

TEAMCODE – A1

BEFORE THE HON'BLE HIGH COURT OF NIRDHAN

PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCi

..PETITIONERS

VERSUS

REPUBLIC OF GARIBA AND MAXIS BANK

..RESPONDENTS

WRIT PETITON NO. 999 / 2015

CLUBBED WITH

WRIT PETITON NO. 1021 / 2015

ON SUBMISSION TO THE HON'BLE HIGH COURT OF NIRDHAN

UNDER ARTICLE 226 OF THE CONSTITUTION

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENTS

MEMORIAL FOR RESPONDENTS

TABLE OF CONTENTS

INDEX OF AUTHORITIES	2
STATEMENT OF JURISDICTION.....	5
STATEMENT OF FACTS.....	6
STATEMENT OF ISSUES.....	7
SUMMARY OF ARGUMENTS.....	8
ARGUMENTS ADVANCED.....	9
1. WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT OF 1996 IS CONSTITUTIONAL.	9
1.1 NARROW SCOPE OF LITIGATION, RUNNING PARALLEL TO ARBITRATION	9
1.2 SECTION 34 OF THE ACT DOES NOT RESULT IN DELAYS AND IS IN CONSONANCE WITH INTERNATIONAL OBLIGATIONS.....	10
1.3 GRANT OF AN AUTOMATIC STAY IS NOT BAD IN LAW	12
2. WHETHER THE WRIT PETITION IS MAINTAINABLE.....	13
2.1 NO VIOLATION OF THE RIGHTS OF THE PETITIONERS	13
2.2 <i>NEMO JUDEX IN CAUSA SUA</i>	14
3. WHETHER LAPSES IN PROCEDURE IS UNCONSTITUTIONAL.	14
3.1 NON-AVAILABILITY OF NOTIFIED VACATION BENCH IS CONSTITUTIONAL	15
3.2 LACK OF NOTIFIED PROCEDURE FOR LISTING DURING VACATION IS NOT ULTRA VIRES	16
3.3 NON-GRANT OF LISTING DOES AFFECT THE MERITS OF THE CASE	17
3.4 PUBLIC INTEREST AND PROBITY	18
4. WHETHER ORDINANCE IS <i>ULTRA VIRES</i> OF THE CONSTITUTION.....	18
4.1 THE ORDINANCE IS NON-JUSTICIABLE IN A COURT OF LAW	18
4.2 THE ORDINANCE IS WITHIN THE VIRES OF PART IX	20
4.3 THE ORDINANCE DOES NOT VIOLATE ARTICLE 14.	21
PRAYER	24

INDEX OF AUTHORITIES

Cases

<i>A.K. Roy v. Union of India</i> , 1982 AIR 710.....	20
<i>A.Yadagiri v. The Chief Election Commissioner</i> , 2013 AP.....	13
<i>Ahluwalia Contracts (India) Ltd. v. Housing And Urban Development</i> , 2007 (4) ARBLR 539 Delhi.	12
<i>Anant Mills Co. Ltd. v. State of Gujarat</i> , (1975) 2 SCC 175.....	9
<i>Ashok Kumar v. Sita Ram</i> , AIR 2001 SC 1692.	13
<i>Association of the Residents of Mhow v. Union of India</i> , AIR 2010 MP 40.	17
<i>Bharat Heavy Electricals Ltd. v. C.N. Garg and Ors.</i> , 2001 (57) DRJ154 (DB).....	10
<i>Bhavesh D. Parish & Ors. Vs. Union of India & Anr.</i> , (2000) 5 SCC 471 .30.	23
<i>D.P. Chadha vs Triyugi Narain Mishra & Ors</i> , (2001) 2 SCC 22.	16
<i>Dalmia Industries v. State of Uttar Pradesh</i> , AIR 1994 SC 2117.....	23
<i>Dharam Prakash v. Union of India & Anr.</i> , 2007 (94) DRJ 431 (DB).....	11
<i>Dimes v. Grand Junction Canal Co.</i> , 1852 3 HLC 759.	14
<i>Dr. D.C. Saxena v. Chief Justice of India</i> , (1996) 5 SCC 216.	16
<i>Gujrat Water Supply & Sewage Board v. Union Erectors (Gujrat) (P) Ltd.</i> , AIR 1989 SC 973	10
<i>Howrah Municipal Corpn. v. Ganges Rope Co. Ltd.</i> , (2004) SCC 663.	13
<i>HP State Electricity Board v. R J Shah & Company</i> , 1999 (2) SCR 643.	9
<i>J. Mahapatra & Co. State of Orissa</i> , AIR 1984 SC 1572.....	14
<i>Jamuna Prasad Mukhariya v. Lachhi Ram</i> , AIR 1954 SC 686 at 688 : <i>Jyoti Basu v. Debi Ghoshal</i> , AIR 1982 SC 983.....	21
<i>Javed & Ors. v. State of Haryana & Ors</i> ,(2003) 8 SCC 369.	22
<i>Javed & Ors. v. State of Haryana & Ors</i> , (2003) 8 SCC 369.	21
<i>K. Nagaraj v. State of Andhra Pradesh</i> , AIR 1985 SC 551.....	19
<i>Lakhinarayan v. State of Bihar</i> , AIR 1950 FC 59.	19
<i>Lalit Mohan Pandey v. Porran Singh</i> , AIR 2004 SC 2303.....	20
<i>Mohd. Ibrahim v. State</i> , AIR 1969 Delhi 315.	16
<i>N.P. Basheer v. State of Kerala</i> . (2004) 3 SCC 609.	23
<i>N.P. Ponnuswami v. Returning Officer, Namakkal Constituency</i> , AIR 1952 SC 64.....	21
<i>Nakara v. Union of India</i> , AIR 1983 SC 130.....	21

<i>Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan</i> , AIR 1999 SC 2102.....	11
<i>Pacific Basin Ihx (UK) Ltd. v. Ashapura Minechem Ltd.</i> , 2011 (113) Bom LR 74.	12
<i>Padeananda v. Board of Revenue</i> , AIR 1971 Assam 16.	15
<i>R.C. Cooper v. Union of India</i> , 1970 AIR 564.	19
<i>R.K. Garg & Ors. v. Union Of India & Ors.</i> ,(1981) 4 SCC 675. : <i>A.K. Roy v. Union of India</i> , 1982 AIR 710.....	19
<i>R.K. Garg v. Union of India</i> , AIR 1981 SC 2138.....	21
<i>R.L Sharma v. Managing Committee, Dr. Hari Ram H S School</i> , AIR 1993 SC 2155.	14
<i>Re Special Courts Bill</i> , AIR 1979 SC 478.....	21
<i>Reg v. Liverpool JJ ex p. Topping</i> (D.C), (1983) 1 WLR 122.	14
<i>S.K.G Sugar Mills v. State of Bihar</i> , AIR 1974 SC 1533: <i>State of Punjab v. Satya pal</i> , AIR 1969 SC 903.....	19
<i>Sadhu Singh & Co. v. N.P.C.C.Ltd.</i> , 2007 (2) Arb LR 11 (Del).	11
<i>Shin Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.</i> , (2005) 7 SCC 234.	10
<i>Srikrishna Das Tikara v. State Government of Madhya Pradesh</i> , AIR 1977 SC 1691.....	14
<i>State of Bombay v. Narottamdas Jethabhai</i> , 1951 AIR 69.	15
<i>State of Orissa v. Bhupendra Kumar Bose</i> , AIR 1962 SC 945.	19
<i>State of Rajasthan v. Nav Bharat Const. Co.</i> , AIR 2002 SC 258.....	11
<i>State of Uttar Pradesh v. Pradhan Sangh Kshetra Samiti</i> AIR 1995 SC 1512.....	20
<i>T.Venkata Reddy v. State of Andhra Pradesh</i> , (1985) 3 SCC 198.....	20
<i>Tata Oil Mills v. Hansa Pharmacy</i> , ILR 1979 (2) Delhi 236.....	15
<i>The Bihar State Electricity Board v. Usha Beltron Ltd.</i> , AIR 2000 Pat 183.....	12
<i>Union of India v. A.L.Rallia Ram</i> , AIR 1963 SC 1685.....	10
<i>Union of India v. Muralidar Menon</i> , (2009) 9 SCC 304	13
<i>Union of India v. S.S. Kothiyal</i> , (1998) 8 SCC 682	18
<i>Union of India v. S.S. Kothiyal</i> , (1998) 8 SCC 682.	17
<i>Vimal Madhukar Wasnik v. Arbitrator</i> , 2006 (1) Arb LR 255 Bom (DB).....	9

STATUTES

CONSTITUTION OF INDIA, 1950.

ARBITRATION AND CONCILIATION ACT,1996.

DELHI HIGH COURT RULES, 1986.

BOOKS AND TREATISES

DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, 8TH ED.,
2008.

H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 4TH ED., 2007.

JAIN, M.P. & JAIN, S. N, PRINCIPLES OF ADMINISTRATIVE LAW 7th ED., 2013.

JAIN, M.P, INDIAN CONSTITUTIONAL LAW, 7TH ED., 2014.

MASSEY, I P, ADMINISTRATIVE LAW, 6TH ED., 2012.

MALHOTRA,O.P,THE LAW AND PRACTICE OF ARBITRATION AND
CONCILIATION, 2ND ED., 2012.

DAVID ST. JOHN SUTTON, RUSSEL ON ARBITRATION, 2000.

STATEMENT OF JURISDICTION

- 1) THE PETITIONER IN WP.NO 999/2015 HAS APPROACHED THE HON'BLE COURT OF NIRDHAN UNDER ARTICLE 226 OF THE CONSTITUTION.

- 2) THE PETITIONER IN WP.NO 1021/2015 HAS APPROACHED THE HON'BLE COURT OF NIRDHAN UNDER ARTICLE 226 OF THE CONSTITUTION.

STATEMENT OF FACTS

The Governor of Nirdhan, the biggest state in Gariba, decided to fast pace infrastructural development with the aid of private parties. One such Company was Jeopardy Contracts Inc. [JCI] which entered into an agreement with Jodhpur Gaon Panchayat Samiti [JGPS]. However this contract was terminated. JCI issued a legal notice invoking the arbitration clause and asking for the termination payment for the work done. An email was sent by JGPS after business hours invoking the performance of the bank guarantee. The following day JCI moved the High Court under an urgent writ petition. The court granted an ex-parte ad-interim order that operated as a stay on the invocation of the bank guarantee if not already encashed. The amount that was to be encashed was not paid to JGPS due to a security breach. Subsequently, the writ petition was disposed off as the matter was to be adjudicated by the arbitrators. This was followed by a petition under Sec.34 of the Arbitration and Conciliation Act of 1996. Meanwhile JCI called for the return of money of the bank guarantee including the interest. JCI then challenged the constitutional validity of Sec.34 by way of WP 999/2015. In the meantime the governor of the state promulgated an ordinance that amended the Panchayati Raj Act, 1994 listing qualifications for the election of the Panch. People's Union for Liberties & Democratic Reforms moved the High Court for urgent listing and hearing during the annual winter holidays, since the election notification was to be issued on 3rd January, 2015. The Chief Justice denied the same. PULDR moved the Apex Court under Art. 32. There was a substantial delay in response and no listing was granted till the issuance of the election notification. Upon listing, the Apex Court was pleased to observe that the matter can now be heard by the High Court. A *pro-bono* petition was filed by PULDR to challenge the vires of the ordinance under WP(C) 1021/15. The High Court admitted the petition. The two writ petitions have been directed to be listed together for final hearing.

STATEMENT OF ISSUES

IN W.P NO. 999/2015

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

IN W.P NO. 1021/2015

- 1) WHETHER THE WRIT PETITION IS MAINTAINABLE IN THIS HON'BLE COURT
- 2) WHETHER LAPSES IN PROCEDURE IS UNCONSTITUTIONAL.
- 3) WHETHER ORDINANCE IS *ULTRA VIRES* OF THE CONSTITUTION.

SUMMARY OF ARGUMENTS

1. WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT OF 1996 IS CONSTITUTIONAL.

S. 34 of the Act of 1996 explicitly lays down provisions for judicial intervention. It lays down procedural limitations ensuring that the introduction of litigation does not defeat the purpose of the arbitral process. Additionally, it has been adopted from the UNICITRAL model law; thereby it is in consonance with international conventions. It provides an automatic stay to ensure the aggrieved has a remedy thereby justifying the same.

2. WHETHER THE WRIT PETITION IS MAINTAINABLE.

The present petition is not maintainable under Art.226 as there is no violation of a fundamental or a legal right. The discretion exercised by the chief justice is a reasonable and informed decision. The principle of *nemo judex* will operate since the adjudicators might have an institutional or personal bias as it involves the Hon'ble Court's procedure.

3. WHETHER LAPSES IN PROCEDURE IS UNCONSTITUTIONAL.

The non-listing of a matter by the Chief justice exercising his discretion does not imply non presence of a vacation bench. Additionally the Hon'ble Supreme Court has the power of disposing writs *in limine* without a speaking order. Adjudication of the case based on the merits cannot be devoid of this inordinate delay as the election notification has already come into operation. Thus their case stands affected.

4. WHETHER ORDINANCE IS *ULTRA VIRES* OF THE CONSTITUTION.

The ordinance promulgated by the Governor is within the *vires* of the constitution because of the following reasons. Firstly, the state is empowered to decide on composition of the Panchayat as per Article 243C and the power so exercised does not violate Part IX. Secondly, there is a reasonable classification for an object in the Eleventh Schedule read with 243G and hence does not violate the Right to Equality.

ARGUMENTS ADVANCED

FOR WRIT PETITION NO. 999/2015

1. WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT OF 1996 IS CONSTITUTIONAL.

Section 34 of the act itself provides for judicial intervention which is the exception to the general rule of non-intervention as laid down by Section 5 of the 1996 Act. In addition to the presumption of constitutional validity of a statutory provision¹ it is contended that section 34 holds constitutional validity due to the following reasons:

1.1 NARROW SCOPE OF LITIGATION, RUNNING PARALLEL TO ARBITRATION

The Act of 1940 was repealed because courts could interfere in the arbitration proceedings at various stages thus defeating the purpose of the same. The act of 1996 sought to do away with the mischief that was caused by the previous act and this led to the introduction of Section 5 of the Act of 1996 which bars judicial intervention except as provided under the act itself.² Besides the stated objective of reduction of judicial intervention and speedy disposal, Section 34 significantly reduces the extent of possible challenge to the arbitral award. Though the restriction is somewhat rigorous, the same is necessary.³ Moreover, it does not amount to introduction of unnecessary litigation as the only way to challenge an arbitral award is via Section 34 and even a writ petition cannot set aside an arbitral award.⁴

In addition, Section 34 is in consonance with Article 39A of the Constitution. Article 39A provides that the state should secure operation of the legal system to promote justice. In order to ensure that the person aggrieved by an arbitral award is not left without a remedy, the

¹ *Anant Mills Co. Ltd. v. State of Gujarat*, (1975) 2 SCC 175.

² *HP State Electricity Board v. R J Shah & Company*, 1999 (2) SCR 643.

³ *HP State Electricity Board v. R J Shah & Company*, 1999 (2) SCR 643.

⁴ *Vimal Madhukar Wasnik v. Arbitrator*, 2006 (1) Arb LR 255 Bom (DB).

application of Section 34 becomes pertinent.⁵ By virtue of such a rigorous restriction on the application of section 34 of the Act of 1996, the contention that it amounts to the introduction of litigation, defeating the purpose of the act itself cannot hold good.

1.2 SECTION 34 OF THE ACT DOES NOT RESULT IN DELAYS AND IS IN CONSONANCE WITH INTERNATIONAL OBLIGATIONS

It is the contention of the respondents that a petition under Section 34 does not result in delays and therefore does not amount to expropriation. The procedure to deal with suits under section 34 is not the same as that of a civil suit. It was held in the case of *Shin Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*⁶ that, “the object of the Act is expedition and it would be defeated if proceedings remained pending for months and years. In order to ensure expeditious disposal, it is imperative that arbitration proceedings should be decided on the basis of affidavits and other relevant documents without oral evidence. It is important that a petition under section 34 is not treated as that of a regular civil suit.” Various other procedural safeguards and exemptions have been provided to ensure that the objective of speedy disposal of suits is preserved.

Appraisal of evidence led before the arbitrator is not a matter for the court to appreciate.⁷ The courts power of enquiry is also limited with respect to a petition under Section 34. The court cannot act as an appellate body in changing the award given by the arbitrator.⁸ Interpretation of letters and appreciation of evidence is within the exclusive domain of the arbitrator and it is not open for the courts to sit in appeal and re-appreciate evidence, as long

⁵ *Bharat Heavy Electricals Ltd. v. C.N. Garg and Ors.*, 2001 (57) DRJ 154 (DB).

⁶ *Shin Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, (2005) 7 SCC 234.

⁷ *Gujarat Water Supply & Sewage Board v. Union Erectors (Gujarat) (P) Ltd.*, AIR 1989 SC 973.

⁸ *Union of India v. A.L.Rallia Ram*, AIR 1963 SC 1685.

as the view taken by the arbitrator is perverse, it cannot be questioned.⁹ Thus, the contention that Section 34 petitions lead to delays does not hold good.

Article 253 of the constitution provides for enactment of legislations by the legislature to give effect to international treaties and agreements and provides for implementation of the same with respect to any decision made in an international conference as well. The Act of 1996 has been enacted in the pattern of Modern Law adopted by the United Nations Commission on International Trade Law (UNCITRAL).¹⁰ The Act of 1996 was based on the model law of UNCITRAL and the Act of 1996 was entirely based on the same to ensure international uniformity. The model law has been adopted by various countries. Section 34 is based on Article 34 of the UNCITRAL Model Law and the same provides a narrow scope for judicial intervention as opposed to Section 30 or 33 of the Act of 1940.¹¹ From a bare reading of the section it can be ascertained that an award can be set aside only if it is brought under the four corners of this section, i.e either under S.34(2)(a) or S. 34(2) (a).¹²

Therefore, as the same is based on the UNCITRAL Model Law it cannot be contended that it violates UNCITRAL itself. The commission itself provided that it should regulate the setting aside of arbitral award and retained the provisions pertaining to the same. Therefore, it can be said that Section 34 has been provided validity by the UNCITRAL Model Law. As the provision of Section 34 is in consonance with the same, the contention that Section 34 would go against the country's conventions and treaties cannot be upheld by the Hon'ble Court.

⁹ *Sadhu Singh & Co. v. N.P.C.C.Ltd.*, 2007 (2) Arb LR 11 (Del).

¹⁰ *Dharam Prakash v. Union of India & Anr.*, 2007 (94) DRJ 431 (DB).

¹¹ *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan*, AIR 1999 SC 2102.

¹² *State of Rajasthan v. Nav Bharat Const. Co.*, AIR 2002 SC 258.

1.3 GRANT OF AN AUTOMATIC STAY IS NOT BAD IN LAW

Section 34 of the Act of 1996 provides for an automatic stay on the execution of an arbitral award. The only remedy available to a person against the arbitral award lies in the form on Section 34 of the 1996 Act.¹³ Therefore, no remedy lies in any other form against the arbitral award. It is necessary to grant an automatic stay of the award as, if the arbitral award is executed simultaneously as that of the proceedings under Section 34 of the Act of 1996, the challenge of the award itself becomes redundant. The stay that is accorded by virtue of Section 34 of the Act is not of a permanent or of an unconditional nature. The outcome of the Section 34 proceedings determine whether the arbitral award should be executed or not. In the case of *The Bihar State Electricity Board v. Usha Beltron Ltd.*¹⁴ it was held that the arbitral award shall be executed or enforced in the same manner as if it were a decree of the court and the court cannot stay the operation by passing a blanket order for stay. The rationale behind the same is also to ensure that a simultaneous suit or claim for compliance or execution of the award does not occur, which would lead to a multiplicity of suits. It has been settled that the execution of the arbitral award under Section 36 is stayed and the petitioner cannot seek enforcement of the same.¹⁵ If the same is not stayed, it would lead to a multiplicity of suits and since the stay is not a perpetual one, the same cannot be considered to be bad in law.

¹³ *Ahluwalia Contracts (India) Ltd. v. Housing and Urban Development*, 2007 (4) ARBLR 539 Delhi.

¹⁴ *The Bihar State Electricity Board v. Usha Beltron Ltd.*, AIR 2000 Pat 183.

¹⁵ *Pacific Basin Ihx (UK) Ltd. v. Ashapura Minechem Ltd.*, 2011 (113) Bom LR 74.

FOR WRIT PETITION NO. 1021/2015

2. WHETHER THE WRIT PETITION IS MAINTAINABLE

The petition is not maintainable as there has been no violation of a fundamental or a legal right of the petitioner that would attract the provisions under Art.226. The existence of a legal right in the petitioner and corresponding legal duty are conditions precedent for issuing a writ of mandamus.¹⁶ The performance of the legal duty must be mandatory and not discretionary.¹⁷ And the duty presently falls under the latter category.

2.1 NO VIOLATION OF THE RIGHTS OF THE PETITIONERS

The High Court does not interfere in orders passed by an authority unless the order suffers from manifest error and if allowed to stand will amount to perpetration of grave injustice.¹⁸ Furthermore, Article 14 is not violated as the ordinance was based on reasonable classification based on an intelligible differentia for the achievement of a lawful object. Right of State to change its policy from time to time cannot be challenged and if it is in public interest then it cannot be termed as arbitrary or unreasonable, or in violation of Art. 14.¹⁹ Additionally, the right to contest an election is a statutory right. The same statute which confers the right to contest an election can also provide for the necessary qualifications and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office.²⁰

¹⁶ *Union of India v. Muralidar Menon*, (2009) 9 SCC 304.

¹⁷ M.P.JAIN AND S.N JAIN, *PRINCIPES OF ADMINISTRATIVE LAW*, 7th Ed. Vol.2, 2013, p. 2387.

¹⁸ *Ashok Kumar v. Sita Ram*, AIR 2001 SC 1692.

¹⁹ *Howrah Municipal Corpn. v. Ganges Rope Co. Ltd.*, (2004) SCC 663.

²⁰ *A. Yadagiri v. The Chief Election Commissioner*- Unreported.

2.2 NEMO JUDEX IN CAUSA SUA

Natural justice is a foundational and fundamental concept which is a part of the legal and judicial procedure.²¹ Justice should not only be done but manifestly seen to be done. Justice can never be seen to be done if a man acts as a judge in his own cause or is himself interested in the outcome.²² The test of personal bias of decision makers can be identified using the “real likelihood of bias” test or the “reasonable suspicion of bias” test.²³

The respondents humbly submit that the matter is *nemo judex in causa sua* since the judges adjudicating on this matter have institutional interest by virtue of the office that they hold.²⁴ Questioning the procedure that has been adopted by the court by members of the very same institution would not attract a fair, impartial decision that is completely devoid of bias thereby vitiating the principles of natural justice.

3. WHETHER LAPSES IN PROCEDURE IS UNCONSTITUTIONAL.

Art. 225 of the Constitution states that the High Courts are to make rules to regulate their own proceedings and the Delhi High Court Rules, 1986 are passed in pursuance of the same. The aforementioned article vests discretionary power in the respective High Courts with regard to the same. In the case of *Srikrishna Das Tikara v. State Government of Madhya Pradesh*,²⁵ it was held that it is not within the normal provisions of the court to demolish discretionary exercise of power in the absence of a set of vitiating features.

²¹ *R.L Sharma v. Managing Committee, Dr. Hari Ram H S School*, AIR 1993 SC 2155.

²² *J. Mahopatra & Co. v. State of Orissa*, AIR 1984 SC 1572.

²³ *Reg v. Liverpool JJ ex p. Topping* (D.C), (1983) 1 WLR 122.

²⁴ *Dimes v. Grand Junction Canal Co.*, 1852 3 HLC 759.

²⁵ *Srikrishna Das Tikara v. State Government of Madhya Pradesh*, AIR 1977 SC 1691.

A mere error of law is not sufficient, it must be one that is manifest/patent on the face of record, mere formal or technical errors of law are not sufficient.²⁶

3.1 NON-AVAILABILITY OF NOTIFIED VACATION BENCH IS CONSTITUTIONAL

Entry 3 of List II²⁷ encompasses the meaning of the word “administration of justice”. It includes the powers to regulate vacation of the High Courts, how long the High Court will remain open without a vacation, how long it will remain closed for the vacation, and how justice is to be administered during the vacation and as that is a State legislative subject, only the State Legislature of the particular State whose High Court is concerned-can make the laws regulating such vacation.²⁸ For this purpose reliance is placed on the Supreme Court decision in *State of Bombay v. Narottamdas Jethabhai*,²⁹ and particularly the observations of Das, J., where it is said:-

"The words 'administration of justice' may be an expression of wide import and may ordinarily and in the absence of anything indicating any contrary intention, cover and include within its ambit, several things as component parts of it, namely, the Constitution, organisation of Courts, jurisdiction and powers and the laws to be administered by the Courts." Thus, there exists no lacuna in the formation and conduct of the workings of a vacation bench.

In *Tata Oil Mills v. Hansa Pharmacy*,³⁰ procedure was held to signify the mode in which the successive steps in litigation are taken. In the present case, the counsel for Respondents humbly submits that there was no absence of a vacation bench at the first instance.

²⁶ *Padeananda v. Board of Revenue*, AIR 1971 Assam 16.

²⁷ Entry 3 of List II, Seventh Schedule, CONSTITUTION OF INDIA, 1950.

²⁸ *Pramatha Nath Mitter and Others v. The Hon'ble Chief Justice*, AIR 1961, Cal 545.

²⁹ *State of Bombay v. Narottamdas Jethabhai*, 1951 AIR 69.

³⁰ *Tata Oil Mills v. Hansa Pharmacy*, ILR 1979 (2) Delhi 236.

The non-listing of a matter by the Chief justice of the High Court does not necessarily imply that he did so since there was no vacation bench that was present. The Chief Justice exercised the power conferred upon him decide if the matter was one of great import and whether the vacation bench was competent enough to handle the same. The case was not listed/ heard not due to the non-availability of a vacation bench but due to the discretion exercised by the Chief Justice which is well within the limits of his power.

3.2 LACK OF NOTIFIED PROCEDURE FOR LISTING DURING VACATION IS NOT ULTRA VIRES

The constitution of benches falls within the administrative powers of the Chief Justice of the Hon'ble High Court.³¹ The Hon'ble Supreme Court has held that the courts have the power of disposing of writs *in limine* in appropriate cases and it is not obligatory to give reasons,³² thus highlighting that the High Court was under no obligation to explicitly disclose the rationale behind non listing.

The High Court's power to hear specified cases is derived only from the application of the business of the Chief Justice. The power of the Chief justice to allocate business is: (a) not only derived from Art.225 of the Constitution, but (b) is also inherent in the Chief justice.

The counsel also submits that only urgent civil matters are heard during vacation time.³³

Delhi High Court Notification Dated 12.12.1966 in furtherance of Sec.7 of the Delhi High Court Act 1996 has a detailed procedure for preparation of a cause list in urgent matters. Chapter 3 on Jurisdiction Part A of the Delhi High Court procedure states the "Rules Regulating the Practice of the High Court in the Hearing of Causes and Other Matters" clearly outlining the method in which cases are to be listed and heard.

³¹ *D.P. Chadha v. Triyugi Narain Mishra & Ors.*, (2001) 2 SCC 22.

³² *Dr. D.C. Saxena v. Chief Justice of India*, (1996) 5 SCC 216.

³³ *Mohd. Ibrahim v. State*, AIR 1969 Delhi 315.

There is an express provision regarding the hearing of matters i.e, Section 4 read with Section 2, thereby clarifying any ambiguity that is present before this Hon'ble Court regarding the listing procedure of the Court itself.

The following matters are considered to be of urgent nature and may be listed and heard during vacation/holidays: i) Matters in which death penalty has been awarded; ii) The petition for Habeas Corpus and matters relating to it; iii) Matters relating to imminent apprehension of demolition of property; iv) Matters relating to dispossession/eviction; v) Matters relating to violation of human rights; vi) Matters relating to and of public importance; vii) Matters for anticipatory bail and matters filed against order refusing/granting bail. ³⁴

The present case does not fall under these categories and hence, the Hon'ble Court deemed fit to not list this matter on the sole basis of priority and thus the question of non-presence of a method of listing of the matter does not arise.

3.3 NON-GRANT OF LISTING DOES AFFECT THE MERITS OF THE CASE

It is a settled law that the limitation act does not apply to a writ petition under Art. 226 of the constitution; but a writ can be dismissed on the ground of delay on the part of the petitioner approaching the court.³⁵ On ground of public policy, the courts have developed this rule and therefore writ petitions filed after substantial delay are usually dismissed.³⁶

The question regarding laches caused by the delay of the court itself does not arise since the court exercising its discretionary power decided that the case did not involve any substantial question of law for it to be listed in the first place. The delay caused in the petition was solely the fault of the Petitioners since the relief that they seek would be redundant as the election notification has already come into effect.

³⁴ SUPREME COURT RULES HAND BOOK, PG 42.

³⁵ *Association of the Residents of Mhow v. Union of India*, AIR 2010 MP 40.

³⁶ *Union of India v. S.S. Kothiyal*, (1998) 8 SCC 682.

The delay has made the claim antiquated and outmoded. This chain of events definitely seeks to alter and affect the course of the proceedings and the final outcome of the same. Adjudication of the case based on the merits cannot and should not be devoid of this inordinate delay caused by the Petitioners and hence their case stands affected.

3.4 PUBLIC INTEREST AND PROBITY

The object underlying the acts of the Court is that of public policy, public interest and public good and therefore this Hon'ble Court must, therefore, repel the temptation to be carried away by feelings of commiseration and sympathy as it cannot be allowed to outweigh considerations of public policy and concern for public interest.³⁷ In the present case, in the interest of the inordinate pile up of cases in the court, the Hon'ble Chief Justice sought to not list the particular matter as it did not fulfil the necessary criterion for listing. No violation of a right did not raise any substantial question of law and thus did not require the immediate attention of the vacation bench. In order to prevent unnecessary pile up of cases the decision rendered by the court was appropriate, fair and pragmatic.

4. WHETHER ORDINANCE IS *ULTRA VIRES* OF THE CONSTITUTION.

The Ordinance promulgated by the governor which amends the Nirdhan Panchayat Raj Act, 1994 is in consonance with Part IX of the Constitution. The educational qualification laid down by the ordinance is based on a reasonable classification and achieves the object they were intended to do.

4.1 THE ORDINANCE IS NON-JUSTICIABLE IN A COURT OF LAW

The ordinance making power exercised by the governor under the Constitution³⁸ is co-extensive with the powers of the state legislature.³⁹ The power so exercised by the governor is

³⁷ *Union of India v. S.S. Kothiyal*, (1998) 8 SCC 682.

³⁸ Article 213, CONSTITUTION OF INDIA, 1950.

subject to two conditions, (1) the state legislature must be in recess and (2) there exist conditions which as per the satisfaction of the governor requiring his action. The ordinance so made by the governor has the same effect as a law made by the state legislature.⁴⁰ The courts can declare an ordinance unconstitutional when it transgresses constitutional limits, but they cannot enquire into the propriety of the exercise of legislative power. It has to be assumed that legislative discretion is properly exercised.⁴¹ The ordinance making power of the Governor which is congruent with that of the president is not discretionary but is advised by the Council of Ministers.⁴²

In the case of *Lakhinarayan v. State of Bihar*,⁴³ for the first time setting precedent on the ordinance making power of the governor held that the Judiciary cannot question the validity of an ordinance on the grounds that there was no sufficient grounds for promulgating an ordinance. Additionally in *K. Nagaraj v. State of Andhra Pradesh*⁴⁴ the court held that an executive act can be stricken down only when it is not legislative. In this case the power so exercised is not executive but is legislative in nature hence falling outside the purview of the courts. The satisfaction of the governor cannot be questioned and is not a justiciable matter.⁴⁵

³⁹ Article 162, CONSTITUTION OF INDIA, 1950.

⁴⁰ *State of Orissa v. Bhupendra Kumar Bose*, AIR 1962 SC 945.

⁴¹ *R.K. Garg & Ors. v. Union Of India & Ors.*, (1981) 4 SCC 675. : *A.K. Roy v. Union of India*, 1982 AIR 710.

⁴² *R.C. Cooper v. Union of India*, 1970 AIR 564.

⁴³ *Lakhinarayan v. State of Bihar*, AIR 1950 FC 59.

⁴⁴ *K. Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551.

⁴⁵ *S.K.G Sugar Mills v. State of Bihar*, AIR 1974 SC 1533: *State of Punjab v. Satya pal*, AIR 1969 SC 903.

In *T.Venkata Reddy v. State of Andhra Pradesh*,⁴⁶ the Supreme Court ruled that since the power to make an ordinance is a legislative and not an executive power, its exercise cannot be questioned on the grounds such as, improper motives, or non-application of mind, or on grounds of propriety, necessity and expediency. An ordinance stands at the same footing as an Act, carrying with its incidents, immunities and limitations under the Constitution. It cannot be treated as an executive or an administrative action. The court in the same case also observed that “the motive of the legislature is beyond the scrutiny of the courts”.

Therefore the ordinance cannot be questioned in a court and the burden lies on the petitioner to show a *prima facie* violation of the Constitution.⁴⁷ Additionally, Art. 243O⁴⁸ also bars interference of courts in election matters.

4.2 THE ORDINANCE IS WITHIN THE VIRES OF PART IX

Article 243C⁴⁹ talks about the composition of Panchayats. In the case of *State of Uttar Pradesh v. Pradhan Sangh Kshetra Samiti*,⁵⁰ it was ruled that when the two conditions under the Article are met therein, i.e. the proviso to clause (1) and that in Clause (2), the composition of a Panchayat cannot be faulted. The article delegates power to state legislatures to make provisions with respect to the composition of the Panchayats and in the present case, the conditions have been met and the powers exercised are within the scope of the Constitution. The detailed provisions prescribed by Art.243C can be made by the state government by passing laws subject to the constitutional provisions mentioned in Part IX.⁵¹

⁴⁶ *T.Venkata Reddy v. State of Andhra Pradesh*, (1985) 3 SCC 198.

⁴⁷ *A.K. Roy v. Union of India*, 1982 AIR 710.

⁴⁸ Article 243O, CONSTITUTION OF INDIA, 1950.

⁴⁹ Article 243C, CONSTITUTION OF INDIA, 1950.

⁵⁰ *State of Uttar Pradesh v. Pradhan Sangh Kshetra Samiti*, AIR 1995 SC 1512.

⁵¹ *Lalit Mohan Pandey v. Porran Singh*, AIR 2004 SC 2303.

The right to contest an election is neither a fundamental right nor a common law right.⁵² It is a right conferred by a statute. In *Ponnuswami*,⁵³ the Supreme Court declared that the right to vote or stand as a candidate for election is not a civil right but is a creature of a special law and must be subject to the limitations imposed by it.

4.3 THE ORDINANCE DOES NOT VIOLATE ARTICLE 14.

The Respondents humbly contend that the amendment effectuated by the ordinance is not in contravention of the Right to Equality guaranteed under Article 14.⁵⁴ The Legislature is entitled to make a reasonable classification for the purposes of legislation and treat all in one class on an equal footing. The Supreme Court⁵⁵ underlying this principle observed that Article 14 does not however operate against rational classification. It is well settled that the Article 14 forbids class legislation, however it does not forbid reasonable classification for the purpose of legislation.⁵⁶

To satisfy the test of permissibility two conditions should be satisfied i.e. (1) that the classification should be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that such differentia has a rational relation to the object sought to be achieved by the Statute in question. The Ordinance promulgated by the governor in the present case, does not exclude but operates to

⁵² *Jamuna Prasad Mukhariya v. Lachhi Ram*, AIR 1954 SC 686: *Jyoti Basu v. Debi Ghoshal*, AIR 1982 SC 983.

⁵³ *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, AIR 1952 SC 64.

⁵⁴ Article 14, CONSTITUTION OF INDIA, 1950.

⁵⁵ *R.K. Garg v. Union of India*, AIR 1981 SC 2138. : *Re Special Courts Bill*, AIR 1979 SC 478.

⁵⁶ *Nakara v. Union of India*, AIR 1983 SC 130: *Javed & Ors. v. State of Haryana & Ors.*, (2003) 8 SCC 369.

include qualified persons. It is merely an election reform with the object to improve the working of the Panchayat Raj Institutions.

The Supreme Court in *Javed & Ors. v. State of Haryana & Ors.*,⁵⁷ upholding the disqualification for those, who have more than two children in the State of Haryana, to contest the elections for Panchayati Raj Institutions, did not sustain the argument that the two children norm is discriminatory, and is violative of Article 14. In *Javed*,⁵⁸ a provision of the Haryana Panchayati Raj Act stipulated that “no person shall be a Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who... has more than two living children.” The constitutionality of this provision was challenged under Articles 14, 21 and 25. A three-judge Bench of the Apex Court rejected the challenge.

At the heart of the Court’s Article 14 reasoning was the proposition that since the right to stand for election is not an antecedent constitutional right, standard principles of rationality review under Article 14 will apply.

In the present scenario the Object-Classification nexus is found in the Eleventh Schedule⁵⁹ read with Article 243G.⁶⁰ The Eleventh Schedule prescribes a duty on the state to provide and improve primary education,⁶¹ vocational education⁶² and adult education.⁶³ The object of the ordinance thus was to sensitise and educate the population of the state about the relevance of

⁵⁷ *Javed & Ors. v. State of Haryana & Ors.*, (2003) 8 SCC 369.

⁵⁸ *Javed & Ors. v. State of Haryana & Ors.*, (2003) 8 SCC 369.

⁵⁹ Eleventh Schedule, CONSTITUTION OF INDIA, 1950.

⁶⁰ Article 243G, CONSTITUTION OF INDIA, 1950.

⁶¹ Entry 17, Eleventh Schedule, CONSTITUTION OF INDIA, 1950.

⁶² Entry 17, Eleventh Schedule, CONSTITUTION OF INDIA, 1950.

⁶³ Entry 17, Eleventh Schedule, CONSTITUTION OF INDIA, 1950.

education. In *Javed*,⁶⁴ responding to the contention that the number of children one bore, had no relevance to one's capabilities to discharge the duties of one's elected office, the Court held that "we have already stated that one of the objects of the enactment is to popularize Family Welfare/Family Planning Programme." Since there was a rational nexus between the "object" (family planning) and the "classification" (number of children), the Act survived Article 14 scrutiny. Additionally, a judgment of the Supreme Court⁶⁵ advocated judicial restraint, unless the law/provision is manifestly unjust or glaringly unconstitutional. The provision barring people who have not studied in a school should not be termed antithetical to equality because it is imposed in public interest and any ordinance imposed in public interest is just and fair.⁶⁶ The provision might alienate only a negligible number of persons and as the Hon'ble Supreme Court held,⁶⁷ marginal over inclusiveness or under inclusiveness will not vitiate the classification and the Right to Equality.

⁶⁴ *Javed & Ors. v. State of Haryana & Ors.*, (2003) 8 SCC 369.

⁶⁵ *Bhavesh D. Parish & Ors. v. Union of India & Anr.*, (2000) 5 SCC 471.

⁶⁶ *Dalmia Industries v. State of Uttar Pradesh*, AIR 1994 SC 2117.

⁶⁷ *N.P. Basheer v. State of Kerala*, (2004) 3 SCC 609.

PRAYER

Wherefore in the light of the issues raised, arguments advanced and authorities cited, it is humbly requested that this Honourable Court may be pleased to adjudge and declare:

1. That WP 999/2015 and WP 1021/2015 be dismissed by this Hon'ble Court.

And pass any such order, writ or direction as the Honourable Court deems fit and proper, for this the Respondents shall duty bound pray.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

COUNSEL FOR THE RESPONDENTS