IN THE HON'BLE HIGH COURT OF NIRDHAN

WRIT PETITIONS

UNDER ARTICLE 226 OF THE CONSTITUTION OF GARIBA

IN THE MATTER OF

People's Union for Liberties & Democratic Reforms and JCi _____ ***Petitioners***

v.

Republic of Gariba and Maxis Bank _____ ***Respondents***

WRIT PETITIONS NO. 999 OF 2015 & 1021 OF 2015

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENTS

Most Respectfully Submitted to the Hon'ble High Court of Nirdhan

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STATEMENT OF JURISDICTION

THE HON'BLE HIGH COURT OF JUDICATURE AT NIRDHAN EXERCISES JURISDICTION TO HEAR AND ADJUDICATE OVER THE MATTER UNDER ARTICLE 226 (1) OF THE CONSTITUTION OF GARIBA. THE RESPONDENTS HUMBLY SUBMITS TO JURISDICTION OF THE HON'BLE COURT WHICH HAS BEEN INVOKED BY THE PETITIONER. HOWEVER, THE RESPONDENT RESERVES THE RIGHT TO CHALLENGE THE SAME. THE PROVISION UNDER WHICH THE PETITIONER HAS APPROACHED THE HON'BLE COURT IS READ HEREIN UNDER AS:

ARTICLE 226 – POWER OF HIGH COURTS TO ISSUE CERTAIN WRITS

NOTWITHSTANDING ANYTHING IN ARTICLE 32 EVERY HIGH COURT SHALL HAVE POWERS, THROUGHOUT THE TERRITORIES IN RELATION TO WHICH IT EXERCISE JURISDICTION, TO ISSUE TO ANY PERSON OR AUTHORITY, INCLUDING IN APPROPRIATE CASES, ANY GOVERNMENT, WITHIN THOSE TERRITORIES DIRECTIONS, ORDERS OR WRITS, INCLUDING WRITS IN THE NATURE OF HABEAS CORPUS, MANDAMUS, PROHIBITIONS, QUO WARRANTO AND CERTIORARI, OR ANY OF THEM, FOR THE ENFORCEMENT OF ANY OF THE RIGHTS CONFERRED BY PART III AND FOR ANY OTHER PURPOSE.

STATEMENT OF FACTS

1. The Republic of Gariba is a sovereign federation of states with several union territories.
2. One of the economically backward state is Nirdhan. To elevate the liquidity crunch of Nirdhan, one company named Jeopardy Contracts Inc. [JCi] entered into an agreement with Jodhpur Gaon Panchayat Samiti [JGPS] on 21.9.2011 for developing 115 km. of road in a Scheduled area of Nirdhan.
3. At the time of culmination of the project, certain issues cropped up regarding land acquisition, design of the bridges etc. due to which the JGPS terminated the contract.
4. Arbitration proceedings took place under the Act of 1996, before the Council for Infrastructure Arbitration (CIA), and objections regarding maintainability were filed by JGPS which were subsequently dismissed by the ld. Arbitrators.
5. The arbitration culminated into an award in favor of JCi, and inter alia held JCi entitled to the money under the performance bank guarantee. JGPS immediately filed a petition under Sec. 34 of the Act of 1996, before the High Court of Nirdhan and this amounted to automatic stay on the award.
6. JCi cited its concern about immediate requirement of liquidity due to erosion of net worth, expenses for litigation, and pressure of the Amerasian Development Bank regarding the repayment of loan etc. However, Maxis Bank did not release any payment to JCi by the reason of pendency of Sec. 34 petition.
7. Subsequently, JCi challenged the constitutional validity of Sec. 34, by way of a writ petition vide no. WP 999/2015 in the High Court of Nirdhan
8. In the meanwhile, the Governor of the State of Nirdhan, on 20th December 2014, promulgated an Ordinance which came into effect from 24th of December 2014, which amended the Nirdhan Panchayati Raj Act, 1994 laying down the certain educational qualifications for being eligible to contest the elections of Panchayati Raj Institutions. Aggrieved from this, People's Union for Liberties & Democratic Reforms on 29.12.2014 moved to the High Court of Nirdhan for an urgent listing. However, the same was denied.
9. Then after, People's Union for Liberties & Democratic Reforms moved the Hon'ble Apex Court under Art. 32 on 31.12.2014 through the "Vacation Officer" as notified on the website. The Vacation Officer accepted the papers and informed the counsels that instructions from the Hon'ble Chief Justice are awaited.
10. Upon listing, the Apex Court was pleased to observe that the matter can now be heard by High Court of Nirdhan. People's Union for Liberties & Democratic Reforms immediately moved the Hon'ble High Court of Nirdhan filing a writ petition vide no. WP 1021/2015.

    Given that the ld. Attorney General was to appear in these two matters, (i.e. WP 999/2015 and WP 1021/2015) they have been directed to be listed together for final hearing before the High Court of Nirdhan.

STATEMENT OF ISSUES

[1] WHETHER THE INSTANT PETITIONS ARE MAINTAINABLE ?

[2] WHETHER § 34 OF THE ARBITRATION & CONCILLATION ACT, 1996 STANDS ULTRA VIRES TO THE CONSTITUTION ?

[3] WHETHER THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN TO AMEND THE NIRDHAN PANCHAYTI RAJ ACT, 1994 IS ULTRA VIRES TO THE CONSTITUTION ?

SUMMARY OF ARGUMENTS

[I] THE INSTANT PETITIONS ARE NOT MAINTAINABLE.

It is submitted that the writs filed in the High Court are not maintainable because there are exists an efficacious alternative remedy in the international arbitral tribunal that would bar the institution of the writ. Moreover, there is no infringement of fundamental rights by the virtue of promulgation of ordinance.

[II] SECTION 34 OF THE ARBITRATION & CONCILIATION ACT, 1996 IS NOT ULTRA VIRES TO THE CONSTITUTION.

It is humbly submitted before the Hon'ble Court that the § 34 of the Arbitration & Conciliation Act, 1996 is not *ultra vires* to the Constitution as the introduction of 'litigation' in the arbitral process is not contrary to the basic tenets of arbitration. Moreover, the delay under Section 34 petitions does not lead to expropriation and thus there occurs no adverse effects of it on country's bilateral and multilateral commitments under various conventions and investment treaties. Lastly, the grant of an automatic stay, without adjudication on prima-facie case, balance of convenience and irreparable injury is not bad in law.

[III] THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN TO AMEND THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS NOT ULTRA VIRES TO THE CONSTITUTION.

It is humbly submitted before the Hon'ble Court that the ordinance promulgated by the Governor of Nirdhan to amend the Nirdhan Panchayati Raj Act, 1994 is not *ultra vires* to the Constitution because non availability of a notified vacation bench during any holidays is not unconstitutional. Moreover, there is availability of a notified procedure for listing when the Court is not in session. Apart from this, the grant of listing before the issuance of election notification will affect the merits of the case since the court was moved well in time and *actus curaie neminem gravabit*. Furthermore, the Ordinance is not *ultra vires* to Part IX of the Constitution and even not retrospective. Lastly, the ordinance do not marginalizes women and weaker section and it is not in violation of the aspects of basic structure like the preamble, single citizenship, and free and equal participation in democratic government, and do not abridges valuable fundamental and constitutional rights.

PRILIMINARY OBJECTION
[I] THE INSTANT PETITIONS ARE NOT MAINTAINABLE

1. It is submitted that the writs filed in the High Court are not maintainable because

[**I.A**] *Existence of an efficacious alternative remedy would bar the institution of the writ.*

2. A writ is an extraordinary relief[1], granted only upon the exhaustion of an existing alternative remedy[2] in a statute. Further, the writ remedy cannot be used as an alternative remedy[3] or as means to adjudge any factual inconsistencies[4] as done in appellate courts[5]. In the case of *Madhya Pradesh v. ITO,*[6] the Supreme Court has held that, when there existed an adequate alternative remedy, then the writ petition would be dismissed by the court in limine. Thus, there were efficacious alternate remedies were available before JCi to seek enforcement of award in international arbitral tribunal.

[**I.B**] *There is no infringement of fundamental rights.*

3. It is submitted that Right to Contest election is not a fundamental right and is only a statutory right. Hence, the basic premise of the writ petition is incorrect and as such writ petition is not maintainable. It is further submitted that the questions raised have already been settled by the Hon'ble Supreme Court and by this Hon'ble Court on similar context and therefore the same not being *res integra,* this petition is not maintainable. The petitioner have failed to place any material on record to show even *prima facie* that

[1] SAMPATH IYENGAR, LAW OF INCOME TAX 10174 (12 ed. 2012).

[2] Income Tax Act, S.154 1961; S. 263 I-T Act, 1961.

[3] *GVK Power Ltd v. ACIT (OSD)*, 336 ITR 451.

[4] *Sterlite Industries Ltd. v. ACIT*, 305 ITR 339

[5] ABHE SINGH YADAV, LAW OF WRITS 27 (2009 ED.); V.G. RAMACHANDRAN'S, LAW OF WRITS 678 (6 ED. 2006); JUSTICE B L HANSARIA'S, WRIT JURISDICTION 132 (3 ed. 2005).

[6] *Madhya Pradesh v. ITO* , (1965) 67 ITR 637 (SC)

4. circumstances did not exist for promulgating the ordinance and therefore the writ petition is not maintainable as has been held by Hon'ble Supreme Court in *A.K. Roy v. Union of India.*[7]

II. SECTION 34 OF THE ARBITRATION & CONCILIATION ACT, 1996 IS NOT *ULTRA VIRES* TO THE CONSTITUTION.

5. It is humbly submitted before the Hon'ble Court that the § 34 of the Arbitration & Conciliation Act, 1996[8] is not *ultra vires* to the Constitution. In pursuance of the pleadings, the submission here is three fold: *Firstly,*

[II.A] *The introduction of 'litigation' in the arbitral process is not contrary to the basic tenets of arbitration.*

6. The introduction of litigation in the arbitral process is for the purpose of judicial review and not to contradict the basic tenets of the arbitration. The efficacy of any legislation must be judged by its implementation rather than its intention. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the Court.[9]
7. Judicial Review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made and it would be an error to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself.[10]
8. In *State of U.P. v. Maharaja Dharmandra Prasad Singh*[11] and *State of U.P. v. Johri Mal,*[12] the Court was of the view that the judicial review is of the decision making process and not of the decision on merits and cannot be converted into an appeal.
9. This is quite evident from the various Clauses of S. 34 (2) (a) which prescribe the grounds of challenge on the lines of violation of the principles of natural justice in making of the award or invalidity of the arbitral

[7] AIR 1982 SC 710

[8] Hereinafter referred to as the Arbitration Act.

[9] *The North Wales v. Evans*, [1982] 1 W.L.R. 1155.

[10] *Ibid.*

[11] (1989) 2 SCC 505

[12] (2004) 4 SCC 714

agreement and non-arbitrability of the disputes arbitrated and of the composition of the Arbitral Tribunal or arbitral procedure being not in accordance with the agreement between the parties. S. 34(2) (b) adds the ground of the arbitral award being in conflict with the public policy of India. None of the said grounds are the grounds of challenge on the merits of the award.

10. The Supreme Court in *Mc. Dermott International Inc. v. Burn Standard Co. Ltd.*[13] commenting on the radical changes brought about by the re-enactment of the arbitration law observed that the role of the Courts under the new law is only supervisory, permitting intervention in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice etc. and the Court cannot correct the errors of arbitrators and can only quash the award leaving the parties free to begin arbitration again.
11. It is the duty of the courts to promote intention of the Legislature by an intelligible and harmonious interpretation of the provisions rather than frustrate their operation.[14] If the Parliament in its wisdom has prescribed certain grounds on which the Award can be challenged, it is not permissible for the petitioners to say that there should be a right to challenge the Award even on merits and in the absence of such a provision Section 34 of the Act is unconstitutional.[15]
12. The Supreme Court of India decision in *Oil and Natural Gas Corporation v. Saw Pipes* [16]added an additional ground of 'patent illegality', thereby considerably widening the scope of judicial review on the merits of the decision. The court does not sit in appeal over the award and review the reasons. The court can set aside the

[13] (2006) 11 SCC 181

[14] *Union of India v. Harman Singh,* (1993) 2 SCC 162.

[15] *TPI India Limited v. Union of India*, In the High Court of Delhi, and Civil Appeal No.: 6875 of 1999 decided on October 19, 2000.

[16] (2003) 5 SCC 705

award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous.[17]

13. Therefore, where the error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible view points, the interference in the award based on erroneous finding of fact is permissible and similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator.[18]

14. Thus, the Supreme Court in *Babar Ali v. Union of India*[19] and the Delhi High Court in *Dharam Prakash v. Union of India*[20] have upheld the constitutional validity of Section 34 of Arbitration and Conciliation Act, 1996.

[II.B] *The delay under Section 34 petitions does not lead to expropriation and thus there occurs no adverse effects of it on country's bilateral and multilateral commitments under various conventions and investment treaties.*

15. As Prof. Ian Brownlie states, "state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation".[21]

16. To begin with, it is important to note that international law looks at the effect of the regulatory action to determine whether an expropriation has occurred.[22] The decisive factor for drawing the border line towards

[17] (1994) 6 SCC 485

[18] *Maharashtra State Electricity Board v. Sterlite Industries,* AIR 2000 Bom. 204.

[19] (2000) 2 SCC 178

[20] AIR 2007 Delhi 155

[21] I. Brownlie, PUBLIC INTERNATIONAL LAW, 509 (6th edn., 2003).

expropriation must primarily be the degree of possession taking or control over the enterprise that the dispute measures entail.[23]

17. Further, States are sovereign and free to legislate as they please within the confines of their own territory.[24] A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State.[25]
18. The police powers of the state term can be used in a general sense to refer to all forms of domestic regulation under a state's sovereign powers which refers to measures that justify state action which would otherwise amount to a compensable deprivation or appropriation of property.[26]
19. Moreover, conduct that is reasonably necessary for the maintenance of public order, safety, or health or the enforcement of laws of the state that do not depart from the international minimum standard of justice would normally not be violation of international law.[27]The degree of interference also determines the criterion to ascertain the expropriation. To ascertain the expropriation the real interests involved and the purpose and

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[22] *Tippets, Abbet, McMcarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, the Government of the Islamic Republic of Iran* (1983) Iran-USCRT 219, 226; *CME v. Czech Republic* Case No.10435/AER/ACS¶ 604; *Lauder v. Czech Republic* 2001 WL 34786000 ¶ 200.

[23] *Nykomb Synergistics Technology Holding AB v. Republic of Latvia* (Award) SCC Case No. 118/2001 (2003) ¶ 4.3.1.

[24] Freidman S., Expropriation in International Law, The London Institute of World Affairs, 1953 p.5.

[25] *Iran-United States Claims Tribunal, Too v. Greater Modesto Insurance Associates* Award, December 29, 1989, 23 Iran-United States Cl. Trib. Rep.378. in OECD Working Papers on International Investment, Number 2004/4.

[26] Newcombe A., Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid?, 1999, p. 74.

[27] See Damrosh & Henkin & Pugh & Schacter & Smit at *supra* note 8, p.767.

effect of the government measure must be taken into account.[28]Furthermore, an uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful.[29]

20. Mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required.[30] Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.[31]
21. Further, it is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities. However, Section 34 of the Arbitration Act neither realizes any benefit from the measure nor transfers the property or benefit directly to others.
22. Thus, the petitions Section 34 of the Arbitration Act does not amount to expropriation and have no repercussions on the bilateral and multilateral investment treaties.

[28] *S.D. Myers Inc. v. Canada*, NAFTA Award, November 13, 2000, para. 282

[29] *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens,* Article 10(5).

[30] *Pope & Talbot v. Government of Canada,* 41 ILM 1347.

[31] *Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, pp. 39-67 at 59.

[II.C] *The grant of an automatic stay, without adjudication on prima-facie case, balance of convenience and irreparable injury is not bad in law.*

23. It is an established principle that filing of the application under Section 34 of the Act for setting aside an arbitral award within the limitation period operates as an automatic stay on the arbitral award.[32] In the case of *Damodar Vally Corporation v. Central Concrete and Allied Constructions Ltd.*[33] the Court held, inter alia, in an application under Section 34, the Court shall not exercise appellate powers but that proposition cannot be extended to the extent of providing an umbrella to those awards where justice has been a casualty.
24. Moreover, the High Court has no jurisdiction to examine the different items awarded clause by clause by the arbitrator and to hold that under the contract these were not sustainable in the facts found by the arbitrator.[34] In *Ispat Engg. & Foundry Works v. SAIL*[35], the Supreme Court has held that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible. Thus, the Court cannot adjudicate upon prima-facie case, balance of convenience and irreparable injury while exercising the jurisdiction under Section 34 of the Arbitration Act.
25. Furthermore, when an application to set aside the arbitration award is filed under Section 34 (1), the Court to which such an application is presented, if so requested by a party and if the Court thinks it appropriate that any one or more of the grounds for setting aside the award as prescribed under Section 34 (2) exists and that it is also capable of being eliminated, may pass an order simply adjourning the proceedings, with an

[32] *National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd.*, (2004) 1 SCC 540; *Fiza Developers & Inter-Trade Pvt. Ltd. v. AMCI (I) Pvt. Ltd.*, (2009) 17 SCC 796.

[33] 2007 2 CHN 441

[34] *Sudarshan Trading Co. v. Govt. of Kerala*, (1989) 2 SCC 38.

[35] (2001) 6 SCC 347

indication as to the grounds that exist for setting aside the award. It will then be open to the arbitral tribunal to resume the arbitral proceedings and to take such other action which in its opinion befits the situation.[36]

26. Thus, the object of automatic stay is to protect the innocent party against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the arbitral proceedings. Therefore, the purpose of automatic stay is to review the validity of arbitral award and prevent it from causing gross injustice.

III. THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN TO AMEND THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS NOT ULTRA VIRES TO THE CONSTITUTION

27. It is humbly submitted before the Hon'ble Court that the ordinance promulgated by the Governor of Nirdhan to amend the Nirdhan Panchayati Raj Act, 1994[37] is not *ultra vires* to the Constitution.

[III.A] *Non availability of a notified vacation bench during any holidays is not unconstitutional.*

28. An examination of the Supreme Court Rules is necessary to determine the scope of the authority of a vacation Judge of the Supreme Court. The Supreme Court Rules are made by the Supreme Court in exercise of the powers conferred on it and all other powers enabling it to make rules.[38]

29. Thus, as per the Supreme Court Rules, except on the days which are holidays both for the Court and the offices of the Court, the offices of the Court shall be open during summer vacation and Christmas and New Year holidays of the Court at such times as the Chief Justice may direct.[39] Hence, it is not an obligation upon the Chief justice to avail the vacation bench rather it is at his absolute discretion.

30. Moreover, the Chief Justice may appoint one or more Judges to hear during summer vacation or winter holidays all matters of an urgent nature which under these rules may be heard by a Judge silting singly, and

[36] *M.M.T.C. v. Vicnivass Agency,* In the Madras High Court, C.R.P. (Pd) (Md) No. 806 of 2008 decided on August 21, 2008.

[37] Factsheet ¶ 16.

[38] The Constitution of India, Article 145.

[39] Order II rule 3 of Supreme Court Rules, 2013.

whenever necessary, he may likewise appoint a Division Court for the hearing of urgent cases during the vacation which require to be heard by a Bench of Judge[40]. However, it is again at the discretion of the judges.

31. Thus, on the basis of above cited rules of the Hon'ble Supreme Court, the non-availability of vacation bench does not run contrary to the established rules and hence is not *ultra vires* to the Constitutional provisions as the power to make the rules is conferred on the Supreme Court by the Constitutional provisions.

[III.B] *There is availability of a notified procedure for listing when the Court is not in session.*

32. The procedure lays down that an administrative order asking the advocates/In Person to approach the vacation officer who shall after screening the papers, seek direction from Hon'ble Chief Justice of India and thereafter inform the advocates concerned about the direction. Further, the matter relating to and of public importance are considered to be of urgent nature and may be heard during vacations after filing of affidavit.[41]
33. As per the laid down procedure, the petitioner moved to the Supreme Court with the affidavit through the vacation officer. However, no instant response was given by the Chief Justice for the next 48 hours.[42] Mere delay in listing cannot render the procedure unconstitutional.
34. The judiciary is outstretched in the nation and the backlog of cases are increasing every year.[43]In such a situation, we have to sympathize with the judges. They are struggling with an unbearable burden. The judges spend late nights trying to read briefs for a Monday or a Friday. When each of the 13 Divisions or Benches have to dispose off about 60 cases in a day, the functioning of the Supreme Court of India is a far cry from what should be desiderata for disposal of cases in a calm and detached atmosphere. The Judges rarely have the leisure to ponder over the arguments addressed to the court and finally to deliver a path-

[40] Order II rule 6 of Supreme Court Rules, 2013.

[41] Supreme Court of India, Manual of office procedure on judicial side, Chapter VI – Mentioning and Listing of urgent Matters, pg. 58-60.

[42] Factsheet ¶ 19.

[43] *Brij Mohan Lal v. Union of India (UOI) and others,* (2012) 6 SCC 502.

breaking, outstanding and classic judgment. All this is impossible of attainment to a Court oppressed by the burden of a huge backlog *of* cases.[44]

35. Furthermore, as per the Supreme Court Notice, there were 3022 cases listed before the vacation bench during summer 2013.[45] Therefore, there is always a pool of urgent cases before the judiciary during the vacations and inordinate delay is ought to be there. However, there is availability of notified procedure for listing when the Court is not in session.

[III.C] *Non grant of listing before the issuance of election notification will affect the merits of the case since the court was moved well in time and actus curaie neminem gravabit.*

36. Indeed, Indian authorities are in abundance to support the view that injustice done should be corrected by applying the principle *actus curiae neminem gravabit* an act of the court shall prejudice no one.[46]

37. However, it is time to sound a note of caution. For applying the maxim, it has to be shown that any party has been prejudiced on account of any order passed by the Court.[47] Thus, it is impossible to find any prejudice having been caused to the petitioner herein due to the order of the Court.

38. Furthermore, the act of the court embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. [48] However, in the instant case, the legal proceedings had not been even initiated. Thus, it would be erroneous to apply the maxim of *actus curiae neminem gravabit.* The argument is obviously based on the maxim *actus curiae neminem gravabit*. It would apply to relieve a party of the hardship or prejudice

[44] *Mathai @ Joby v. George & Anr.,* (2010) 4 SCC 358.

[45] Available at http://supremecourtofindia.nic.in/outtoday/vacation.pdf

[46] *A. R. Antulay v. R. S. Nayak and Another,* AIR 1988 SC 1531.

[47] *Contonment Board, Meerut & Anr v. K.P. Singh & Ors.,* (2010) 2 SCC 518.

[48] *South Eastern Coalfields Ltd. v. State of M.P. & others*, (2003) 8 SCC 648.

caused due to the act of the Court. To invoke this maxim there must be a nexus between the act of the court complained of and the hardship or prejudice suffered by the party.[49]

39. However, in the instant case, there is no nexus between the act of the court and prejudice suffered by the party. There was no legal proceeding actuated and no order was passed on behalf of the Court. Thus, the case at hand, does not attract the maxim of *actus curiae neminem gravabit.*Now, there is a Constitutional bar to interference by Courts in electoral matters.[50] In *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency and Ors.,*[51] the Court held that the restriction reflected under Article 329(b), has also been incorporated in Part IX of the Constitution, inserted vide 73rd Amendment in Article 243-O of the Constitution.

[III.D] *The Ordinance is not ultra vires to Part IX of the Constitution and even not retrospective.*

40. It is submitted that the ordinance amending § 19 of Nirdhan Panchayati Raj Act, 1994 is not in violation Part IX of the Constitution.

41. The 73rd Amendment of the Constitution gives the Panchayati Raj Institutions (PRIs) a constitutional status, inserting Part IX in the Constitution, defining 'Panchayat', to mean an institution of self-governance constituted under Article 243B, for the rural areas.

42. Legislative powers of the Governor, exercised by him under Article 213 of the Constitution of India, cannot be challenged on the ground that no such circumstances existed, which rendered it necessary to promulgate the Ordinance. The satisfaction of the Governor in such matters, in issuing an Ordinance is not subject to judicial review. Moreover, a disqualification can be prescribed under Article 243F(1)(b) of the Constitution by the Legislature of the State. The powers of the Governor to promulgate an Ordinance during the recess of

[49] *W. B. Essential Commodities Supply Corporation v. Swadesh Agro Farming and Storage Private Limited*, AIR 1999 SC 3421.

[50] The Constitution of India, Article 243-O.

[51] AIR 1952 SC 64

Legislature under Article 213, is a legislative power. Any doubt on the proposition, has been cleared by clause(2) of Article 213 of the Constitution, which provides that an Ordinance promulgated under the Article, shall have the same force and effect as an Act of Legislature of the State assented to by the Governor. Moreover, the powers of the Governor to promulgate an Ordinance cannot be challenged on the ground of non-application of mind or *mala fides*.[52]

43. Furthermore, the right to contest the election is not a fundamental right. It is a statutory right, for which qualifications and disqualifications can be prescribed by the Legislature.[53]

44. In *State of Punjab v. Satya Pal*[54] the Court held that the disqualification of a person who has been convicted of any offence by a competent court and sentenced to imprisonment for six months or more, and a person who is under trial in the competent court, in which charges have been framed against him of any offence punishable with imprisonment for five years or more, was in public interest. The fact that similar disqualification has not been provided for the MLA's and MP's, cannot be held to be discriminatory.

45. Further, in *Shivram and others v. The State of Rajasthan and others*[55]**,** a challenge to the Rajasthan Panchayati Raj (Third Amendment) Ordinance, 1999, inserting Section 19(g), 19(gg) and Proviso (ii) of Section 19 as disqualification, was turned down. The Ordinance does not exclude but operates to include qualified persons. It is merely an election reform with the object to improve the working of the Panchayati Raj Institutions.

[52] *K. Nagaraj and others etc. v. State of Andhra Pradesh,* AIR 1985 SC 551; *T. Venkata Reddy etc. v. State of Andhra Pradesh,* AIR 1985 SC 724.

[53] *Javed & Others v. State of Haryana & Others,* (2003) 8 SCC 369.

[54] AIR 1969 SC 903

[55] 2004(4) WLC(Raj.) 412

46. The Supreme Court in *Javed and Others v. State of Haryana and Others,*[56] have uphold the disqualification for those, who have more than two children in the State of Haryana, to contest the elections for Panchayati Raj Institutions. The Supreme Court even did not sustain the argument that the two children norm is discriminatory, and is in violation of Article 14 of the Constitution of India. The disqualification was not found to be in violation of the Article 14 and 21 of the Constitution.

47. Moreover, the Division Bench judgment of the Raj High Court in *Jodhpur Chartered Accountants Society and Another v. The State of Rajathan and Another*[57]*,* held that the Courts do not have powers to stay the operation of the law, and the in *Bhavesh D. Parish and Others v. Union of India and Another,* [58] the Supreme Court advocated judicial restraint, unless the law/provision is manifestly unjust or glaringly unconstitutional. Thus, the Court should not interfere with the process of elections.[59]

48. The Hon'ble Supreme Court in *S.T. Muthusami v. K. Natarajan and Ors.*[60]*,* and in *Election Commission of India Through Secretary v. Ashok Kumar & Ors.*[61], upheld that the Courts must not interfere in the elections.

49. The Division Bench of Rajasthan High Court in *Bhupendra Pratap Singh v. State of Rajasthan*,[62] in which relying upon the judgments of *Meghraj Kothari v. Delimitation Commission & Others* [63], and *State of U.P. & Others v. Pradhan Sangh Kshettra Samiti & Ors.*[64]**,** it was held that power of delimitation is legislative in

[56] *Supra* note 53

[57] 2001(2) WLC(Raj.) 17

[58] (2000) 5 SCC 471

[59] *Supra* note 51

[60] AIR 1988 SC 616

[61] AIR 2000 SC 729

[62] DBCWP No.12960/2014, decided on 18.12.2014.

[63] AIR 1967 SC 669

[64] 1995 Suppl.(2) SCC 305

character and refused to interfere with the elections for the local bodies on the ground that mandatory procedure for delimitation was not followed.

50. Any interference in the elections will cause difficulty in holding elections, for which all preparations have been made, Officers trained and deputed and program finalized, for which any delay is not permissible at this stage, nor is advisable.[65] Further, the ordinance is not *ultra vires* to the Constitution and even not retrospective.

[III.E] *The Ordinance do not marginalizes women and weaker section and it is not in violation of the aspects of basic structure like the preamble, single citizenship, and free and equal participation in democratic government, and do not abridges valuable fundamental and constitutional rights.*

51. Having provided reservation to women and other class of citizens, it has been observed in the functioning of the Panchayati Raj Institutions after the constitutional amendment that the absence of educational qualification at the grass root level of these democratic Institutions is frustrating the objectives of their establishment. Irrespective of the Right to Education Policy in the constitution irrespective of incorporation of the same as fundamental duty of the parents in Article 51-A of the Constitution.

52. *In the case of Javed And Others v. State of Haryana And Others,*[66] The right to contest the election is not a fundamental right. It is a statutory right, for which qualifications and disqualifications can be prescribed by the Legislature. Freedom of speech and expression as contemplated under Art 19 of the constitution of india is not hampered in any manner by the impugned legislation .

53. It is wholly incorrect and unfounded to say that the impugned ordinance is in violation of Article 14 of the Constitution of India in any manner or which creates class between the person who possess the prescribed qualification and those who do not possess the prescribed qualification. Constitution Bench in the case of

[65] *Dulari Devi & Others v. State of Rajasthan & Others,* DBCWP No.375/2015 reported on January 15, 2015

[66] (2003) 8 SCC 369

Budhan Choudhry and Ors. v. The State of Bihar,[67] the basis for classification may rest on conditions which may be geographical or according to objects or occupation or the like.

54. Furthermore, the Ordinance is not in violation of either Article 14 or Article 21 of the Constitution. This view has been further relied upon in a case of *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and others*[68]. Article 21 requires that procedure must be reasonable , fair and just and not arbitrary , whimsical or fanciful.

55. In *Olga Tellis and others v. Bombay Municipal Corporation and others,*[69] it was held that just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his Fundamental right must conform the norms of justice and fair play.

56. In *Jyoti Basu and Ors. v. Debi Ghosal and Ors*.[70], it was held that a right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right.

57. The whole ordinance promulgated fulfils the purpose of Article 40 of the Constitution and it also submitted that the amendment does not touch upon the existing reservation scheme for women under Article 15.

58. Thus, the Ordinance do not marginalizes women and weaker section and it is not in violation of the aspects of basic structure like the preamble and free and equal participation in democratic government, and do not abridges valuable fundamental and constitutional rights.

[67] AIR 1955 SC 191

[68] AIR 1981 SC 746

[69] AIR 1982 SC 983

[70] (1982) 1 SCC 691

PRAYER

WHEREFORE, IN THE LIGHT OF FACTS STATED, QUESTION PRESENTED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, THE RESPONDENT RESPECTFULLY REQUESTS THIS HON'BLE COURT TO ADJUDGE AND DECLARE THAT:

[1] The writ petition is not maintainable.

[2] The Section 34 of the Arbitration and Conciliation Act, 1996 is not ultra vires to the Constitution.

[3] The ordinance promulgated by the governor of Nirdhan to amend the Nirdhan Panchayati Raj Act, 1994 is not ultra vires to the Constitution.

AND TO PASS ANY SUCH ORDER, DISCRETION & JUDGMENT AS THIS HON'BLE COURT MAY DEEM FIT IN THE INTEREST OF JUSTICE, EQUITY AND GOOD CONSCIENCE.

All of which is respectfully submitted

Sd/- _____

COUNSEL FOR THE RESPONDENTS

PLACE: STATE OF NIRDHAN