

TEAM CODE-T

IN THE HIGH COURT OF JUDICATURE AT NIRDHAN

WRIT PETITION NO. 999 OF 2015

----IN THE MATTER OF----

1. JCi.....Petitioner 1

Versus

1. Maxis Bank.....Respondent 1

2. Republic of Gariba.....Respondent 2

WRIT PETITION NO. 1021 OF 2015

----IN THE MATTER OF----

1. People's Union for Liberties and Democratic ReformsPetitioner 1

Versus

1. Republic of Gariba.....Respondent 1

**MEMORANDUM FILED AND SUBMITTED BY THE
COUNSELS FOR THE PETITIONERS**

MEMORANDUM SUBMITTED ON BEHALF OF THE PETITIONERS

TABLE OF CONTENTS

1. INDEX OF AUTHORITIES

a) LIST OF STATUTES_____	ii
b) LIST OF ABBREVIATIONS AND ACRONYM_____	ii
c) BOOKS AND COMMENTARIES_____	ii
d) DICTIONARIES_____	iii
e) ELECTRONIC MEDIUM_____	iii
f) LIST OF CASES_____	iii
2. STATEMENT OF JURISDICTION_____	1
3. STATEMENT OF FACTS_____	2
4. STATEMENT OF ISSUES_____	3
5. SUMMARY OF ARGUMENTS_____	4
6. ARGUMENTS ADVANCED_____	6
I. Whether the WP 999/2015 and WP 1021/2015 is maintainable or not?_____	6
II. Whether Section 34 of the Arbitration and Conciliation Act 1996 is constitutionally valid or not?_____	8
III. Whether the Ordinance, which was promulgated on 20th December, 2014 by the Governor of the State of Nirdhan is constitutionally valid or not?_____	15
IV. Whether non-availability of a notified vacation bench during holidays and non-availability of a notified procedure for listing when the Court is not in session is unconstitutional?_____	21
7. PRAYER_____	22

INDEX OF AUTHORITIES

LIST OF STATUES

- ↻ Arbitration and Conciliation Act, 1996
- ↻ The Constitution of Gariba
- ↻ The General Clauses Act, 1897
- ↻ Representation of the People Act, 1951

LIST OF ABBREVIATIONS AND ACRONYMS

AIR : All India Reporter	Ltd. : Limited
Anr.: Another	Ors.: Others
Art. : Article	SC : Supreme Court
Edn. /ed. : Edition	SCC : Supreme Court Cases
Hon'ble : Honourable	Sec. ; u/ s. : Section; under Section
ILR.: Indian law report	v. : versus

BOOKS AND COMMENTARIES

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2. Justice Malik S.B, '*Commentary on the Arbitration and Conciliation Act*', 6th Ed., Universal Law Publishing Co., New Delhi.
3. Basu Durga Das, '*Commentary On The Constitution Of India*', 8th Ed.,2008, Vol. 1,3,5,6,7, Lexis Nexis Butterworths Wadhwa Nagpur, New Delhi.
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2. **Bharat Sewa Sansthan v. U.P.Electronics Corpn. Ltd.**, 2007 (3) Arb LR 299 (SC).
3. **Bondu Ramaswamy v. Bangalore Development Authority**, (2010) 7 SCC 129.
4. **Chiranjit Lal Chowdhury v. Union of India**, AIR 1951 SC 41
5. **Collector of Customs, Madras v. Nathulla Sampathu Shetty**, AIR 1962 SC 316 (332)
6. **D.C. Wadhava v. State of Bihar**, (1987) 1 SCC 378
7. **Devi Lal Modi v. Sales Tax Officer, Ratlam**, AIR 1965 SC 1150
8. **Fertilizers Kangar Union v. Union of India** AIR 1981 S.C 344 (para 10)
9. **GTC Industries Ltd. V. Union of India** AIR 1998 SC 1566
10. **Gujarat Bottling Co. Ltd v. Coca Cola Company & Ors.** (1995) SCC 5 545
11. **Harbanslal Sahnia v. Indian Oil Corporation Ltd**, AIR 2003 SC 2120
12. **Hari Shanker Tripathi v. Shiv Harsh and Ors.**, (1976) 1 SCC 897
13. **Indian Society of Lawyers v. Union of India**, 2012 2 AWC 1157 All
14. **Indira Nehru Gandhi v. Raj Narain**, AIR 1975 SC 2299

15. **Indra Sawhney v. Union Of India**, AIR 2000 SC 498
16. **Javed v. Sate of Haryana**, AIR 2003 SC 3057.
17. **M. Nagaraj v. Union of India**, AIR 2007 SC 71.
18. **National Aluminium Co. Ltd. v. Pressteel and Fabrications (P) Ltd**, (2004) 1 SCC 540
19. **NHRC v. State of Arunachal Pradesh**, AIR 1996 SC 1234.
20. **Nurmaligarh Refinery Ltd. v. Daelim Industrial Company Ltd.**, (2007) 6 SCC 128
21. **ONGC Ltd. v. Streamline Shipping Co. Pvt. Ltd**, AIR 2002 Bom 420(423)
22. **Orissa State Commercial Transport Corp.Ltd v. Satyanarayan Singh**,(1974) 40 Cut LT 336
23. **P. Anand Gujapathi Raju v. P.V. G. Raju**, (2000) 4 SCC 539.
24. **P. Vajravelu Mudaliar v. Special Deputy Collector, Madras** 1965 SCR (1) 614
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26. **NP Punnuswamy v. Returning Officer**, (1952) 1 SCR 218
27. **Radheyshyam Shaw alias Radhey v. Union of India**, AIR 2009 NOC 309 (Cal)
28. **Ramavtar Meena & Anr. v. State of Rajasthan & Ors.**, D.B. CIVIL WRIT PETITION
NO.1/2015
29. **Scheduled castes and weaker section Association v. Karnataka**, AIR 1991 SC 1117
30. **Shin-Etsu Chemical Co. v. Aksh Optifibre Ltd** AIR 2005 SC 3766
31. **Smt. Rani Kusum v. Smt. Kanchan Devi & ors**,¹ AIR 2005 SC 3304
32. **State of Bihar v. Maharajadhiraja Sir Kameshwar Singh**, [1952] 1 SCR 889
33. **Ventaka v. State of A.P**, AIR 1985 SC 724
34. **Vijay Lakshmi v. Punjab University**, AIR 2003 SC 3331 (3335).
35. **Western U.P. Electric Power and supply Co. Ltd. v. State of U.P**. AIR 1970 SC 21
36. **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai .**, AIR 1999 SC 22

STATEMENT OF JURISDICTION

The petitioners have approached this Hon'ble Court under Article 226¹ of the Constitution vide WP No. 999/2015 and WP No. 2021/2015 as as the *vires* of Section 34 of the Arbitration and Conciliation Act, 1996 and the *vires* of the Ordinance promulgated on 20.12.14 amending the Nirdhan Panchayati Raj Act, 1994 has been challenged in the aforementioned petitions respectively. The petitioners accept that this Court has territorial jurisdiction as the subject matter of the petitions relate to the State of Nirdhan. The petitioners have approached this Hon'ble Court as they did not have any alternative remedy. The two matters have been listed together by this Hon'ble Court. The Counsels for the petitioner accept and submit to the jurisdiction of this Court.

¹.226 (1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises 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*, *prohibition*, *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.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

STATEMENT OF FACTS

➤ **Facts of Writ Petition No. 999/2015**

- On 21.9.2011, a company named Jeopardy Contracts Inc.[JCI] entered into agreement with Jodhpur Goan Panchayat Samiti [JGPS] which was terminated by JGPS on 21.9.2013
- On 11.12.2014 JCI tried invoking arbitration but was refused by JGPS
- On 12.12.2014 JGPS invoked the performance bank guarantee which could not be released. On 13.12.2014 JCI moved the High Court of Nirdhan by filing an urgent writ petition, on 15.12.2014, High Court granted an *ad interim* stay on the bank guarantee.
- Subsequently the Court directed the parties to seek interim remedies from Id. Arbitrator under the Act of 1996. An award culminated in favor of JCI on 21.1.2015.
- Before the award could be enforced, JGPS challenged the award U/s. 34 of the Act of 1996 before the High Court of Nirdhan on its original side. On 27.1.2015, Maxis bank refused to release the guarantee due to the pendency of petition under Sec. 34 which amounts to a stay on the award.
- On 28.1.2015, JCI challenged the constitutional validity of Section 34 via W.P. 999/2015.

❖ **Facts of Writ Petition No. 1021/2015**

- On 20.12.2014, Governor of Nirdhan promulgated an Ordinance which came into effect from 24.12.2015, which provided for the educational qualifications of a Panch or a member of the Panchayat
- On 29.12.2014, Petitioner moved the High Court of Nirdhan for listing listing was not granted. On 31.12.2014, Petitioner moved the Supreme Court through the “Vacation Officer” but no listing was granted till the issuance of election notification. Upon listing the Apex Court referred the matter to the High Court of Nirdhan
- People’s Union immediately moved the High Court filing a pro-bono petition WP(C) No.1021/2015 for challenging the *vires* of the Ordinance and for certain other reliefs.

STATEMENT OF ISSUES

- I. Whether the WP 999/2015 and WP 1021/2015 is maintainable or not?**
- II. Whether Section 34 of the Arbitration and Conciliation Act, 1996 is constitutionally valid or not?**
- III. Whether the Ordinance, which was promulgated on 20th December, 2014 by the Governor of the State of Nirdhan is constitutionally valid or not?**
- IV. Whether non-availability of a notified vacation bench during holidays and non-availability of a notified procedure for listing when the Court is not in session is unconstitutional?**

SUMMARY OF ARGUMENTS

I. Whether the WP 999/2015 and WP 1021/2015 is maintainable or not?

- That the Writ Petition No. 999/2015 is maintainable as Article 226 of the Constitution of Gariba gives a right to an individual to approach the High Courts for the issuance of a Writ in the nature of *Mandamus* when the constitutional validity of a statute has been challenged.
- That the Writ Petition No. 2021/2015 is maintainable as Article 14 of the Constitution is being violated by the impugned Ordinance for it discriminates between the ‘literate’ and the ‘illiterate’ by providing educational qualifications for contesting elections. Further, it also violates the Preamble and the right to contest election which is a legal right.

Hence, both the Writ petitions are maintainable.

II. Whether Section 34 of the Arbitration and Conciliation Act 1996 is constitutionally valid or not?

- It is most humbly submitted before this Hon’ble Court that Sec. 34 of the Act of 1996 is *ultra vires* the Constitution of Gariba because it is unreasonable as it amounts to introduction of “litigation” in the arbitral process which is against the basic tenets of arbitration and defeats the object of the Act of 1996 which is evident from Section 5.
- That grant of automatic stay u/S 34 without adjudication on prima-facie case, balance of convenience and irreparable injury is per se bad in law.
- That the pendency of Sec. 34 petitions is huge and the delay thereon frustrates the object of arbitration.
- That under Art. 51(c) of the Constitution, the State is duty bound to respect its international commitments. Gariba is a signatory to the UNICTRAL model law and Art. 5 of this law prohibits judicial intervention to a large extent in the arbitration process. Thus, Sec. 34 violates the provisions of the UNICTRAL Model Law.

III. Whether the Ordinance, which was promulgated on 20th December, 2014 by the Governor of the State of Nirdhan is constitutionally valid or not?

- Non-grant of listing before the issuance of the election notification cannot affect the merit of the case since the Court was moved well in time and the act of the Court cannot harm anybody as is evident from the maxim *actus curiae neminem gravabit*.
- That the Ordinance is *ultra vires* Part IX, retroactive and is marginalizing women and weaker sections of the society.
- The Ordinance is in violation of aspects of basic structure like the preamble and equal participation in democratic government and it also abridges valuable fundamental and constitutional rights.
- That the promulgation of the impugned Ordinance amounts to a colourable exercise of authority by the State Government.

IV. Whether non-availability of a notified vacation bench during holidays and non-availability of a notified procedure for listing when the Court is not in session is unconstitutional?

- It is most humbly submitted before this Hon'ble Court that non-availability of a notified vacation bench and procedure for listing during winter vacations is unconstitutional as it violates the Right to speedy justice which is a mandate guaranteed by Art. 21 of the Constitution and also increases the pendency of cases.

ARGUMENTS ADVANCED

I. Whether the WP 999/2015 and WP 1021/2015 is maintainable or not?

It is most humbly submitted before this Hon'ble Court that the two writ petitions are maintainable. Following are the grounds for the submission.

A. That Writ Petition 999/2015 is maintainable.

- **That Article 226 of the Constitution of Gariba gives a right to an individual to approach the High Courts for the issuance of a Writ in the nature of *Mandamus* when the constitutional validity of a statute has been challenged.**

It is submitted that Article 226(1) of the Constitution of Gariba empowers the High Courts to issue Writs to any person or authority including any government for any purpose. The Hon'ble Supreme Court in the case of **Harbanslal Sahnia v. Indian Oil Corporation Ltd.**² observed that, “*In an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged.*”

Further it is submitted that the Hon'ble Supreme Court has held in **Probodh v. State of U.P.**³ that *Mandamus* and not *Certiorari* is the proper relief to be asked for where the petitioner seeks a declaration that an Act or Ordinance is unconstitutional and a consequential direction restraining the State and its officers from enforcing or giving effect to the provisions of such unconstitutional law.⁴

²AIR 2003 SC 2120; Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., AIR 1999 SC 22

³ AIR 1985 SC 167(para 40); Chiranjit Lal Chowdhury v. Union of India, AIR 1951 SC 41

⁴ Durga Das Basu, Commentary on the Indian Constitution, 8th Edition 2010, Vol. 7

B. That Writ Petition 1021/2015 is maintainable.

- **That the fundamental Right under Art. 14 and Article 15(1) of the Constitution, the basic structure of the Constitution and the legal right i.e. The Right to Contest Elections is being violated by the impugned Ordinance.**

It is submitted that a writ is maintainable under Art. 226 as the impugned Ordinance is violative of Art. 14 and Art. 15(1) of the Constitution. In the case of **Fertilizers Kangar Union v. Union of India**⁵, the Apex Court held that, “*The power of the High Court to issue writs under Art 226 can be exercised for two fold purpose, viz., the enforcement of (a) fundamental rights, as well as of (b) non fundamental or ordinary legal rights*”. In the instant case, the impugned Ordinance provides for educational qualifications for contesting elections which are discriminatory in nature as a distinction is being made between the ‘literate’ and the ‘illiterate’. Further, the right to contest elections, which is a legal right under the Constitution is being violated by the impugned Ordinance as it bars a large section of people from contesting elections. It is also submitted that the impugned Ordinance is violating the basic structure of the Constitution of Gariba i.e. the Preamble which provides, “We the people” but by promulgation of such an Ordinance its meaning is changing to “We the literate people”.

- It is humbly submitted that an Ordinance made by the President or Governor comes within the definition of law as provided in Art. 13(2). Further it is not an executive but a legislative act as has been held by the Apex Court.⁶ Hence, in the instant case the constitutional validity of the Ordinance can be challenged.
- It is submitted that People Union’s for Liberties & Democratic Reforms have the *locus standi* to challenge the Ordinance as they have filed this petition for the enforcement of

⁵ AIR 1981 S.C 344 (para 10); *Devi Lal Modi v. Sales Tax Officer, Ratlam*, AIR 1965 SC 1150

⁶ *Ventaka v. State of A.P*, AIR 1985 SC 724

fundamental right on behalf of a class of persons who on account of poverty, socially and economically disadvantaged position cannot approach the court for relief. The same was upheld by the Court in the case of **Scheduled Castes and Weaker Section Association v. Karnataka.**⁷

II. Whether Section 34 of the Arbitration and Conciliation Act, 1996 is constitutionally valid or not?

It is most humbly submitted before this Hon'ble Court that Sec. 34 of the Act of 1996 is *ultra vires* the Constitution of Gariba. Following are the grounds for the submission.

A. That Section 34 amounts to introduction of "litigation" in the arbitral process which is against the basic tenets of arbitration and defeats the object of the Act of 1996 and is thus, unconstitutional.

It is submitted that the basic object of arbitration is to provide an alternate mechanism of dispute redressal aimed at reducing the burden of the Courts by resolving the disputes outside the Court, therefore introduction of litigation in the arbitral process is against the basic tenets of arbitration. In **ONGC Ltd. v. Streamline Shipping Co. Pvt. Ltd.**, it was held that, "*Arbitration means resolving the dispute or difference between two or more parties after hearing both sides in judicial manner by a person or persons other than a Court of competent jurisdiction.*"⁸

It is further submitted that the main objective of the Act of 1996 is to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration and to **minimize the supervisory role of Courts in the arbitral process.**⁹ It was held in the case of **Shin-Etsu Chemical Co. v. Aksh Optifibre Ltd.**¹⁰

⁷ AIR 1991 SC 1117

⁸ AIR 2002 Bom 420(423).

⁹ Bharat Sewa Sansthan v. U.P.Electronics Corpn. Ltd., 2007 (3) Arb LR 299 (SC).

¹⁰ AIR 2005 SC 3766

that, “45. I fully agree with my Learned Brother's view that the object of dispute resolution through arbitration, including international commercial arbitration, is expedition and that the object of the Act would be defeated if proceedings remain pending in Court even after commencing of the arbitration.”

In the case of **State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Ors.**¹¹ The said decision was concerned with the *vires* of the Bihar Land Reforms Act, 1950 by which the Zamindaries or intermediaries' interest were acquired by the State. One of the provision was struck down as being unconstitutional and in that connection, Mahajan, J. as he then was, said at page 944:

“It has no connection with land reform or with any public purpose. It stands on the same footing as other debts due to zamindars or their other movable properties, which it was not the object of the Act to acquire.....This purpose does not fall within any definition, however wide, of the phrase "public purpose" and the law therefore to this extent is unconstitutional.”

- It is submitted that Section 5 of the Act minimizes the supervisory role of Courts in arbitral process. The Hon'ble Supreme Court in **P. Anand Gujapathi Raju v. P.V. G. Raju**,¹² observed that, Section 5 brings out clearly the object of the Act, namely, that of encouraging resolution of disputes expeditiously and less expensively.

Thus, Section 34 is unreasonable and therefore constitutionally invalid. It was held in the case of **Collector of Customs, Madras v. Nathulla Sampathu Shetty**¹³ that, a statute which is invalid as being unreasonable cannot be saved because it is being administered in a reasonable manner.

¹¹ [1952] 1 SCR 889

¹² (2000) 4 SCC 539.

¹³ AIR 1962 SC 316 (332)

- That the arbitrator is chosen by the parties themselves, hence, his decision should be respected and not valuing the decision will render the entire process futile.

It is submitted that the legal proposition as enunciated by the Supreme Court in various decisions is that the Courts shall not ordinarily interfere in the arbitral process. It is also true that if the parties with their eyes wide open have consented to refer the matter to the arbitration then normally the finding of the arbitrator should be accepted without demur.¹⁴

Since the arbitrator is a judge appointed by the parties, the parties are bound by his decision. His decision should be final and binding on the parties. It is further submitted that in the instant case, JGPS initially tried to avoid arbitration as is evident from the facts, in spite of arbitration being mentioned in the contract which was later reiterated and reaffirmed by the Hon'ble High Court, directing that the matter should be subjected to arbitration under the Act of 1996. In the instant case, JCI is suffering for no fault on its part as it was JGPS who repudiated the contract and invocation of petition under S. 34 by JGPS is a mere attempt to cause inconvenience to JCI, therefore, S.34 is providing grounds for frivolous litigation and is hence frustrating the very purpose of arbitration.

B. That grant of automatic stay without adjudication on prima-facie case, balance of convenience and irreparable injury is per se bad in law.

It is submitted that an automatic stay is granted under Sec. 36 of the Act when a petition is filed under Sec. 34, till the objections to the award are rejected.¹⁵ It is a well-known fact that the parties against whom the award has been made abuse the existing provision that imposes an automatic stay on the execution of the award on mere filing of an application u/S 34. Therefore, the objective of arbitration as a mechanism for speedy resolution of disputes is defeated due to obtrusive delays. In the case of **National**

¹⁴ Nurmaligarh Refinery Ltd. v. Daelim Industrial Company Ltd., (2007) 6 SCC 128.;

¹⁵ Radhey shyam Shaw alias Radhey v. Union of India, AIR 2009 NOC 309 (Cal)

Aluminium Co. Ltd. v.. Pressteel and Fabrications (P) Ltd¹⁶, the Apex Court observed that “*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. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend section 34 with a proposal to empower the civil Court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law*”.

It is also submitted that the 20th Law Commission in its 246th report also criticized the grant of automatic stay on the award in the following words, “Admission of a section 34 petition, therefore, virtually paralyzes the process for the winning party/award creditor.” In the instant case, even though the award was decided in favor of JCI but they could not avail the fruits of the award as an automatic stay was imposed on the award as soon as JGPS challenged the award under Section 34 of the Act of 1996.

- It is also submitted that an injunction is always granted after taking into consideration the prima facie case, balance of convenience and irreparable injury. In the case of **Gujarat Bottling Co. Ltd v. Coca Cola Company & Ors.**¹⁷ it was held that, “*Grant of temporary injunction, is governed by three basic principles i.e. prima facie case; balance of convenience; and irreparable injury which are required to be considered in a proper perspective in the facts and the circumstances of a particular case.*” But these principles are condoned in Sec 34 of Arbitration and Conciliation Act, 1996 which is per se bad in

¹⁶ (2004) 1 SCC 540

¹⁷ (1995) SCC 5 545

law. In the instant case, the principle of balance of convenience¹⁸ was neglected on the grant of automatic stay on the award, as JCi immediately needed the money involved in the award and which rightfully, as decided by the arbitrator belonged to it whereas JGP was not suffering from any loss, on the contrary, it filed the petition u/S 34 with a *malafide* intention to delay the execution of the award and deprive JCi of the fruits of the award. In the similar way the concept of irreparable injury¹⁹ was also neglected in granting of automatic stay which led to the non-issuance of performance bank guarantee. JCi concerns about immediate requirement of liquidity due to erosion of net worth, expenses for litigation, and pressure of the Amerasian Development Bank regarding the repayment of loan etc. increased because of it as well as due to the insufficiency of funds.

C. That the pendency of Sec. 34 petitions is huge and the delay thereon amounts to expropriation.

It is submitted that although arbitration has fast emerged as a frequently chosen alternative to litigation, it has come to be afflicted with various problems including those of high costs and delays, making it no better than litigation, to which it intends to provide an alternative. Delays are inherent in the arbitration process, and costs of arbitration can be tremendous. Even though Courts play a pivotal role in giving finality to certain issues which arise before, after and even during an arbitration, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the Courts. After the award, a challenge under Section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated. The 20th Law Commission in its 246th Report observed as that, “Judicial intervention in arbitration proceedings adds significantly to the

¹⁸ Orissa State Commercial Transport Corporation Ltd. v. Satyanarayan Singh, (1974) 40 Cut LT 336

¹⁹ *ibid*

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 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.

Justice S.U. Khan in an article²⁰ in *The Practical Lawyer* observed that, “*If a particular law (Act of Parliament or State Legislature, Ordinance, rules, regulations, government order/notification or scheme, etc.) or a part of it is giving rise to excessive litigation then it means that either it and its interpretation and application is causing injustice to many or it is generating undue, unjust expectations or both. The theory that if a law (or a provision of it) is quite reasonable and just on the face of it, then its faulty application does not warrant its criticism or any change in it is rather precarious. Law is a living organism. It is not a gallery of ideas. The idea of law and justice must work and deliver goods...If some of the laws (or parts thereof) are being more misused and mismanaged in their application than other laws then such laws (or parts thereof) require rethinking.*”

It is further submitted that the petitioner has and is still suffering due to the delay which is caused once an award has been the challenged under Section 34 as the petitioner was in an immediate requirement of liquidity as mentioned before. After the Arbitration was decided in favour of the petitioner on 21.1.2015, he submitted a copy of the award on 24.1.2015 but he could not get back his money as a petition u/S 34 was pending.

²⁰ (2010) PL March 6

D. That the delay takes away the fruit of the award which leads to violation of country's bilateral and multilateral commitments under various conventions and investment treaties.

It is submitted that Article 51(c) of the Constitution of Gariba imposes a duty on the State to foster respect for international law and treaty obligations. It is further submitted that the Act of 1996 is based on the UNICTRAL Model Law which was adopted by the United Nations on 21.6.1985. This Model Law lays emphasis on three things, *firstly*, greater party autonomy and non-intervention of Court in the Arbitral process, *secondly*, Preference for institutional instead of *ad hoc* arbitration and *thirdly*, Recourse to arbitral proceedings instead of Court litigation. Further, Article 5²¹ of the Convention puts a restriction on the intervention of the Courts in the Arbitral proceedings. It is also submitted that Gariba, being a member of the United Nations has adopted the Model Law in the form of the Act of 1996. Thus, it is a duty of the State to honour the treaties signed by it but the delay caused when an award is challenged under Section 34, not only defeats the very purpose of arbitration i.e. speedy relief but also results in the violation of the provisions of the UNICTRAL Model Law.

²¹**Article 5:** Extent of Court Intervention- In matter governed by this law no Court shall intervene except where so provided in this law.

III. Whether the Ordinance, which was promulgated on 20th December, 2014 by the Governor of the State of Nirdhan is constitutionally valid or not?

It is most humbly submitted before this Hon'ble Court that the impugned Ordinance is constitutionally invalid. Following are the grounds for the submission.

A. Non-grant of listing before the issuance of the election notification cannot affect the merit of the case since the Court was moved well in time and the maxim *actus curiae neminem gravabit* prevails.

It is submitted that non-grant of listing before the issuance of the election notification should not affect the merit of the case as the delay was not caused by the petitioner rather it was caused by an act of the Court. The petitioner on the contrary tried very hard, without any ordinate delay to approach both the High Court and the Supreme Court but he was denied listing. The maxim i.e. *actus curiae neminem gravabit* provides that '*act of the Court shall not harm anybody*' In the case of **GTC Industries Ltd. v. Union of India**²² the Apex Court held that, "*The Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by the party invoking the jurisdiction of the Court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the Court*".

- It is also submitted that Section 10 of the General Clauses Act, 1897 also gives a right to the petitioner to have the case heard on merits.²³ Therefore the case should be heard on merits and non-grant of listing before election notification should not affect the case.

²² AIR 1998 SC 1566

²³ Hari Shanker Tripathi v. Shiv Harsh and Ors., (1976) 1 SCC 897

B. That the Ordinance is *ultra vires* Part IX, retroactive and is marginalizing women and weaker sections of the society.

- It is submitted that the Ordinance is defeating the object of the Act and is marginalizing women and weaker sections of the society. The object of part IX as stated in the statement of Objects and Reasons is that the Urban Local Bodies are incorporated in the Constitution for *providing adequate representation for the weaker sections like ST/SC and women*. In the instant case if this Ordinance is made effective then it will defeat the very purpose of the enactment of the 73rd amendment by which Part IX was incorporated in the Constitution.

It is also submitted that the State of Nirdhan was considered backward till 2011, hence, the general literacy rate in Nirdhan is very low and therefore, this Ordinance will exclude a large section of people from contesting elections. Also that the literacy rate is lower in case of the backward classes as well as women so this Ordinance on critical examination appears to prevent active participation and hence adequate representation of the weaker sections like ST/SC and women. In **Ramavtar Meena & Anr. v. State of Rajasthan & Ors.**²⁴ the Court held that *“If the disqualification prescribed by the Ordinance deprives a large section of the society to participate in the democratic institution of Panchayati Raj and runs counter to the object of the 73rd Amendment, it may be declared as unconstitutional by the Court of law [...] The poor, underprivileged and downtrodden, cannot be denied participation in a democracy merely on the ground that she does not have educational qualification for such inclusion [...] The republicanism in the country has allowed many persons, who did not even have any formal education, to rise and lead. Some of them have also risen to the position of Chief Ministers of the States.”*

²⁴ D.B. CIVIL WRIT PETITION NO.1/2015

- That the Ordinance will have a retroactive effect because it will bar all the people who have not completed their education as per the stated requirements. This retroactive effect of Ordinance is against the principles of Natural Justice, as a potential contesteer of Panchayat elections would have had completed his education according to the rules of the Ordinance if he had a reasonable notice of the same. It is also submitted that a similar attempt was proposed in the State of Maharashtra which was defeated on the floor of legislative assembly.²⁵ It is against the very essence of democracy to put educational bar on the contesting of elections and if at all it be permitted it must be made applicable prospectively from a later date so that all citizens are presented with equal opportunity to acquire the requisite educational qualifications.

C. The Ordinance is in violation of aspects of basic structure like the preamble and equal participation in democratic government and it also abridges valuable fundamental and constitutional rights.

- It is submitted that the Ordinance is in violation of the Preamble and the basic tenets of democracy. That in the instant case the Ordinance will be violative of the Preamble as the Preamble clearly speaks of “we the people” and not we the literate people. This introduction of educational qualification with respect to the right to contest elections is also against the very idea of a socialism as enshrined in the Preamble of the Constitution because this Ordinance is restricting participation of the marginalized sections of the society. This Ordinance will also be against the basic tenets of republican democracy as republican democracy is based upon the core idea that every citizen has the freedom to participate in the workings of democracy, whether by voting or by standing for elected office. This Ordinance if promulgated will also be against the concept of justice and the concept of justice as has been mentioned in the Preamble.

²⁵ *ibid*

That in **Bondu Ramaswamy v. Bangalore Development Authority**,²⁶ it has been held that, *“the object of Part IX was to introduce the Panchayat system at grass root level. As Panchayat systems were based on State Legislation, and their functioning was unsatisfactory, the amendment to the Constitution sought to strengthen the Panchayat system by giving a uniform Constitutional base, so that the Panchayats become vibrant unit of administration in rural area by establishing strong, effective and **democratic local administration**, so that there can be rapid implementation of rural development programs.”* It is further submitted that democracy is a government of the people by the people and for the people and is not the government of the literate people by the literate people and for the literate people. Republican democracy is based upon the core idea that every citizen has the freedom to participate in the workings of democracy, whether by voting or by standing for elected office. It is also pertinent here to note that Art. 21 of UDHR and Art. 25 of ICCPR specifically mention that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. That in rural areas the general literacy rate is lower so putting educational bar for contesting elections will be violative of the basic tenets of democracy.

- That the Ordinance is violative of Art. 213(2)(a) of the Constitution as it is operative of five years instead of six months. Art. 213(2)(a) clearly lays down that no Ordinance can continue to operate for a period of more than six weeks from the reassembly of the legislature unless it is passed by the legislature. In the instant case even if the Ordinance is not ratified by the legislature it will continue to be in operation for a period of five years as the tenure of the Panchayat is five years and so this Ordinance goes against Art. 213 of the Constitution. In the case of **D.C. Wadhava v. State of Bihar**²⁷ it was held that,

²⁶ (2010) 7 SCC 129.; Anokh Singh v. Punjab State Election Commission, (2011) 11 SCC 181

²⁷(1987) 1 SCC 378

“re-promulgation of Ordinance without placing them before the Legislature as required by Art 213(2)(a), in a routine manner, would be a fraud on the Constitution and any such re-promulgated Ordinance would be struck down”.

- That this Ordinance abridges valuable fundamental and constitutional rights as it disenfranchises individuals. It is submitted that Article 14 of the Constitution is being violated by the impugned Ordinance as the marginalized weaker sections of the society are being subjected to discriminatory treatment on the basis of educational qualifications. The weaker sections of the society are being made to suffer because of their weak socio-economic conditions. In the case of **Western U.P. Electric Power and supply Co. Ltd. v. State of U.P.**²⁸, the Supreme Court held that :*“Article 14 of the Constitution ensures equality among equals : its aim is to protect persons similarly placed against discriminatory treatment.* It may be noted that the right to equality has been declared by the Supreme Court as the basic feature of the Constitution. Preamble to the Constitution of India emphasizes principle of equality as being basic to the Constitution. Parliament and State Legislature cannot transgress the Principle of equality enshrined in Article 14 of the Constitution which is the basic feature of the Constitution.²⁹
- It is also submitted that the Ordinance is violating Art. 15(1) as it is restricting the women candidates from participating in the democratic process. The provisions of Part III also provide for political and social justice³⁰ which are being violated by the impugned Ordinance.

²⁸ AIR 1970 SC 21; referred in Vijay Lakshmi v. Punjab University, AIR 2003 SC 3331 (3335) ; NHRC v. State of Arunachal Pradesh, AIR 1996 SC 1234.

²⁹ Indra Sawhney v. Union of India, AIR 2000 SC 498; Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299.

³⁰ M. Nagaraj v. Union of India, AIR 2007 SC 71.

- Right to contest an election is a right conferred by a statute i.e. Section 62 of the Representation of the People Act, 1951. In view of Part IX having been added to the Constitution, a right to contest an election for an office in Panchayat may be said to be a Constitutional right under Article 326- a right originating from the Constitution and given shape by a statute.³¹ So restricting the right of the marginalized and weaker sections of the society to contest election will violate their Constitutional right to contest elections.
- That in the instant case there is violation of the doctrine of single citizenship which is an important feature of our democracy because when there exists no educational qualification for contesting elections for the Parliament or State Legislature then imposing educational qualifications for contesting elections for Panchayat which is the smallest unit of self-government is unconstitutional. Therefore, with the promulgation of this Ordinance a person not fulfilling the educational requirements provided in the impugned Ordinance will be able to contest for the Parliament but not for the Panchayat.

D. That the promulgation of the impugned Ordinance amounts to a colourable exercise of authority by the State Government.

It is submitted that had this Ordinance been introduced in the State legislature, in all probability the motion would have failed as the Ordinance abridges several Constitutional provisions. Hence, the State government tried to regulate the upcoming elections via this Ordinance. Thus, this Ordinance amounts to colorable exercise of authority by the State government and is constitutionally invalid. It is further submitted that if the Ordinance is not passed by the legislature, the present elections would become void which would result in fresh elections. In the case of, **P. Vajravelu Mudaliar v. Special Deputy Collector,**

³¹ Javed v. State of Haryana, AIR 2003 SC 3057. NP Punnuswamy v. Returning Officer, (1952) 1 SCR 218

Madras³², it was held that such an abuse of power by the executive in a covert and indirect manner would be colourable legislation.

IV. Whether non-availability of a notified vacation bench during holidays and non-availability of a notified procedure for listing when the Court is not in session is unconstitutional?

It is most humbly submitted before this Hon'ble Court that non-availability of a notified vacation bench and procedure for listing during winter vacations is unconstitutional.

- A.** That the right to speedy justice is a basic right guaranteed by Article 21 and is also one of the principles of natural justice. In the instant case, the Ordinance came into effect from 24.12.2014. The petitioners tried to move the High Court of Nirdhan on 29.12.2014 i.e. during the annual winter vacations, but they were denied listing. On 31.12.2014, they tried to move the Apex Court but they were not granted listed till after the election notification was issued. Upon listing the Supreme Court observed that the matter could now be heard by the High Court of Nirdhan. The petitioners tried their best to approach both the High Court and the Supreme Court before the election notification was issued but they were denied listing. It is pertinent to note that had the petitioners been granted listing earlier, the Hon'ble High Court or the Supreme Court would have been able to adjudicate upon the matter and prevent the injustice that will be caused due to the enforcement of this Ordinance. In the case of **Indian Society of Lawyers v. Union of India**³³, the Court held that, "75. *The fundamental rights guaranteed under Article 21 of the Constitution of India to every citizen for speedy justice has been established in our country.*" Thus, right to speedy justice of the petitioners was violated.

³² 1965 SCR (1) 614

³³ 2012 2 AWC 1157 All, Smt. Rani Kusum v. Smt. Kanchan Devi & ors, AIR 2005 SC 3304

PRAYER

Wherefore in the light of facts stated, issues raised, arguments advanced and authorities cited, it is most humbly prayed before this Hon'ble Court, that it may graciously be pleased to–

1. To issue a declaration in the nature of *Mandamus* declaring Section 34 *ultra vires* the Constitution.
2. To issue a declaration in the nature of *Mandamus* declaring the Ordinance promulgated on 20.12.2014 as *ultra vires* the Constitution.
3. To pass any other order which the Court may deem fit in the light of justice, equity and, good conscience.

All of which is most humbly and respectfully prayed.

Sd/-

Counsels for the Petitioners