

[TEAM CODE - V]

IN THE HIGH COURT OF JUDICATURE AT NIRDHAN
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 999 OF 2015

JEOPARDY CONTRACTS INC. ...PETITIONER

VERSUS

REPUBLIC OF GARIBA & ANR. ...RESPONDENTS

ALONG WITH

WRIT PETITION NO. 1021 OF 2015

PEOPLES UNION FOR LIBERTIES AND
DEMOCRATIC REFORMS ...PETITIONER

VERSUS

REPUBLIC OF GARIBA ...RESPONDENTS

5TH JUSTICE R.K. TANKHA MEMORIAL MOOT COURT COMPETITION

NATIONAL LAW INSTITUTE UNIVERSITY, BHOPAL

SUBMITTED BEFORE THE HIGH COURT OF NIRDHAN
ON BEHALF OF THE
PETITIONERS

TABLE OF CONTENTS

1. INDEX OF AUTHORITIESII

2. STATEMENT OF JURISDICTIONIV

3. STATEMENT OF FACTS.....VIII

4. STATEMENT OF ISSUES.....IX

5. SUMMARY OF ARGUMENTSX

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

2. THE DELAY CAUSED BY THE PENDENCY OF SEC. 34 PETITION LEADS TO VIOLATION OF THE COUNTRY’S BI-LATERAL AND MULTI-LATERAL COMMITMENTS

3. THE AUTOMATIC STAY GRANTED UNDER SEC. 34 IS UNCONSTITUTIONAL AS BEING VIOLATIVE OF THE PRINCIPLES OF NATURAL JUSTICE ENSHRINED IN ART. 14 OF THE INDIAN CONSTITUTION.

4. THE GOVERNORS ORDINANCE IS UNCONSTITUTIONAL AND ULTRA VIRES PART XI OF THE CONSTITUTION.

5. THE NON-AVAILABILITY OF A NOTIFIED VACATION BENCH AND NOTIFIED VACATION PROCEDURE FOR LISTING DURING COURT HOLIDAYS IS UNCONSTITUTIONAL.

6. THE NON-GRANT OF LISTING BEFORE THE ISSUANCE OF ELECTION NOTIFICATION CANNOT AFFECT THE MERITS OF THE CASE SINCE THE COURT WAS MOVED WELL IN TIME AND THAT AN ACT OF THE COURT SHALL PREJUDICE NO ONE.

6. ARGUMENTS ADVANCED.....1-15

7. PRAYERXII

INDEX OF AUTHORITIES

-TABLE OF CASES-

Sr. No.	Cases
1.	Madhavpura Mercantile Co-op Bank Ltd. v. Shah Bhimani Chemicals Pvt. Ltd. (2009) 2 Arb LR 287, 291 (Guj)
2.	National Aluminum Co. Ltd. v. Pressteel & Fabrications Pvt. Limited (2004) 1 SCC 540 : SCC p.546
3.	Chevron- Texaco v. Ecuador, Partial Award on the Merits dated 30/03/2010 (Para. 4.4.5 of the International Award)
4.	Decor India P. Ltd. vs National Building Construction (3) ARBLR 348 Delhi, 142 (2007) DLT 21
5.	K. Thimmappa v. Chairman Central Board of Directors SBI AIR 2001 SC 467
6.	Air India v. Nargesh Meerza AIR 1981 SC 1829
7.	Shri Sitaram Co. Ltd v Union of India AIR 1990 SC 1277
8.	US v Two Hundred Barrels of Whiskey (1877) 95 US 571
9.	Morrill v Jones, (1883) 106 US 466
10.	Hitendra Vishnu Thakur v. State of Maharashtra(1994) 4 SCC 602
11.	MithileshKumari and another, vs. PremBehariKhare AIR 1989 SC 1247
12.	S. Pratap Singh v. State of Punjab [1964] 4 SCR 733
13.	M.C.Mehta v. Union of India M.C.Mehta v. Union of India[2006] (3) SCC 399
14.	I R Coelho. State of Tamil Nadu AIR 2007 SC 861 : [2007] 2 SCC 1
15.	Prem Chand Garg v. Excise Commissioner, UP UPAIR [1963] SC 996 : 1963 (Supp-I) SCR 885
16.	Basappa v. NagappaAIR [1954] SC 440 : [1955] 1 SCR 250 : 1954 SCJ 695
17.	Japani Sahoo v. Chandra Sekhar Mohanty, AIR [2007] SC 2762

-BOOKS-

1.	Shorter Constitution of India by Durga Das Basu
2.	Indian Constitution Law by Prof. M. P. Jain
3.	Durga Das Basu, Commentary on the Constitution of India, 6 th Edition, 2007
4.	H.M. Seervai, Constitutional Law of India, 4 th Edition, Vol. 1, 2006.
5.	M.P. Jain, Indian Constitutional Law, 8 th Edition, 2012
6.	P.M. Bakshi & Jaswant Singh, The Constitution of India, 2007 Edition.
7.	V.N. Shukla, Constitution of India, 9 th Edition, 2006.

-STATUTES-

1. The Constitution of India, 1950
2. Arbitration and Conciliation Act, 1996

-WEBSITES-

1. www.parliamentofindia.nic.in
2. www.indiankanoon.org
3. <http://www.allindiareporter.com>
4. <http://www.manupatra.com>
5. <http://www.supremecourtfindia.nic.in>
6. <http://www.sconline.com>

STATEMENT OF JURISDICTION

It is humbly submitted before the Hon'ble High Court of Nirdhan that, the Petitioners have filed this Writ petition by virtue of Article 226 of the Constitution of India. :

ARTICLE 226. POWER OF THE HIGH COURT 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*
- (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.*

THIS MEMORANDUM SETS OUT THE GROUNDS OF THE PETITIONERS AND THE SUBMISSIONS THERE UNDER

STATEMENT OF FACTS

1. Nirdhan, is a state situated in Republic of Gariba. The Governor of Nirdhan devised a new scheme under which highways and arterial roads were to be constructed by private parties. Jeopardy Contracts Inc.(Jci) entered into an agreement with Jodhpur Gaon Panchayat Samiti (JGPS) on 21.09.2011. Certain issues cropped up due to which JGPS terminated the contract on 21.09.2013.
2. JCi sent a legal notice dated 11.12.2014 for invoking arbitration. JGPS' counsel on 12.12.2014 sent a reply stating that the matter was covered under the Madhyastham Adhikaran Adhiniyam, 1983 and therefore the Arbitration and Conciliation Act, 1996 was not applicable.
3. JGPS invoked the performance bank guarantee on 12.12.2014 by sending an email to the Maxis Bank. On 13.12.2014, JCi moved the High Court of Nirdhan by filing an urgent civil writ petition, which was directed to be listed at 10.30 am on 15.12.2014. At 10 am the Manager of Maxis bank had acted on the email of JGPS and encashed the bank guarantee. The writ petition was disposed off. The arbitration culminated into an award dated 21.1.2015 in favour of JCi.
4. JGPS immediately filed a petition under Sec.34 of the Act of 1996, before the High Court of Nirdhan on 25.01.2015. On 27.01.2015, JCi challenged the constitutional validity of Sec.34 by way of a writ petition.
5. In the meanwhile, the Governor of the State of Nirdhan, on 20.12.2014, promulgated an ordinance which came into effect from 24.12.2014 which amended the Nirdhan Panchayat Act, 1994 saying that every person to be qualified as a Panch or a member of the Panchayat Samiti has to fulfil the criteria of having passed class V from a school in Nirdhan or class VIII in case of other than a scheduled area.
6. With its counsel's affidavit, the People's Union for Liberties & Democratic Reforms moved the Apex Court under Art.32 on 31.01.2014 through the Vacation Officer. Upon listing, the Apex Court held that the matter can be heard by the High Court of Nirdhan.
7. Therefore, the People's Union for Liberties & Democratic Reforms moved the High Court of Nirdhan filed a pro-bono petition seeking to challenge the vires of the ordinance. The High Court of Nirdhan accepted the petition, and notices were issued to the Attorney General.

STATEMENT OF ISSUES

- 1. SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS UNCONSTITUTIONAL.**
- 2. THE DELAY CAUSED BY THE PENDENCY OF SEC. 34 PETITION LEADS TO VIOLATION OF THE COUNTRY'S BI-LATERAL AND MULTI-LATERAL COMMITMENTS**
- 3. THE AUTOMATIC STAY GRANTED UNDER SEC. 34 IS UNCONSTITUTIONAL AS BEING VIOLATIVE OF THE PRINCIPLES OF NATURAL JUSTICE ENSHRINED IN ART. 14 OF THE INDIAN CONSTITUTION.**
- 4. THE GOVERNORS ORDINANCE IS UNCONSTITUTIONAL AND ULTRA VIRES PART XI OF THE CONSTITUTION.**
- 5. THE NON-AVAILABILITY OF A NOTIFIED VACATION BENCH AND NOTIFIED VACATION PROCEDURE FOR LISTING DURING COURT HOLIDAYS IS UNCONSTITUTIONAL.**
- 6. THE NON-GRANT OF LISTING BEFORE THE ISSUANCE OF ELECTION NOTIFICATION CANNOT AFFECT THE MERITS OF THE CASE SINCE THE COURT WAS MOVED WELL IN TIME AND THAT AN ACT OF THE COURT SHALL PREJUDICE NO ONE.**

SUMMARY OF ARGUMENTS

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

1.1.The Introduction, Statement of Objects and Reasons and Preamble to the Arbitration & Conciliation Act, 1996, made provisions for an Arbitral procedure which is fair, efficient and capable of meeting the needs of specific arbitration.

1.2.The Law Commission in their Report had observed that parties are filing applications to set aside the award even though there is no substance whatsoever in such applications and, to put a stop to this practice, proposed the amendment of section 36.

2. THE DELAY CAUSED BY THE PENDENCY OF SEC. 34 PETITIONS LEADS TO THE VIOLATION OF THE COUNTRY'S BI-LATERAL AND MULTI-LATERAL COMMITMENTS

2.1.Part IV of the Constitution of India enshrines the Directive Principles of State Policy and Section 51 (c) talks about promotion of international peace and to foster respect for international law and treaty obligations.

2.2.The prevention of expropriation is one of the foundational principles of international investment law, in accordance with the Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA) on which the Bilateral Investment Treaties are based.

3. THE AUTOMATIC STAY GRANTED UNDER SEC. 34 IS UNCONSTITUTIONAL AS BEING VIOLATIVE OF THE PRINCIPLES OF NATURAL JUSTICE.

3.1.Section 34 of the Arbitration and Conciliation Act, 1996 provides for setting aside of the arbitral award on the grounds mentioned thereunder but whenever an application under this Section is preferred the enforcement of the award gets pushed back to when the above application is rejected and in the meantime imposes an automatic stay on the same.

4. THE ORDINANCE PASSED BY THE GOVERNOR IS ULTRA VIRES TO ULTRA VIRES TO PART IX OF THE CONSTITUTION AND RETROACTIVE

4.1.The Governor through his Ordinance has attempted to create a differentiation among the citizens based on educational qualifications which cannot be referred to as a reasonable basis of classification.

5. THE NON-AVAILABILITY OF NOTIFIED VACATION BENCH AND NOTIFIED PROCEDURE FOR LISTING DURING COURT HOLIDAYS IS UNCONSTITUTIONAL

5.1.It is submitted that non-availability of a notified vacation bench during any court holidays violates Article 32 of the Constitution.

5.2.The lack of transparency regarding how the application would be treated, leaves no choice to the petitioners but to wait for instructions, howsoever delayed.

6. THE NON-GRANT OF LISTING BEFORE THE ISSUANCE OF ELECTION NOTIFICATION CANNOT AFFECT THE MERITS OF THE CASE

6.1.The maxim “*Actus curiae neminem gravabit*” expresses the concept that the court ought not to prejudice a litigant.

ARGUMENTS ADVANCED

1. Sec. 34 of the Arbitration & Conciliation Act, 1996 is unconstitutional

It is humbly submitted in front of the Hon'ble High Court of Nirdhan that the automatic stay on the arbitral award released in favor of the Petitioners amounts to unconstitutionality under Section 34 of the Arbitration & Conciliation Act, 1996.

1.1. Setting aside of Arbitral Award

Chapter VII of The Arbitration and Conciliation Act, 1996 formulates provisions for recourse against arbitral awards. Sec. 34 provides for setting aside of an arbitral awards under the grounds mentioned thereunder.

An Arbitral Award under the 1996 Act therefore, cannot be enforced as a Decree till the period of challenge under Sec.34 (3) is over or the objections filed have been dismissed. It is a common practice that whenever an Arbitral Award is made, the party adversely affected by it files a petition u/s 34 of the Act in the Court and the Court issues notice. Then, till the time this objection petition is dismissed the said award cannot be enforced. Given the delays in our judicial system, it almost takes years for the Objection Petition to be disposed off and till such time the party having the arbitral award in its favour remains in limbo. Thus, the laudable objective behind doing away of legal proceedings to make the arbitral award a Rule of Court under the 1940 Act by introducing Sec.36 in the 1996 Act has been diluted to a great extent.

By the time the stage of filing execution comes, the party against whom the award had come, cleverly disposes off its assets so as to defeat the execution proceedings. Unless a party has taken interim orders u/s 9 of the Act against disposal of assets etc. there are good chances that by the time execution application is filed, the judgment debtor would have practically spirited away all its assets.

1.2. Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996

The Introduction, Statement of Objects and Reasons and Preamble to the Arbitration & Conciliation Act, 1996, in sum and substance, state that the outdated Arbitration Act, 1940 was replaced by the Arbitration & Conciliation Act, 1996 to make it more responsive to

contemporary requirement; to make provisions for an Arbitral procedure which is fair, efficient and capable of meeting the needs of specific arbitration; to minimize the supervisory role of the courts in the arbitral process and to provide that every final Arbitral Award is enforced in the same manner as if it were a decree of the Court. If we read the provisions of Section 35, 36 & 37 of the Act and Order XLI Rule 5 of the Code of Civil Procedure in the light of the laudable objects of the Arbitration & Conciliation Act, 1996, we find that there is no manner of doubt that the very purpose of Arbitration & Conciliation Act, 1996 is to curb the procedural delays as are inherent in the routine civil disputes in the courts.¹

1.3. Observations made in National Aluminium Co. Ltd.

The scope of Section 36 was considered, although not challenged, before the Supreme Court in the case of *National Aluminium Co. Ltd.*² It was pointed out that an automatic suspension on the execution of the award, the moment an application challenging the award is filed under S. 34 leaves no discretion to put the parties on terms and defeats the very objective of the Act. The Court however reserved its opinion on the matter, and only recommended that the Parliament look into the provision. A Bench of Their Lordships Hon'ble Mr. Justice N. Santosh Hegde and Justice B.P. Singh, were pleased to observe the following;

“11. 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. 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.”

¹*Madhavpura Mercantile Co-op Bank Ltd. v. Shah Bhimani Chemicals Pvt. Ltd. [2009] 2 Arb LR 287, 291 (Guj)*

²*National Aluminium Co. Ltd. v. Pressteel & Fabrications Pvt. Limited [2004] 1 SCC 540 : SCC p.546*

1.4.Observations of the Law Commission and Proposed Amendments

The Law Commission in their Report had observed that parties are filing applications to set aside the award even though there is no substance whatsoever in such applications and, to put a stop to this practice, proposed the amendment of section 36 by deleting the words which say that the award will not be enforced once an application is filed under sub-section (1) of Sec. 34.

It will have a salutary effect on the expeditious execution of the awards. It provided that an award will be enforceable after the period fixed for filing applications under section 34 has expired, unless the court stays its enforcement. The court is vested with powers to refuse stay or grant stay subject to conditions. While granting stay, the court can impose conditions, keeping the scope of interference in applications under subsection (1) of section 34 in mind. The manner of imposing conditions and interim measures has also been specified. Therefore, it is proposed to substitute Section 36. Where an application is filed in the Court under sub-section (1) of section 34 to set aside an arbitral award, the filing of such an application shall not by itself operate as a stay of the award unless, upon a separate application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of sub-section (3).

Section 36 as it stands now provides that the enforcement of the award will come to a stop upon the filing of an application under sub-section (1) of Section 34 to set aside the award. Parties are now filing such applications even though there is no substance whatsoever in such applications. Section 36 is therefore proposed to amended by designating the existing section as sub-section (1) and omitting the words which say that the award will not be enforced once an application is filed under sub-section (1) of Sec. 34.

These sub-sections are proposed to be introduced to enable the Court to stay the operation of the award subject to such conditions as it may deem fit, in the light of the limited grounds available under Sec. 34 and 34A. Under these subsections, the Court can pass orders against third parties or against property which is not the subject matter of arbitration, for the purpose of protecting the interests of the party in whose favor the award is passed.

This section is proposed to be introduced to enable the Court to dismiss in limine, an application under sub-section (1) of Sec. 34 (application to set aside the award) or any appeal (whether a regular appeal or an appeal against an interim order of the tribunal), even before notice is issued to the opposite party. It is further proposed to provide that even in a case where notice is issued to the opposite party, the Court, at the time of the disposal of the above matters, will not interfere unless “substantial prejudice” is shown by the applicant or the appellant, as the case may be. It is further provided that all applications and appeals are to be disposed of within 6 months of service on the opposite party. These provisions are introduced to avoid applications and appeals being automatically registered and kept pending by the Registry and being kept pending for years together, in the Courts.

Therefore, mere filing objection petition under Sec.34 will not operate as stay of the award and the court may grant stay of the operation of the award subject to imposition of such conditions as it may deem fit to impose and the power to impose conditions include the power to grant interim measures not only against the parties to the award but also against the third parties in order to protect the interest of the party in whose favor the award is passed. The Law Commission and the Legislature have taken note of the hardship faced by several claimants who eventually become litigants at the behest of these provisions. The above amendment, however, has not yet come into force but it goes to show the intent of the Legislature to bring about a change and provide for a truly speedy remedy for those persons who opt for arbitration.

2. The delay caused by the pendency of Sec. 34 petitions leads to violation of the country’s bi-lateral and multi-lateral commitments.

2.1 Section 51(c) of the Constitution of India

Part IV of the Constitution of India enshrines the Directive Principles of State Policy and Section 51 (c) talks about *promotion of international peace and security and the state shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another.*

2.2 Effective means of asserting claims and enforcing rights

In any BIT entered into by the nation, for instance, the Indian Kuwait BIT, Article 4(5) of the same obligates the host state to provide “*effective means of asserting claims and*

enforcing rights” to investors. It states that; “each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments. ”

Article II (7) of the US-Ecuador BIT also provided for a similar provision. In an arbitration invoked under the above BIT the Arbitral Tribunal found that the standard of effective means of asserting claims and enforcing rights was violated when the host state took an inordinate amount of time in allowing the investor to assert his rights.³

In the instant case, if JCi fails to maintain and fulfil its bi-lateral and multilateral commitments then the Republic of Gariba would be amenable to international arbitration as it would be in violation of the various conventions and treaties it is a signatory to. The provisions of the Arbitration and Conciliation Act, 1996, while aiming to provide for a speedy remedy with minimal court interference ends up prolonging the process for foreign investors who wish to assert their claims against the contracting parties.

2.3 The pendency of matters filed under the Arbitration & Conciliation Act, 1996 amounts to expropriation

The prevention of expropriation is one of the foundational principles of international investment law, in accordance with the Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA) on which the Bilateral Investment Treaties are based. Article 5 (1) of the same prohibits the host state from expropriating investments other than for a public purpose in accordance with the law, in a non-discriminatory, lawful manner and against the payment of compensation.

³*Chevron- Texaco v. Ecuador, Partial Award on the Merits dated 30/03/2010 (Para. 4.4.5 of the International Award)*

2.4 The White Industries Case

In the above case, White Industries, an Australian company, entered into a contract with Coal India, a public sector undertaking, over which certain disputes arose which were settled by an award in favor of White Industries passed by an Arbitral Tribunal in Paris. The award gave rise to several proceedings which included Sec. 34 application filed in the Calcutta High Court. Eventually, White Industries could not enforce the award in India due to the pending proceedings and invoked arbitration under the provisions of the India- Australia Bilateral Investment Treaty (BIT) against the Republic of India. On failure of negotiations, the parties agreed to the constitution of an ad hoc arbitral tribunal, under the terms of the BIT. The UNICITRAL Rules of Arbitration applied to the proceedings which took place in London. In the award dated 30/11/2011, the Tribunal found that India had breached its obligation to provide “*effective means of asserting claims*” and that the standard of the same was violated when the host state took an inordinate amount of time in allowing the investor to assert its rights thereby causing a breach of India’s international obligations.

3. The automatic stay granted under Sec. 34 is unconstitutional as being violative of the principles of natural justice enshrined in Article 14 of the Indian Constitution

Section 34 of the Arbitration and Conciliation Act, 1996 provides for setting aside of the arbitral award on the grounds mentioned thereunder but whenever an application under this Section is preferred the enforcement of the award gets pushed back to when the above application is rejected and in the meantime imposes an automatic stay on the same. This stay is granted to the party that has filed the application without even giving an opportunity to the award holder of being heard.

3.1 Provision for Appeal under Section 37 of the Arbitration and Conciliation Act, 1996

Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 provides for Appeals from certain orders. Therefore, an order setting aside or refusing to set aside an arbitral award is also open to a challenge under Section 37 thereby incorporating another hoop that the award holder may have to jump through before he ever gets the fruits of his award. The above provisions are opening the arbitral process to the complete scrutiny of the Courts and not minimizing it in any manner whatsoever. The party even after securing an award in his favor cannot know when the award

will be enforced as it is deferred till the rejection of the Section 34 application and stayed during its pendency.

3.2 No automatic stay under the CPC

In *Decor India P. Ltd. vs National Building Construction*,⁴ the Court remarked that “*if the execution of the Decree followed by Award is to be delayed by treating the pendency of Appeal as automatic stay then the new legislation i.e., the Arbitration & Conciliation Act, 1996 instead of being an efficient and speedy remedy would be reduced to a remedy worst than what we already had, that is the civil suits and the deep routed procedural delays till passing of the decree and even thereafter in civil suits' decrees there is no automatic stay on pendency of the Appeal and stay even if granted in execution of civil suits' decrees is more often than not a conditional stay and preferably subject to deposit of the decretal amount. Had the legislature intended to give the provision of stay of execution on filing of an Appeal under Section 37 of the Act, it would have given the provision in the Act itself, in parimateria with Order XLI Rule 5 of the Code of Civil Procedure. Since it has not been done by the legislature, in our view, it will not be possible to provide unconditional automatic stay under the principle of merger. So from whatever angle we examine this proposition, the interpretation, in our view, falls in favor of non-automatic stay.*”

Order XXI Rule 26(1) of the Civil Procedure Code provides for when a Court may stay execution on an application.

4. The Ordinance passed by the Governor is Ultra vires to Part IX of the Constitution and retroactive.

It is humbly submitted before this Hon’ble Court that the Ordinance passed by the Governor is in violation of Article 14 of the Fundamental Rights enshrined under Part III of the Constitution which makes it Ultra Vires.

4.1 The Governor’s Ordinance is in violation of Article 14

Art. 14 ensures “equality before law and equal protection of law” to all persons. It forbids class legislation but does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of achieving specific ends. The classification should not be “arbitrary, artificial and evasive”. It must always rest upon some real and substantial distinction

⁴*Decor India P. Ltd. vs National Building Construction*[2007](3) ARBLR 348 Delhi, 142 DLT 21

bearing a just and reasonable relation to the object sought to be achieved by the legislature. For this purpose, the Courts have established a Test of Classification.

In *K. Thimmappa v. Chairman Central Board of Directors SBI*⁵, it was laid down that,

“Classification to be reasonable must fulfil the following two conditions:

1. 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
2. The differentia must have a rational relation to the object sought to be achieved by the Act.”

Article 14 has rightly activist magnitude and it embodies a guarantee against arbitrariness. If the action of State is arbitrary it cannot be justified even on the basis of doctrine of classification. Where an act is arbitrary, it is implicit in it that it is unequal and therefore violating Art. 14. Art 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is attracted where equals are treated differently without any reasonable basis.

Again in the case of *Air India v. Nargesh Meerza*⁶, Supreme Court has struck down the Air India and Indian Airlines Regulations on the retirement and pregnancy bar on the services of air hostesses as unconstitutional on the ground that the conditions laid down therein were entirely unreasonable and arbitrary. The court held that the termination of service on pregnancy was manifestly unreasonable and arbitrary and therefore, clearly violative of Art. 14 of the Constitution.

The Governor through his Ordinance has attempted to create a differentiation among the citizens based on educational qualifications in the backward state of Nirdhan which cannot be referred to as a reasonable basis of classification, as literacy cannot be the only criteria to judge the efficiency and competence of a Sarpanch. It is experience and knowledge of societal problems which need to be dealt with by the Panchayat. The literacy level should not be equated with the capacity to be effectively elected as representatives of people.

⁵ *K. Thimmappa v. Chairman Central Board of Directors SBI*, AIR [2001] SC 467

⁶ *Air India v. Nargesh Meerza*, AIR [1981] SC 1829

4.2 The Ordinance further marginalises women and hinders democratic participation

The Governor's Ordinance not only violates Right to equality, but also further marginalises weaker section and women as the literacy level in such a class is quite less. It also violates the statutory right of the weaker section to contest elections. Such a criteria hinders inclusive participation of all in the grassroots development and governance, and contravenes the basic feature of free and equal participation in the democratic form of government.

4.3 The Ordinance is Ultra vires to Part IX

The Ordinance promulgated by the Governor is in violation of the Fundamental Rights conferred by the Constitution to its citizens. Art 13(2) of the Constitution clearly states that such an Act made by the Government or the Legislative is not justified.

Article 13(2) states that: *The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.*

The Supreme Court in the case of *Shri Sitaram Co. Ltd v Union of India*⁷ held that a repository of power acts ultra vires when he acts in excess of his powers in the narrow sense or when he abuses his power by acting in bad faith or for an inadmissible with gross unreasonableness. The Governor has indeed acted in abuse of his powers in the present case as the urgency behind the promulgation of the said Ordinance cannot be justified and amounts to an arbitrary action inadmissible with gross unreasonableness.

In the present case, the Governor has exploited his executive powers in the promulgation of the said Ordinance which due to its nature of being violative towards the Article 14 of the Constitution is Ultra vires in nature.

The Art 245 states the extent of power delegated to make subordinate legislation.

As put in *US v Two Hundred Barrels of Whiskey*⁸, a subordinate legislation may become ultra vires in various ways:

The excess of statutory authority may be either (a) as to the extent and contents of the subordinate legislation, or (b) to the mode in which it has been made.⁹ The subordinate law-

⁷*Shri Sitaram Co. Ltd v Union of India*, AIR 1990 SC 1277

⁸*US v Two Hundred Barrels of Whiskey* [1877] 95 US 571

making body cannot go beyond the policy laid down in the statute, so as to alter or amend the law

The Governor's Ordinance, being a subordinate legislation, cannot be taken as above the Constitution of the land, in the present case. Therefore, the said ordinance amounts to being ultra vires to Part IX.

4.4 The Governor's Ordinance is retroactive in nature

Retroactive is defined as, "*taking effect from a date in the past*".

It is crystal clear that the Statutes dealing with substantive rights is prima facie / generally prospective unless it is expressly or by necessary implications made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect the vested rights or impose new burdens or to impair existing obligations. Statutes dealing with procedure in contrast to statutes dealing with substantive rights, statutes dealing with merely matters of procedure are presumed to retrospective unless such a construction is textually inadmissible.

In the case of *Hitendra Vishnu Thakur v. State of Maharashtra*¹⁰, the Supreme Court laid down the scope of a retrospective amendment being:

"(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

⁹ *Morrill v Jones*, [1883] 106 US 466

¹⁰ *Hitendra Vishnu Thakur v. State of Maharashtra*, [1994] 4 SCC 602

(iii) *A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished:*

In the present case, the Ordinance affects a substantive law. Further, the Supreme Court has given a similar view point in the case of *MithileshKumari and another, vs. PremBehariKhare*¹¹ where it was clearly stated that:

“A retrospective operation is not to be given to a statute so as to impair existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. ... The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively, would prejudicially affect vested rights or the illegality of past transaction, or impair contracts, or impose new duty or attach new disability in respect of past transactions or considerations already passed.... Every law that impairs or takes away rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive. ... It cannot be said to be an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed. The question is whether on a proper construction the legislature may be said to have so expressed its intention.”

Therefore, it is submitted that the said Ordinance is Ultra Vires in nature and its retroactivity adversely affects the rights of the citizens.

5. The non-availability of notified vacation bench and notified procedure for listing during court holidays is unconstitutional.

5.1. Non-availability of notified vacation Bench is unconstitutional

It is submitted that non-availability of a notified vacation bench during any court holidays violates Article 32 of the Constitution, i.e., the right to constitutional remedies.

Article 32(1) of the Constitution guarantees to all citizens the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III.

¹¹*MithileshKumari and another, vs. PremBehariKhare, AIR [1989] SC 1247*

Article 32(4) of the same states, “*The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.*” Article 32(1) read with Article 32(4) means that the guarantee provided to citizens for seeking remedy in case of violation of any fundamental right cannot be suspended or delayed by any means, except as laid down in the Constitution.

As stated in *S. Pratap Singh v. State of Punjab*¹²,

“*Article 32 and 226 of the Constitution are designed to ensure that each and every authority in the State, including the Government, acts bona fide and within limits of its powers and that when a court is satisfied that there is an abuse or misuse of power and its jurisdiction is invoked, it is incumbent on the court to afford justice to the individual.*”

The judges in the case of *M.C.Mehta v. Union of India*¹³ said,

“The object is to declare that the Supreme Court has a constitutional duty to protect the fundamental rights of citizens. When violators or abettors of the violators are those who have been entrusted by law with the duty to protect these rights, the task becomes difficult and also requires urgent intervention by the Court so that the rule of law is preserved. The problem is not the absence of law, but its implementation.”

As laid down in *Prem Chand Garg v. Excise Commissioner, UP*¹⁴

“*It cannot, consistent with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights.... In discharging the duties assigned to it, this court has to play the role of a “sentinel on the qui vive” and it must always regard it as its solemn duty to protect the said Fundamental Rights “zealously and vigilantly”.*”

¹²*S. Pratap Singh v. State of Punjab* [1964] 4 SCR 733

¹³*M.C.Mehta v. Union of India* [2006] (3) SCC 399, I R Coelho. *State of Tamil Nadu* AIR 2007 SC 861 : [2007] 2 SCC 1

¹⁴*Prem Chand Garg v. Excise Commissioner, UP* AIR [1963] SC 996 : 1963 (Supp-I) SCR 885

In *Basappa v. Nagappa*¹⁵, “The Courts have made it clear that they cannot refuse to entertain an application for an appropriate constitutional remedy where a fundamental right has been infringed.”

This 32(4) clause provides that the right guaranteed by art. 32 (1) shall not be suspended except as provided by this constitution, i.e. except as provided in Art 359.

The mode of suspension provided by Art. 359 is an order of the President, and subject to new Cl. (1B) of that Article, when a Proclamation of Emergency is in operation.

Order II of the Supreme Court Rules, 2013, Rule 6 states,

“The Chief Justice may appoint one or more judges to hear during summer vacation or winter holidays all matters of an urgent nature which under these rules may be heard by a Judge sitting singly, and, whenever necessary, he may likewise appoint a Division Court for the hearing of urgent cases during the vacation which require to be heard by a Bench of Judges.”

The Supreme Court of India, Practice and Procedure Handbook specifies the matters that are considered to be of urgent nature.

The current matter of violation of fundamental rights by the ordinance issued by the Governor was a matter of public importance, as it related to the elections at Panchayat level, and it needed an earliest hearing before the election notification was issued. The same got delayed due to non-availability of notified vacation bench. Such a delay hinders the administration of justice.

Avoidable delay in the disposal of cases in Courts of Justice is a grave reproach to the administration of justice. I have said “avoidable delay”, because the Courts have to harmonize two well-known sayings: “Justice delayed is justice denied” and “Justice hurried is justice buried”.¹⁶

¹⁵ *Basappa v. Nagappa* AIR [1954] SC 440 : [1955] 1 SCR 250 : 1954 SCJ 695

¹⁶ *H.M. Seervai, Constitution law of India, 4th Edition, Vol III, pg 2859*

5.2 The non-availability of notified procedure for listing when the court is not in session is unconstitutional.

It is submitted to the Court that there is no notified procedure for listing cases of urgent nature when the Court is not in session.

Article 145 of the Constitution gives to the Supreme Court power to frame rules including rules regarding condition on which a person can practice in the Supreme Court, under which the Supreme Court has framed the Supreme Court Rules, 2013. It has also made available the Practice and procedure Handbook for information. But, there is no mention as to how listing shall be done when the courts are not in session.

An advocate seeking relief in urgent matters either on court holidays or after court hours shall first approach a senior officer of the Registry specially deputed for the said purpose, who shall after screening the papers seek directions from Hon'ble Chief Justice of India/Hon'ble judges and thereafter inform the advocates concerned about the directions.¹⁷

The lack of transparency regarding how the application would be treated, leaves no choice to the petitioners but to wait for instructions, howsoever delayed. This absence of crystallized procedure comes in the way of an equitable administration of justice.

6. The Non-grant of listing before the issuance of election notification cannot affect the merits of the case since the Court was moved well in time and that an act of the court shall prejudice no one.

The maxim "*Actus curiae neminem gravabit*" expresses the concept that what the court does, ought not to prejudice a litigant.

The Supreme Court was moved well in time to seek remedy against the ordinance. But due to delay in process of listing and receiving back instructions from the Court, the merits of the case should not be affected.

¹⁷Supreme Court of India, Circular dated 23.09.2014

In *Mitchell v Overman*¹⁸, Justice John Marshall Harlan I of the Supreme Court of United States said that the rule established by the general concurrence of the American and English courts is that where the delay in rendering a judgement or a decree arises from the act of the court, the judgement or the decree may be entered retrospectively, as of a time when it should or might have been entered up.

As stated in, *Japani Sahoo v. Chandra Sekhar Mohanty*¹⁹,

“So far as complainant is concerned, as soon as he files a complaint in a competent court of law, he has done everything which is required to be done by him at that stage. Thereafter, it is for the Magistrate to consider the matter, to apply his mind and to take an appropriate decision of taking cognizance, issuing process or any other action which the law contemplates. The complainant has no control over those proceedings. Because of several reasons, it may not be possible for the Court or the Magistrate to issue process or take cognizance. But a complainant cannot be penalized for such delay on the part of the Court nor can be non-suited because of failure or omission by the Magistrate in taking appropriate action under the Code.”

Thus, it is a humble submission that the delay caused due to the procedural aspect of listing in the court, should not affect the merits of the case and relief should not be denied only on this ground.

¹⁸*Mitchell v Overman*, [1881] 103 U.S 62

¹⁹*Japani Sahoo v. Chandra Sekhar Mohanty*, AIR [2007] SC 2762

PRAYER

The Petitioner submits that the above grounds are without prejudice and alternative to one another and seek leave of this Hon'ble Court to add, amend or alter the same if and when need arises.

Wherefore in light of the facts mentioned, issues raised, arguments advanced and authorities cited, it is humbly prayed before this Hon'ble High Court of Nirdhan that it may be pleased to:

- a. Strike down Section 34 and Section 36 of the Arbitration and Conciliation Act, 1996;
- b. Issue a writ of certiorari or any other appropriate writ to quash and set aside the Ordinance passed by the Governor prescribing qualifications for election as Panch or a member;
- c. Direct the Hon'ble Supreme Court of Gariba to formulate and notify the procedure to be followed during the holidays and/or the vacations of the Hon'ble Supreme Court of Gariba;
- d. Such other and further reliefs that this Hon'ble Court may deem fit to grant in the above facts and circumstances.

All of which is most respectfully submitted and to pass any such judgment as the Court may deem fit.

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

Sd/-

Counsel for the Petitioner