

**5TH JUSTICE R.K TANKHA MEMORIAL MOOT COURT COMPETITION  
2015**

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**TEAM CODE:W**

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**BEFORE THE HON'BLE HIGH COURT OF NIRDHAN**

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**WRIT PETITION**

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WP 999/2015 AND WP 1021/2015

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UNDER ARTICLE 226 OF THE CONSTITUTION OF GARIBA

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IN THE MATTER OF SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996

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**PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCI.....PETITIONER**

**Vs.**

**REPUBLIC OF GARIBA AND MAXIS BANK.....RESPONDENT**

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UPON SUBMISSION TO THE HON'BLE LD. ATTORNEY GENERAL AND HIS  
COMPANION JUSTICES OF AND THE REPUBLIC OF GARIBA

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MEMORIAL ON BEHALF OF THE PETITIONER

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## LIST OF ABBREVIATIONS

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&.....	And
§.....	Under Section
AC.....	Appeal Cases
AIR .....	All India Reporter
All ER.....	All England Reporters
AO.....	Assessing Officer
App.....	Appeal
Art.....	Article
Cl.....	Clause
DB.....	Divisional Bench
Ed.....	Edition
Hon'ble.....	Honourable
ibid.....	Ibidium
ILR.....	Indian Law Reports
LR.....	Law Reports

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NIA.....Negotiable Instruments Act, 1881

No.....Number

Ors.....Others

PC.....Privy Council

RP.....Review Petition

SC.....Supreme Court

SCC.....Supreme Court Cases

SCR.....Supreme Court Reporter

SLP.....Special Leave Petition

U/A.....Under Article

UOI.....Union of India

vs.....Versus

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## INDEX OF AUTHORITIES

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### CASES CITED:

1. B.V RADHA KRISHNA V. SPONGE IRON INDIA LTD,4 SCC 693(1997); AIR 1997 SC1324
2. DEBIDAS V. KESHWAR AIR ALL 423 1945
3. Hindustan Vidyut Products Ltd. V. Delhi Power Company Ltd. And Anr  
MANU/DE/0722/2011
4. INDU ENGG & TEXTILES LTD V. DDA,5 SCC 691(2001)
5. IRCON INTERNATIONAL LTD V. ARVIND CONST. Co. (1)ARB LR 1052000;(1) RAJ 111  
(DEL)2000
6. KRISHAN KUMAR MUNDHRA V. NARENDRA KUMAR ANCHALIA,(2)ARB LR 469(DEL)2004
7. M. ANSUYA DEVI V. M. MANIK REDDY,8 SCC 565(2003)
8. RAJASTHAN SRTC V. INDAG RUBBER LTD7 SCC 700(2006)
9. RITES V. RANI CONST,AIR NOC 30 (2002)
10. SMITA CONTRACTORS LTD V. EURO ALLOYS LTD, 7 SCC 728 (2001)
11. STATE OD RAJASTHAN V. NAV BHARAT CONST. Co. AIR SC 258 2002; 1SCC 659 (2002)
12. STATE OF U.P V. ALLIED CONSTRUCTION,7 SCC 396 2003; 3 RAJ 106 (2003)
13. STEEMAN LTD V. STATE OF H.P 9 SCC 252 (1997)
14. UNION OF INDIA V. BHARAT BUILDERS, (2) RAJ576(DEL) 2002
15. Vinod Kumar Dugar V. Bijoy Kumar Loyalka MANU/WB/0989/2014
16. VIPUL AGARWAL V. ATUL KANODIA, (3) RAJ 617 2003; (3)ARB LR 242(ALL)(DB)
17. YASODA DEVI V. MINIRALS & METAL TRADING CORP, (3)ARB LR 557 (DEL) 2000

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## BOOKS REFERRED:

1. Law of Arbitration and conciliation, Avtar Singh 10<sup>th</sup> Edition
2. Commentary on The Arbitration and Conciliation Act ,1996, P.C Markanda, 6<sup>th</sup> Edition
3. M P Jain's Indian Constitutional Law, 6th Edition 2013
4. Tannan's Banking Law and Practice in India, M.L Tannan, 23<sup>rd</sup> Edition

## LEGAL DATABASES:

1. Hein Online
2. Manupatra
3. West Law
4. SCC Online

## LEGISLATIONS:

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

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## STATEMENT OF JURISDICTION

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The Hon'ble Court of India has the jurisdiction in this matter under **Article 226** of the Constitution of India, 1950 which reads as follows:

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

(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

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(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 aid 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

**The Counsels for the Respondents most respectfully submit to this jurisdiction of the  
Hon'ble High Court of Nirdhan.**



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## QUESTIONS PRESENTED

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*If it may please this Hon'ble court, in the interest of justice and on account of the reason of necessity and brevity, this Hon'ble bench is empowered to address the following issues, provided as hereunder:*

### **Issue 1:**

Whether the Arbitration clause in the construction agreement takes away the jurisdiction of the court as much as that the parties to the dispute have to exhaust the remedy through arbitration rather directly approach the law?

### **Issue 2:**

Whether the bank guarantee can be stayed in the manner in which it is done in the moot case or not?

### **Issue 3:**

Whether sec 34 of Arbitration and Conciliation Act can be considered to be ultra vires in the context as pleaded in the moot case?

### **Issue 4:**

Whether there is any effect of the ordinance on the pendency of Arbitral proceeding or application under sec 34 of the Act of 1996?

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## STATEMENT OF FACTS

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Jeopardy contracts Inc (JCI) entered into an agreement with Jodhpur Gaon Panchayat Samiti (JGPS) on 21.09.2011 for 115 kms of road. The JGPS terminated that contract on 21.09.2013 because of issues regarding the land acquisition and design of the bridges.

JCI sent a legal notice on 11.12.2014 for invoking arbitration as per contractual clause and asked for the 'termination payment' for the work already done.

JGPS sent a reply on 12.12.2014 that matter is covered under The Madhyastham Adhikaran Adhiniyam, 1983 and the Arbitration and Conciliation Act, 1996, is not applicable. JGPS further invoked the performance bank guarantee on 12.12.2014 via email to the Maxis bank.

JCI filed an urgent civil writ petition being WP (C) No. 99/2014 at the High Court of Nirhdan which granted "an ad-interim ex- parte stay on invocation of bank guarantee if not already encashed..". By 11:00 am the copies were served upon JGPS and the Maxis bank. At 10:00 am, the branch manager of the Jodhpur Gaon branch of Maxis bank encashed the bank guarantee. At 10:01 am there was a massice breach in the systems of the bank due to an attack by a group of hackers which froze all accounts and transactions-in-progress. Therefore, the Bank guarantee still remained in the account of JCI.

Subsequently, the writ petition was disposed of directing the parties to seek appropriate interim remedies from the Id. Arbitrators. Further the arbitration culminated into an award dated 21.01.2015 in favour of JCI, and held JCI entitled to the money under the performance bank guarantee.

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A petition under Section 34 of the Arbitration and Conciliation Act, 1996, before the High Court of Nirdhan was filed by JGPS. Also on 24.01.2015, JCI with a copy of award asked the bank to return the money pertaining to the bank guarantee.

On 27.1.2015, Maxis Bank informed that admission of Petition under section 34 amounts to stay on the award and until the final outcome of section 34, the bank is not obliged to pay anything to JCI.

In response, On 28.01.2015, JCI cited its concern about the immediate requirement of the liquidity. However, Maxis Bank did not release any payment to JCI.

Realizing the difficulty, JCI challenged the constitutional validity of section 34, by way of a writ petition being WP 999/2015.

The High Court of Nirdhan admitted the petition.

The Governor of the Sate of Nirdhan, on 20<sup>th</sup> December , promulgated an Ordinance which amended the Nirdhan Panchayati Raj Act, 1994 as “*Qualification for election as a Panch or a member*” which laid down the various qualifications to be eligible for election as a Panch or a member.

People’s Union for Liberties and Democratic Reforms moved the High Court of Nirdhan on 29<sup>th</sup> of December 2014 (during the annual winter holidays).

People’s Union for Liberties and Democratic Reforms moved the Hon’ble Apex Court under Art. 32 on 31.12.2014, through the “vacation officer”. Upon listing, the Apex Court was pleased to observe that the matter can be heard by the High Court of Nirdhan.

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People's Union for Liberties and Democratic Reforms immediately moved the Hon'ble High Court of Nirdhan by filing a pro-bono petition WP (C) No. 1021/2015 seeking to challenge the vires of the Ordinance and certain other reliefs on various other grounds.

The High Court of Nirdhan admitted the petition and Id. Attorney General was to appear in these two matters ( WP 999/2015 and WP 1021/2015) and they have been directed to be listed together for final hearing.

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## SUMMARY OF PLEADINGS

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- 1) Whether the Arbitration clause in the construction agreement takes away the jurisdiction of the court as much as that the parties to the dispute have to exhaust the remedy through arbitration rather directly approach the law?

Yes, Arbitration clause is clearly mentioned in the contract and introduction of litigation is against the basic tenants of arbitration.

- 2) Whether the bank guarantee can be stayed in the manner in which it is done in the moot case or not?

Yes, the bank guarantee can be stayed because it is the decision of the arbitrators and as per the contract the disputes have to be resolved through arbitral process.

- 3) Whether sec 34 of Arbitration and Conciliation Act can be considered to be ultra vires in the context as pleaded in the moot case?

Yes, Section 34 of the Arbitration and Conciliation Act is unconstitutional because unlike the Act of 1940 the new amended Act does not include every provisions for setting aside arbitral award. Thereby adequacy and effectiveness of award is also threatened. As such Section 34 should be deemed to be Ultra Vires and struck down.

- 4) Whether there is any effect of the ordinance on the pendency of Arbitral proceeding or application under sec 34 of the Act of 1996?

Yes, the ordinance effects the pendency of the Arbitral Proceeding and application under sec 34 of the Act of 1996.

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## PLEADINGS

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1) WHETHER THE ARBITRATION CLAUSE IN THE AGREEMENT TAKES AWAY THE JURISDICTION OF THE COURT AS MUCH AS THAT THE PARTIES TO THE DISPUTE HAVE TO EXHAUST THE REMEDY THROUGH ARBITRATION RATHER DIRECTLY APPROACH THE LAW ?

The Hon'ble High Court of Nirdhan has granted stay order without adjudication of the matter which is not sustainable in the eyes of law.

The arbitrariness of the Learned Court, without preliminary arguments by the petitioner therein and without considering the evidence whatsoever, and granting of stay by the Learned Court is against the principle of Natural Justice.

Basic Principle of Jurisprudence:-

Audi- Alteram- Partem - Audi alteram partem is a [Latin phrase](#) that means "listen to the other side", or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

"Audi alteram partem" is considered a principle of [fundamental justice](#) or [equity](#) in most [legal systems](#). The principle includes the rights of a party or his lawyers to confront the [witnesses](#) against him, to have a fair opportunity to challenge the [evidence](#) presented by the other party, to summon one's own witnesses and to present evidence, and to have counsel, if necessary at public expense, in order to make one's case properly.

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In the case of Hindustan Vidyut Products Ltd. V. Delhi Power Company Ltd. And Anr<sup>1</sup> The High Court of Delhi affirmed the basic principle of jurisprudence.

Also in the case of Vinod Kumar Dugar V. Bijoy Kumar Loyalka<sup>2</sup> at the High Court of Calcutta, The Hon'ble bench affirmed the principle of Audi Alteram Partem.

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<sup>1</sup> MANU/DE/0722/2011

<sup>2</sup> MANU/WB/0989/2014

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2)WHETHER BANK GAURANTEE CAN BE STAYED IN THE MANNER IN WHICH IT IS DONE IN THE MOOT CASE OR NOT?

Stay order was passed by the Hon'ble High Court and it was maliciously informed by the Advocate to the respondent that the stay has been issued and maliciously the respondent had invoked the bank guarantee just before the issuance of the stay order by the Hon'ble High Court.

The Courts believe that if in all mercantile matters when a person proceeds on the guarantee of an unconditional bank guarantee - staying would make the business work come to a standstill. Only in exceptional cases of fraud/irretrivable injustice/special equities do the courts stay the encashing of bank guarantees.

A bank guarantee is an independent contract whereby a bank undertakes to unconditionally and unequivocally abide by its terms and it cannot be affected by disputes between the parties to the underlying transactions. It creates an irrevocable obligation on the bank to perform the contract in terms thereof and on occurrence of the events mentioned therein, the bank guarantee becomes enforceable.



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3) WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT CAN BE CONSIDERED TO BE ULTRA VIRES IN THE CONTEXT AS PLEADED IN THE MOOT CASE ?

In the case of Indu Engg & Textiles Ltd V. DDA, Sec 34 introduced litigation in arbitral process and is against the basic tenets of arbitration.<sup>3</sup> The basic concept of law is to prevent multipherious litigation but the Section introduces it by the way of setting aside the award. The Supreme Court has observed, In addition the Act provides right of appeal under section 37.

The multiple layers for the aggrieved person are such which can cause delay and also negativate the award itself keeping in view the nature of proceeding under Section 34 and Section 37.

In Smita Contractors Ltd V. Euro Alloys Ltd, The arbitration proceeding have been provided as an alternative dispute resolution`where an arbitrator is appointed or nominated by the parties in the commercial agreement and in the absence of consenses court has the power to appoint the arbitrator. The conclusion of the arbitrator on facts, even if erroneous in the opinion of the court cannot be interfered with. Where the view of the arbitrator cannot be ruled as one which it is impossible to accept, the court should not substitute its own view in place of that of the arbitrator.<sup>4</sup>

In B.V Radha Krishna V. Sponge Iron India Ltd, The basic thrust in an arbitrator is to provide prompt remedy and awards which can be effective but by the introduction of Section 34 an

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<sup>3</sup> 5 SCC 691 (2001)

<sup>4</sup> 7 SCC 728 (2001)

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unwarranted ties is created between arbitral award and appeal proceeding. The High Court cannot substitute its own views in place of those of the arbitrators.<sup>5</sup>

The scheme of Sec 34 is that the first part in Sec 34 (1,3,4) gives procedural grounds for keeping aside the award while it is Sec 34 (2) which deals with the substantive part for setting aside the award like dispute is not capable of settlement or the award is in conflict with public policy.

In *Steeman Ltd V. State of H.P.*, this Section does not mention various other grounds for setting aside the award like natural justice, no evidence and/or errorness findings like other grounds including fraud as provided in the Act of 1940. More over setting aside can be done only on the grounds specified in the Section.<sup>6</sup>

On the one hand Section 34 restricts the grounds and also creates vagueness but on the other hand appeal under Section 37 is only limited to the provisions of Section 34.

In one way Section 34 does not disclose the different grounds and on the other Section 37 curtails the right to appeal.

Section 34 and Section 37 thereto or contrary to provisions to appeal as provided under Section 96 Section 100 and Order 41 of C.P.C.

In short justice delivery must be in consense with the Constitution of India and International Standards ought to be prompt adequate and effective aspropounded by Hull, commonly known as Hull Formula.

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<sup>5</sup> 4 SCC 693(1997); AIR SC 1324 1997

<sup>6</sup> 9 SCC 252 (1997)

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The introduction of Section 34 in the Act deprives/prevents promptness of the award and adversely affects its adequacy and effectiveness.

Article 19 of the Constitution speaks about equality before law while in Directive Principles is Inter Alia under 39(a) refers to equal justice. Here in the present case Section 34 carves out a discriminatory procedure different from C.P.C in matters of setting aside the award and the dispute and adjudication matter thereto are treated differently under regular Code Of Criminal Procedure depriving the litigant :

- 1) To Constitutional Rights
- 2) Rights under Procedural Laws
- 3) Effects and promptness of judgement by the way of Sec 34

Thereby adequacy and effectiveness of award is also threatened. As such Section 34 should be deemed to be Ultra Vires and struck down.

The Fundamental Principle is that-

Approbation and Reprobation is bad. In one hand award is being given and on the other provision for setting aside the award despite the fact that the Section 37 gives the right to appeal.

The framing of Section 34 is such that it amounts to exprobaton, i.e, taking away the fruits of the award. India is a party to various bilateral and multi-lateral conventions say for that matter GATT, TRIMES, UNCTAD AND UNITERAL. The meaning of some is still provided in Arbitration and Conciliation Act 1996 like New York and Geneva conventions. All these

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conventions lay much stress on promptness of the award but the Section 34 and phraseology is such that it delays the enforcement of the award. Delay defeats equity.

That for grant of Interim Injunction or Ad- Interim injunction there are set rules and judicial decisions. It is the duty of the courts to follow the Honorable Supreme Courts judgement and the non-following will amount to indiscipline and judicial misconduct.

Reliance can laid on :

State of Himachal Pradesh Vs. Paras Ram AIR SC 930 2008

OR

BSES Ltd Vs. Fenner Ltd AIR SC 1148 2006

On applying the principles laid down by the Honorable Supreme Court for grant of Interim Injunction and binding nature of Honorable Supreme Court Judgement in terms of Article 141 of Constitution of India the court has committed an impropriety by wrongly granting Ex-party injunction which needs to be vacated as the JGPS and the Maxis Bank does not have any prima case nor do they suffer any loss and have not also established the Fundamental Principle of Balance of convenience.

To sum up it is submitted before the Honorable High Court to declare Section 34 Ultra Vires and non-constitutional and accordingly struck the same. Even otherwise an alternative injunction granted be vacated and the bank guarantee invoked be allowed to be encashed and the award passed be given effect.

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4. WHETHER THERE IS ANY EFFECT OF THE ORDINANCE IN THE PENDENCY OF ARBITRAL PROCEEDING OR APPLICATION UNDER SEC 34 OF THE ACT OF 1996 ?

I. & II . NON- AVAILABILITY OF A NOTIFIED VACATION BENCH DURING ANY HOLIDAYS IS UNCONSTITUTIONAL AND NON – AVAILABILITY OF A NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION IS UNCONSTITUTIONAL -

Non availability of Judicial Bench and procedure during vacations-

Where there is a wrong there is a remedy is a proverb in the subject. The ordinance in the present case has been passed during the Honorable High Courts vacation giving no chance to challenge until the court reopens. This action is unconstitutional as it prevents the remedy to the aggrieved party in a way that not only is justice delayed but is justice denied.

“What cannot be done directly cannot be undone indirectly”

Thus in a way the right to get justice in a court is denied indirectly which otherwise is called creeping denial.

III. 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 ACTUS CURAIE NEMINEM GRAVABIT -

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In one way there neither has been a bench nor the listing procedure was adopted and the election process has been issued malafiedly. The issuance of the notification under the circumstances cannot deter the court to decide the matter on its merit.

#### IV. THE ORDINANCE BEING ULTRA VIRES PART IX , AND RETROACTIVE –

The ordinance thus otherwise is retroactive (retrospective) in nature and as such is bad in law. On the ground that the vested rights cannot be taken by the retrospective law.

Reliance is also placed on Article 243 (n) of the Constitution of India.

#### V. THE ORDINANCE FURTHER MARGINALIZES WOMEN AND WEAKER SECTIONS DUE TO THE PREVAILING SKEWED LITERACY STANDARDS , AND IT IS IN VIOLATION OF ASPECTS OF BASIC STRUCTURE LIKE THE PREAMBLE , SINGLE CITIZENSHIP, AND FREE AND EQUAL PRICIPATION IN DEMOCRATIC GOVERNMENT, AND IT ALSO ABRIDGES VALUABLE FUNDAMENTAL AND CONSTITUTIONAL RIGHTS-

The ordinance is discriminatory in a way law doing literary standards when in fact constitution provides

“Equality before law and equal protection of law” Article 14. On this ground alone the ordinance is Ultra Vires to the constitution.

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**PRAYER**

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IN THE LIGHT OF THE ARGUMENTS ADVANCED, CASES AND AUTHORITIES CITED, THE COUNSEL FOR RESPONDENTS HUMBLY REQUESTS THE HON'BLE HIGH COURT OF NIRDHAN:

1. DECLARE THAT SEC 34 OF ARBITRATION AND CONCILIATION ACT, 1996 IS UNCONSTITUTIONAL.
2. DECLARE THAT THE BANK GUARANTEE INVOKED BY THE JGPS SHALL NOT BE ENCASHED.
3. DECLARE THAT THE AWARD GRANTED BY THE PROCESS OF ARBITRATION SHALL PREVAIL.

**AND PASS ANY OTHER ORDER, DIRECTION OR RELIEF THAT THE COURT MAY DEEM FIT SO THAT THE MERITS OF THE CASE MEET THE ENDS OF JUSTICE, FAIRNESS, EQUITY AND GOOD CONSCIENCE.**

**FOR THIS ACT OF KINDNESS, THE PETITIONER SHALL DUTY BOUND FOREVER PRAY.**

SD/-

**COUNSELS FOR PETITIONERS**

PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCI