

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

IN THE HIGH COURT OF NIRDHAN

UNDER ART. 32 OF THE CONSTITUTION OF GARIBA

JEOPARDY CONTRACT INC.

Vs.

THE REPUBLIC OF GARIBA & MAXIS BANK

WRIT PETITION NO.999 OF 2015

&

PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS

Vs.

THE REPUBLIC OF GARIBA

WRIT PETITION (C) NO.1021 OF 2015

MEMORANDUM ON BEHALF OF THE RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	I
STATEMENT OF FACTS	V
QUESTIONS PRESENTED	VII
SUMMARY OF ARGUMENTS	VIII
ARGUMENTS	1
1. THAT SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS NOT UNCONSTITUTIONAL	1
1.1. That litigation subjects arbitral award to greater Judicial scrutiny.....	1
1.2. That the pendency of Section 34 petitions does not amount to expropriation.	2
1.3. That ground of automatic stay is not bad in law.....	3
1.4. That Supreme Court being the Final Interpreter has a duty to see that injustice is not perpetuated.....	4
2. THAT THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN IS NOT UNCONSTITUTIONAL AND CANNOT BE SET ASIDE.	5
2.1. That the ordinance is brought in conformity with Part IX and responsibility furthered to Panchayat.....	5
2.2. That the ordinance is not against Art 14.....	6
2.3. Court cannot interfere with policy matter.....	8
2.4. There is no fundamental right to contest	9
2.5. The ordinance in the present case is non-justiciable.	9
2.6. The court is barred to interfere once the election process has began	10
3. THAT (A). NON AVAILABILITY OF A NOTIFIED VACATION BENCH DURING ANY HOLIDAYS AND, (B). NON-AVAILABILITY OF A NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION IS NOT UNCONSTITUTIONAL.	11
3.1. The High Court of Nirdhan cannot issue a writ of mandamus to the Republic of Gariba.....	11
3.2. The Parliament is not competent to pass legislation regarding vacation benches and notified procedure regarding listing when court is not is session.....	13
3.3. No violation of Fundamental rights.....	14
SUBMISSIONS TO THE COURT.....	15

TABLE OF AUTHORITIES

Case Name	Citation	Page No.
A. Laxmandas And Ors. Vs. The State Of Madhya Pradesh	AIR 1970 MP 189	11
Amalgamated Tea Estate Co Ltd Vs. State of Kerala	(1974) 2 SCC 415	9,12
Aravali Golf Club Vs. Chander Hass	(2008) 1 SCC (L&S) 289	13
Ashok Kumar Gupta Vs. State of Uttar Pradesh	(1997) 5 SCC 201	10
Ashuthosh Gupta Vs. State of Rajasthan	(2002) 4 SCC 34	6,9
Babar Ali Vs. Union of India & Ors	(2000) 2 SCC 178	1
Banarasidas Vs. State of U.P.	AIR 1956 SC 520	6
Bhavesh D. Parish And Others Vs. Union of India And Another	(2000) 5 SCC 471	8
Budhan Choudhry and Ors. Vs. The State of Bihar	1955 Cri LJ 374	7
Chevron Corporation (USA) and Texaco Petroleum Company (USA) Vs. The Republic of Ecuador	UNCITRAL, PCA Case No. 34877	3
Controller of Monghyr Vs. Keshav Prasad	A.I.R. 1962 S.C. 1694	11
Dhakeswari Cotton Mills Vs. Commissioner of Income-tax	West Bengal, AIR 1955 SC 65	4
Dr. Rai Shivendra Bahadur Vs. Governing Body of the Nalunda College	A.I.R. 1962 S.C. 1210	11
Dulari Devi and Ors. Vs. State of Rajasthan	CWP. No. 375/2015, January 15 th , 2015	10
J.K. Cotton Mills Spinning and Weaving Milk Co. Ltd v. State of U.P.	[1961] 3 SCR 185	3
Javed And Others Vs. State of Haryana And	(2003) 8 SCC 369	6,7

Others.		
Jodhpur Chartered Accountants Society & Anr Vs. The State of Rajasthan & Anr,	2001 (2) WLC (Raj.) 17	8
Jumuna Prasad Mukhariya and Ors. Vs. Lachhi Ram and Ors.	AIR 1954 SC 686	9
Jyoti Basu and Ors. Vs. Debi Ghosal and Ors.	[1982] 3 SCR 318	9
K. Nagaraj and others etc. Vs. State of Andhra Pradesh	AIR 1985 SC 551	9
Kanhaiya Lal Sethia and anr. Vs. Union of India and anr.	(1997) 6 SCC 573	11
Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna etc., Vs. State of Bihar and Ors.	[1988] 3 SCR 311	8
Mata jog Vs. Bhari	AIR 1955 SC 44 at pg 48	14
Meghraj Kothari Vs. Delimitation Commission & Others	AIR 1967 SC 669	10
Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors.	AIR 1978 SC 581	10
Mondev International Ltd Vs. United States of America	ICSID Case No-ARB (AF)/99/2	3
N P Ponnuswami Vs. Returning Officer, Nammakal	AIR 1952 SC 64.	10
Naraindas Indurkhya Vs. State of MP	(1974) 4 SCC 788	14
National Aluminum Co. Ltd. v. Pressteel & Fabrications (P) Ltd	(2004) 1 SCC 540	4
Oil & Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,	AIR 2003 SC 2629	5
Pannalal Bansilal Pitti and Ors. Vs. State of A.P. and Anr.	[1996] 1 SCR 603	8
Rai Sahib Ram Jawaya Kapur and Ors. Vs. union of India	AIR 1955 SCC 549	13

Ramtanu Co-operative Society Vs. State of Maharashtra	AIR 1970 SC 1771	4
S.T. Muthusami Vs. K. Natarajan and Ors.	AIR 1988 SC 616	10
Sakhawat Ali Vs. The State of Orissa	[1955] 1 SCR 1004	9
Salini Costruttori S.A and Italstrade S.A Vs. Kingdom of Morroco	ICSID Case No ARB/00/4 (Decided on 21-07-2001)	2
Shiv Ram & Ors. Vs. The State of Rajasthan & Others	AIR 2000 Raj 416	6
State of Punjab Vs. Satya Pal	AIR 1969 SC 903	8,9,10
State of West Bengal and Ors. Vs. The Committee for Protection of Democratic Rights, West Bengal and Ors.	AIR 2010 SC 1476	1
T. Venkata Reddy etc. Vs. State of Andhra Pradesh	AIR 1985 SC 724	10
The Bar Council of Uttar Pradesh Vs. The State of U.P. and Anr.	[1973] 2 SCR 1073	8
The State of Madhya Pradesh Vs. G.C. Mandawar	(1954) II LLJ 673 SC	8
Tirupati Balaji Developers Pvt. Ltd. and Ors. Vs. State of Bihar and Ors.,	AIR 2004 SC 2351	5
Toto Costruzioni Generali SpA Vs. Lebanon	(ICISD Case No. ARB/07/12, Decision on Jurisdiction of 11 September, 2009)	3
TPI India Limited Vs. Union of India	(2001) 2 AD (Del) 21	2
Venture Global Engineering Vs. Satyam Computer Services Ltd. and Anr	AIR 2008 SC 1061	1
White Industries Australia Limited Vs. The Republic of India	UNCITRAL, Final Award (30 November, 2011)	2,3
SC Advocates on Record Assn Vs. Union of India,	(1993) 4 SCC 441	11

TREATISES:

ARVIND P. DATAR, COMMENTARY ON THE CONSTITUTION OF INDIA (2nd ed, 2007)

H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4th ed., 1993)

M.P. JAIN, INDIAN CONSTITUTIONAL LAW (6TH ed., 2010)

D.D BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, (VOL2 8TH ED, 2007)

TREATIES & STATUTES & CONSTITUTIONS REFERRED:

REPRESENTATIVE OF PEOPLE ACT, 1951

CONSTITUTION OF INDIA

CODE OF CIVIL PROCEDURE, 1908

NEW YORK CONVENTION, 1958

ARBITRATION AND CONCILIATION ACT 1996

STATEMENT OF FACTS

The Republic of Gariba is a sovereign federation of states with several union territories. The countryside of the Republic displays a very diverse geographic profile, with hills in the north and the east, seas in the south and the south-west, and desert in the northwest. Most part of the desert is situated in Nirdhan, which is the biggest of the States in the Republic.

The territory was considered as backward till 2011. So as to alleviate the liquidity crunch of the region, a new scheme was devised under which highways and arterial roads were to be constructed by private parties. Powers in this regard were delegated to all the Panchayat Samitis.

A company Jeopardy Contracts Inc. [*“hereinafter **Petitioner 1**”*] entered into an agreement with Jodhpur Gaon Panchayat Samiti [*“hereinafter **JGPS**”*] on 21.9.2011 for 115 kms of road in a Scheduled area in Nirdhan. Due to certain issues, regarding land acquisition, design of the bridges etc., JGPS terminated the contract on 21.9.2013.

As per the contractual mechanism, Petitioner 1 sent a legal notice on 11.12.2014 for invoking arbitration as per contractual clause and also asked for ‘termination payment’ for the work already done. To which JGPS refuted the arbitration jurisdiction and further invoked the performance bank guarantee on 12.12.2014 by sending an email after business hours to the Maxis bank.

On 13.12.2014, Petitioner 1 moved the High Court of Nirdhan by filing an urgent civil writ petition being WP (C) No. 99/2014, which was directed to be listed at 10.30 am on 15.12.2014.

The High Court then granted “an ad-interim ex-parte stay on invocation of bank guarantee if not already encashed”, and also directed matter to the arbitration proceedings. By 11.00 am, the copies of the order were served upon JGPS, and the Maxis Bank [*“hereinafter **Respondent 1**”*].

However, in the meantime, at 10.00 am, the branch manager of the Jodhpur Gaon branch of

Respondent bank had acted on the email of JGPS and encashed the bank guarantee, but due to a massive security breach it remained unenforced.

Subsequently, arbitration proceedings took place under the Act of 1996, before the Council for Infrastructure Arbitration (CIA), and objections regarding maintainability filed by JGPS were dismissed by the Id. Arbitrators and further gave award in favour of Petitioner 1.

JGPS immediately filed a petition under Sec. 34 of the Act of 1996, before the High Court of Nirdhan, on its original side. While the Petitioner 1 asked for enforcement of arbitral award, which the Respondent bank refused to enforce and cited its inability due to directions of the Apex Court as well as the Reserve Bank with bank guarantee norms. Hence the said writ petition challenged the validity of Sec 34. In the meanwhile, the Governor of the State of Nirdhan, promulgated an Ordinance which came into effect from 24th of December 2014, laying down qualifications for election as Panch and Sarpanch.

This was first time such a provision had been brought into vogue in the entire Republic. People's Union for Liberties & Democratic Reforms [**Petitioner 2**] filled a writ petition before the vacation bench of High Court of Nirdhan challenging this ordinance and asked for immediate relief since election notification was to be issued on 3-01-2015. The said petition was denied any listing. To which the petitioner approach the apex court under Art 32 on 31-12-2014. After much delay by the authorities, listing was granted after the issuance of the election notification.

The apex court directed the petitioner to approach the High Court of Nirdhan, to which, the said writ petition lies before this Hon'ble Court challenging the validity of Ordinance and the asking for a procedure for the setting of the vacation benches. The High Court of Nirdhan admitted the petition, and issued notices to the Id. Attorney General as well as the Republic of Gariba. The High Court of Nirdhan functions in the same manner like the Delhi High Court.

QUESTIONS PRESENTED

1. Whether Section 34 of the Arbitration and conciliation Act, 1996 is unconstitutional
2. Whether the ordinance promulgated by the governor of Nirdhan is unconstitutional and liable to be set aside.
3. Whether non availability of (a). notified vacation benches and (b). notified procedure for listing when court is not in session is unconstitutional.

STATEMENT OF JURISDICTION

THE REPUBLIC OF GARIBA AND MAXIS BANK. submit to the jurisdiction exercised by the Hon'ble High Court of Nirdhan under Article 226 of the Constitution of Gariba.

SUMMARY OF ARGUMENTS

1. That Section 34 of the Arbitration and Conciliation Act, 1996 is not unconstitutional

It is submitted that the pendency of Section 34 petitions does not amount to expropriation. It is further argued that the ground of automatic stay is not bad in law, and that litigation subjects arbitral awards to greater judicial scrutiny. Also, That Supreme Court being the Final Interpreter has a duty to see that injustice is not perpetuated.

2. That the Ordinance promulgated by the governor of Nirdhan is not unconstitutional and cannot be set aside.

It is submitted that the ordinance is brought in conformity with Part IX and responsibility furthered to Panchayat and that the ordinance is not against Article 14. It is further argued that the court cannot interfere with policy matters, that there is no fundamental right to contest, that the ordinance in the present case is non-justiciable, and that the court is barred to interfere once the election process has begun.

3. That non availability of a notified vacation bench during any holidays, and non-availability of a notified procedure for listing when the Court is not in session is not unconstitutional.

It is submitted that the High Court of Nirdhan cannot issue a writ of mandamus to the Republic of Gariba as establishment of Vacation Benches and notification of procedure for listing when the Court is not in session are policy matter in which the High Court of Nirdhan cannot interfere and as a writ of Mandamus to the Republic constitutes a breach of the Doctrine of Separation of Powers. Further, the Parliament is not competent to pass legislation regarding vacation benches and notified procedure regarding listing when court is not is session. Lastly it is argued that there is no violation of Fundamental Rights.

ARGUMENTS

1. THAT SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS NOT UNCONSTITUTIONAL

1.1. That litigation subjects arbitral award to greater Judicial scrutiny

It is humbly submitted that there is no question of the Arbitration and Conciliation Act, 1996 being unconstitutional or in any way of fending the basic structure of the Constitution of India, as the Court has rightly observed that judicial review is available for challenging the award in accordance with the procedure laid down therein. Only because Question are required to be considered after the award is passed and not at any penultimate stage by the appropriate court cannot be a ground for submitting that an order is not subject to any judicial scrutiny. The time and manner of judicial scrutiny can legitimately be laid down by the Act passed by Parliament¹. Through multiple cases the courts had allowed greater scrutiny in cases of arbitral awards².

Further it has been held that Judicial Review is a part of Basic Structure of the Constitution³, hence the sections of Act of 1996 should be read in consonance with Judicial Review.

It may be noted here the Arbitration and Conciliation Act, 1996 is substantially based on the model law adopted by the United Nations Commission on International Trade Law (UNCITRAL) in view of the policy of liberalisation pursued by this country. It became almost

¹ Babar Ali Vs. Union of India & Ors, (2000) 2 SCC 178, ¶1

² Venture Global Engineering Vs. Satyam Computer Services Ltd. and Anr., AIR 2008 SC 1061, ¶20

³ State of West Bengal and Ors. Vs. The Committee for Protection of Democratic Rights, West Bengal and Ors., AIR 2010 SC 1476, ¶11

imperative to model the arbitration laws of the country after the UNCITRAL Model Code⁴. §34 is based on Article 34 of the UNCITRAL model law and hence introduction of litigation is in compliance with the UNCITRAL model.

1.2. That the pendency of Section 34 petitions does not amount to expropriation.

1.2.1. That there is no expropriation when the award is still pending

It is humbly submitted that in the case of *White Industry Australia Ltd Vs. Republic of India*⁵, the ICC tribunal held that since the award has neither been enforced nor set aside, there was no expropriation. Further the tribunal held based on the test of investment that was developed by the Salini Tribunal⁶ that the bank guarantee do not constitute an investment for the purpose of the BIT and hence India cannot be found in breach of its obligation under article 7(1)(a) of the BIT which provides for expropriation. In the present case, as the bank guarantee was not encashed therefore the award is still pending enforcement not leading to expropriation.

1.2.2. That a delay in proceedings cannot qualify as a breach of its legitimate expectations and fair and equitable standards.

It is humbly submitted that the delay in the judicial proceeding under Section 34 does not lead to expropriation as “The tribunal held it is a given that any investor in India would be expected to

⁴ TPI India Limited Vs. Union of India, (2001) 2 AD (Del) 21, ¶2

⁵ White Industries Australia Limited Vs. The Republic of India, UNCITRAL, Final Award (30 November, 2011), ¶12.2.1

⁶ Salini Costruttori S.A and Italstrade S.A Vs. Kingdom of Morocco, ICSID Case No ARB/00/4 (Decided on 21-07-2001), ¶52

know the heavily burdened and backlogged nature of its courts and therefore, a delayed proceeding cannot qualify as a breach of its legitimate expectation”⁷.

Also, “the excessive delays in the present case did not meet the threshold for the breach of the fair and equitable treatment standard”⁸. In support of this, the Tribunal relied on *Mondev*⁹ and *Chevron*¹⁰ to prove the fact that the test for court’s denial of justice is a stringent one. Moreover, “the tribunal emphasised on the absence of any fixed timeframe under international law within which cases are to be disposed off.”¹¹

1.3. That ground of automatic stay is not bad in law.

It is humbly submitted that while interpreting a statute, the court always presume that the legislature’s insertion of every part of the statute should have effect¹² and not selectively. Further, going by the literal rule, under §34 of the Act of 1996, an award, when challenged under Section 34 within the time stipulated 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 the court contrary to that, also becomes impermissible.”¹³

⁷ *Supra* Note No. 5, ¶10.3.15

⁸ *Ibid*, ¶10.4.5

⁹ *Mondev International Ltd Vs. United States of America*, ICSID Case No-ARB (AF)/99/2, ¶101

¹⁰ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) Vs. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, ¶65,155

¹¹ *Toto Costruzioni Generali SpA Vs. Lebanon* (ICISD Case No. ARB/07/12, Decision on Jurisdiction of 11 September, 2009) ¶155; *Ibid* at ¶10.4.9.

¹² *J.K. Cotton Mills Spinning and Weaving Milk Co. Ltd Vs. State of U.P.*, [1961] 3 SCR 185,¶9

¹³ *National Aluminum Co. Ltd. Vs. Pressteel & Fabrications (P) Ltd*, (2004) 1 SCC 540, ¶10

Further it is submitted that a special Act cannot be annulled as discriminatory merely on the ground that it lays down a procedure different from that prescribed by the general law, because the objects and purposes of the two Acts are different¹⁴.

Hence adjudication on prima facie case, balance of convenience and irreparable injury under Rule 1 of Order 39 of CPC is not necessary as under §36 of the Act of 1996 an award which is to be set aside under §34 of the Act of 1996 becomes unexecutable.

1.4. That Supreme Court being the Final Interpreter has a duty to see that injustice is not perpetuated.

It was held by the Supreme Court that, "It is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in this Court by the constitutional provision made in Article 136.....All that case be said is that the Constitution having trusted the wisdom and good sense of the Judges of this Court in this matter, that itself is a sufficient safeguard and guarantee that the power will only be used to advance the cause of justice.....because the whole intent and purpose of this article is that it is the duty of this Court to see that injustice is not perpetuated or perpetrated by decisions of Courts and tribunals because certain laws have made the decisions of these courts or tribunals final and conclusive."¹⁵ Also, that, "As far as the appellate jurisdiction is concerned, in all civil and criminal matters, the Supreme Court is the highest and the ultimate court of appeal. It is the final interpreter of the law."¹⁶

¹⁴ Ramtanu Co-operative Society Vs. State of Maharashtra, AIR 1970 SC 1771, ¶21

¹⁵ Dhakeswari Cotton Mills Vs. Commissioner of Income-tax, West Bengal, AIR 1955 SC 65, ¶12

¹⁶ Tirupati Balaji Developers Pvt. Ltd. and Ors. Vs. State of Bihar and Ors., AIR 2004 SC 2351, ¶8

Hence it's Saw Pipes Judgment¹⁷ which expanded the concept of public policy to add that the award would be contrary to public policy if it is 'patently illegal' is final and conclusive and must have been made by the court after seeing that injustice is not perpetuated or perpetrated.

2. THAT THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN IS NOT UNCONSTITUTIONAL AND CANNOT BE SET ASIDE.

2.1. That the ordinance is brought in conformity with Part IX and responsibility furthered to Panchayat.

It is humbly submitted that the qualifications enacted in the present case was done to improve the shortcomings of the Panchayat by prescribing education as a parameter of selection and also to bring the legislation in conformity with Part IX of the Constitution of India relating to "The Panchayat" added by the 73rd Amendment.

The Panchayats are entrusted with the responsibilities of preparation of plans and implementation of schemes for economic development and social justice. Hence, to make the Panchayats an efficient body such steps were taken¹⁸. Being a self governance unit, education is fundamental to its functioning.

In the present case the legislature chooses to carve out an exception in favour of females it is free to do so but merely because women are not made excepted from the operation of the disqualification it does not render it unconstitutional¹⁹.

If person already under Government employment on part time basis has shown themselves not to be amenable to proper discipline in Government offices, it is open to the Government not to

¹⁷ Oil & Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., AIR 2003 SC 2629 ¶14

¹⁸ Article 243G read with Eleventh Schedule

¹⁹ Javed And Others Vs. State of Haryana And Others, (2003) 8 SCC 369, ¶63

appoint such persons because such person could not be said to be efficient, then in such cases there is no such violation of Art 14²⁰.

From Arts. 46, 16(4) and 1(a) and 335 of the Constitution, it is apparent any provision without bearing in mind the maintenance of efficiency of administration, cannot be sustained²¹.

Further the legislation is within the permitted field of State subjects,.

2.2. That the ordinance is not against Art 14

It is humbly submitted that the Governor has the jurisdiction to make laws relating to the Panchayat especially when making disqualifications and challenges to such power has been turned down by the courts²².

The provision does not violate the principle of equality mentioned in Art 14, as it satisfies both the tests i.e. it should be reasonable classification and it should satisfy object nexus test²³.

Therefore such law stands the test of law.

2.2.1. The ordinance is in nexus with the legislature

It is submitted that the court has held that qualifications promoting the goals, mentioned in under the function of Panchayat, are valid and hence have a nexus with the purpose sought to be achieved by the Act²⁴. In the present case, it is valid, as the main objective of the legislature is to promote education and hence uplift the weaker sections of the society. This is consistent with functions of the Panchayat under Art 243G i.e. Education, including primary and secondary schools, and welfare of the weaker sections and National Education Policy. The disqualification

²⁰ Banarasidas Vs. State of U.P., AIR 1956 SC 520, ¶5,6,7

²¹ Ashuthosh Gupta Vs. State of Rajasthan, (2002) 4 SCC 34, ¶4

²² Shiv Ram & 5 Ors. Vs. The State of Rajasthan And Others, AIR 2000 Raj 416, ¶9

²³ *Supra* at Note 16, ¶8

²⁴ *Ibid*, ¶38,39

enacted by the provision seeks to achieve the objective by creating a disincentive. Hence it is valid

2.2.2. The Ordinance creates a Reasonable Classification

It is humbly submitted that Article 14 forbids class legislation; it does not forbid reasonable classification for the purpose of legislation. The basis for classification may rest on conditions which may be geographical or according to objects or occupation or the like²⁵. Further the classification should be well-defined and well-perceptible. In the present case the persons, in case of Zila Parishad, having passed the Board of Secondary Education are clearly distinguishable from persons that haven't. Also in the case of qualification of Sarpanch the classification is founded on an intelligible differentia. The classification does not suffer from any arbitrariness.

2.2.3. It is not unequal with respect to other Legislative bodies.

It is humbly submitted that under the constitutional scheme there is a well-defined distribution of legislative powers²⁶. The Parliament and every State Legislature has power to make laws with respect to any of the matters which fall within its field of legislation²⁷. Therefore, the difference of law made by different authorities may arise. A legislation by one of the States cannot be held to be discriminatory or suffering from the vice of hostile discrimination as against its citizens simply because the Parliament or the Legislatures of other States have not chosen to enact similar laws²⁸. Such a submission if accepted would be violative of the autonomy given to the center and the States within their respective fields under the constitutional scheme. So is the case

²⁵ Budhan Choudhry and Ors. Vs. The State of Bihar, 1955 Cri LJ 374, ¶9,12

²⁶ Contained in Part XI of the Constitution

²⁷ Under Article 246 read with Seventh Schedule of the Constitution

²⁸ The State of Madhya Pradesh Vs. G.C. Mandawar, (1954) II LLJ 673 SC, ¶13

with the laws governing legislators and parliamentarians as the sources of power are different and so do those who exercise this power²⁹. Hence it is not discriminatory³⁰.

2.3. Court cannot interfere with policy matter

It is submitted that education qualification viz. Secondary Education is based on legislative wisdom. It could have been altered accordingly. The level of qualification is a matter of policy decision which is not open to judicial scrutiny. The implementation of policy decision in a phased manner is suggestive neither of arbitrariness nor of discrimination, since all the institutions cannot be taken over at a time³¹ and merely because the beginning was made with one institute, it could not complain that it was singled out³². Further the courts do not have powers to stay the operation of the law³³ and the court should practice judicial restraint, unless the law/provision is manifestly unjust or glaringly unconstitutional³⁴. Since it is considered that the legislature is the best judge of the needs of the particular classes and to estimate the degree of evil, so as to adjust its legislature according to the exigency found to exist. The legislature alone knows the local conditions and circumstances which demanded the enactment of the law and it must be remembered that the legislature are the ultimate guardian of liberties and welfare of the

²⁹ The Bar Council of Uttar Pradesh Vs. The State of U.P. and Anr., [1973] 2 SCR 1073, ¶16

³⁰ State of Punjab Vs. Satya Pal, AIR 1969 SC 903, ¶18

³¹ Pannalal Bansilal Pitti and Ors. Vs. State of A.P. and Anr., [1996] 1 SCR 603, ¶8

³² Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna etc., Vs. State of Bihar and Ors., [1988] 3 SCR 311, ¶11,13,14

³³ Jodhpur Chartered Accountants Society & Anr Vs. The State of Rajasthan & Anr, 2001 (2) WLC (Raj.) 17, ¶36

³⁴ Bhavesh D. Parish And Others Vs. Union of India And Another, (2000) 5 SCC 471, ¶30

people in quite as great a degree as the court³⁵. Hence it must be presumed that the legislature understands and correctly appreciates the need of its people³⁶.

2.4. There is no fundamental right to contest

It is humbly submitted that right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a Statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right. But even so the Fundamental Rights Chapter has no bearing on a right like this created by statute³⁷. So the same Statute which confers the right to contest an election also to provide for the necessary qualifications and also to provide for disqualifications can put further limits³⁸.

Further it has been held that a disqualification meant to be in the interest of the public and has a public purpose behind it is a valid³⁹. In the present case, the ordinance made to create an active and educated citizenry.

2.5. The ordinance in the present case is non-justiciable.

It is submitted that the satisfaction of the Governor is not justiciable under any court of law⁴⁰. Supreme Court in multiple cases⁴¹ has defended the powers of the Governor to promulgate an

³⁵ Amalgamated Tea Estate Co Ltd. Vs. State of Kerala, (1974) 2 SCC 415, ¶12

³⁶ Ashuthoush Gupta Vs. State of Rajasthan, (2002) 4 SCC 34, ¶5

³⁷ Jumuna Prasad Mukhariya and Ors. Vs. Lachhi Ram and Ors. AIR 1954 SC 686, ¶5

³⁸ Jyoti Basu and Ors. Vs. Debi Ghosal and Ors., [1982] 3 SCR 318, ¶8,9

³⁹ Sakhawat Ali Vs. The State of Orissa, [1955] 1 SCR 1004, ¶9,11

⁴⁰ *Supra* at Note 30, ¶17,18,34

⁴¹ K. Nagaraj and others etc. Vs. State of Andhra Pradesh, AIR 1985 SC 551, ¶31, 37

Ordinance by stating that it cannot be challenged on ground of non application of mind or malafides⁴² as he himself is the best judge of the circumstances.

Merely because the ordinance was promulgated on the eve of the elections, it cannot be held void as the existence of emergency situation is not necessary and the courts have upheld an ordinance the same⁴³. Arguendo, it is declared void it does not become void ab intio⁴⁴ and hence the election will be held on the basis of qualifications of Ordinance

2.6. The court is barred to interfere once the election process has began

Under the Constitution the courts are barred to interfere with the election process once it has began⁴⁵. In the present case the election process has started since the formal notification of the election has been issued⁴⁶. The court in multiple cases has refused to entertain the petition challenging the election process once it has started⁴⁷ even in the case of panchayats⁴⁸.

Further, if the interference in the election process is allowed, it would lead to extension of the term which is not provided in Part IX of the Constitution⁴⁹.

⁴² T. Venkata Reddy etc. etc. Vs. State of Andhra Pradesh, AIR 1985 SC 724, ¶ 14, 15

⁴³ *Supra* at Note 30, ¶1

⁴⁴ Ashok Kumar Gupta Vs. State of Uttar Pradesh, (1997) 5 SCC 201, ¶61

⁴⁵ Art 243 O of the Constitution, also in Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors., AIR 1978 SC 581, ¶113

⁴⁶ N P Ponnuswami Vs. Returning Officer, Nammakal AIR 1952 SC 64, ¶11, 12, 13

⁴⁷ S.T. Muthusami Vs. K.Natarajan and Ors., AIR 1988 SC 616, ¶4, 8

⁴⁸ Meghraj Kothari Vs. Delimitation Commission & Others, AIR 1967 SC 669, ¶25, 39 and State of U.P. & Others Vs. Pradhan Sangh Kshettra Samiti & Ors., 1995 Suppl. (2) SCC 305, ¶44, 46

⁴⁹ Dulari Devi and Ors. Vs. State of Rajasthan CWP. No. 375/2015, January 15th, 2015, ¶28, 41

3. THAT (A). NON AVAILABILITY OF A NOTIFIED VACATION BENCH DURING ANY HOLIDAYS AND, (B). NON-AVAILABILITY OF A NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION IS NOT UNCONSTITUTIONAL.

3.1. The High Court of Nirdhan cannot issue a writ of mandamus to the Republic of Gariba

It is submitted that a “Mandamus only lies against authorities who have a duty to perform certain acts when they have failed to do so. The applicant must have a legal right to the performance of a legal duty”⁵⁰. Formation of Vacation benches and procedure to regulate listing when court is not in session cannot be said to be a duty of the Republic in the instant matter as “In order, for a mandamus to compel performance of a duty; it must clearly appear from the language of the statute that a duty is imposed, the performance or non- performance of which is not a matter of mere discretion.”⁵¹ No law compels the government to act in the instant matter.

A mandamus will not issue where; to do or not to do an act, is left to the discretion of the authority⁵². The policy regarding Vacation benches and notification of procedure for listing may only be enacted at the discretion of the Legislature and therefore no mandamus may be issued.

⁵⁰ Dr. Rai Shivendra Bahadur Vs. Governing Body of the Nalunda College, AIR. 1962 SC 1210,

¶5

⁵¹ SC Advocates on Record Assn Vs. Union of India, (1993) 4 SCC 441, ¶412

⁵² Collector of Monghyr Vs. Keshav Prasad, AIR 1962 SC 1694, ¶15

‘No mandamus may lie where there is merely an enabling provision and therefore no duty to legislate.’⁵³ Article 145 and Entry 77 of the Union List are mere enabling provisions and do not place any duty upon the Legislature.

3.1.1. Establishment of Vacation Benches and notification of procedure for listing when the Court is not in session are policy matter in which the High Court of Nirdhan cannot interfere.

Courts cannot interfere in policy matters unless the policy so formulated violates the mandate of the constitution or a statutory provision.⁵⁴ It is submitted that there is no constitutional violation in the instant matter and therefore no reason for the court to review the policies.

In the case of Union of India Vs. Sankalchand Himatlal Seth it was held that:

Whatever measures are required to be taken in order to achieve national integration would be in public interest. Whether it is necessary to transfer Judges from one High Court to another in the interests of national integration is a moot point. But that is a policy matter with which courts are not concerned directly.

“The legislature is the best judge of the needs of the particular classes and to estimate the degree of evil, so as to adjust its legislation according to the exigency found to exist. The legislature alone knows the local conditions and circumstances which demanded the enactment of the law and it must be remembered that the legislature are the ultimate guardian of liberties and welfare of the people in quite as great a degree as the court”⁵⁵

3.1.2. A writ of Mandamus to the Republic in the instant matter will constitute a breach of the Doctrine of Separation of Powers.

⁵³ A. Laxmandas And Ors. Vs. The State Of Madhya Pradesh, AIR 1970 MP 189, ¶7

⁵⁴ Kanhaiya Lal Sethia and anr. Vs. Union of India and anr., AIR 1998 SC 365, ¶2

⁵⁵ *Supra* at Note 35, ¶12

It is submitted that that none of the three organs of Government; Legislative, Executive, and Judicial, can exercise any power which properly belongs to either of the other two.⁵⁶ A writ of mandamus directing the Legislature with regard to the matter at hand is patently violative of the Doctrine of Separation of Powers as it is tantamount to the Judiciary taking on the role of the Legislature.

“The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another⁵⁷.”

Courts cannot create rights where none exist nor can they make orders which are violative of other laws or settled legal principles. With a view to see that judicial activism does not become judicial adventurism the courts must act with caution and proper restraint. It needs to be remembered that courts cannot run the government.⁵⁸

3.2. The Parliament is not competent to pass legislation regarding vacation benches and notified procedure regarding listing when court is not in session.

Entry 77 of the 1st list in the 7th Schedule permits the parliament to enact laws regarding certain aspects of the Supreme Court such as ‘organisation’ and ‘powers’. It is submitted that vacation benches and procedure for listing during vacations do not come within the ambit of the relevant entry.

⁵⁶ DD Basu Commentary on the Constitution of India, Vol.II

⁵⁷ Rai Sahib Ram Jawaya Kapur and Ors. Vs. Union of India, AIR 1955 SCC 549, ¶14

⁵⁸ Aravali Golf Club Vs. Chander Hass, (2008) 1 SCC (L&S) 289, ¶29

3.3. No violation of Fundamental rights

Article 21

There is no dilution of the right to speedy justice as Urgent petitions are heard by the Vacation Bench of the Supreme Court. The criteria of urgency are well defined in numerous judgements.⁵⁹

Article 14

There is rational classification under Article 14 as urgent matters form a rational class and are heard by a specially fixed Vacation bench of the Supreme Court. Order 2 Rule 6 of the Supreme Court rules permit the Chief Justice to appoint Judges to hear all matters of an urgent nature.

Every application for hearing must be filed with all facts relevant for formation of opinion as to the urgency of the matter and non-hearing is no ground for challenge of procedure.⁶⁰

Discretionary power is not necessarily discriminatory when the legislative policy is clear from the statute and discretion is vested in the government or other high authority as distinguished from a minor official.⁶¹ The legislative policy regarding the instant matter is clear. Utmost discretion was affording to the Supreme Court in framing the Supreme Court Act and Supreme Court rules in order to maintain the sanctity of the Doctrine of Separation of Powers. Powers of discretion are vested with the Administrative head of the judiciary; the Chief Justice. Additionally the mere possibility that power may be misused or abused cannot per se induce the court to deny the existence of the power.⁶²

⁵⁹ Supreme court of India Practice and Procedure Handbook pg 42

⁶⁰ Supreme court of India Practice and Procedure Handbook pg 42

⁶¹ Mata jog Dobey Vs. H.C. Bhari, AIR 1956 SC 44 at pg 48,

⁶² Naraindas Indurkhya Vs. State of MP, (1974) 4 SCC 788, ¶26

SUBMISSIONS TO THE COURT

Wherefore, in the light of facts stated, arguments advanced and authorities cited, it is most humbly prayed that this Hon'ble Court may be pleased to adjudge and declare that:

- §34 of The Arbitration and Conciliation Act, 1996 be declared constitutionally valid and upheld.

- The impugned ordinance be declared constitutional and upheld with all its effects.

- The non-availability of a notified vacation bench and procedure does not violate any Fundamental Rights and discretion rests with the Supreme Court.

and pass any other order, direction, or relief that it may deem fit in the interests of justice, equity and good conscience.

All of which is most humbly submitted.

Place: Nirdhan

S/d-

Date: 11-01-2015

On Behalf of the Respondents