TEAM CODE: C1

BEFORE THE HON'BLE HIGH COURT OF NIRDHAN

Writ Petition under Article 226 of Constitution of Republic of Gariba

WP No. 999/2015 with WP No. 1021/2015

Jeopardy Contracts Inc. .....PETITIONER

VERSUS

Republic of Gariba .....RESPONDENT

&

People's Union for Liberties & Democratic Reforms.....PETITIONER

VERSUS

State of Nirdhan & Ors .....RESPONDENT

MEMORIAL FOR THE PETITIONER

5TH NLIU - JUSTICE RK TANKHA MEMORIAL NATIONAL MOOT COURT COMPETITION, 2015

Drawn and filed by the Counsel for the Petitioners

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STATEMENT OF JURISDICTION

IT IS HUMBLY SUBMITTED THAT THE PETITIONERS HAVE FILED THE TWO WRIT PETITIONS BEFORE THE HON'BLE HIGH COURT UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

THE WRIT PETITIONS HAVE BEEN CLUBBED TOGETHER BY THE HON'BLE COURT FOR THE JOINT HEARING AND DISPOSAL. THE PETITIONERS VERY HUMBLY SUBMITS TO THE JURISDICTION OF THIS HON'BLE COURT.

THE PRESENT MEMORIAL SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN THE PRESENT CASE.

STATEMENT OF FACTS

1. The Republic of Gariba is a sovereign federation of States, which became independent in the year 1947. Nirdhan, is the biggest state in the Republic of Gariba. Most parts of Nirdhan are in the form of desert and the territory was mostly considered as backward.
2. The governor of Nirdhan in an effort to fast pace the development in the state, devised new schemes, under which the infrastructural development was also allotted to private parties,
3. The Powers were delegated to the Panchayat Samitis, in order to enter into contracts with Private entities. On 21.9.2011 Jodhpur Gaon Panchayat Samiti ["**JGPS**"] entered into an agreement with Jeopardy Contracts Inc. ["**JCi**"] for 115 kms of road in a Scheduled area in Nirdhan. This contract was however terminated by JGPS on 21.9.2013, due to some issues on Land Acquisition.
4. JCi sent a legal notice on 11.12.2014 for invoking arbitration as per contractual clause, to which JGPS replied on 12.12.2014, saying that the Arbitration and Conciliation Act, 1996 Act was not applicable.
5. On 13.12.2014, JCi moved to the High Court and filed an urgent civil writ petition WP (C) No. 99/2014. On 15.12.2014, the High Court granted a stay on the Bank Guarantee and directed that all further actions shall remain subject the proccedings.
6. However, on account of an email sent by JGPS, the Maxis Bank had already encashed the Bank Guarantee. Also, there was a security breach in the software systems of the Maxis Bank, which amounted to freezing of all accounts. Thus, the amount in question remained in the accounts of JCi.
7. The Head of JGPS convened a Press Conference and made allegations that the act of security breach was attributable to JCi. In reaction to the allegation made, JCi, issued a statement, which along with their denial, also put forthwith, the statement that the Head of JGPS was an illiterate man, who was naïve and was thus making such false accusations.
8. Meanwhile, the High Court disposed the suit, directing the parties to seek remedies from the Ld. Arbitrators. On, 21.1.2015, an award was granted in the favour of JCi.

9. JGPS immediately filed a petition under Sec. 34 of the Act of 1996, before the High Court of Nirdhan, on its original side on 25.1.2015. This suit resulted in the stay over the arbitral award, and therefore Maxis Bank could not release funds in the favour of JCi, as communicated by Maxis Bank to JCi.

10. JCi challenged the constitutional validity of Sec. 34, by way of a writ petition, (WP 999/2015). The High Court of Nirdhan admitted the petition, and considering the nature of issues raised, issued notice to the ld. Attorney General.

11. On the other hand, on 20th December 2014, the Governor of the State of Nirdhan promulgated an Ordinance which amended the Nirdhan Panchayati Raj Act, 1994, to include disqualifications on the basis of the candidate's educational qualifications. The ordinance was to come into effect on 24th December, 2014.

12. This was the very first time such a provision had been brought into vogue in the entire Republic. People's Union for Liberties & Democratic Reforms issued a public statement that the Ordinance was replete with malice in law, it amounted to promulgating the ordinance for 5 years instead of 6 months, and it is violative of Constitution since "We the people" does not, and cannot mean "we the literate people".

13. The 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. However, there was a delay in the granting of listing, and thus the election notification was effective by that time. Further, upon listing, the Apex Court was pleased to observe that the matter can now be heard by High Court of Nirdhan.

14. People's Union for Liberties & Democratic Reforms immediately moved the Hon'ble High Court of Nirdhan. It filed a pro-bono petition WP (C) No. 1021/2015 in the High Court of Nirdhan seeking, to challenge the vires of the Ordinance.

15. The High Court of Nirdhan admitted the petition, and given that important questions pertaining to the interpretation of Constitution were involved, notices were issued to the ld. Attorney General as well as the Republic of Gariba. Given that the ld. 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.

STATEMENT OF ISSUES

THE FOLLOWING ISSUES ARE PRESENTED BEFORE THE HON'BLE COURT IN THE PRESENT MATTER:

1. WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS TO BE DECLARED UNCONSTITUTIONAL IN ITS PRESENT FORM.

2. WHETHER THE ORDINANCE, PROMULGATED BY THE GOVERNOR OF NIRDHAN, IS VIRES THE CONSTITUTION.

SUMMARY OF ARGUMENTS

1. WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS TO BE DECLARED UNCONSTITUTIONAL IN ITS PRESENT FORM?

1.4 Section 34 postulates Automatic stay which is against the procedural principals of Balance of convenience and irreparable injury.

1.5 Section 34 leads Introduction of litigation in the arbitration process and is against basic tenets of arbitration.

1.6 Whether Section 34 of the Arbitration and Conciliation Act, 1996 is unconstitutional on some other grounds.

2. WHETHER THE ORDINANCE, PROMULGATED BY THE GOVERNOR OF NIRDHAN, IS VIRES THE CONSTITUTION?

2.1 The Ordinance is Ultra-Vires Part IX of the Constitution of Nirdhan.

2.2 Validity of the Ordinance and the Powers of the Governor under Article 213 of the Constitution.

2.3 The Ordinance takes away the right of free and equal Participation in the Democratic Govt.

1.4 The Ordinance violates the Principles of Natural Justice

ARGUMENTS ADVANCED

1. WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS TO BE DECLARED UNCONSTITUTIONAL IN ITS PRESENT FORM.

1.1 Section 34 leads Introduction of litigation in the arbitration process and is against basic tenets of arbitration.

1.1.1 It is humbly contended that impugned section introduces unnecessary litigation in the arbitral proceedings. The sum and substance of these sub-headings in the Arbitration & Conciliation Act, 1996 is that the outdated Arbitration Act, 1940 was replaced by the Arbitration & Conciliation Act, 1996 to make it more responsive to contemporary requirement; to make provisions for an Arbitral procedure which is fair, efficient and capable of meeting the needs of specific arbitration; to minimize the supervisory role of the courts in the arbitral process and to provide that every final Arbitral Award is enforced in the same manner as if it were a decree of the Court.[1] Therefore in the light of the laudable objects of the 1996 Act it is contended that the very purpose of Act is to curb the procedural delays which are inherent in the routine civil disputes in the courts. In light of the above it becomes clear that the provisions as to appeal and re appeal of the award are against the basic tenets of the Act. It is contended that in every case of arbitral award, the person against whom an award is passed starts annulment proceedings and tries to bring enforcement proceedings to a halt. It is contended that by mere pendency of proceedings for setting aside or suspending an award, its enforcement are being stalled indefinitely. It is further contended that ADR become more of "Court-Annexed Dispute Resolution" rather than "Alternative" or

[1] *D'cor India P. Ltd.* v. *National Building Const. Corpn. Ltd.* 142 (2007) DLT [MANU/DE/8162/2007 (¶ 13)]

"Appropriate" Dispute Resolution in our country. Invariably, the victim or litigant is heard to say that "the wheels of justice" turn far too slowly, and which gives credence to the old age that "Justice delayed, is Justice denied".

1.1.2 The court interferences during and after the course of arbitration are numerous and the very purpose of arbitration, being a fast and fair process of dispute resolution, has suffered serious set-backs due to the said Section. In light of the above, it is humbly submitted that the impugned Section should be repealed in its present form.

1.2 <u>Section 34 postulates Automatic stay which is against the procedural principals of balance of convenience and irreparable injury.</u>

1.2.1 It is humbly contended that the very admission of the petition under Section 34 is treated as an automatic stay of execution of the award.[2] Therefore, granting a stay in case of a continuing arbitral proceeding without considering the merits of the case, prima facie, is bad in law. From it, what it follows is that provision in section 34 dealing with the automatic stay of the award is bad in law and is suitable to be struck off from the Act due to want of legitimacy. Upon conjoint reading of Section 34 with Section 36 of the Act, it is clear that if the petition challenging the award has been filed, till such application is disposed of, such award is not executable.[3] The Hon. Supreme Court in *National Aluminium Co. Ltd.* v. *Pressteel & Fabrications (P) Ltd. & Anr*[4] held that an award, when challenged under Section

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[2] *R.R. Donnelley Publishing India Private Ltd.* v. *Canara Traders and Printers Private Limit*ed
Original Petition Nos.717 of 2011 and 433 of 2012 and A.No.3752 of 2012
[MANU/TN/2902/2014 (¶ 107)]

[3] *Laljee Godhoo and Co.* v. *Veena Nalin* Merchant Notice of Motion No. 2327 of 2012 in Arbitration Petition No. 791 of 2012 [MANU/MH/1744/2012(¶ 5)]

[4] (2004) 1 SCC 540 [MANU/SC/1082/2003(¶ 10)]

34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the Court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from the Courts as to the contrary would not be permissible. This renders the said section 34 nugatory for it prevents an aggrieved party taste the fruits of the award to which he was rightfully entitled to but cannot do so in the light the impugned Section. In a majority of the arbitrary proceedings the balance of convenience is tilted more in favour of permitting arbitration proceedings to continue rather than to bring same to grinding halt.[5] It is contended that in such a case, staying the fruits of the arbitration proceeding by bringing it to a standstill takes away the natural rights of a party. In the case of *Pacific Basin I.H.X (UK) Ltd.* v. *Ashapura Minechem Ltd.*[6]the Hon. Bombay High Court has held that the confirming Court should be very selective in staying enforcement proceedings. This approach is very important to ensure that the main objectives of New York Convention are not defeated. The party seeking an Order of temporary injunction or stay has to prove that the balance of convenience is in his favour. That must be the major consideration. It is for the Court to decide as to in whose favour the balance of convenience lies. It is the duty of the Court to ensure that its interference is protecting the party from that species of injury which the Court calls irreparable, before the legal right can be established. The Court must pertinently put the question "will the party suffer irreparable damage if no injunction is granted now?" [7] It is most humbly contended that the object of the Act is to provide speedy remedy for the commercial and other related transactions and to avoid the procedural delays

[5]*Swiss Timing Limited* v. *Organising Committee, Commonwealth Games* 2010 (2014) 6 SCC 677 [MANU/SC/0516/2014 (¶ 30)]

[6] 2011 (2) Arb. LR 548(Bom) [MANU/MH/1698/2010 (¶ 55)]

[7] *K. Krishna Moorthy* v. *Bangalore Turf Club Ltd. and Ors*. 1975(2) Kar. L.J. 428

in the routine suits in the courts of law.[8] Speedy remedy and removal of unnecessary litigation is one of the primary focuses which the Act tries to achieve. It is contended that the insertion and the existence of such provision in the Arbitration Act enabling automatic stay to the award, conflict with the Procedural Laws and the continuing ladder of appeal provided under the Act under mines its basic purpose and objective. Therefore the said provision should be declared as unconstitutional. It is further contended that adjudication of the matters at dispute becomes very essential in order to decide whether the stay has to be granted or not. In the case of *K.P. Poulose* v. *State of Kerala*[9] the Hon. Court has held that in case of such matter the Court is under a duty to examine the controversy on the merits of the dispute, and pass proper orders in accordance with its conclusion. It humbly submitted that Section 34 of the Arbitration and Conciliation Act, 1996 does not lay down any express law in regard whether the Courts are to examine the controversy on the merits of the dispute or are to simply adjudicate the matter. Therefore section 34 is per say bad in law and needs to be declared unconstitutional. It is contended that the Hon. Courts across India cannot overlook the principles of balance of convenience and irreparable injury.[10] In a case where one party could be fully compensated in monetary terms if they finally succeeded at trial, the other party could never be compensated for being forced to enter into a contract with a party he did not desire to deal with, if the trial results in rejection of first party's claim.[11] It is to note that the grant of automatic stay in section 34 petitions pending before the various Courts emanates that these two principles of Procedure are not given due significance. It is most humbly submitted that principles of balance of convenience and Irreparable injury form the

[8] *supra* note 1 at Pg. 1

[9] AIR 1975 SC 1259 [MANU/SC/0037/1975 (¶ 6)]

[10] *H.P* v. *Sriman Narayan* AIR 2002 SC 2598 [MANU/SC/0578/2002 (¶ 7&8)]

[11] *Percept D'Mark (India) Pvt. Ltd.* v. *Zaheer Khan & Anr.* (2006) 4 SCC 227 [MANU/SC/1412/2006] (¶ 26)

cornerstone of the Procedure and the blatant ignorance of these two principles in the arbitral proceeding is reflective of the fact that section 34 defies the legal procedure established by the law.

1.3 Whether Section 34 of the Arbitration and Conciliation Act, 1996 is unconstitutional on other grounds.

1.3.1 It is further contended that Section 34 is being abused by virtue of its wordings in regard with setting aside the award on ground of "public policy". In *Janson v. Driefontein Consolidated Gold Mines Ltd*[12], the Hon. Court has held that Public Policy is always an unsafe and treacherous ground for legal decision. Burrough, J., in *Richardson v. Mellish*[13]described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The scope of public policy was further expanded in the case of *ONGC* v. *Saw Pipes*.[14] The Hon. Courts had given a very wide interpretation of the said term. It is contended that this has resulted in plethora of cases filed by the parties which results in stay of the arbitral award thus making the aggrieved party waiting for years in order to enjoy the fruits of the award.

1.3.2 The explanation to Section 34 of the 1996 Act is like "a stable man in the saddle on the unruly horse of public policy.[15] The Apex Court in *Renusagar Power Co. Ltd.* v. *General Electric Co.*[16] while dealing with the provisions of the new Act discussed at length as to the meaning of that expression. The Apex Court incidentally also examined the scope of the expression "Public Policy". The Apex Court held as follows : "While observing that "from

[12] (1902) AC 484

[13] (1824) 2 Bing 229

[14] 2003 (5) SCC 705 [MANU/SC/0314/2003 (¶ 15)]

[15] *Venture Global Engineering* v. *Satyam Computer Services Ltd.* (2010) 8 SCC 660 (¶ 6)

[16] AIR 1994 SC 860 (¶ 43 & 67)

the very nature of things, the expressions "public policy" "opposed to public policy" or "contrary to public policy" are incapable of precise definition this Court has laid down-- "Public policy connotes some matter which concerns the public good and the public Interest. The concept of what is for the public good or in the public interest or what would be injurious "or harmful to the public good or the public interest has varied from time to time". Legal glossary published by Ministry of Law & Justice has defined the expression "public policy" as under: *"Principles in accordance in accordance with which actions of men and communities need to be regulated to achieve the good of the entire community or public"* This definition is based on sec. 171 of IPC. "Considering that public policy cannot be exhaustively defined, it creates a grey area as far as the scope of section 34 is considered which should be approached with extreme caution."[17]

1.3.3 A mere error of law would not amount to breach of "public policy" within the meaning of Sec. 34 (2) (b) (ii). [18] It is most humbly contended before this Hon'ble Court that Article 34 of Chapter VII of the UNCITRAL Model Law "allows only one type of recourse to the exclusion of any other means of recourse". It contains an exclusive of limited grounds on which an award may be set aside". Here, Recourse means "actively attacking the award".[19]It is submitted that such a step is a clear deviation from the norms of the International Arbitral Agreements to which India is a signatory and any provision of law not in consonance with the International should not operate as the law of land. Sub-Section (3) has fixed the time limit of three months after the receipt of the award (or the additional award under the Sec 33) within which the application for setting aside may be made. But deviating from the Model Law, the

[17] *Deutsche Schachtbanund MBH* v. *Ras Al Khaimath Oil Co.* 1987 ALL ER 769

[18] *Union of India* v. *Moti Enterprises* (2003) 1 RAJ 408 (Bom)

[19] *supra* 14 at Pg. 14

sub section authorises the courts to extend the period by another 30 days. [20] This form of Deviation encourages unwarranted introduction of litigation process and also the people who sleep over their rights. It is humbly submitted that arbitral proceeding in the Nation has to be distinguished from the regular legal proceedings keeping in mind the purpose of the Act.

2. WHETHER THE ORDINANCE, PROMULGATED BY THE GOVERNOR OF NIRDHAN, IS VIRES THE CONSTITUTION?

2.1 The Ordinance is Ultra-Vires Part IX of the Constitution of Nirdhan.

2.1.1 The 73rd Amendment of the Constitution of India gives the Panchayati Raj Institutions a constitutional status, inserting Part IX in the Constitution of India, defining 'Panchayat', to mean an institution of self-governance constituted under Article 243B, for the rural areas. It is submitted that the Panchayati Raj Institutions are representative institutions, which must give equal opportunity to all including those, who do not have formal education in schools to represent in local governance. The impugned Ordinance effectively excludes the direct representation in the posts of Sarpanchas, members of the Panchayat Samiti and Zila Parishadas. It is violative 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 of India. The 73rd Amendment itself states that one of the objects of constitutionalizing the Panchayati Raj institutions is to remedy the "*insufficient representation of weaker sections like Scheduled Castes, Scheduled Tribes and women*".

In case of *Dr. K. Krishna Murthy and Ors.* v .*Union of India (UOI) and Anr.*[21] one of the observation laid down by the court was related to insufficient representation of weaker

[20] Chapter VII of the UNCITRAL Model Law

[21] (2010)7SCC202 [¶ 82(iv)]

section of society, the disqualifications was held to be as unconstitutional as it defeated the very object of the 73rd amendment. It was laid down that:

"*The upper ceiling of 50% vertical reservations in favour of SC/ST/OBCs should not be breached in the context of local self-government. Exceptions can only be made in order to safeguard the interests of Scheduled Tribes in the matter of their representation in Panchayats located in the Scheduled Areas.*"

2.1.2 But this ordinance will clearly have a negative impact on the participation of the weaker section of society and will prevent them from becoming a part of the Democracy. It is thus, contended that if one of the stated objects of the 73rdAmendment could effectively be subverted (despite the Educational Disqualifications) by setting electoral bars in pursuance of goals the constituted body is to pursue (a different object), then the object of the Constitutional Amendment would be defeated.

2.1.3 The petitioners have relied on the case of *Anokh Singh v. Punjab State Election Commission*[22], in which the disqualification in elections under clause (1) of Article 243F of the Constitution read with Section 2(a) of the Punjab State Legislature (Prevention of disqualifications) Act, 1952 was struck down by the Humble Supreme Court.

2.1.4 Also, the ordinance goes against the very tenet of the 73rd Constitutional amendment, which provide for local self-governance in rural areas. There is merit in the argument that a public official should be able to understand the documents she/he is handling. However this understanding is related to literacy (the ability to read and write with understanding) and not some arbitrarily defined standards of educational attainment**.** Literacy, as defined in Census

[22] (2011) 11 SCC 181(¶ 36 & 37)

operations, is the ability to read and write and any formal education or minimum educational standard is not necessary to be considered literate[23].

2.1.5 In *Bhanumati and Others* v. *State of Uttar Pradesh through its Principal Secy. and Ors.* [24], the Supreme Court, referring to the debates in the Constituent Assembly, which led to the enactment of the Constitution of India, referred to the 73rd Amendment as a powerful tool of social engineering. It was held that:

"The Seventy-third Amendment heralded a new era - a turning point in the history of local self-governance with sweeping consequences in view of decentralisation, grass-root democracy, people's participation, gender equality and social justice." Further, it was stated that, "What was in a nebulous state, as one of the directive principles under Article 40, through the Seventy-third Constitutional Amendment metamorphosed to a distinct part of constitutional dispensation with detailed provision for functioning of Panchayat. The main purpose behind this is to ensure democratic decentralisation on the Gandhian principle of participatory democracy so that the Panchayat may become viable and responsive people's bodies as an institution of governance and thus it may acquire the necessary status and function with dignity by inspiring respect of common man."

2.1.6 Thus, it is most humbly submitted, on account of the importance of Inclusive governance and Grass Root democracy, which were the primary objective of the 73rd amendment, which inserted the Part IX of the Constitution that the impugned ordinance, as promulgated by the Governor of Nirdhan, Violates the tenets of Part IX the Constitution of Gariba, and therefore is ultra-vires.

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[23] National Commission Review literacy in the context of the Constitution of Gariba

[24] 2010 (12) SCC 1 (¶ 22 & 24)

2.2 Validity of the Ordinance and the Powers of the Governor under Article 213 of the Constitution.

2.2.1 Article 213(1)[25] provides that "If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require". As has been held by the Apex court in the prominent case of *D.C. Wadhwa* v. *State of Bihar*[26], in the context of the ordinance making powers of the Governor, "The power to make an ordinance is to meet an extraordinary situation and it should not be made to meet political ends of an individual. Though it is contrary to democratic norm for an executive to make a law but this power is given to the President to meet emergencies so it should be limited in some point of time."

2.2.2 In this case, the main motto of passing this ordinance, just before the Election clearly indicates political interest which makes this ordinance invalid. There is requirement of judicial review of this ordinance. The power of judicial review of ordinances was discussed in the case of *Krishna Kumar Singh* v. *State of Bihar*[27], in this case the Supreme Court struck down many number of ordinances stating that no particular basis for the exercise of the Ordinance making power of the President had been shown. Here also there was no relevant ground shown for promulgating the ordinance of educational qualification for contesting election. Further in case of *K. Nagaraj* v. *State of AP*[28], the court held that the Power of making Ordinances is a legislative action so the same grounds as related to the law making

[25] Constitution of Gariba.

[26] 1987 SCR (1) 798 [MANU/SC/0072/1986 (¶ 6)]

[27] (1998)5SCC643 [MANU/SC/0358/1998 (¶ 53)]

[28] (1985) 1 SCC 523 [MANU/SC/0343/1985 (¶ 31)]

should be challenged than challenging the executive on judicial grounds**.** So one have right to challenge the executive for the error based ordinance.

2.2.3 It is humbly contended before this honourable court that the following grounds were established to challenge the validity of the Ordinances as mentioned in case of *Chiranjit Lal Chowdhuri* v. *Union of India and Ors*[29]**:**

1. *Directly violates a constitutional provision, i.e. it is violative of substantive provisions of Our Constitution such as an Article 301*
2. *President has exceeded his constitutional power,*
3. *President had made a colorable use of his power. i.e it constitutes colorable legislation; or*
4. *It contravenes any of the Fundamental Rights as mentioned in our Constitution.*
5. *Its retrospectively is unconstitutional.*

2.2.4 It is submitted that the ordinance is ultra vires powers of the Governor. It was promulgated only to defeat the constitutional process. There was no urgency to introduce a vital disqualification through an Ordinance, as the matter could have awaited a duly enacted law. The Ordinance is plainly against the objective of the main Act, providing for representative democracy for the weaker sections of the society.

2.2.5 Further, it is contended that the Ordinance violates the Right to Equality, as enshrined under article 14 of the constitution of India. The right to equality, guaranteed under Article 14[30], provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The requirement of formal educational

[29] [1950]1SCR869 [MANU/SC/0009/1950 (¶ 8,9 & 31)]

[30] Constitution of Gariba.

qualification is not essential for effectively discharging the duties and functions, vested in the Panchayats and Zila Parishads.

2.2.6 The Supreme Court in *National Council for Teacher Education* v. *Shri Shyam Shiksha Prashikshan Sansthan*[31] has re-iterated the Concept of 'Right to Equality' as enshrined in our Constitution. The Supreme Court has re-iterated that the Constitution doesn't allow class legislation but permits reasonable classification, based upon an 'intelligible differentia'. The relevant extracts from the aforesaid judgment are reproduced herein; *Article 14 forbids class legislation but permits reasonable classification provided that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the legislation in question.* In order to pass the test, two conditions must be fulfilled, as laid down in many landmark judgements *Kerala Hotel & Restaurant* v. *State of Kerala & Ors*[32] and *Basheer @ N.P. Basheer* v. *State of Kerala*[33] namely:

- That the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and
- That differentia must have a rational relation to the object sought to be achieved by the Act."

2.2.7 The petitioners have relied upon a judgment of the Supreme Court in *State of Tamil Nadu & Ors.* v. *K. Shyam Sunder & Ors.*[34] in support of the submissions that the Courts can, while exercising powers of judicial review, declare any legislation as violative of Article 14 of the Constitution of India on the ground that it is arbitrary and unreasonable.

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[31] (2011) 3 SCC 238 [MANU/SC/0080/2011 (¶ 31)]

[32] 1990 SCR (1) 516 [MANU/SC/0170/1990 (¶ 3)]

[33] 2004(3)SCC609 [MANU/SC/0117/2004 (¶ 18)]

[34] (2011) 8 SCC 737 (¶ 50-53)

2.3 The Ordinance takes away the right of free and equal Participation in the Democratic Government.

2.3.1 It is submitted before the Hon'ble Court that the Impugned Ordinance, takes away the right to free and equal participation in the state of Nirdhan. In case of Smt. *Indira Nehru Gandhi* v. *Raj Narain*[35] court laid down that judicial review, democracy, free and fair election and rule of law were included in the list of the basic features of the Constitution. Consequently any Constitutional amendment, which takes away, any of them will be unconstitutional and therefore void. The republicanism in the country has allowed many persons, who did not even have any formal education, to rise and lead. Some of them had also risen to the position of Chief Ministers of the States.*"*

2.3.2 In India, the right to vote is only a statutory right, but the act of voting is a constitutionally protected 'freedom of expression' under Article 19, as a fundamental right as mentioned in *PUCL* v. *Union of India*[36]. The freedom to vote is inseparable from the freedom to contest in elections, and hence a policy of encouraging education cannot arguably prevail over fundamental rights. The law is a major setback to the constitutional mandate of ensuring gender equality in Panchayati governance but this ordinance therefore excludes the majority of potential women contestants. The educational qualification norms, on top of the existing massive inequality in literacy rates, will reduce women's participation in politics i.e. infringes their fundamental right guaranteed under article 14 i.e right to equality. The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour

[35] 1975 SCC (2) 159 [MANU/SC/0304/1975 (¶ 343, 344, 352 & 354)]

[36] (2013) 10 SCC 1

of women. Within the framework of a democratic polity, our laws, development policies, Plans and programmes have aimed at women's advancement in different spheres.

2.3.3 India has also ratified various international conventions and human rights instruments committing to secure equal rights of women. The message of international instruments - Convention on the Elimination of All Forms of Discrimination against Women, 1979 *("**CEDAW**")* and the ***Beijing Declaration***, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. The domestic courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them as stated in case of *Ms. Githa Hariharan & Anr* v. *Reserve Bank of India & An.r*[37].

2.4 The Ordinance violates the Principles of Natural Justice

2.4.1 A law which allows administrative authority to take a decision affecting the rights of people without assigning any reason cannot be accepted as laying down procedure which is fair, just and reasonable and hence violative of article 14 and 21 of the constitution as mentioned in the case of *Curator, Victorio Memorial Hall* v. *Howrah Ganatantrik Nagarik Samiti*[38]**.**

2.4.2 Further stated by Apex court in case of *City Corner* v. *Personal Asstt*[39] that a Decision without hearing or giving the party to be affected an opportunity to be heard would be null and void. In *Union Carbide Corp.* v. *Union of India*[40] it was observed that non-compliance with the rule of "*Audi Alteram Partem*" would vitiate a decision where there is violation of

[37] (1999)2SCC228 [MANU/SC/0117/1999 (¶ 14)]

[38] (2010) 3SCC 732 [MANU/SC/0155/2010 (¶ 31)]

[39] AIR 1976 SC 143 (¶ 5)

[40] (1991) 4SCC 584 [MANU/SC/0058/1992 (¶ 79)]

natural justice. It is now settled that there are certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 as held in case of *Haryana Financial Corp.* v. *Kailash Chandra Ahuja*[41].

2.4.3 As mentioned in case of *Japani Sahoo* v. *Chandra Sekhar Mohanty*[42] in which court held that ***one of first and highest duties of all Courts is to take care that act of Court does no harm to suitors.*** One of the first and highest duties of all Courts is to take care that an act of Court does no harm to suitors. Non availability of vacation bench, violate the right to be heard so this is due to procedural defect by the court. Such interpretation of law, instead of promoting justice would lead to perpetuate injustice and defeat the primary object of procedural law.

2.4.4 Further held in case of *A.R. Antulay* v. *R.S. Nayak and Anr.*[43] that "*Actus Curiae Neminem Gravabit"* main area of operation of the maxim is, generally, procedural. Errors in judicial findings, either of facts or law or operative decisions consciously arrived at as a part of the judicial-exercise cannot be interfered with by resort to his maxim. It is not only within the power, but a duty as well, of this Court to correct its own mistakes in order to see that no party is prejudiced by a mistake of the Court. There is no substance in contention.

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[41] (2008) 9 SCC 31 [MANU/SC/7804/2008 (¶ 47)]

[42] (2007)7SCC394 **[**MANU/SC/3080/2007 (¶ 51)]

[43] (1988)2SCC602 [MANU/SC/0002/1988 (¶ 71)]

PRAYER

WHEREFORE, in the light of arguments advanced and authorities cited, the Petitioners humbly submit that the Hon'ble Court graciously be pleased to:

- Entertain the present Petitions, namely W.P No. 999/2015 & W.P No. 1021/2015.
- Adjudge that Section 34 of the Arbitration & Conciliation Act, 1996 is unconstitutional.
- Adjudge that the impugned Ordinance is ultra vires of Part IX and Part III of the Constitution of Gariba.
- Award costs of the present Petitions to the Petitioners.

*And pass any order in favour of the Petitioners that it may deem fit in the ends of justice***.**

For this act of kindness, the Petitioners shall duty bound forever pray.

SD/-

Dated this..... Day of , 2015.

(Counsels for the Petitioners)