JUSTICE R.K. TANKHA MEMORIAL MOOT COURT COMPETITION 2015

Team Code – **N**

BEFORE THE HONOURABLE HIGH COURT OF NIRDHAN

Writ Petition (Civil) No. 999/2015 and 1021/2015

(Filed under Article 226 of The Constitution of Gariba, 1950)

People's Union for Liberties & Democratic Reforms and JCi

Versus

Republic of Gariba and Maxis Bank

Written Submission on behalf of the Petitioner

Counsel for the Petitioner

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STATEMENT OF JURISDICTION

The Petitioner has approached the Hon'ble High Court of Nirdhan under Art. 226 of the Constitution of Gariba, 1950.

226. Power of High Courts to issue certain writs

(1) 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

Nirdhan a desert state of the Republic of Gariba was considered as backward till 2011. Pursuant to a scheme devised for construction of highways and arterial roads by private parties, Jeopardy Contracts Inc. [JCi] entered into a contract with Jodhpur Gaon Panchayat Samiti [JGPS] for the construction of 115 Kms of road in a scheduled area of Nirdhan. However, due to certain issues at the time of culmination of the project the contract was terminated by JGPS on 21.9.2013.

JCi sent a legal notice on 11.12.2014 for invoking arbitration as per contractual clause and asking for 'termination payment'. In reply JGPS' counsel informed that the matter is covered under the Madhyastham Adhikaran Adhiniyam, 1983, and therefore no institutional arbitration can take place. JGPS also invoked the performance bank guarantee on 12.12.2014 by sending an email after business hours to the Maxis bank.

On 13.12.2014, JCi moved the High Court of Nirdhan by filing an urgent civil writ petition being WP (C) No. 99/2014. On 15.12.2014, the High Court took this matter and granted "…an ad-interim ex-parte stay on invocation of bank guarantee if not already encashed….", and also directed "…all further action in this regard by all parties to remain subject to the outcome of the proceedings…", with directions to immediately furnish copy by all means to the concerned parties. By 11.00 am, the copies of the order were served upon JGPS, and the Maxis Bank. However, at 10.00 am, the branch manager of the Jodhpur Gaon branch of Maxis bank had acted on the email of JGPS and encashed the bank guarantee. At 10.01 am, as a result of a massive security breach in the systems of the Maxis Bank all transactions-in-progress were stalled.

Subsequently, disposing the writ petition the High Court directed the parties to arbitration. The arbitration culminated into an award dated 21.1.15 in favour of JCi. JGPS filed an application under sec. 34 for setting aside the award. On 24.1.15 JCi wrote to Maxis Bank

demanding the money pertaining to the bank guarantee. However, the same was denied by the bank on the ground of strict compliance with RBI norms, and that the admission of the petition under section 34 amounted to an automatic stay on the award and that the invocation was prior to the stay order of the Court. On refusal by the bank, JCi moved the High Court challenging the constitutional validity of Sec. 34, by way of a writ petition, being WP 999/15.

In the meanwhile, the Governor of Nirdhan, on 20.12.14, promulgated an Ordinance which came into effect from 24.12.14, which amended the Nirdhan Panchayati Raj Act, 1994 as under:

"19. Qualification for election as a Panch or a member- *Every person registered as a voter in the list of voters of a Panchayati Raj Institution shall be qualified for election as a Panch or, as the case may be, a member of such Panchayati Raj Institution unless such person-*

(r) in case of a member of a Zila Parishad or a Panchyat Samiti, has not passed school examination of the Board of Secondary Education, Nirdhan or of an equivalent Board;

(s) in case of Sarpanch of a Panchayat in a Scheduled Area, has not passed class V from a School in Nirdhan; and

(t) in case of a Sarpanch of a Panchayat other than in a Scheduled Area, has not passed class VIII from a School in Nirdhan;"

People's Union for Liberties & Democratic Reforms moved the High Court of Nirdhan on 29th Dec. for an urgent listing, challenging the validity of the Ordinance as violative of inter alia, basic fundamental and constitutional rights, since the election notification was to be issued on the 3rd of January, 2015.

On being denied the listing, 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, no listing was granted till the issuance of election notification. Upon listing, the Apex Court was pleased to observe that the matter could now be heard by High Court of Nirdhan. People's Union for Liberties & Democratic Reforms consequently moved the Hon'ble High Court of Nirdhan via a pro-bono petition WP (C) No. 1021/15.

STATEMENT OF ISSUES

1. WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT OF 1996 IS UNCONSTITUTIONAL?

2. WHETHER THE NON AVAILABILITY OF A NOTIFIED VACATION BENCH OR A NOTIFIED PROCEDURE FOR LISTING DURING HOLIDAYS IS UNCONSTITUTIONAL?

3. WHETHER THE ORDINANCE IS VIOLATIVE OF THE CONSTITUTION OF GARIBA?

SUMMARY OF ARGUMENTS

1) **Section 34 of the Arbitration and Conciliation Act of 1996 is unconstitutional.**

The Submission in this regard is three fold. Firstly, it amounts to introduction of litigation into arbitration. Secondly, an application under it leads to an automatic stay on the arbitral award without adjudication on a prima facie case. And thirdly, the delay caused in enjoying the fruits of the award lead to indirect 'expropriation'.

2) **Non-availability of a notified vacation bench or a notified procedure of listing during holidays is unconstitutional.**

It is prayed in this regard that the issue involving a substantial question of law as to the interpretation of the Constitution, the non-availability of a duly constituted and competent vacation bench was unconstitutional. The procedure adopted by the Vacation Officer was arbitrary and thus, unconstitutional. Finally, non-grant of listing cannot affect the merits of the case as the Court was moved well in time.

3) **The Ordinance is violative of the Constitution of Gariba.**

The Ordinance is against the basic tenets of the 73rd amendment to the Constitution which provides for reservation for the marginalised sections of the society in the Panchayati Raj Institutions and their participation in the democracy. It marginalises the weaker sections and is thus, violative of Article 14 and 19 (1) (a) of the Constitution of Gariba.

ARGUMENTS ADVANCED

1) Section 34 of the Arbitration and Conciliation Act of 1996 is Unconstitutional.

It is humbly submitted that section 34 of the Arbitration and Conciliation Act, 1996 is beyond the object and purpose sought to be achieved by the Act, which is considered as an alternative dispute redressal mechanism for speedy disposal of disputes. Lord Coke in the landmark judgement of ***Heydon's case***[1] laid down the following 4 points to be taken into consideration to arrive at the real meaning of a statute:-

(i) What was the law before the Act was passed.

(ii) What was the mischief or defect for which the law had not provided

(iii) What remedy parliament has appointed

(iv) The reason for the remedy.

The Arbitration and Conciliation Act, 1996 was introduced in place of the 1940 Act to minimise the intervention of courts in the arbitral process and to provide for a speedy dispute redressal mechanism. This is also supported by the 'main objectives' for introduction of the Arbitration and Conciliation Act, 1996 which include:-

> *. . . (ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the need of the specific arbitration.*
>
> *(v) to minimise the supervisory role of courts in the arbitral process. . . .*

It is also submitted that a statue is an edict of the legislature and the conventional way of interpreting or construing a statute is to seek the 'intention' of its maker. A statute is to be

[1] (1584) 3 Co. Rep. 71: 76 ER 637.

construed according "to the intent of them that make it" and" the duty of judicature is to act upon the true intention of the legislature - the mens or sentential legis.[2]

Going by the wordings of the objects, it can be seen that the Arbitration and Conciliation Act, 1996 was essentially conceived to provide for 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. However a challenge under section 34 makes the award un-executable and such petitions remain pending for several years. The object of quick alternative disputes resolution thus stands frustrated.

The Delhi High Court has also in the case of ***Décor India P. Ltd. v. National Building Construction Corporation Limited***[3] noted 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.*

It is also submitted that the object of minimal interference by courts in the arbitral process is enshrined in section 5 of the Arbitration and Conciliation Act, 1996, which reads as follows:-

'Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.'

Section 5 of the Arbitration and Conciliation Act brings out clearly the object of the Act, namely that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement the Courts' intervention should be minimal.[4]

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[2] Bharat Heavy Electricals Ltd. v. C.N. Garg and Ors., 2001(57) DRJ 154 (DB), para. 8

[3] 142 (2007) DLT 21, para. 13

[4] P. Anand Gajapathi Raju v. P.V.G Raju, AIR 2000 SC 1886, para. 4

The Law Commission also in its report on Amendments to Arbitration and Conciliation Act[5] has noted that 'judicial intervention in arbitration proceedings adds significantly to the delays in the arbitration process and ultimately negates the benefits of arbitration. Two reasons can be attributed to such delays. *First*, the judicial system is over-burdened with work and is not sufficiently efficient to dispose cases, especially commercial cases, with the speed and dispatch that is required. *Second*, the bar for judicial intervention (despite the existence of section 5 of the Arbitration and Conciliation Act) has been consistently set at a low threshold by the Indian judiciary, which translates into many more admissions of cases in Court which arise out of or are related to the Act.'

It is thus submitted that making an appeal under section 34 not only escalates the cost and time of the arbitral process but also makes it a clone of litigation.

Automatic stay on enforcement of Arbitral award is bad in law.

As per section 36 of the Arbitration and Conciliation Act, 1996 an arbitral award becomes enforceable as a decree only after the time for filing a petition under section 34 has expired or after the section 34 petition has been dismissed. Thus the moment an application under section 34 is filed, the award becomes un-executable without adjudication on prima-facie case, balance of convenience and irreparable injury. Admission of a section 34 petition, therefore, virtually paralyzes the process for the winning party.

It is submitted that under the Indian Legal System the law relating to injunction has been provided in the Specific Relief Act, 1963. In ***Agricultural Produce Market Committee Case***[6], the Hon'ble Apex Court has held that "a temporary injunction can be granted only if the person seeking injunction has a concluded right, capable of being enforced by way of

[5] Law Commission of India Report No. 246 (Amendments to Arbitration and Conciliation Act, 1996), Aug 2014, pg. 15, para. 22

[6] Agricultural Produce Market Committee Vs. Girdharbhai Ramjibhai Chhaniyara – AIR 1997 SC 2674, para. 7

injunction." The Hon'ble Apex Court has also in plethora of judgments like the landmark judgment in ***Gujarat Bottling Co. Ltd. Case***[7], held that the Court needs to follow certain guidelines while considering an application for grant of temporary injunction, such as, the applicant seeking relief of temporary injunction shall have to establish a prima facie case in his favour; the balance of comparative loss caused to the applicant and the Respondent in the case of not passing the order; the extent of loss that would be caused to the applicant if the order is not passed and also whether it is reparable by monetary compensation; and the loss suffered by Respondent if the order is passed and thereupon it has to see which loss will be greater and irreparable.

It is submitted that under the Arbitration Act however an award becomes un-executable merely on filing of an application under section 34 even though there is no concluded right of the person filing the application.

This situation was criticized by the Supreme Court, in ***National Aluminum Co. Ltd. v. Pressteel & Fabrications***[8] 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 section 34 of the 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."

To correct this mischief the **Law Commission in its 246th Report**[9] has proposed to amend section 36. The proposed section requires filing of a separate application (other than the one filed under section 34) for the purpose of seeking stay on the arbitral award. It also requires that the Court while considering the grant of stay shall have due regard to the provisions for grant of stay of money decrees under the Code of Civil Procedures, 1908.

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[7] Gujarat Bottling Co. Ltd. Vs. Coca Cola Co. – AIR 1995 SC 2372

[8] (2004) 1 SCC 540, para. 11

[9] Ibid. n. 5, pg. 56, para. 19

Delay in the enforcement of Arbitral Award amounts to Expropriation.

It is humbly submitted that the Arbitral Award constitutes 'property' in the hands of the Petitioner and the delay caused by section 34 in enforcement of the award takes away the fruits of the award and thereby amounts to 'expropriation'.

The Black's Law Dictionary defines property as *'belonging to a person or persons and not to a community.'* The term expropriation however has not been precisely defined. The 1961 'Harvard Draft Convention on International Responsibility of States for Injuries to Aliens' defines expropriation as '*any such unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property …*'[10].

In ***Metalclad Corporation* v. *United Mexican States***[11], the Tribunal noted:

"*expropriation includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*"

It is also important to note that even where an action is unintentional it would amount to expropriation. The form of the measures of control or interference is less important than the

[10] Sohn & Baxter, *Convention on the International Responsibility of States for Injuries to Aliens*, *Draft No. 12*, 55 AM. J. INT'L. L. 545 (1961).

[11] Metalclad Corporation v. United Mexican States ICSID Case No. ARB (AF)/97/1 para. 103.

reality of their impact. [12] What is to be seen is the effect of the governmental action to determine whether an expropriation has occurred, rather than the intention of the state.[13]

Article 5(1) of the Model Text of Bilateral Investment Promotion and Protection Agreement of Gariba reads as*: 'Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation. . .'*

Now, the words 'subjected to measures having effect equivalent to expropriation' used in Art. 5(1) would also include delaying the enjoyment of the fruits of the award by filing an application under section 34.

It is thus humbly submitted that filing an application under section 34 is neither for a public purpose nor against fair and equitable compensation. It amounts to unreasonable interference with the Petitioners 'property' thereby causing indirect expropriation which is against the bilateral and multilateral commitments of the Republic of Gariba.

2) <u>Non availability of a notified vacation bench or a notified procedure for listing during holidays is unconstitutional.</u>

It is humbly submitted that an urgent matter like the one at hand that involves a substantial question of law as to the interpretation of the Constitution can come up at any time during the year, even during the annual winter break and the absence of any vacation bench or a

[12] Tippets, Abbet, McMcarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, the Government of the Islamic Republic of Iran (1983) Iran-USCRT 219, 226

[13] CME v. Czech Republic Case No.10435/AER/ACS para. 604; Lauder v. Czech Republic 2001 WL 34786000 para. 200

vacation procedure to be followed in such matters would result in grave injustice to the aggrieved party which is against the basic structure of the Constitution.

It is prayed that having being denied listing by this hon'ble Court, the Petitioners duly moved the hon'ble Apex Court, through the notified vacation officer, without any delay.

However, the procedure that was followed by the hon'ble Apex Court for listing the matter was arbitrary which caused an unwarranted and undue delay in considering the issue. Even after moving the Court well in time, the time it took to intimate the Petitioner about the matter of such urgent nature, defeats the very purpose of providing for listing of urgent matters in the rules of the Court. Thus, in the absence of any procedure providing for a systematic flow of information from the Hon'ble Chief Justice to the Petitioner, it will inevitably lead to chaos and confusion and thereby defeat the very purpose of approaching the Court for justice.

It is also prayed that the matter was not listed in the Apex Court for hearing till after the vacations were over. Thus, the very purpose of approaching the Court in time under such urgency was defeated since the impugned election notification had already been issued by then. Non grant of listing till after the holidays were over violates the principle of *audi alteram partem,* since the delay in deciding on the application defeated the purpose of approaching the Court urgently and thereby condemning the Petitioner unheard. The principle is grounded in Article 14 of the Constitution, thereby, also amounting to a violation of Article 14 of the Constitution.

Now given the fact that the matter involved a substantial question of law as to the interpretation of Constitution, there should have been a hearing by a bench of the Court. The absence of any such bench defeats the purpose of approaching the Court in such matters and is thus, unconstitutional.

It is prayed before the hon'ble Court that as per Article 145 (3) of the Constitution of Gariba:

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"The minimum number of judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution…shall be five…"

Now it is prayed that as per Rule 6(5) of Order VI of the Supreme Court rules 2013, a single judge presiding over the urgent matter is incompetent to hear matters involving substantial question of law as to the interpretation of the Constitution.

As per Rule 6 of Order II, the jurisdiction of a bench constituted by the hon'ble Chief Justice to hear urgent matters during holidays is also restricted to the powers of a single judge. Thus, it is submitted that in view of the above, the absence of a duly constituted and competent vacation bench is unconstitutional.

Lastly, it is prayed before this Court that 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. The procedural delay on the part of the Court should not result in injustice to the Petitioner and should not have a bearing on the facts of the case.

The maxim *actus curaie neminem gravabit* holds true in the present case as per which 'an act of court shall prejudice no one'. The Supreme Court, in a case, while interpreting certain provisions of the IPC observed: *"The Code imposes an obligation on the aggrieved party to take recourse to appropriate forum within the period provided by law and once he takes such action, it would be wholly unreasonable and inequitable if he is told that his grievance would not be ventilated as the Court had not taken an action within the period of limitation. Such*

interpretation of law, instead of promoting justice would lead to perpetuate injustice and defeat the primary object of procedural law."[14]

Thus, it is prayed before this Court, that the Petitioner did everything within its power to seek justice. However, due to the delays, laches and adoption of unconstitutional practices by the Court, the ends of justice could not be met.

3) The Ordinance being violative of Art. 14 and 19(1)(a) of the Constitution is unconstitutional.

It is humbly submitted before the hon'ble Court that the promulgation of the Ordinance by the Governor of Nirdhan is a strategically timed move. The Ordinance was promulgated on 20th December 2014 and came into effect from 24th December 2014. Given the timing – mere days before the Panchayat polls and while the Courts are on annual winter vacation – the Ordinance is in effect an executive arbitrary order.

(i) Ordinance is against the tenets of the 73rd amendment to the Constitution of Gariba:

As per Article 213(1) of the Constitution of Gariba, an Ordinance ought to be promulgated only in instances of necessity and when the legislature is not in session. Also the Ordinance route is an interim measure and must be ratified by the legislature.

As per the provisions of Article 213 (2) (a) of the Constitution of Gariba, 1949:

"An Ordinance promulgated under this article shall have the same force and effect as an Act of Legislature of the State assented to by the Governor, but every such Ordinance-

[14] Japani Sahoo v. Chandra Sekhar Mohanty AIR 2007 SC 2762 (para 51)

(a) Shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed by the Legislative Council, if any, upon the passing of the resolution or as the case may be, on the resolution being agreed to by the Council";

This means that there is scope for both rejection and amendment. However, in the present case, bringing the Ordinance just before the election notification 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.

As per Article 243E (2) of the Constitution:

"No amendment of any law for the time being in force shall have the effect of causing dissolution of a Panchayat at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1)".

Now it may be worth mentioning in this regard that upon reassembly of the Houses, even if a resolution is passed rejecting the Ordinance or accepting it with modifications, the elections to the Panchayat would have already concluded by then. By virtue of the above mentioned Article 243E (2) any such amendment would have no effect on the tenure of the already elected body. This would in essence mean promulgation of Ordinance for 5 years instead of 6 months.

It is also pertinent to note that a political party is using executive power to change an electoral law by explicitly bypassing the state assembly. The State has acted in colourable exercise of power with an oblique purpose to disqualify and exclude a large section of

population living in rural areas from the election process. The Ordinance is violative of the core constitutional philosophy of democratic governance which is based upon equality of status and opportunity, featuring in the preamble to the Constitution.

Panchayats were recognised as constitutional bodies pursuant to the 73rd Amendment Act, 1992 to give effect to the objects and purpose of the amendment. Of the objects of the amendment, one of the most important object was to prevent marginalisation of women and the weaker sections and to provide an opportunity for representation to women, SCs, STs and the other weaker sections of the society. The amendment did not moot any sort of educational qualification to be eligible to contest elections and instead provide reservation for marginalised social groups to ensure their participation in the political process.

The Ordinance, however, goes against the very tenets of the amendment. By setting arbitrary standards, majority of people from these communities will be excluded and the Constitutional and the collective will of the citizenry will be subverted.

It is humbly prayed before this court that the Constitution of Gariba, or the Representation of the People Act, 1951, do not provide for disqualification on the ground of any educational qualifications for contesting the elections for MLA or MP. There is no educational qualification prescribed for the Cabinet Ministers, Prime Minister, or even for the President of Gariba.

By imposing educational qualification, women would be the most excluded section because owing to social and cultural reasons, girls are most discriminated against in getting education. By excluding women the cause of women would be further understated. Women in rural areas are often discouraged from pursuing education. This would only widen the gap between men and women in the future. Reserved seats for women will not be filled.

In most of the rural households, the male members often migrate to urban towns for better opportunities and it is the women who are closer to the ground to be better administrators. Thus, by causing disadvantage to women in the elections, the Ordinance will also lead to ineffective local administration. Therefore, all central and state initiatives taken towards gender equality may get adversely affected in their implementation at the grassroots.

Its introduction would be effective only when both genders are at a level playing field as regards access to education.

Most of the people in villages will be ineligible given the educational qualifications. This would leave people with a very limited choice and hence lesser pressure on the elected members to perform. The role of elected member at the Panchayat level is primarily problem solving in the local context that he/she is best aware of. For this, education is not a stringent requirement. Unlike an MP or MLA, the PRI member is very locally grounded. The issues engulfing the village society do not require technical and professional knowledge but rather the awareness of the ground realities and the coordination of the various activities and the people.

There is merit in the argument that a public official should be able to understand the documents he/she is handling. However, this understanding is related to literacy (the ability to read and write with understanding) and not some arbitrarily defined standards of education attainment. By this Ordinance the government has chosen to disenfranchise the rural populace who have not had the opportunity to study due to class, gender, caste and region based marginalisation in what can only be seen as double punishment.

Important issues such as this that affect the polity and the very fabric of the constitution should mandatorily be put through the democratic decision making process, wherein people

have access to the proposed legislation and can express their opinion and the legislature has an opportunity to debate and ratify.

It is also prayed that benchmarking the qualification is no guarantee of good governance. As a matter of fact, the head of JGPS, despite lacking formal education, pointed out flaws in the structural designs submitted by the highly qualified engineers and saved hundreds of lives for which he was awarded by reputed national and international dailies. Also the Eleventh Schedule to the Constitution recognises Adult and non-education as one of the objects to be achieved. The Ordinance defeats the purpose of including the entry in the schedule.

If this Ordinance is given a go ahead it will make panchayati raj institutions elitist, gender-biased and out of reach of people whose talents and capabilities do not have a certificate of formal education.

(ii) Violative of Article 14 of the Constitution of Gariba:

It is humbly submitted before this hon'ble Court that the Ordinance is violative of Article 14 of the Constitution of Gariba.

Article 14 provides that, "The State shall not deny to any person equality before the law or the equal protection of the laws…"

The Gravamen of Article 14 is equality of treatment. Equality is the basic feature of the Constitution. The concept of equality is not a doctrinaire approach. It is a binding thread which runs through the entire constitutional text.[15]

Differential treatment does not *per se* constitute violation of Article 14. It violates when there is no *reasonable basis* for the differentiation.[16]

[15] Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697, 764 (para 118)

[16] Ameeroonisa Begum v. Mehboob Begum, 1953 SCR 404 (414)

Black's Law Dictionary defines "reasonable" as "fair, proper, just, moderate, suitable under the circumstances" and "fit and appropriate to the end in view."[17]

The constitutional requirement for judging the question of reasonableness and fairness on the part of the statutory authority must be considered having regard to the factual matrix obtaining in each case. It cannot be put in a straightjacket formula.[18]

It is prayed before the honourable Court that the Ordinance makes an *unreasonable* classification. It is unclear how the government arrived at the 5th and 8th pass qualification and what separates the candidate who has passed the 5th grade from the one who has passed the 8th grade or what separates a candidate who has passed the 7th grade from one who has passed the 8th grade.

In order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that such differentia has a rational relation to the object sought to be achieved by the Statute in question.[19]

Now, what is necessary is that there must be a *nexus* between the basis of classification and the object of the Act under consideration.[20]

A Constitution Bench had an occasion to consider the test of reasonableness under Article 14 of the Constitution. It noted in this regard that the object itself should be lawful and it cannot be discriminatory. If the object is to discriminate against one section of the minority, the

[17] Black's Law Dictionary 1138 (5th ed. 1979).

[18] M.P Gangadharan v. State of Kerala (2006) 6 SCC 162, 174 (para 34)

[19] Dharam Dutt v. Union of India, (2004) 1 SCC 712, 747 (para 56)

[20] State of W.B v. Anwar Ali Sarkar, (1952) SCR 284 (para 320)

discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved.[21]

In the present case the classification goes against the very purpose of recognising Panchayats as constitutional bodies of self-government. It is in furtherance of the vision of the 73rd amendment that reservations were made for representation of the marginalised sections of the society. If, however, such disqualifications are incorporated then majority of socially backward classes of people will be thrown out of the political system. They will have no opportunity to participate in the democracy. Educational qualifications have no nexus with the ultimate objective and vision of the enactment.

If the government fails to support its action of classification on the touchstone of the principle whether the classification is reasonable having an intelligible differentia and a rational basis germane to the purpose, the classification has to be held as arbitrary and discriminatory.[22]

It may also be mentioned here that in another leading case the Court reiterated the proposition that Article 14 strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. Whenever therefore, there is arbitrariness in State action, whether it be of the legislature or of the executive, Article 14 immediately springs into action and strikes down such State action.[23]

Article 14 applies to government policies and if the policy or the act of government even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.[24]

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[21] Nagpur Improvement Trust and Anr. V. Vithal Rao and Ors (1973) 1 SCC 500 (para 50)

[22] Sube Singh v. State of Haryana, (2001) 7 SCC 545, 548 (para 10)

[23] State of Tamil Nadu and Others v. K. Shyam Sunder and Others, (2011) 8 SCC 737 (para 50-53)

[24] Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd., (2007) 8 SCC 1, 21 (para 36)

If a measure tends to perpetuate inequality and makes the goal of equality a mirage, such measure should not receive the approval of the Court. The Court in such circumstances, has to mould the relief by indicating what would be the reasonable measure or action which furthers the object of achieving equality.[25]

If an action is arbitrary, there must be a denial of equality; Article 14 thus strikes at arbitrariness of State action in any form.[26]

Arbitrary action is described as one that is irrational and not based on sound reason or as one that is unreasonable.[27]Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision violative of the mandate of Article 14 of the Constitution.[28]

It is humbly prayed before this court that the Ordinance culminates into an arbitrary action. By further marginalising already marginalised sections of the society the Government is in fact creating multiple classes within the same society. What it is in fact also doing is separating those who are reasonably or sufficiently educated from those are educated up to the benchmark set by the Government.

Fixing district wise quota for admission for admission to B.Ed. without any material to show the nexus between such quota and the object to be achieved, the distribution of seats was held to be violative of Article 14.[29]

The Supreme Court has observed on an occasion that: Whereas larger interest of the country must be perceived, the lawmakers cannot shut their eyes to the local needs also. Such local

[25] Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697, 764 (para 118)

[26] Ajay Hasia v. Khalid Mujib Sehravardi, AIR 1981 SC 487 (para 16, 19)

[27] Om Kumar, Union of India, (2001) 2 SCC 386, 409 (para 59)

[28] Union of India v. Dinesh Engineering Corporation, (2001) 8 SCC 491, 498-99 (para 12)

[29] Govind A. Mane v. State of Maharashtra, AIR 2000 SC 1576 (para 6)

needs must receive due consideration keeping in view the duties of the State contained in Article 41 and 47 of the Constitution of India.[30]

The Ordinance does not only provide any benefit to the uneducated as per the Government's understanding but in fact inflicts a double punishment by stripping them of the basic fundamental right of equality, democracy and justice enshrined in the preamble. The Ordinance in fact operates on unequals equally which Article 14 explicitly prohibits.

(iii) Violative of Article 19 (1) (a) of the Constitution of Gariba:

Article 19(1)(a) of the Constitution is also pertinent for this matter:

Protection of certain rights regarding freedom of speech, etc.- (1) All citizens shall have the right-

(a) To freedom of speech and expression

Democracy is a part of the basic structure of the Constitution. Right to vote and Right to contest elections are political rights and way of participating in the democracy.

Freedom to vote goes hand in hand with freedom to contest elections. The Supreme Court in a leading case observed that true democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country.[31] Republican democracy is based upon the core idea that every citizen has the freedom to participate in the working of democracy, whether by voting or by standing for elected office.

The Supreme Court held that the right to vote at elections is a constitutional right and not merely a statutory right; Freedom of voting as distinct from right to vote is a facet of the

[30] Saurabh Chaudri v. Union of India, (2003) 11 SCC 146, 164-65 (para 39)

[31] Secretary, Ministry of Information and Broadcasting, Government of India and Others v. Cricket Association of Bengal and Others (1995) 1 SCR 1036 (para 82)

fundamental right enshrined in Article 19(1)(a).[32] Now the court in yet another case upheld the above mentioned ruling and held that casting of a vote is a facet of the right of expression of an individual and the said right is provided under Article 19(1)(a).[33] It observed further that even if the right to vote is statutory, the significance attached with the right is massive. Thus, it is necessary to keep in mind these facets while deciding the issue at hand.[34]

It is pertinent to note here that the right to run for office is an extension of the right to vote. They are two sides of the same coin and form the core of democratic participation. Also both have their origin in the constitution, though are regulated by statute. The logic of voting applies equally to the logic of running for office.

In this regard it is humbly prayed before this hon'ble Court that the Supreme Court distinguishes between the right to vote (statutory) and the freedom to vote (constitutional). By analogy then, freedom to run for office can be distinguished from the right to be elected. The former freedom is grounded in Article 19(1)(a). The legislature can prescribe the modalities of how elections are to be carried out. However, if the legislature makes a law that regulates or restricts not *how* the electoral process is to be carried out, but *who* is entitled to participate in it and actually disenfranchises sections of the population, it must be subjected to rigorous scrutiny.

Fundamental rights are not to be read in isolation. They have to be read along with the Chapter on Directive Principles of State Policy and the Fundamental Duties enshrined in Article 51A. Under Article 38 the State shall strive to promote the welfare of the people and develop a social order. Clause (2) provides for minimising the inequalities in income and endeavouring to eliminate inequalities in status, facilities and opportunities. Under Article 46

[32] Peoples Union for Civil Liberties v. Union of India (2003) 4 SCC 399 (para 123)

[33] Peoples Union for Civil Liberties & Anr. v. Union of India & Anr. (2013) 10 SCC 1 (para 24)

[34] Supra. (para 52)

the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular the constitutionally down-trodden. None of these lofty ideals can be achieved if the women and the weaker sections of the community are marginalised and singled out from participating in the democratic process.

The Ordinance violated the *freedom to run for office* by subjecting it to arbitrary limitations not provided for in the Constitution. Article 243F could not have provided for any such condition which may take away the right of self-governance.

PRAYER

In the light of the foregoing arguments, the Petitioner respectfully requests this Honourable Court to adjudicate and declare that:

1) Section 34 of the Arbitration and Conciliation Act, 1996 is unconstitutional.
2) Non-availability of vacation bench and a notified procedure for listing during holidays is unconstitutional.
3) Non grant of listing before the issuance of the election notification cannot effect the merits of the case.
4) The Ordinance is ultra-vires the Constitution of Gariba.

Any other order as it deems fit in the interest of equity, justice and good conscience.

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

Sd/-

(Counsel for the Petitioner)