

JUSTICE R.K TANKHA MEMORIAL MOOT COURT COMPETITION

2015 EDITION

National Law Institute University, Bhopal

TEAM CODE NO- E
MEMORIAL SIDE - PETITIONER

JUSTICE R.K TANKHA MEMORIAL MOOT COURT COMPETITION**National Law Institute University, Bhopal****BEFORE THE HON'BLE HIGH COURT OF NIRDHAN****AT NIRDHAN**

W.P No (Civil) 999/2015

and W.P No (Civil) 1021/2015

IN REFERENCE TO THE W.P.(C)No. 99/2014 IN THE HIGH COURT OF NIRDHAN ,
REPUBLIC OF GARIBA, AND THE ORDER OF LISTING BY THE APEX COURT

People's Union for Liberties and Democratic Reforms ... **PETITIONER NO.1**

And

Jeopardy Contracts Inc. (JCI) ... **PETITIONER NO.2**

V/s

Republic of Gariba ...**RESPONDENT NO.1**

And

Maxis Bank ...**RESPONDENT NO.2**

COUNSEL FOR PETITIONER

**WRITTEN SUBMISSION ON BEHALF OF THE PETITIONERS (PEOPLE'S UNION FOR
LIBERTIES & DEMOCRATIC REFORMS AND JEOPARDY CONTRACTS INC.)**

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- (i) **H.M Seervai on Constitution.**
- (ii) **M.P Jain on Constitutional Law.**
- (iii) **Durga Das Basu Commentary on the Constitution.**
- (iv) **Subhash. C. Kashyap (Parliamentary Procedure and privileges.**
- (v) **Arvind P. Datar (Constitutional Law on Principles of Natural Justice).**
- (vi) **All India Reporter (AIR).**
- (vii) **Supreme Court Cases (SCC).**
- (viii) **Supreme Court Journals.**
- (ix) **Supra Reference Book On Constitutional Verdicts.**
- (x) **Lexis Nexis (Amendment 42 of 1974 Socialism).**
- (xi) **M.P. Jain on the code of civil procedure.**
- (xii) **P.K. Majumdar 10th edition on Law of Arbitration And Conciliation.**
- (xiii) **Indian Constitutional Law Volume 1 Lexis Nexis.**

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The petitioners humbly submit before this Hon'ble High Court that this Hon'ble Court has the jurisdiction to allow this petition under **article 226** of the constitution of Gariba .

The petitioner no 1 - approach this Hon'ble court challenging the issue of ordinance by the Governor of Nirdhan and the validity of the ordinance issued by the Governor under **article 213** of the constitution of Gariba.

The petitioner no.1 submits before this Hon'ble court that the **writ of certiorari** may be issued against the executive who wrongly interprets the constitutional provisions. It is submitted that the decision can be set-aside by a writ of certiorari because it would not be a valid order in the eyes of law, which is the case in the present petition.

The petitioner no.2 - approach this Hon'ble High Court challenging the constitutional validity of **section 34** of **arbitration and conciliation act 1996** . The petitioner no.2 submits before this Hon'ble court that the **writ of mandamus** may be issued restraining the state from enforcing or giving effect to the provisions of the law in question.

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1. That the Petitioner No.1 herein is People's Union for Liberties and Democratic Reforms and the Petitioner No.2 herein is Jeopardy Contracts Inc.(JCI).
2. That the Respondent No.1 is The Republic of Gariba and the Respondent No.2 is the Maxis Bank.
3. That the Jeopardy Contracts Inc. (JCI), i.e, is the Petitioner No.2 in the present case entered into an agreement on 21.09.2011 with Jodhpur Gaon Panchayat Samiti (JGPS) for the construction of roads. On the termination of the contract , by JGPS on 21.09.2013 due to certain issues regarding land acquisition, design of the bridges etc, The JCI asked for invoking arbitration as per contractual clause and ' termination payment' from the JGPS for the work already done by sending a legal notice dated 11.12.2014 to which the JGPS replied on 12.12.2014 challenging the applicability of the Arbitration and Conciliation Act,1996 suggesting that no institutional arbitration can take place. Further the JGPS invoked the performance bank guarantee in the Maxis Bank.
4. The JCI moved the High Court of Nirdhan in an urgent writ petition being WP(c)No. 99/2014 which was listed at 10:30 am on 15.12.2014. The High Court taking this matter first on board granted "... an ad-interim ex-parte stay on invocation of bank .However at 10:00 am when the branch manager of the Jodhpur Gaon branch of Maxis bank acted on the email of JGPS and encashed the bank guarantee, at 10:01 am due to some massive security breach in the security systems of the Maxis bank due to an attack by a group of hackers the amount of bank guarantee still remained in the account of JCI Further when the JGPS in a press conference attributed the act of hacking solely to JCI.

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5. The corporate headquarters of JCI denying such allegations stated that, “ ... the head of JGPS is an illiterate villager, his allegations arise out of ignorance and naivety due to lack of formal education.”
6. The writ petition pending before the High Court was disposed off directing the parties to seek appropriate interim remedies from the Ld. Arbitrators, The award was culminated on 21.01.2015 entitling JCI to the money under the performance bank guarantee.
7. When on 24.01.2015, JCI wrote to Maxis bank to return the money pertaining to the performance bank guarantee retained by it, on 27.01.2015 Maxis bank informed the admission of writ petition initiated by JGPS under section 34 under the act of 1996 before the High Court of Nirdhan amounts to a stay on the award.
8. In response on 28.01.2015, when JCI cited its concern about immediate requirement of liquidity due to pressure of the foreign bank, expenses of the litigation etc, and the Maxis bank still did not release any payment JCI challenged the constitutional validity of section 34 by writ petition 999/2015 contending:
 - (i) introduction of litigation in the arbitration against the principles of arbitration,
 - (ii) the pendency of section 34 petition takes away the fruits of the award
 - (iii) grant of an automatic stay on prima-facie case causes irreparable injury.

Admitting the petition, notice was issued to the Ld. Attorney General.

8. In the meanwhile when the Governor of the state of Nirdhan on 20th Dec 2014 promulgated an ordinance amending the Nirdhan Panchayat Raj act 1994 making rigid the qualifications for election as a Panch or as the case may be.
9. The Peoples Union for Liberty and Democratic reforms moved the High Court of Nirdhan on 29th decemeber 2014{the annual winter holidays} for an urgent listing. Due to the denial of the

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listing, they moved the Hon'ble Apex court under Article 32 on 31.12.2014 through the "Vacation Officer". Despite several reminder, no listing was granted till the issuance of election notification. Upon listing the Apex court observed that the matter could now be heard by the High Court of Nirdhan.

10. The Peoples Union for Liberty and Democratic rights immediately filed a pro-bono petition WP (C) No. 1021/2015 in the High Court of Nirdhan challenging the vires of the ordinance on the grounds :

- (i) Non availability of a notified vacation bench procedure is unconstitutional;
- (ii) Non grant of listing before the issuance of election notification cannot effect the merits of the case.
- (iii) The ordinance of the Governor being ultra vires.
- (iv) The ordinance violates the preamble, fundamental and constitutional rights.

The High Court of Nirdhan admitting the petition, pertaining tot the interpretation of the constitution, 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 WP 999/2015 and WP 1021/2015 they have been listed together for final hearing.

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The Following issues came up before the honourable Supreme court for consideration -

1. Whether high court of state of Nirdhan has the jurisdiction to try the present Petition?

2. Whether Section 34 of the Arbitration and Conciliation Act is unconstitutional as challenged by the JCI. In the High Court of state of Nirdhan?

(i) Whether introduction of litigation in the arbitratral process and pendency of section 34 is against the basic principle of arbitration?

(ii) Whether the pendency of cases and further delay leads to violation of country's bilateral commitments under various conventions and investment treaties?

(iii) Whether pendency of petition of sec.34 takes away the fruits of the award?

(iv) Whether or not grant of automatic stay on prima facie case causes irreparable injury?

3. Whether issuing of the ordinance by the Governor is ultra vires?

(i) Whether non availability of a notified vacation bench and notified procedure for listing during any holidays is unconstitutional?

(ii) Whether non grant of listing before the issuance of election notification affects the merits of the case?

(iii) Whether ordinance issued by Governor violates part IX of constitution and is retroactive?

(iv) Whether the ordinance violates the fundamental rights or any other provisions given to the people in the Constitution?

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It is humbly submitted before the Hon'ble High Court that-

1. Whether High Court of state of Nirdhan has the jurisdiction to try the present petition?

POSITIVE the High Court of state of Nirdhan has the jurisdiction to try and entertain the case as the petitioner humbly submits before this Hon'ble High Court that this Hon'ble court has the jurisdiction to allow this petition under article 226 of the constitution of Gariba .

In the matter at hand the **petitioner no1** humbly prays before the Hon'ble High Court that the **writ of certiorari** should be issued against the Governor and the court also have the power of judicial review under article 226.

The petitioner no2 humbly prays before the Hon'ble court that the **writ of mandamus** should be issued against the legislature as they have fail to provide the proper law.

2. Whether Section 34 of the Arbitration and Conciliation Act is Constitutional or unconstitutional as challenged by the Jeopardy Contracts Inc. in the High Court of state of Nirdhan ?

POSITIVE Section 34 of the Arbitration and Conciliation Act is Constitutional or unconstitutional as challenged by the Jeopardy Contracts Inc. in the High Court of state of Nirdhan as the petitioner no 2 humbly prays before the Hon'ble High Court that sec **34 of arbitration and conciliation act 1996** violates the right under **article 14 right to equality** and **article 19 (1) (g) freedom to carry trade and commerce** .

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(i) Whether introduction of litigation in the arbitral process and pendency of section 34 is against the basic principle of arbitration?

POSITIVE introduction of litigation in the arbitral process and pendency of section 34 is against the basic principle of arbitration **under section 2 (a)** of the arbitration and conciliation act 1996 the definition of arbitration is given which states that arbitration is a settlement of differences or disputes by mutual understanding or agreement by the parties the basic purpose of arbitration is to provide speedy justice without pending litigation.

(ii) Whether the pendency of cases and further delay leads to violation of country's bilateral commitments under various conventions and investment treaties?

POSITIVE the pendency of cases and further delay leads to violation of country's bilateral commitments under various conventions and investment treaties.

In the matter at hand the petitioner is been denied from getting justice even the award has been pronounced in favour of the JCI still the maxis bank is denying to deposit the performance bank guarantee in favour of the JCI which is depriving then the right to equality article 14 provided under constitution of Gariba.

(iii) Whether pendency of petition of sec.34 takes away the fruits of the award ?

POSITIVE pendency of petition of sec.34 takes away the fruits of the award --- justice delayed is justice denied. In the matter at hand the petitioner is been denied from getting justice even the award has been pronounced in favour of the JCI still the maxis bank is denying to deposit the performance bank guarantee in favour of the JCI.

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(iv) Whether or not grant of automatic stay without adjudication on prima facie case can be considered in the present case?

POSITIVE grant of automatic stay without adjudication on prima facie case can be considered in the present case as the matter has been admitted in HC and maxis bank is not returning the bank guarantee in favour of JCI as the respondent is claiming that there is a execution on stay on bank guarantee which is violation of order 21 rule 26.

3. Whether issuing of the ordinance by Governor is ultra vires ?

POSITIVE issuing of the ordinance by Governor is ultra vires as the Governor has the power to issue ordinance under article 213 of constitution of Gariba but this power is only related to emergency situation when the legislative assembly is not in session but in the matter in hand the Governor has used his power in unconstitutional way and violated the powers of people at large by violating their fundamental and statutory rights.

(i) Whether non availability of a notified vacation bench and notified procedure for listing during any holidays is unconstitutional ?

POSITIVE non availability of a notified vacation bench and notified procedure for listing during any holidays is unconstitutional .The petitioner humbly prays that the right to constitutional remedies under article 32 given by the constitution of Gariba is been violated as there is no way to approach to the Hon'ble court to enforce the fundamental right of people.

(ii) Whether non grant of listing before the issuance of election notification affects the merits of the case ?

POSITIVE non grant of listing before the issuance of election notification affects the merits of the case as the ordinance was issued a week before the publication of election notification and at

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that time winter was there so there was no proper procedure for listing and filing was not present so the petitioner was aggrieved by the ordinance of the Governor and was left with no remedy and the basic feature of the constitution of Gariba is to provide remedy, justice .

(iii) Whether ordinance issued by Governor violates part IX of constitution and is retroactive?

POSITIVE ordinance issued by Governor violates part IX of constitution and is retroactive as by imposing the restriction on the people to participate in the election process. The constitution of Gariba seventy third amendment 1992 has been enacted to strengthen the panchayats system in villages in a bid to strengthen the democratic institution .Article 243 d (1) mandates that seats be reserved for the scheduled caste and scheduled tribes in every panchayat .In the present matter the seats are reserved but with restriction imposed on them by differentiating on the basis of literacy with very less time left for the election.

(iv) Whether the ordinance violates the fundamental rights or any other provisions given to the people in the Constitution?

POSITIVE the ordinance violates the fundamental rights given to the people in the Constitution also the basic feature embedded in the constitution of Gariba. The petitioner humbly submits before the Hon'ble High Court that the ordinance goes against the very tenet of the 73rd Constitutional amendment, which provided for local self-governance in rural areas. The Constitutional amendment, passed by the Parliament and ratified by state legislatures, did not moot any sort of educational qualification to be eligible to contest elections and instead provided reservation for marginalised social groups such as Dalits and women.

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It is humbly submitted before the Hon'ble High Court that-

1. Whether High Court of state of Nirdhan has the jurisdiction to try the present Petition?

POSITIVE the High Court of state of Nirdhan has the jurisdiction to try and entertain the case as the petitioner humbly submits before this Hon'ble High Court that this Hon'ble court has the jurisdiction to allow this petition under article 226 of the constitution of Gariba .

ARTICLE 226 a High Court is empowered to issue directions ,orders or writs for the enforcement of fundamental right and for any other purpose High Court exercise discretionary and equitable jurisdiction.

In the matter at hand the **petitioner no1** humbly prays before the Hon'ble High Court that the **writ of certiorari** should be issued against the Governor because he has violated the constitutional provision by acting ultra vires and issuing the ordinance which is violating the fundamental rights of the people.

In **D.C WADHWA vs STATE OF BIHAR**¹ the sc court held that under the constitution the primary law making authority is the legislature and not the executive and the ordinance making power is in the nature of an emergency power and the court strictly emphasized that the executive cannot by taking resort to emergency provision of art 213 usurp the law making function of the legislature.

¹ AIR 1987 SC 579 : (1989) 1 SCC 378 PIL

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In the matter at hand the Governor has misused his power to promulgate ordinance before the election notification has to be issued and he was well aware about the situation that if he promulgate the ordinance which will amend the Nirdhan panchayti raj act 1994 and will ultimately violate the fundamental rights of the people and also the basic structure of the preamble that is free and equal participation in democratic government.

The petitioner no1 humbly pleads before the Hon'ble High Court that the court has the power of **judicial review** under article 226 to determine the actions of legislative and executive in interpreting the constitution .In the matter at hand the Governor has acted **ultra vires** to the constitution of Gariba which can be derived from the prima facie of the case as Governor has a mala fide intention and he has wrongly used his power given by the constitution of Gariba .

In **MINERVA MILLS vs UNION OF INDIA**² the sc held that the courts has the rights to pronounce upon the validity of laws wherever the question of fundamental right of a person is involved as the court thought if there is no judicial review than a controlled constitution will become uncontrolled.

The petitioner no2 humbly prays before the Hon'ble court that the **writ of mandamus** should be issued against the legislature as they have fail to provide the proper law that is **section 34 of arbitration and conciliation act 1996** which actually takes away the fruit of the award and involves litigation.

In **PRABODH VERMA vs STATE OF UTTAR PRADESH**³ the supreme court emphasized that a writ in the nature of certiorari is wholly inappropriate relief to ask when constitutional validity of a legislative measure is being challenged. In such a case the proper relief to ask for

² AIR 1980 SC 1789

³ AIR 167 1985 SCR (1) 216

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would be declaration that a particular law is unconstitutional or void. if a consequential relief is though necessary than a writ of mandamus may be issued restraining the state from enforcing or giving effect to the provisions of the law in question. In the matter at hand legislature has failed to provide the proper legislation which is affecting the rights of the people at large and instead of getting justice the justice is been denied due to improper law .As in the present matter the decision was in favour of JCI given by the arbitrator but maxis bank refused to give the bank guarantee in favour of the JCI .

2 -Whether Section 34 of the Arbitration and Conciliation Act is unconstitutional as challenged by the Jeopardy Contracts Inc. in the High Court of state of Nirdhan ?

POSITIVE section 34 of the arbitration and conciliation act is unconstitutional as challenged by the jeopardy contracts inc. in the High Court of state of Nirdhan. Section 34 of arbitration and conciliation act states application for setting aside arbitral award.

In TRUSTEE PORT OF MADRAS vs ENGINEERING CONSTRUCTION

CORPORATION⁴ limited the sc held that as a general rule ,the court should approach the award with a desire to support it if that is reasonably possible ,rather than to destroy it by calling illegal the court is not empowered to set aside the award suo moto.

In the present matter at hand as the contract was terminated by the jodhpur gaon panchayat samiti and there was a clause mentioned in the contract that if there is a dispute between a parties then the matter will be referred to the arbitrator in the present matter dispute arose between the parties and the award was given in favour of JCI by the arbitrator .The jgps moved to the High Court under section 34 that is application for setting aside arbitral award under arbitration and conciliation act 1996.the High Court of Nirdhan admitted the petition due to which there is a stay

⁴ 1995 AIR 2423 , 1995 SCC (5) 531

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order on the encashment of bank guarantee as informed by the maxis bank. Which is violating the right to property under article 19 (1) (f) of the constitution of Gariba by not encasing the bank guarantee after the award is given in favour of JCI. Also the freedom to carry on trade and commerce has been restricted under article 19 (1) (g) of the constitution as by not encasing the said bank guarantee the JCI is not able to carry on its business even the award has been given in favour of the JCI.

In **EXCEL WEAR VS UNION OF INDIA**⁵ the sc held that the court emphasized on nationalism and state ownership of industries, private ownership is recognised, private enterprise forms an overwhelming large portion of economic structure.

In the matter at hand by not encasing the bank guarantee the private enterprises that is JCI is deprived of their rights and in this way it's not promoting the private enterprises but also violating their fundamental rights.

(i)Whether introduction of litigation in the arbitral process and pendency of section 34 is against the basic principle of arbitration?

POSITIVE introduction of litigation in the arbitral process and pendency of section 34 is against the basic principle of arbitration .As the contract contained a clause related to arbitration in the present matter at hand as the parties by the mutual consent were ready to solve the dispute without going into litigation which involve huge pendency and delay which is the basic object of the arbitration and by involving into litigation the right of the JCI is been violated that instead of justice to be provided justice was denied.

⁵ 1979 AIR 25, 1979SCR (1) 1009

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In **FAZALALLY JIVAJI RAJA vs KHIMJI POONJA & COMPANY**⁶ the Bombay High Court has observed that the law of arbitrations based upon principle of withdrawing the dispute from the ordinary courts and enabling the parties to substitute a domestic tribunal for adjudication. The essence of arbitration is that it is an arbitral tribunal which decides the case. Under section 2 (a) of the Arbitration and Conciliation Act 1996 the definition of arbitration is given which states that arbitration is a settlement of differences or disputes by mutual understanding or agreement by the parties where rights and liabilities of parties are determined in judicial point of view which are binding on parties such settlement may be before the arbitral tribunal but not by the court of law. The basic reason of this act is to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court. In the present matter at hand the arbitrator has given its award in favour of the JCI but still the bank guarantee was not encased in favour of the JCI by the Maxis Bank.

In **T.P GEORGE VS STATE OF KERALA**⁷ the Supreme Court considered the reasonableness of the award and the High Court has wrongly interfered by saying that the view of the arbitrator has been unreasonable. The SC held that impugned judgement of the HC is not sustainable.

SECTION 34 deals with application for setting aside arbitral award which is against the basic principle of arbitration and the petitioner humbly prays before this Hon'ble court that section 34 violates the constitution and should be declared unconstitutional.

⁶ AIR 1934 BOM 476

⁷ AIR 2001 SC 816: 2001 (2) JT 438

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POSITIVE the pendency of cases and further delay leads to violation of country's bilateral commitments under various conventions and investment treaties .In the matter at hand there is a commitment made to amersian development bank regarding the repayment of loan which is been pending due to the litigation process going on as the HC as admitted the matter under sec 34 and the foreign investors who had invested the amount for the development of state in jeopardy contracts inc. are suffering huge losses in terms of money .Compared to several developing economies India is definitely considered a much safer jurisdiction to invest. Investors do not have to worry about issues like nationalization, rampant expropriation, politically motivated and forceful confiscation and redistribution of private property etc. But, still there are several crucial issues where investors in India would like or rather need to seek protection and security. So the petitioner no 1 humbly prays that the litigation process should not be allowed when the parties in the contractual clause have clearly mentioned about their intention to resolve their dispute under arbitral tribunal.

(iii) Whether pendency of petition of sec.34 takes away the fruits of the award?

POSITIVE - pendency of petition of sec.34 takes away the fruits of the award --- justice delayed is justice denied as it violates the basic structure of the constitution of Gariba to provide justice to the people. Delays in the judicial process in not unheard of in India. The Indian Legal System is fraught with delays which many a time makes the investors wary of choosing India as the investment venue despite the lucrative prospects it entails for foreign investment. With statistics suggesting that the average pendency time of a case in the Indian Judiciary is fifteen years the investors are apprehensive about the fate of their investments should it so happen that

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they face a suit in India. The delay in Indian judicial system is due to numerous reasons such as acute shortage of judges, lengthy and cumbersome procedure for a suit, unnecessary adjournments sought by the parties. Thus, the undue and unreasonable delays in justice necessitate that an investor before investing in India In the matter at hand the petitioner is been denied from getting justice even the award has been pronounced in favour of the JCI still the maxis bank is denying to deposit the performance bank guarantee in favour of the JCI.

(iv)Whether or not grant of automatic stay without adjudication on prima facie case causes irreparable injury?

POSITIVE grant of automatic stay without adjudication on prima facie case can be considered in the present case as the High Court has admitted the matter under section 34 of the arbitration and conciliation act 1996 and maxis bank is refusing to Ancash the bank guarantee in favour of the JCI as the matter is admitted before the High Court which is violating the rights of JCI in the matter at hand .The petitioner no 2 humbly prays before the Hon'ble High Court that the petition admitted under sec 34 is violating the fundamental rights that is freedom to carry trade and commerce 19 (1) (g) and as money under bank guarantee is an important part in paying the debts as it is clearly mentioned in the facts that the JCI needs to pay the loan amount to amerasian development bank as there is a lot of pressure from this bank regarding the repayment of loan amount. the award was pronounced on 21.1.2015 in favour of JCI by the arbitrator and on 24.1.2015 JCI wrote to return the money pertaining the performance of bank guarantee in its fixed deposit but the maxis bank refused on 27.01.2015 s they were having a mala fide intention to return the said amount as the petition was admitted after 4 days from the date of pronouncement of judgement by the arbitrator. As per the provision of the civil procedure code order 21 rule 26 it states that when a court can stay execution only when a sufficient cause has been shown .

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K. LAKSHIAMMAL vs D.S NAGALAKSHMI⁸ it was held by sc that rule 26 CPC seeking for stay of the execution proceedings without satisfying the requirements as contemplated under Order 21 Rule Order 21 Rule 26 CPC. Therefore, the petitioner is not entitled to seek protection under Order 21 Rule.

In the matter at hand the respondent no 2 has failed to show the reason for stay of the decree passed by the arbitrator. So the petitioner humbly pleads before the Hon'ble court that there is a mala fide intention on the part of maxis bank to not return the bank guarantee and its ultimately violating the rights of the JCI. So the petitioner no 1 humbly prays that the litigation process should not be allowed when the parties in the contractual clause have clearly mentioned about their intention to resolve their dispute under arbitral tribunal.

3. Whether issuing of the ordinance by the Governor is ultra vires ?

POSITIVE the issuing of ordinance is ultra vires to the constitution of Gariba as promulgated by the Governor in the state of Nirdhan which amended the panchayti raj act 1994 section 19 qualification for election as a panch or a member Under article 213 of constitution of Gariba the Governor is vested with the power of making ordinance similar to that of president under article 123 of the constitution of Gariba .the Governor can issue ordinance only when the Governor is satisfied that the circumstances exist which render it necessary for him to take immediate action .

In **UNION OF INDIA v ASSOCIATION FOR DEMOCRATIC REFORM WITH PEOPLES UNION FOR CIVIL LIBERTIES vs UNION OF INDIA**⁹, where the Court held the act of voting to be a form of freedom of expression (a fundamental right under Article 19(1)(a)). However, the position on the right to contest remains unchanged – it is still to be only a statutory right. In the matter at hand there is no such immediate circumstance can be derived

⁸ ILR 2012 MHC 2370 HC MADRAS

⁹ 2002 5 SCC 294

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from the facts of the case where there is an emergency situation to issue the ordinance by the Governor. Given the timing - mere days before panchayat polls and while the courts are on vacation the ordinance is in effect an executive fiat. An ordinance ought to be promulgated only in instances of great emergency when the legislature is not in session. However in this case, bringing the ordinance just before panchayat polls means that the legislature will have no scope for rejection or amendment since the polls would have already concluded with these conditions in place - and would necessarily have to rubber-stamp what is in effect an executive decision. So its very crystal clear that the legality of the ordinance is thus under question not just because of the substantive changes made by it, but also in its nature and timing.

In **JAVED VS STATE OF HARYANA**¹⁰, the Court rejected a challenge to a statutory provision disqualifying potential Panchayat election candidates with more than two children. The Court first rejected contention based on Article 14 (equality before law) by reasoning that it satisfies the tests of intelligible differentia and rational nexus to the Statute's object. However, with respect to the contentions based on Article 21 (right to life) and Article 25 (freedom of religion), the Court endorsed the decision in *Lachhi Ram*.

Equally, the ordinance goes against the very tenet of the 73rd Constitutional amendment, which provided for local self-governance in rural areas. The Constitutional amendment, passed by the Parliament and ratified by state legislatures, did not moot any sort of educational qualification to be eligible to contest elections and instead provided reservation for marginalised social groups such as Dalits and women to ensure their participation in the political process. By setting arbitrary standards, which will exclude majority of the people from these very communities.

¹⁰ 2003 8 SCC 369

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Thus the petitioner no 1 humbly prays before the Hon'ble court that the ordinance issued by the Governor should be declared void ab initio and unconstitutional as it is violating the rights of the people under article 14 right to equality that is contest election and also the freedom of expression guaranteed under article 19 (1) of the constitution of Gariba.

(i) whether non availability of a notified vacation bench and notified procedure for listing during any holidays is unconstitutional ?

POSITIVE non availability of a notified vacation and notified procedure for listing during any holiday is unconstitutional as the petitioner has reached well before the time before the issuance of election notification but due to the winter vacation there was no proper procedure to approach the court which ultimately affects the right of the people, as the ordinance passed by the Governor was unconstitutional and ultra vires. The petitioner humbly prays that the right to constitutional remedies under article 32 given by the constitution of Gariba is been violated as there is no way to approach to the Hon'ble court to enforce the fundamental right of people. In 2008, the Parliamentary Standing Committee on Law and Justice, headed by E.M. Sudarsana Natchiappan, in its 28th report tabled in Parliament, stated that "the system of vacations is a colonial legacy that has no relevance today." The report went on to say: "Given the huge pendency of cases at various levels, including at the Supreme Court, vacation is a privilege that the judicial system could hardly afford." It recommended that long court vacations were better done away with. In 2009, the Law Commission of India chaired by Justice AR. Lakshmanan, wrote in its report to the Union Law Ministry recommending an increase in the number of working days for judges in order to clear huge pendency of cases at all levels of the judicial hierarchy. "Of late, there has been a general erosion of work culture throughout the country. Government servants avoid discharging their duties and responsibilities. The judiciary has also been affected by this evil.

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(ii) Whether non grant of listing before the issuance of election notification affects the merits of the case ?

POSITIVE non grant of listing before the issuance of election notification affects the merits of the case as the ordinance was issued a week before the publication of election notification and at that time winter was there so there was no proper procedure for listing and filing was not present so the petitioner was aggrieved by the ordinance of the Governor and was left with no remedy and the basic feature of the constitution of Gariba is to provide remedy, justice .The petitioner humbly prays before the Hon'ble court that now the election notification has been already issued and the ordinance which is ultra vires to the constitution of Gariba should be set aside and should be declared unconstitutional. The merits of the case is not affected as the ordinance was void ab initio and ultra vires to the constitution of Gariba which does not flow any rights from it so the court should set aside the ordinance which is affecting the rights of the people at large.

(iii) Whether ordinance issued by Governor violates part IX of constitution and is retroactive?

POSITIVE ordinance issued by Governor violates part IX of constitution and is retroactive as by imposing the restriction on the people to participate in the election process. The constitution of Gariba seventy third amendment 1992 has been enacted to strengthen the panchayats system in villages in a bid to strengthen the democratic institution. Article 243 d (1) mandates that seats be reserved for the scheduled caste and scheduled tribes in every panchayat .In the present matter the seats are reserved but with restriction imposed on them by differentiating on the basis of literacy with very less time left for the election. Article 243d (6) a state legislature may make any provision for reservation of seats in any panchayat or offices of chairpersons in the panchayats at any level in favour of backward class of citizen.

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In **KRISHNA KUMAR MISHRA vs STATE OF BIHAR**¹¹ the patna HC held that it is well within the domain of the legislative to determine as to who is the backward class and the caste can be one of the factors for such determination. In the present matter the Governor has failed to look into basic provision of the constitution of Gariba that the backward people should be uplifted and in this case the Governor instead of uplifting has degraded their level .

(iv) Whether the ordinance violates the fundamental rights or any other provisions given to the people in the Constitution?

POSITIVE the ordinance violates the fundamental rights given to the people in the Constitution also also the basic feature embedded in the constitution of Gariba .The petitioner no 1 humbly prays before the Hon'ble High Court ,that the ordinance goes against the very tenet of the 73rd Constitutional amendment, which provided for local self-governance in rural areas. The Constitutional amendment, passed by the Parliament and ratified by state legislatures, did not moot any sort of educational qualification to be eligible to contest elections and instead provided reservation for marginalised social groups such as Dalits and women to ensure their participation in the political process. By setting arbitrary standards, which will exclude majority of the people from these very communities. By introducing such a discriminatory disqualification criteria, it excludes the rest of the non-literate women from the possibility of exercising their political right to contest elections thereby defeating the very purpose of the reservation of seats for women in the Delhi Panchayati Raj Act. By issuing such an Ordinance the state government is absolving itself of its primary responsibility of realizing the Right to Education Act.. Many of the current potential candidates have voiced their discontent and anger at being excluded from accessing their fundamental rights.

¹¹ AIR 1996 PAT 112

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In the light of the issues raised , arguments advanced and Authorities cited , it is most humbly and respectfully pleaded to this most honourable court to adjudicate and declare that -

- 1. To allow the petition no 2 and declare section 34 of arbitration and conciliation act 1996 as unconstitutional.**
- 2. To allow petition no1 and declare ordinance issued by Governor as ultra vires to the constitution of Gariba.**
- 3. The Court may grant any provisional relief as deemed fit by the Court .**

The counsel for petitioner also plead the honourable court to pass any other judgement , or which the court deems faith in the light of justice , equity and good conscience.

And for this act of kindness , the petitioner shall as duty bound ever humbly pray.

Respectfully Submitted

Place - High Court of Nirdhan

Counsel for the Petitioner