

TEAM CODE: Z

5TH NLIU Justice R.K Tankha Memorial Moot Court Competition

IN THE HON'BLE HIGH COURT OF NIRDHAN

Writ Petition (Civil) No. 999 / 2015
Clubbed with
Writ Petition (Civil) No. 1021 / 2015

(Filed under Article 226 of the Constitution of India, 1950)

People's Union for Liberties & Democratic Reforms and JCI Petitioners

versus

Republic of Gariba and Maxis Bank Respondents

Written Submissions on behalf of the Petitioners,

Counsel for the Petitioners.

TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

STATEMENT OF JURISDICTION v

STATEMENT OF FACTS xi

STATEMENT OF ISSUES..... vii

SUMMARY OF ARGUMENTS..... viii

ARGUMENTS ADVANCED 1

 I. Section 34 of the Act is Unconstitutional 1

 [A]. Introduction of Litigation in Arbitral process is unwarranted..... 1

 [B]. Pendency of the petition disturbs Fundamental Rights and bilateral commitments. 3

 [C]. Grant of automatic stay is per se bad in law..... 5

 II. Ordinance is Unconstitutional 7

 [A]. Ordinance is Ultra vires to part IX and retroactive 7

 [B]. Marginalizes women and weaker sections.....10

 III. The procedure followed by the Court during holidays is Unconstitutional 12

 [A]. The Non-availability of notified vacation bench and notified procedure for listing. 12

 [B]. The Non-Grant of listing of cases before election notification cannot affect the merits of the case 14

PRAYER 16

INDEX OF AUTHORITIES

A. Redfern & M.Hunter, Law & Practice of International Commercial Arbitration (London: Sweet & Maxwell, 2004) at 763

A.K.Gopalan v. The State of Madras AIR 1984 SC 309

A.K.Roy v. Union of India And Others, (1982) 1 SCC 27

Anokh Singh v. Punjab State Election Commission, (2011) 11 SCC 181

Aruna Roy v. State of Rajasthan(WP(C) No. 1 of 2015

Atlanta Limited v. Executive Engineer, Road Development Division and Another CDJ 2014 BHC 1285

Basinha v. State of Uttar Pradesh, (1969) 1 SCR 32

Bennett Coleman and Co. v. Union of India, (1972) 2 SCC 788

Bhanumathi and Others v. State of Uttar Pradesh And others 2010 (12) SCC 1

Bharu Kure Jat v. Tara Lal AIR 1962 Punj 173

Charan Lal Sahu and Others V. Giani Singh and another AIR 2012 SC 3217

Election Commission of India v. Ashok Kumar And Others AIR 2000 SC 729

Food Corporation of India v. Indian Council of Arbitration (2003) 6 SCC 564

Fuerst Day Lawson Ltd v. Jindal Exports Ltd (2001) 6 SCC 356

Guru Nanak Foundation v. M/s. Rattan Singh and Sons AIR 1981 SC 2075

House Production Pvt. Ltd v. Meediya Plus (2005) 2 M.L.J. 256

Hussainara Khatoon & Ors v. Home Secretary, State of Bihar AIR 1979 SC 1360

Indian Oil Corporation Ltd v. Raja Transport (P) Ltd (2009) 8 SCC 520

Indira Nehru Gandhi v. Raj Narain 1975 Supp SCC 1

Ircon International Ltd v. Arvind Construction Company Ltd 2000 (1) Raj 111

Japani Sahoo vs Chandra Sekhar Mohanty AIR 2007 SC 2762

Joyti Basu v. Debi Ghosal, (1982) 1 SCC 691

K.Nagraj and Others v. State of Andhra Pradesh, (1985) 1 SCC 523

M.Anasuya Devi v. M.Manik Reddy (2003) 8 SCC 565

M.G. Badappanavur v. State of Karnataka AIR 2011 SC 260

Margardia Sequeira Fernandes and Ors. v. Erasmo Jack de Sequiera AIR 2012 SC 1727

Messers Laljee Godhoo & Co. & Others v. Veena Nalin Merchant & Another CDJ 2012
BHC 1973

Motilal Sarafi v. State of J&K AIR 2007 SC 56

National Aluminium Co. Ltd v. M/s Pressteel & Fabrications Pvt. Ltd (2004) 1 SCC 540

Nilabati Behera v. State of Orissa 1993(2) SCC 746

P.Anand Gajapathi Raju v. P.V.G.Raju (Dead) AIR 2000 SC 1886

People's Union for civil Liberties and another v. Union of India and another (2003) 4 SCC
399

Peoples Union for Civil Liberties v. Union of India and Another, (2005) 2 SCC 436: (2005) 1
JT 283

R.K Garg v. Union of India And Others ,(1981) 4 SCC 675

Rail India Technical and Economic Services Ltd., Bangalore v. Ravi Constructions,
Bangalore AIR 2002 NOC 30 (Kart) p.14

Rajendra Singh by LRS v. Prembhai, AIR 2007 SC 3057

Rattiram v. State of M.P. through Inspector of Police, AIR 2012 SC 1485.

Rehman Antulay v. R.S.Naik AIR 1992 SC 1701

Renjan Dwiwedi v. C.B.I AIR 1950 SC 27, 1950 SCR 88

Shyama Charan Agarwal and Sons, M/s v. Union of India AIR 2002 SC 2659

State of Punjab v. Sarwan Singh, (1981) 3 SCR 349 : AIR 1981 SC 1054

Swamy v. Director, Central Bureau of Investigation And Another (2014) 8 SCC 682

The Empire Jute Co. Ltd. and Ors. Vs. The Jute Corporation of India Ltd. and Anr.2007 (4)

ARBLR 74 (SC).

The Konkan Railway Corporation Ltd v. Mehul Construction Co AIR 2000 SC 2821

Union of India And others v. Rakesh Kumar and others, (2010) 4 SCC 50

Vide S. M. Dyechem Ltd. v. M/s. Cadbury (India) Ltd AIR 2000 SC 2114

Vishaka and Others v. State of Rajasthan 1997 (6) SCC 241

W.B. Essential Commodities Supply Corporation v. Swadesh Agro Farming and Storage

Ltd1999 Supp(2) SCR 399

White Industries Australia Limited v. Republic of India (2012) 29 Journal of International

Arbitration, Issue 5, pp 623-635

Yeshwantrao Ganpatrao v. Dattarayarao Ramachandrarao AIR 1948 Nag 162 (DB)

Zenit Mataplast P.Ltd v. State of Maharastra AIR 2009 SC (Supp) 2364

WRITTEN SUBMISSIONS FOR THE PETITIONERS

STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

1. The Governor of Nirdhan, which is the biggest state in the Republic of Gariba, in order to fast pace the development devised a new scheme where roads were to be constructed by private parties. Jeopardy Contracts Inc. (JCI) entered into agreement with Jodhpur Goan Panchayat Samiti (JGPS) to construct 115 km road on 21.9.2011. The contract was terminated by JGPS on 21.9.2013.
2. JCI sent a legal notice on 11.12.2014 invoking the arbitration clause and for claiming the termination payment. JGPS replied on 12.12.2014 informing that the matter would not be considered under the Arbitration and Conciliation Act, 1996. They also invoked the performance bank guarantee. JCI filed an urgent civil writ in the High Court of Nirdhan, which directed the arbitration to be conducted by Council for Infrastructure Arbitration (CIA).
3. The arbitral award pronounced on 21.1.2015 was in favour of JCI. JGPS immediately filed a Sec.34 petition before the High Court of Nirdhan. The petitioners have challenged the constitutional validity of Sec.34 of the Arbitration and Conciliation Act, 1996.
4. Meanwhile, the Governor had promulgated an ordinance on 20.12.2014 which came into effect from 24.12.2014 which amended the Panchayati Raj Act, 1994. The ordinance incorporated academic qualifications for candidates to contest in Panchayat elections.
5. People's Union for Liberties & Democratic Reforms issued a public statement against the ordinance. Urgent listing was denied for the said matter in the High Court of Nirdhan. On 31.12.2014 the petitioner approached the Supreme Court under Art.32.
6. The Supreme Court directed the High Court of Nirdhan to hear the proceedings. The petitioner challenges the constitutionality of the ordinance.

STATEMENT OF ISSUES

1. Whether Section 34 of the Arbitration and Conciliation Act, 1996 is unconstitutional?
2. Whether the ordinance promulgated by the Governor of Nirdhan is ultra vires Constitution of India?
3. Whether the procedure followed by the courts during holidays and when not in session is unconstitutional?

SUMMARY OF ARGUMENTS

1. The petitioners humbly submit that Section 34 of the Arbitration and Conciliation Act, 1996 is unconstitutional. The argument is based on three-folds. *Firstly*, Section 34 introduces litigation in arbitral process against the basic tenets of arbitration. *Secondly*, the pendency of the petition disturbs fundamental rights and treaty obligations. And *finally*, the grant of automatic stay is per se bad in law.

2. The ordinance promulgated by the Governor of Nirdhan is ultra vires. This is because *firstly*, the ordinance is ultra vires to Part IX of the Constitution and is retroactive. And *secondly*, the ordinance marginalizes women and weaker sections of the society.

3. The third and final submission of the petitioners is that the procedure followed by the court during the holidays is constitutionally invalid. The argument is proved by substantiating that, *firstly*, non-availability of a notified vacation bench and procedure for listing during holidays is in violation of fundamental rights. *Secondly*, non-grant of listing of the case before the issuance of the election notification cannot affect the merits of the case.

ARGUMENTS ADVANCED

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

Section 34 of the Arbitration and Conciliation Act, 1996 (herein after referred as the “Act”) provides for the setting aside of the award on the grounds enumerated therein and none other.¹ The court entertaining an application for setting aside an award has no power to sit as court of appeal over the decision of the arbitrator and it cannot substitute its own views in place of the views of the arbitrator even if the same is erroneous.²

Jodhpur Gaon Panchayat Samati (JGPS) on 25.1.2015 filed a petition under section 34 of the Act before the High Court of Nirdhan challenging the award pronounced by Council for Infrastructure Arbitration (CIA), which was in favour of Jeopardy Contracts Inc. (JCI). JCI, the petitioner humbly submits that section 34 of the Act is unconstitutional since, the introduction of litigation in arbitral process is unwarranted[A], the pendency of the petition disturbs fundamental rights and bilateral commitments[B] and the grant of automatic stay is *per se* bad in law[C].

[A] The introduction of litigation in arbitral process is unwarranted.

An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.³ The Supreme Court of India while laying down the

¹ M.Anasuya Devi v. M.Manik Reddy (2003) 8 SCC 565 see also: Rail India Technical and Economic Services Ltd., Bangalore v. Ravi Constructions, Bangalore AIR 2002 NOC 30 (Kart) p.14

² Ircon International Ltd v. Arvind Construction Company Ltd 2000 (1) Raj 111

³ Halsbuy’s Laws of England

judgement in the *Indian Oil Corporation Ltd v. Raja Transport (P) Ltd*⁴ had defined the concept as “*Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties*”.

The object of the new Act is to encourage resolution of disputes expeditiously and less expensively and when there is an arbitration agreement the courts intervention should be minimal.⁵ The Apex Court in the *Konkan Railway Corporation Ltd v. Mehul Construction Co*⁶ had well explained the purpose of the Act as:

“...aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of Law so that trade and commerce is not affected on account of litigations before a court”.

Superior Court’s power of judicial review has wide amplitude but the same should not be exercised when there exists an arbitration clause.⁷ The legislative intent underlying the Arbitration and Conciliation Act, 1996 is to minimise the supervisory role of the courts in the arbitral process.⁸ The principle behind the formulation of the Act was to provide speedy and alternative solution to the disputes and thus avoid the protraction of litigation.⁹

Arbitrators are judges of fact as well as law and have jurisdiction and authority to decide wrong as well as right, and thus, if they reach a decision fairly after hearing both sides, their award cannot be attacked.¹⁰ However erroneous his decision may be, it cannot be interfered with by any court.¹¹

⁴ (2009) 8 SCC 520

⁵ P.Anand Gajapathi Raju v. P.V.G.Raju (Dead) AIR 2000 SC 1886

⁶ AIR 2000 SC 2821

⁷ The Empire Jute Co. Ltd. and Ors. Vs. The Jute Corporation of India Ltd. and Anr.2007 (4) ARBLR 74 (SC).

⁸ Food Corporation of India v. Indian Council of Arbitration (2003) 6 SCC 564

⁹ Fuerst Day Lawson Ltd v. Jindal Exports Ltd (2001) 6 SCC 356

¹⁰ Yeshwantrao Ganpatrao v. Dattarayao Ramachandrarao AIR 1948 Nag 162 (DB)

¹¹ Bharu Kure Jat v. Tara Lal AIR 1962 Punj 173

If the courts are given the power to review on the ground of error of law or error of fact then it will defeat the objectives of the Act and will also make arbitration the first step in the process which will lead to the highest Court of the land by way of successive appeals.¹²

The Supreme Court in a catena of decisions had conclusively held that the sole purpose of arbitration is to minimise the unwarranted judicial intervention in the arbitral process. Thus the petitioner submits that section 34 of the Act amounts to the introduction of litigation in arbitral process which is unwarranted and hence disturbs the basic tenets of arbitration.

[B] The pendency of the petition disturbs fundamental rights and bilateral commitments.

The admission of petition under Section 34 prolongs the judicial proceedings which in turn violates the fundamental right of speedy trial guaranteed under Art.21 of the Constitution of India (i). It also disrupts the country's bilateral and multilateral commitments under various conventions and investment treaties (ii).

i. Violates the right to speedy trial.

The aim of arbitration is to settle all the disputes between the parties and to avoid further litigation.¹³ In *Guru Nanak Foundation v. M/s. Rattan Singh and Sons*¹⁴ Justice D.A. Desai observed the importance of speedy resolution in his statement:

“Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940.”

The right to speedy trial was incorporated in the Constitution as per the case of *Hussainara Khatoon & Ors v. Home Secretary, State of Bihar*¹⁵, wherein the Supreme Court had

¹² A. Redfern & M.Hunter, Law & Practice of International Commercial Arbitration (London: Sweet & Maxwell, 2004) at 763

¹³ Shyama Charan Agarwal and Sons, M/s v. Union of India AIR 2002 SC 2659

¹⁴ AIR 1981 SC 2075

conclusively held that: ” *No procedure which does not ensure a reasonable quick trial can be regarded as ‘reasonable, fair or just’ and it would fall foul of Art.21..... It is an integral and essential part of fundamental right to life and liberty enshrined under Art.21*”.

The purpose of right of speedy trial is intended to avoid oppression and prevent delay by imposing on the court and on prosecution an obligation to proceed with reasonable despatch.¹⁶ With the passing of time, the parties will have to worry about more trial expenses and the chance of loss of evidence.¹⁷

The admission of petition under section 34 causes a huge delay in the process. It ultimately culminates into rendering the arbitral award earlier propounded ineffective in nature. Thus it is against the basic principle of both arbitration and the right to speedy trial envisaged under Art.21 of the Constitution which provides for speedy remedy.

ii. Disrupts country’s commitment towards conventions and investment treaties.

Any international convention not inconsistent with the Fundamental Rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of constitutional guarantee.¹⁸

The Apex Court in answering the question regarding the applicability of international conventions in domestic law in the case of *Vishaka and Others v. State of Rajasthan*¹⁹ had explicitly pointed out that:

“The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must

¹⁵ AIR 1979 SC 1360

¹⁶ Motilal Sarafi v. State of J&K AIR 2007 SC 56

¹⁷ Rehman Antulay v. R.S.Naik AIR 1992 SC 1701

¹⁸ Nilabati Behera v. State of Orissa 1993(2) SCC 746

¹⁹ 1997 (6) SCC 241

be had to international conventions and norms for construing domestic law when there is no inconsistency between them.”

The International Convention on Civil and Political Rights (ICCPR) which India ratified on 10 April 1979, has endorsed *the right to a fair and speedy trial*²⁰ by the Human Rights Committee on immediate implementation. The ICCPR provides for the fair and speedy trial without any undue delay as under Article 14 of the Convention²¹.

In the arbitration dispute, *White Industries Australia Limited v. Republic of India*²² decided based on the UNCITRAL Arbitration rules (1976), on the Australia-India bilateral investment treaty (BIT) it was implied that the inordinate delays in Indian court proceedings could potentially violate India’s BIT obligations not due to the violation of ‘denial of justice’, but due to a violation of the ‘effective means’ standard which requires a lower threshold than ‘denial of justice’. Thus, it is submitted that the Act is contravention to the International Obligations.

[C]The grant of automatic stay is per se bad in law.

The admission or filing of a petition under Section 34 of the Act would result in the grant of an automatic stay, which is a form of injunction (i), without adjudication on prima-facie case, balance of convenience and irreparable injury (ii) is *per se* bad in law.

i. Automatic stay is a form of injunction.

Once a petition challenging arbitral award under section 34 has been filed within the time prescribed under section 34(3) of the Arbitration and Conciliation Act, 1996, the implementation and execution of the award is automatically stayed.²³ Section 34 of the 1996

²⁰ Doc.CCPR/C/79/Add.67, para 25. And Doc.CCPR/C/79/Add.18, para 10.

²¹ See Article 14 of ICCPR

²² (2012) 29 Journal of International Arbitration, Issue 5, pp 623-635

²³ Atlanta Limited v. Executive Engineer, Road Development Division and Another CDJ 2014 BHC 1285 see also: Messers Laljee Godhoo & Co. & Others v. Veena Nalin Merchant & Another CDJ 2012 BHC 1973

Act makes a mere challenge to an award operate as an automatic stay even without an order of the court, thereby encouraging many parties to file petitions under that provision to delay the execution proceedings.²⁴

The Supreme Court had cleared the fog around the grant of an automatic stay on the arbitral award on the admission of a challenge in the case of *National Aluminium Co. Ltd v. M/s Pressteel & Fabrications Pvt. Ltd*²⁵. The court had opined that:

“An award, when challenged under Section 34 within the stipulated time therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible.”

Automatic stay is an injunction granted by a court in a bankruptcy proceeding. It is a statutory injunction against all efforts outside of the bankruptcy proceedings to collect a debt against the bankrupt.²⁶

- ii. Grants stay without adjudication on prima-facie case, balance of convenience and irreparable injury.

The grant of temporary injunction is governed by three basic principles, i.e. (a) prima facie case; (b) balance of convenience; and (c) irreparable injury, which are required to be considered in a proper perspective in the facts and circumstances of a particular case.²⁷

²⁴ Paper prepared for the Law and Economy in India Project at the Center on Democracy, Development, and The Rule of Law. Stanford University.

²⁵ (2004) 1 SCC 540

²⁶ <http://www.duhaime.org/LegalDictionary/A/AutomaticStay.aspx>

²⁷ *Zenit Mataplast P.Ltd v. State of Maharastra* AIR 2009 SC (Supp) 2364 see also: *Vide S. M. Dyechem Ltd. v. M/s. Cadbury (India) Ltd* AIR 2000 SC 2114

The Supreme Court of India in the case of *Margardia Sequeira Fernandes and Ors. v. Erasmo Jack de Sequiera*²⁸ held that:

“In the broad category of prima facie case, it is imperative for the Court to carefully analyse the pleadings and the documents on record and only on that basis the Court must be governed by the prima facie case. In grant and refusal of injunction, pleadings and documents play a vital role.”

The grant of injunction is a discretionary relief and while granting such injunction, the Court is required to satisfy itself that there is a prima facie case in favour of the party asking for injunction and irreparable injury or damage would be caused if injunction is not granted and balance of convenience lies in favour of the applicant.²⁹

Petition under Section 34 does not adjudicate on the merits of the case. Thus, it is not compliance with the three basic principles and is per se bad in law. It is a well established principle that petition under Section 34 leads to automatic stay without prima facie adjudication. Further more it does not consider balance of convenience and irreparable injury.

Thus Section 34 of the Act introduces litigation in arbitral process against the basic tenets, is against the fundamental rights and treaty obligations and furthermore such an automatic stay is per se bad in law. Hence the counsel for the petitioners prays to hold that Section 34 of the Arbitration and Conciliation Act of 1996 to be constitutionally void.

II. The ordinance is ultra vires.

The petitioners contend that the ordinance promulgated by the Governor of Nirdhan is ultra vires the Constitution. Since, it violates part IX of the Constitution and is retrospective [A] and it marginalizes women and other weaker sections [B].

²⁸ AIR 2012 SC 1727

²⁹ House Production Pvt. Ltd v. Meediya Plus (2005) 2 M.L.J. 256

[A]The ordinance is ultra vires to part IX of the Indian constitution and is retroactive.

A Constitutional Bench of the apex in the case of M.G. Badappanavur v. State of Karnataka³⁰ held that:

“...equality is a basic feature of the constitution and although emphasis in earlier decisions evolved around discrimination and classifications, the content of Article 14 got expanded conceptually and has recognized the principles to comprehend the doctrine of promissory estoppels, non arbitrariness, compliance with rules of natural justice eschewing irrationality etc”.

A constitutional bench of the ultimate judicial authority in India laid down the importance of the fair and free elections in the *Indira Nehru Gandhi v. Raj Narain*³¹ case wherein it was held that: *“...free and fair elections, being an intrinsic part of democracy, are a part of the basic structure of the constitution.”*

Part IX of the Indian Constitution deals with the function of Panchayats. Article 243 F (1) (a)³² states the disqualifications for membership. No educational qualification has been prescribed even for election to the legislature of the State less alone a Panchayat. Hence, it is settled that the disqualifications set by the Governor using his ordinance making power prescribed in Article 213 of the constitution in the instant case is unconstitutional.

Article 25 of the ICCPR recognizes and protects the right of every citizen to take part in the conduct of public affairs, right to vote and to be elected and the right to have access to public service. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant³³. Moreover the UDHR also recognizes and protects the right of every citizens also entitles every citizen of a country to

³⁰ AIR 2011 SC 260

³¹ 1975 Supp SCC 1

³² See Article 243 F of the Constitution of India

³³ ICCPR Article 25

actively take part in the government of the country directly or indirectly.³⁴ Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.³⁵

Right to vote would be effectively nullified without a full right to contest. Electoral democracy cannot run without contestants³⁶. The Apex Court has placed the right to contest on the same pedestal as the right to vote.³⁷ Therefore, by interpretation even the right to contest is a fundamental right.

Article 14 of the Constitution of India strikes down arbitrariness in any form. The impugned Ordinance cannot be sustained on the ground of object-nexus test. In the case of *People's Union for civil Liberties and another v. Union of India and another*³⁸, the Apex court struck down disqualification in elections. According to the Court, if the disqualification prescribed by the ordinance deprives a large section of the society to participate in the democratic institution of Panchayathi raj, and runs counter to the objectives of the 73rd amendment, it may be declared as unconstitutional by the court of law.³⁹

The object of enacting Article 329(b) of the Constitution of India was explained, and the principles for considering the applications for staying the elections were explained in the case of *Election Commission of India Through Secretary v. Ashok Kumar And Others*⁴⁰, wherein it was held that:

³⁴ see UDHR Article 21

³⁵ ICCPR (Fifty seventh session, 1996) (1)(2) see also: Article 25

³⁶ *Bennett Coleman and Co. v. Union of India*, (1972) 2 SCC 788

³⁷ *Joyti Basu v. Debi Ghosal*, (1982) 1 SCC 691

³⁸ (2003) 4 SCC 399, see also; *Union of India And others v. Rakesh Kumar and others*, (2010) 4 SCC 50 (para 45) and *Anokh Singh v. Punjab State Election Commission*, (2011) 11 SCC 181(para 36 and 37).

³⁹ *Aruna Roy v. State of Rajasthan*(WP(C) No. 1 of 2015

⁴⁰ AIR 2000 SC 729, para 32z

“The action taken or orders issued by election Commission are open to judicial review on the well-settled parameters which enable as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

Without Interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to perverse a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.”

Hence, it is proved that the ordinance is ultra vires to part IX of the Indian constitution and is retroactive.

[B] The ordinance marginalizes women and weaker societies

The poor, under privileged and downtrodden, cannot be denied participation in a democracy merely on the ground that they do not have educational qualification for such inclusion.⁴¹ Article 243 (D) of the Indian Constitution⁴², provides special reservation for the weaker Societies, for participating in the elections; it reserves seats for the scheduled castes, scheduled tribes and for women to different constituencies in a Panchayat.

In fact, prescription of educational qualification for inclusion for contesting election in any democratic institution, unless there is a strong nexus with the object, to be achieved, is an anti-thesis to the democratic governance of the institution in a republic.⁴³

⁴¹ Supra n 30

⁴² 73rd Amendment of the constitution of India

⁴³ The Rajasthan Panchayat Ordinance case <https://electionlawindia.wordpress.com/2015/01/>

The observation of the Hon'ble Supreme court, in introducing the 73rd amendment in the Constitution of India, providing for inclusive governance at the grass root level was held in the case of *Bhanumathi and Others v. State of Uttar Pradesh through its Principal Secretary And others*,⁴⁴ and the powers of the court for judicial review of an ordinance which are not issued in emergency situations in plethora of cases and explanation of the classification rule under Article 14 of the Constitution of India in the case of *Subramanian Swamy v. Director, Central Bureau of Investigation And Another*.⁴⁵

The distinction between the two objects is one of crucial importance. The 73th amendment itself states that one of the objects of constitutionalizing the Panchayathi Raj institution is to remedy the “insufficient representation of weaker sections like scheduled case, scheduled tribes and women”.

Thus it can be held that the ordinance promulgated by the Governor of Nirdhan marginalizes women and other weaker section of the society. And that it is against the basic structure of the Constitution.

It is a humble submission on the petitioners that the ordinance is in violation of the fundamental rights and moreover it is against the basic principles of protecting women and weaker sections. Thus the court may kindly hold the ordinance to be unconstitutional.

III. The procedures followed by the court during the holidays are unconstitutional.

Fair trial is the heart of justice and equality and, in a way, an important facet of democratic policy that is governed by the Rule of law. It is ingrained in the concept of due process of law⁴⁶. Fundamental Rights must not be read in isolation, but along with directive principles.⁴⁷

⁴⁴ 2010 (12) SCC 1, see also; *R.K Garg v. Union of India And Others* ,(1981) 4 SCC 675, *A.K.Roy v. Union of India And Others*, (1982) 1 SCC 271(para 26), *K.Nagraj and Others v. State of Andhra Pradesh*, (1985) 1 SCC 523(para 26)

⁴⁵ (2014) 8 SCC 682

⁴⁶ *Rattiram v. State of M.P. through Inspector of Police*, AIR 2012 SC 1485.

Before a person is deprived of his life or personal liberty, the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected.⁴⁸

The procedure followed by the court during holidays are unconstitutional, since the non-availability of a notified vacation bench and notified procedure for listing is in violation of fundamental rights [A]. Furthermore, the non-granting of listing of case before election notification cannot affect the merits of the case [B].

[A] Non-availability of a Notified Vacation Bench and Notified Procedure during any holiday or even when the court is not in session is in violation of Fundamental Rights.

The petitioners in the instant case, i.e. people for democratic rights and reforms moved to the high court on 29.12.2014 through its counsel, approached the High Court for an urgent listing. The PPS to the Hon'ble Chief Justice informed the counsel that the listing has been denied⁴⁹. Considering the situation that was demanding a fast and important decision, the court, without even considering the situation or the merits of the case denied the listing of the case. In turn the petitioners were denied their right to fair trial instantly.

A clear reading of the *A.K.Gopalan v. The State of Madras*⁵⁰ case establishes that:

“...there is nothing revolutionary in the view that procedure established by law must include the four principles’ of elementary justice which inhere in and are at the root of all civilized systems of law, and which have been stated by the American courts and jurists as consisting in 1) Notice, 2) opportunity to be heard

⁴⁷ Peoples Union for Civil Liberties v. Union of India and Another, (2005) 2 SCC 436: (2005) 1 JT 283

⁴⁸ Basinha v. State of Uttar Pradesh, (1969) 1 SCR 32

⁴⁹ Statement of facts page 4, Para 18

⁵⁰ AIR 1950 SC 27, 1950 SCR 88

3) *impartial tribunal* 4) *orderly course of the procedure*. These four principles are really different aspects of the same right, namely, the right to be heard before one is condemned. Hence the words “*procedure established by the law*”, whatever its exact meaning be, must necessarily include the principle that no person shall be condemned without hearing by an impartial tribunal”.

Matters relating to violation of human rights and those relating to and of public importance are considered to be of urgent nature and maybe listed and heard during vacation/holidays.⁵¹

The apex court in the case of *Charan Lal Sahu and Others V. Giani Singh and Another*⁵² held that “*Denial of a speedy trial may lead to an inference of prejudice denial of justice*”.

In *Renjan Dwiwedi v. C.B.I*⁵³ through the Director General, The Apex Court held that “*Delay in approaching a court itself is not a ground for dismissing of a case though it may be a relevant circumstance in reaching a final verdict.*” In the instant case no delay has been made by the petitioners in approaching the court.

The urgency of the matter was relating to the violation of fundamental rights and also included public importance. The petitioners are denied their right to be heard by denying the listing of their case in the High court of Nirdhan. It can be evidently presumed that a vacation bench was not available, as the PPS to the Hon’ble Chief Justice informed the counsel that the listing of the case had been denied. Thus it can be conclusively held that there has been fundamental right violation since the right to be heard under Art.21 of the Constitution was breached.

[B] Non-grant of listing of the case before the issuance of election notification cannot affect the merits of the case.

⁵¹ Supreme Court of India, Practice and Procedure Third(Revised) Edition, Page: 42, 2010

⁵² AIR 1984 SC 309

⁵³ AIR 2012 SC 3217

The petitioners have come to the court seeking justice on a short note time, though the item brought in front of the court is of high importance. The Governor of Nirdhan had anticipated a situation of time shortage as he promulgated the ordinance two weeks before the election notification dates.

The Supreme Court in the case of *Japani Sahoo vs Chandra Sekhar Mohanty*⁵⁴ had enunciated that:

“...a complaint filed within the period of limitation under the Code cannot be made infructuous by an act of court. The legal phrase "actus curiae neminem gravabit" which means an act of the court shall prejudice no man, or by a delay on the part of the court neither party should suffer, also supports the view that the legislature could not have intended to put a period of limitation on the act of the court of taking cognizance of an offence so as to defeat the case of the complainant.”

The courts have observed that people lose faith in the judiciary because of the long delay in the disposal of cases, and that the authorities have to do the needful to ensure speedy justice.⁵⁵

In the present matter any decision delivered in favour of petitioners, to have a full and effective relief, it is necessary that the order should effect retrospectively. Even though there was no listing of the case it is evident that the petitioners have had approached the High Court and even the Apex Court well in time.

As stated in Article 243 E (1)⁵⁶ Every Panchayat, unless sooner dissolved under any laws for the first time being in force, shall continue for five years from the date appointed for its meeting and longer. Any further delay in the instant case would amount to the effect of the

⁵⁴ AIR 2007 SC 2762 see also: In State of Punjab v. Sarwan Singh, (1981) 3 SCR 349 : AIR 1981 SC 1054, of W.B. Essential Commodities Supply Corporation v. Swadesh Agro Farming and Storage (Private) Ltd 1999 Supp(2) SCR 399

⁵⁵ Rajendra Singh by LRS v. Prembhai, AIR 2007 SC 3057

⁵⁶ Indian Constitutional Law, M.P.Jain, 7th edition, 2014

ordinance to act for a period of 5 years rather than for 6 months. Thus, it could be conclusively held that non-grant of listing of the case before the issuance of election notification cannot affect the merits of the case.

PRAYER

In the light of issues raised, arguments advanced and authorities cited, the petitioners humbly pray that this Hon'ble High Court may kindly adjudge and declare that:

- A. The Section 34 of the Arbitration and Conciliation Act, 1996 is unconstitutional.
- B. The ordinance promulgated by the Governor of Nirdhan is ultra vires.
- C. The procedure followed by the Court during holidays and when not in session is unconstitutional.

Or may kindly pass any other order that this Hon'ble High Court may deem fit. For this act of kindness the petitioners shall in duty bound forever pray.

Respectfully submits

Sd/-

Counsel for Petitioners