Minister of Panchayati Raj, 2007.

⁶⁵ 2010 (12) SCC 1

⁶⁶ *Rai Ramkrishna and Ors. v. The State of Bihar*, AIR 1963 SC 1667

reservation. There is marked difference in the literacy and educational qualifications between men and women in the backward state of Nirdhan, denying more opportunity to women than men. The impugned ordinance is in violation of the core constitutional philosophy of democratic governance in India, which is based upon equality of status and opportunity, featuring in the preamble to the Constitution. The ordinance is the serious assault on the participatory democracy which an integral part of the basic structure of the Constitution and thus transgress Art. 40 of the Constitution.

51. The impugned ordinance is *ultra vires* of Art. 14 of the Constitution as there is no reasonable nexus between the criteria laid down in the ordinance and the object that it seeks to achieve. The Courts can, while exercising powers of judicial review, declare any legislation as violation of Art. 14 of the Constitution on the ground that it is arbitrary and unreasonable.⁶⁷ Further, the Representation of People Act do not provide for disqualification on the grounds of educational qualification. The Supreme Court of India has struck down the disqualification in election in the catena of judgments.⁶⁸
52. It is submitted that, the Parliament in its wisdom has brought in the 73rd Constitutional Amendment, whereby Art. 15 has been further given expression in terms of providing 50% reservation for women in PRIs vide Art. 243 D. Hence, denying opportunity to women by the impugned ordinance runs *ultra vires* to the Art. 15 of Constitution. Further, everyone has the Right to take part in the government of his country, directly or through freely chosen representatives.⁶⁹ Further, every citizen shall have the right to vote and to be elected.⁷⁰

⁶⁷ *State of Tamil Nadu and Others v. K. Shyam Sunder and Others*, (2011) 8 SCC 737.

⁶⁸ *People's Union for Civil Liberties & Another v. Union of India & Another*, (2003) 4 SCC 399; *Union of India & Others v. Rakesh Kumar & Others*, (2010) 4 SCC 50; *Anokh Singh v. Punjab State Election Commission*, (2011) 11 SCC 181.

⁶⁹ Universal Declaration of Human Rights, 1950: Art. 21

⁷⁰ International Covenant on Civil and Political Rights, 1973: Art. 25

P R A Y E R

**WHEREFORE, IN THE LIGHT OF FACTS STATED, QUESTION PRESENTED, ARGUMENTS
ADVANCED AND AUTHORITIES CITED, THE PETITIONERS RESPECTFULLY REQUESTS THIS
HON’BLE COURT TO ADJUDGE AND DECLARE THAT:**

[1] The writ petition is maintainable

[2] The Section 34 of the Arbitration and Conciliation Act, 1996 stands ultra
vires to the Constitution.

[3]The ordinance promulgated by the governor of Nirdhan to amend the
Nirdhan Panchayati Raj Act, 1994 is ultra vires to the Constitution.

**AND TO PASS ANY SUCH ORDER, DISCRETION & JUDGMENT AS THIS HON’BLE COURT MAY
DEEM FIT IN THE INTEREST OF JUSTICE, EQUITY AND GOOD CONSCIENCE.**

All of which is respectfully submitted

Sd/- _____

COUNSEL FOR THE PETITIONERS

PLACE: STATE OF NIRDHAN