TEAM CODE: C1

BEFORE THE HON'BLE HIGH COURT OF NIRDHAN

Writ Petition under Article 226 of Constitution of Republic of Gariba

WP No. 999/2015 with WP No. 1021/2015

Jeopardy Contracts Inc. .....PETITIONER

VERSUS

Republic of Gariba .....RESPONDENT

&

People's Union for Liberties & Democratic Reforms.....PETITIONER

VERSUS

State of Nirdhan & Ors. .....RESPONDENT

MEMORIAL FOR THE RESPONDENT

5th NLIU - Justice RK Tankha Memorial National Moot Court Competition, 2015

Drawn and filed by the Counsel for the Respondents

TABLE OF CONTENTS

INDEX OF AUTHORITIES

✓ LIST OF CASES

- *State of Bihar v. Pandey & Co. Builders Pvt. Ltd.* [AIR 2011 Pat. 51]
- *Parvathi v. A.P Transp. Corpn.* [(2007) 135 Comp Cas 581 (AP)]
- *State of U.P v. Harish* [(1999) 1 SCC 63]
- *H.B Gandhi v. Gopinath & Sons* [(1992) Supp 2 SCC 312]
- *Shin Satellite Co. v. Jain Studious* [AIR 2006 SC 963]
- *McDermott Intt'l Inc. v. Burn Standard Co. Ltd.* [(2006) 11 SCC 181]
- *MMTC v. Vicnivas Agency* [(2009) 5 RAJ 177]
- *Centrotrade Minerals & Metals Inc. Hindustan Copper Ltd* [(2006) 11 SCC 245]
- *L Chandra Kumar v. Union of India*[(1997) 3 SCC 225]
- *Subhesh Sharma v. Union of India* [1991 Supp. (1) SCC 574]
- *Sangram Singh v. Election Tribunal* [1955 (2) SCR 1]
- *Narappa Reddy v. Chandrammal* [AIR 1967 AP 219]
- *Nekkalapudi Ramakrishna Pratap v. District Collector-cum- Arbitrator, West Godavari District* [AIR 2006 AP 136]
- *Sushil Kr. Sharma v. Union of India* [(2005) 6 SCC 281]
- *Mafatlal Industries Ltd. v. Union of India* [(1997) 5 SCC 536]
- *State of Rajasthan v. Union of India* [(1977) 3 SCC 592]
- *State Fishery Officer's Association v. State of West Bengal* [(1997) 9 SCC 65]
- *Manager, St. Thomas U.P School v. Commisioner & Secretary to General Education Department* [(2002) 2 SCC 497]
- *Municipal Corporation of Delhi v. Nirmal Sachdeva* [(2001) 10 SCC 364]
- *Subrata v. Union of India* [(2002) 2 SCC 725]
- *Shri Sant Guru v. State of Maharastra* [(2001) 8 SCC 509]
- *A.K. Roy v. Union of India* [1982 SCR (2) 272]
- *T Venkata Reddy vs. State of Andhra Pradesh* [1985 SCR (3) 509]
- *S.K.G.Sugar Ltd v. State of Bihar* [1975 SCR (1) 312]
- *State of Punjab vs. Satya Pal Dang* [AIR 1969 SC 917]
- *Shiv Ram vs. State of Rajasthan* [AIR 2000 Raj.416]
- *Union of India v ADR* [(2002) 5 SCC 294]
- *PUCL v Union of India* [(2013) 10 SCC 1]
- *Jumuna Prasad Mukhariya V Lachhi Ram [(*1955) 1 SCR 608]
- *Javed v State of Haryana* [(2003) 8 SCC 369]

- *Sakhawat Ali v State of Orissa* [(1955) 1 SCR 1004]
- *P.S.Sadasivaswamy vs. State of Tamil Nadu* [1975(1) SCC 152]
- *The State of West Bengal vs. Anwar All Sarkarhabib* [1952 SCR 284]
- *Raja Ram Pal Vs The Hon'ble Speaker, Lok Sabha and Ors* [(2007)3SCC184]
- *Rustom Cavasjee Cooper vs. Union of India* [(1970)1SCC248]
- *Government of Andhra Pradesh & Ors. v. Smt. P. Laxmi Devi* [(2008) 4 SCC 720]
- *Kuldip Nayar Vs.Union of India (UOI) and Ors* [AIR (2006) SC 3127]
- *K. Prabhakaran vs. P. Jayarajan* [(2005) 1 SCC 754]
- *Union of India vs. Association for Democratic Reforms and Anr* [(2002) 5 SCC 294]
- *Jyoti Basu v. Debi Ghosal* [(1982) 3 SCR 318]
- *D C Wadhwa V State of Bihar* [1987 SCC (1)378]
- *Krishna Kumar Singh v State of Bihar* [(1998)5SCC643]
- *Namit Sharma V Union of India* [(2013) 1 SCC 745]
- *Ashoka Kumar Thakur vs. Union of India (UOI) and Ors* [(2008)6SCC1]
- *Dinesh Trivedi, M.P. and Ors. v. Union of India and Ors* [(1997) 4 SCC 306]
- *Lloyd v McMohan* [(1987) 1 ALL ER 1118]
- *A.R. Antulay Vs.R.S. Nayak and Anr* [(1988)2SCC602]

✓ **LIST OF STATUES**

- The Arbitration and Conciliation Act, 1996
- The Constitution of India, 1950
- The Representation of Peoples Act, 1951

STATEMENT OF JURISDICTION

IT IS HUMBLY SUBMITTED THAT THE RESPONDENTS HAVE APPROACHED THE HON'BLE SUPREME COURT OF INDIA IN RESPONSE TO THE WRIT PETITIONS FILED BY THE PETITIONERS UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

THE WRIT PETITIONS HAVE BEEN CLUBBED TOGETHER BY THE HON'BLE COURT FOR THEIR JOINT HEARING AND DISPOSAL. THE RESPONDENTS DENY THE JURISDICTION APPROACHED BY THE PETITIONERS.

THE PRESENT MEMORIAL ON BEHALF OF THE RESPONDENTS SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN THE PRESENT CASE.

STATEMENT OF FACTS

1. The Republic of Gariba is a sovereign federation of states, which became independent in the year 1947. Nirdhan, is the biggest state in the Republic of Gariba. Most parts of Nirdhan are in the form of desert and the territory was mostly considered as backward.
2. The governor of Nirdhan in an effort to fast pace the development in the state, devised new schemes, under which the infrastructural development was also allotted to private parties,
3. The Powers were delegated to the Panchayat Samitis, in order to enter into contrActs with Private entities. On 21.9.2011 Jodhpur Gaon Panchayat Samiti ["**JGPS**"] entered into an agreement with Jeopardy ContrActs Inc. ["**JCi**"] for 115 kms of road in a Scheduled area in Nirdhan. This contrAct was however terminated by JGPS on 21.9.2013, due to some issues on Land Acquisition.
4. JCi sent a legal notice on 11.12.2014 for invoking arbitration as per contrActual clause, to which JGPS replied on 12.12.2014, saying that the Arbitration and Conciliation Act, 1996 Act was not applicable.
5. On 13.12.2014, JCi moved to the High Court and filed an urgent civil writ petition WP (C) No. 99/2014. On 15.12.2014, the High Court granted a stay on the Bank Guarantee and directed that all further Actions shall remain subject the proceedings.
6. However, on account of an email sent by JGPS, the Maxis Bank had already encashed the Bank Guarantee. Also, there was a security breach in the software systems of the Maxis Bank, which amounted to freezing of all accounts. Thus, the amount in question remained in the accounts of JCi.
7. The Head of JGPS convened a Press Conference and made allegations that the Act of security breach was attributable to JCi. In reaction to the allegation made, JCi, issued a statement, which along with their denial, also put forthwith, the statement that the Head of JGPS was an illiterate man, who was naïve and was thus making such false accusations.
8. Meanwhile, the High Court disposed the suit, directing the parties to seek remedies from the Ld. Arbitrators. On, 21.1.2015, an award was granted in the favour of JCi.

9. JGPS immediately filed a petition under Sec. 34 of the Act of 1996, before the High Court of Nirdhan, on its original side on 25.1.2015. This suit resulted in the stay over the arbitral award, and therefore Maxis Bank could not release funds in the favour of JCi, as communicated by Maxis Bank to JCi.

10. JCi challenged the constitutional validity of Sec. 34, by way of a writ petition, (WP 999/2015). The High Court of Nirdhan admitted the petition, and considering the nature of issues raised, issued notice to the ld. Attorney General.

11. On the other hand, on 20th December 2014, the Governor of the State of Nirdhan promulgated an Ordinance which amended the Nirdhan Panchayati Raj Act, 1994, to include disqualifications on the basis of the candidate's educational qualifications. The ordinance was to come into effect on 24th December, 2014.

12. This was the very first time such a provision had been brought into vogue in the entire Republic. People's Union for Liberties & Democratic Reforms issued a public statement that the Ordinance was replete with malice in law, it amounted to promulgating the ordinance for 5 years instead of 6 months, and it is violative of Constitution since "We the people" does not, and cannot mean "we the literate people".

13. The 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. However, there was a delay in the granting of listing, and thus the election notification was effective by that time. Further, upon listing, the Apex Court was pleased to observe that the matter can now be heard by High Court of Nirdhan.

14. People's Union for Liberties & Democratic Reforms immediately moved the Hon'ble High Court of Nirdhan. It filed a pro-bono petition WP (C) No. 1021/2015 in the High Court of Nirdhan seeking, to challenge the vires of the Ordinance.

15. The High Court of Nirdhan admitted the petition, and given that important questions pertaining to the interpretation of Constitution were involved, notices were issued to the ld. Attorney General as well as the Republic of Gariba. 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.

STATEMENT OF ISSUES

THE FOLLOWING ISSUES ARE PRESENTED BEFORE THE HON'BLE COURT IN THE PRESENT MATTER:

1. WHETHER THE PRESENT PETITIONS NAMELY, W.P NO. 999/2015 AND W.P NO. 2 ARE MAINTAINABLE IN ITS PRESENT FORM BEFORE THIS HON. COURT.

2. WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS TO BE DECLARED UNCONSTITUTIONAL IN ITS PRESENT FORM.

3. WHETHER THE ORDINANCE, PROMULGATED BY THE GOVERNOR OF NIRDHAN, IS VIRES THE CONSTITUTION.

SUMMARY OF ARGUMENTS

1. WHETHER THE PRESENT PETITIONS NAMELY, W.P NO. 999/2015 AND W.P NO. 1021/2015 ARE MAINTAINABLE IN ITS PRESENT FORM BEFORE THIS HON. COURT.

    1.1 It is humbly contended that the Writ Petition No. 999/2015 and Writ Petition No. 1021/2015 is not maintainable before this Hon. Court due to the want of jurisdiction.

2. WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS TO BE DECLARED UNCONSTITUTIONAL IN ITS PRESENT FORM.

2.1 It is submitted that Section 34 does not postulate automatic stay and therefore it is not against the Procedural Laws. It is contended that pendency of Section 34 Petitions does not amounts to expropriation and violation of International Commitments. Further, Section 34 does not lead to Introduction of litigation in the Arbitration process and is not against basic tenets of arbitration.

3. WHETHER THE ORDINANCE, PROMULGATED BY THE GOVERNOR OF NIRDHAN, IS VIRES THE CONSTITUTION.

    3.1 It is contended that the ordinance is not vires part IX of the Constitution of Nirdhan. The powers of the governor under article 213 cannot be questioned and the Ordinance does not violate any fundamental rights. The Ordinance cannot be questioned on malafide grounds. It is further contended that the rules of "*actus curaie neminem gravabit*" applies to procedural areas only.

ARGUMENTS ADVANCED

1. Whether the present Petitions namely, W.P No. 999/2015 and W.P No. 1021/2015 are maintainable in its present form before this Hon. Court.

1.1 Maintainability of W.P No. 999/2015- 1.1.1 It is submitted that Article 226 of the Hon. High Court is the part and parcel of the basic structure of our Constitution.[1]Such jurisdiction is very wide and can never be ousted.[2]However the Hon. Courts have restricted themselves in entertaining matters under this jurisdiction. One of the self imposed limitations is that the Courts shall not exercise jurisdiction unless substantial injustice has ensued or is likely to ensue.[3]It is humbly submitted in the present matter that no injustice is caused to the petitioners in W.P No. 990/2015 and W.P No. 1021 therefore the present petition is liable to be dismissed. It is further contended that the grant of relief under Article 226 is discretionary and the Court will refuse relief if it finds that there is abuse of process. It means proceedings which are wanting in bonafides, are frivolous, vexatious or oppressive.[4] It is submitted before this Hon. Court that the present petition is motivated by malafide and vexatious intent. The Panchayat had moved to the High Court which had declared the award to be stayed. Due to the above the Petitioners had lost access to the Bank Guarantee sum and the present petition challenging the constitutionality of the Section 34 is a mere abuse of process of Court for it is motivated by the prior proceedings which were against the Present Petitioner. Further, a writ

[1] *L Chandra Kumar* v. *Union of India* (1997) 3 SCC 225 [MANU/SC/0261/1997 (¶ 42)]

[2] *Subhash Sharma* v. *Union of India* 1991 Supp. (1) SCC 574

[3] *Sangram Singh* v. *Election Tribunal* 1955 (2) SCR 1 [MANU/SC/0044/1955 (¶ 15)]

[4] *R.Narappa Reddy* v. *Chandrammouli* AIR 1967 AP 219 [MANU/AP/0064/1967 (¶ 70)]

jurisdiction is not a proper remedy when the matter is being adjudicated by the Arbitrator.[5] It is humbly submitted that the Petitioner's apprehension about the misuse of Section 34 for introducing unnecessary litigation is unfounded. The Hon. Supreme Court has upheld that mere possibility of a Section being abused or misused cannot be a ground to strike it down as ultra vires and unconstitutional.[6]

1.1.2 It is humbly submitted that no inference is permissible when the dispute relates to property rights between private persons. The High Court is not allowed to invoke its extraordinary jurisdiction to be used for deciding disputes for which remedies are available under the general law, both civil and criminal.[7] It is most humbly contended that relief to a party must be denied when there is a reasonable certainty that the party has come to the Court with unclean hands.[8]

1.2 Maintainability of W.P No. 1021/2015- 1.2.1 It is humbly submitted that the W.P No. 2 concerns with the intrinsic aspects of Panchayat Elections which is totally a legislative policy out of the purview of the Courts. It is a general rule of law that the High Court shall not interfere in the matters of policy.[9]Therefore the present writ petition is liable to be dismissed. It is contended that the ordinance has been passed in order to achieve a greater good. No

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[5] *Nekkalapudi Ramakrishna Pratap* v. *D.C Cum Arbitrator , West Godavari District*, AIR 2006 AP 136 [MANU/AP/0886/2005 (¶ 4)]

[6] *Sushil Kr. Sharma* v. *Union of India* (2005) 6 SCC 281, *Mafatlal Industries Ltd.* v. *Union of India* (1997) 5 SCC 536, *State of Rajasthan* v. *Union of India* (1977) 3 SCC 592 [MANU/SC/0370/1977 (152)]

[7] *Mng,St.Thomas School* v. *Comm&Sec GED* (2002)2SCC497 [MANU/SC/0052/2002 (¶ 6)]

[8] *Municipal Corporation of Delhi* v. *Nirmal Sachdeva* (2001) 10 SCC 36

[9] *State Fishery Officer's Association* v. *State of West Bengal*, (1997) 9 SCC 65 [MANU/SC/1427/1997 (¶ 2)]

motives or malafides can be ascribed to Parliament merely because it passed constitutional and statutory amendments on the same day and obtained Presidential assent on the next day, if such Action was justified having regard to the existing situation and impending elections.[10]As a general rule, election is a distinct procedure and the Court's will not interfere at that state.[11]

2. Whether Section 34 of the Arbitration and Conciliation Act, 1996 is to be declared unconstitutional in its present form.

2.1 Section 34 does not postulate Automatic stay and therefore it is not against the procedural principals of Balance of convenience and irreparable injury.

2.1.1 In the case of *Sarkar and Sarkar* v. *State of West Bengal & Ors*. [12] the Court held that if the appeal is treated to be automatic continuation of the Action under Section 34 the whole object of the language of Section 34 is rendered nugatory. It is submitted that it is only under exceptional circumstances the Court can stay an Arbitral proceeding. [13] Such power of the Hon. Court may be bound by discretion but such discretion is of judicial nature, that is, the Court is bound to consider the law at hand, legal principles and the legislative mandate while granting a stay. It is contended that where the first four requisites of Section 34 are present, even then it is the judicial discretion of the Court to stay or not stay those proceedings and in appropriate cases the Court may still refuse to stay the proceedings if there are sufficient

[10] *Subrata* v. *Union of India* (2002) 2 SCC 725 [MANU/SC/0085/2002 (¶ 12)]

[11] *Shri Sant Guru* v. *State of Maharastra* (2001) 8 SCC 509 [MANU/SC/0602/2001 (¶ 4)

[12] AIR 2006 Cal 149 [MANU/WB/0056/2006 (¶ 6)]

[13] *Deccan Asian Infrastructure (Mauritius) Inc*. v. *BPL Communications Limited and Ors.* 2005(2) Arb L.R 450 (Kar) [MANU/KA/0118/2005 (¶ 24)]

reasons not to stay the proceedings.[14]As observed in *Anderson Wright Ltd.* v. *Moran & Company*[15]: "The Court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitration in accordance with the arbitration agreement". This clearly indicates that discretion is vested in the Court in appropriate cases to refuse stay of the proceedings and the Court has to therefore proceed on the facts of each particular case in the matter of granting or refusing a stay of the suit. In *Asiatic Shipping Co. (Pvt.) Ltd.* v. *P.N. Djakarta Lioyd and Anr.* [16]the Hon. Court held that the Court has always a discretion to grant the stay or not and this discretion is to be exercised judicially. The Supreme Court[17] has also held that the strict principle of sanctity of contract is subject to the discretion of the Court under Section 34 of the Indian Arbitration Act. The Court of Appeal in *Dardana Ltd* v. *Yokos Oil Co*.[18] has held that a Court can consider inter-alia whether proceedings initiated indicate an intent to hinder or delay resolution of the dispute and a balance of the possible hardships to each of the parties. In light of the above precedent, it is unfounded to allege that Section 34 of the arbitration and Conciliation Act does not encompass balance of convenience.

2.1.2 In the case of *D'cor India P. Ltd.* v. *National Building Const. Corpn. Ltd.*[19] the learned Judge held that there is no automatic stay due to pendency of the "appeal". It is contended that since the provision of automatic stay has not been provided by the legislature, it is not possible to provide unconditional automatic stay.[20] It has been held in *Jivarajbhai Ujamshi*

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[14] *Apollo Tyres Limited* v. *National Insurance Company Ltd. and Ors.* 1987 (1) Arb LR 45 (Delhi) [MANU/DE/0148/1986 (¶ 9)]

[15] AIR 1955 SC 53 [MANU/SC/0122/1954 (¶ 8(4))]

[16] AIR 1969 Calcutta 374 [MANU/WB/0062/1969 (¶ 4)]

[17] *Ibid.*

[18] (2002) 2 LR 326 (Court of Appeals)

[19] 142 (2007) DLT 21 [MANU/DE/8162/2007 (¶ 13)]

[20] *Ibid.*

Sheth v. *Chintamanrao Balaji*[21]that it is not open to the Court to attempt to approach the mental process by which the Arbitrator has reached his conclusion. In *Khusiram* v. *Hanutmal*[22] it was held that where on an application made under Section 34 of the Arbitration Act for stay of a suit, an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the Court is not bound to provide or refuse a stay but may in its discretion, on the application for stay, decide the issue as to the existence or validity of the arbitration agreement.

2.2 **Pendency of Section 34 petitions not amounts to expropriation and violation of International Commitments and does not take away the fruits of the award.**

2.2.1 It is submitted that Section 34 does not postulate expropriation. Hastening the process of enforcement would take away the discretion of the Court where enforcement proceedings are pending to consider a request for adjourning the decision on the enforcement of the Award.[23]

2.2.2 In *M.V. Elisabeth & Ors.* v. *Harwan Investment & Trading Pvt. Ltd.*[24]the Court observed that where substantive law demands justice for the party aggrieved and the statute has not provided the remedy, it is the duty of the Court to devise procedure by drawing analogy from other systems of law and practice. In *Dhanna Lal* v. *Kalawatibi and Ors.*[25]the Court observed that wrong must not be left unredeemed and right not left unenforced.

Article V (2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of

[21] (1964) 5 SCR 480 [MANU/SC/0239/1963 (¶ 22)]

[22] [1949] 53 CWN 505

[23] 2011 (2) Arb. L.R 548 (Bom) [MANU/MH/1698/2010 (¶ 55)]

[24] [1992]1SCR1003 [MANU/SC/0685/1993 (¶ 65)]

[25] [2002] Supp 1 SCR 19 [MANU/SC/0565/2002 (¶ 20)]

challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced.[26] It is most humbly submitted that the setting aside of a foreign arbitral award is also based on the principle of public policy. Therefore to contend that the widening scope of public policy is a barrier to the arbitral proceeding is not warranted in the light of the present law of Arbitration. An arbitration clause barring judicial review of arbitral award under sec. 34 would make the clause illegal.[27] In *McDermott Intt'l Inc.* v. *Burn Standard Co. Ltd.*[28], the Court has observed that the 1996 Act makes provision for the supervisory role of Courts for the review of the arbitral award only to ensure fairness. Therefore, the said Section provides for judicial control over the private Courts, the arbitral tribunal established by the parties. But this control is limited to supervising the arbitral process and award making. The proceedings under Section 34 cannot be equated with an appeal.[29] Apart from these grounds laid down in the Section it is only the arbitrator who is the best judge to decide the matter at hand.[30]

2.3 <u>Section 34 does not lead to Introduction of litigation in the arbitration process and is not against basic tenets of arbitration.</u>

2.3.1 The Hon. Supreme Court in *Alopi Parshad & Sons Ltd.* v. *Union of India*[31] observed that the extent of jurisdiction of the Court to set aside the award on the ground of an error in making the award is well defined.

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[26] *ONGC* v. *Saw Pipes* 2003 (5) SCC 705 [(MANU/SC/0314/2003 (¶ 17)]

[27] *Shin Satellite Co.* v. *Jain Studious* AIR 2006 SC 963

[28] (2006) 11 SCC 181 [*MANU/SC/8177/2006 (¶ 35)]*

[29] *MMTC v. Vicnivas Agency* (2009) 5 RAJ 177

[30] *Centrotrade Minerals & Metals Inc.* v. *Hindustan Copper Ltd* (2006) 11 SCC 245 [MANU/SC/8146/2006 (¶ 9)]

[31] (1960) 2 SCR 793 [MANU/SC/0057/1960 (¶ 16)]

2.3.2 The Hon'ble Supreme Court in *O.N.G.C Ltd.* v. *Saw Pipes Limited*[32] has held that for the purpose of achieving the object of speedier disposal of dispute, justice in accordance with law cannot be sacrificed. That giving limited jurisdiction to the Court for giving finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate.

2.3.3 A conspectus reading of the Act makes it amply clear that under no other mode it is permissible for a party to the Arbitration Award to seek for setting aside the same.[33] In the case of *A and A Restaurant & Hotel Pvt. Ltd. Kanpur* v. *Dwarkajeet restaurant Pvt. Ltd. , Kanpur*[34], the Hon. Allahbad High Court has held that the arbitral award can be set aside only on the grounds as enshrined in Section 34 of the 1996 Act. The Hon. Supreme Court has also reiterated that undisputedly an application for setting aside the award would not lie on any other ground, which is not enumerated in Section 34 of the Act.[35]

2.3.4 Any ground of challenge to an arbitral award could succeed only if same finds support from any of the grounds of challenge mentioned in sub-Section (2) of Section 34 and not otherwise.[36] An application under Section 34 could not be termed an "appeal". This law was upheld in *Parvathi* v. *A.P Transp. Corpn.*[37]. In *H.B Gandhi* v. *Gopinath & Sons*[38], the Hon. Supreme Court has observed that Judicial review is trite and not directed against the decision but is confined to the decision making process.

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[32] *supra* 29 at Pg. 17

[33] *Sri Swaminathan Cons* , v. *Sri Thirunavukkarasu Dhanalakshmi & Ors*. (2008) 2 MLJ 637 [MANU/TN/9696/2007 (¶ 18)]

[34] AIR 2005 All 60 [MANU/UP/0906/2004 (¶ 9)]

[35] *M. Anasuya Devi* v. *M. Manik Reddy*, (2003) 8 SCC 565 [MANU/SC/0837/2003(¶ 4)]

[36] *State of Bihar* v. *Pandey & Co.* AIR 2011 Pat. 51 [MANU/BH/1404/2010 (¶ 6)]

[37] (2007) 135 Comp Cas 581 (AP) [MANU/AP/0624/2006 (¶ 6)]

[38] (1992) Supp 2 SCC 312

2.4 Section 34 is not unconstitutional on other grounds.

2.4.1 Section 34 provides that the Court may set aside arbitral award if it is in conflict with the 'Public Policy of India'. [39]The phrase 'Public Policy of India' is not defined under the Act. The Master of the Rolls Lord *Denningheld in Enderby Town Football Club Ltd.* v. *Football Assn. Ltd.*[40]held that "with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". It is humbly submitted that the expression "public policy" could not mean the contravention of the law simpliciter.[41] The Explanation to Section 34 of the 1996 Act is not exhaustive but only illustrative. This explanation was given without prejudice to the general meaning of the words "public policy of India.[42] The above observation of the Supreme Court is truer now as sec. 34 has specifically defined the grounds of challenge rather than leave them vague as in old sec. 30.

3. Whether the Ordinance, promulgated by the Governor of Nirdhan, is vires the Constitution.

3.1 The Ordinance is Vires Part IX of the Constitution of Nirdhan.

3.1.1 Article 243F provides for disqualifications for memberships, Sub-Clause (1) clearly provides, for disqualifications as when they exist under any laws that are operational in the State at the time of the Election. In the case of *Som Lal* v. *Vijay Laxmi*[43], certain

[39] supra 29 at Pg. 17
[40] (1971)1 WLR 81
[41] *Bfil Finance Ltd.* v. *G Tech. Store Ltd.* 2003 (1) Arb LR 184 (Bom) (D.B) [MANU/MH/0531/2002 (¶ 16)]
[42] *Government of Kerala* v. *Som Dutt Builders Ltd*. AIR 2003 Ker 61 [MANU/KE/0621/2002 (¶ 14 & ¶ 20)
[43] 2008 11 SCC 413 (¶ 7)

disqualifications based on the office of profit were brought into effect, and it was held to be a valid disqualification and within powers of the Governor under article 213.

3.1.2 In another case of the Honourable Rajasthan High Court[44], challenging Rajasthan Panchayati Raj (Third Amendment) Ordinance, 1999, inserting Section 19(g), 19(gg) and Proviso (ii) of Section 19 as disqualification, the case was turned down. By an amendment of Section 19, the Ordinance substituted clause(g), providing "that a person who has been convicted of any offence by a competent Court and sentenced to imprisonment for six months or more, such sentence not having been subsequently reversed or remitted or the offender pardoned, will be disqualified from contesting elections".

3.1.3 The Ordinance was challenged on the same grounds, namely that there existed no emergency which called for the Governor to promulgate the Ordinance, 1999, and that the impugned amendment is hit by Article 14 and 21 of the Constitution of India, as it provides an unreasonable restriction on a person to contest the elections for the post of Panch and Sarpanch. The Division Bench held that the satisfaction of the Governor regarding emergency was not justifiable, in view of the judgment of the Supreme Court in *State of Punjab* v. *Satya Pal*,[45]and 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. The Ordinance was not violative of either Article 14 or

[44] *Shiv Ram & Ors. v. State of Rajasthan & Ors.* 2004 (4) WLC (Raj.) 412 [MANU/RH/0225/2000 (¶ 9)]

[45] AIR 1969 SC 903 [MANU/SC/0414/1968 (¶ 18)]

Article 21 of the Constitution of India. The Ordinance in the year 1999 was also promulgated, on the eve of elections.

3.2 The Powers of the Governor Under article 213, cannot be questioned.

3.2.1 It is most humbly submitted that before this Hon'ble Court that Panchayati raj is a subject of the Union List, over which president and governor work through aid and advice of councils of ministers along with the election commission. As mentioned in the case of *S.K.G. Sugar Ltd v. State of Bihar*[46], that promulgating of an Ordinance by the Governor is purely upon the Subjective Satisfaction of him and he is the sole Judge to consider the necessity to issue the Ordinance and "his satisfaction is not a justifiable matter". Subjective satisfaction of the Governor means his personal satisfaction about the existence of necessity, in the given circumstances, for promulgating an ordinance and such satisfaction is conclusive[47]. It cannot be questioned on the ground of error of judgement or otherwise in Court[48].The Governor is the sole judge as to the existence of the circumstances necessitating making of an Ordinance.[49]

3.2.2 Thus, it is submission of the State that the validity of the Ordinance cannot be called into question.

3.3 The Ordinance does not violate any Fundamental Rights.

3.3.1 In the case of *Union of India* v. *ADR*[50] and *PUCL* v. *Union of India*[51] , the Apex Court has held the Act of voting to be a form of freedom of expression i.e. a fundamental right

[46] 1975 SCR (1) 312 [MANU/SC/0063/1974 (¶ 16)]

[47] *State of Punjab v. Satya Pal Dang* AIR 1969 SC 917.

[48] *supra* note 44 at Pg. 19

[49] *supra* note 44 (¶ 9)

[50] (2002) 5 SCC 294 [MANU/SC/0394/2002 (¶ 54(7)]

under Article 19(1) (a). However, the position on the right to contest remains unchanged , it is still to be only a statutory right.

3.3.2 In *Jumuna Prasad Mukhariya v. Lachhi Ram*[52] , "The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statue." In *Javed v. State of Haryana*[53] , the Court rejected a challenge to a statutory provision disqualifying potential Panchayat election candidates with more than two children. The Court first rejected contention based on Article 14 by reasoning that it satisfies the tests of intelligible differentia and rational nexus to the Statute's object. However, with respect to the contentions based on Article 21 and Article 25, the Court endorsed the decision in *Lachhi Ram*[54]. The logic was that a person is otherwise free to exercise his or her fundamental rights, but if he or she wants to contest elections, the rules must be followed.

3.3.3 Similarly, in *Sakhawat Ali* v. *State of Orissa*[55] considered a statute disqualifying legal practitioners who had against the Municipality and once again admitted the Article 14 challenge but rejected it on the basis of constitutional tests. The challenge on the basis of Article 19(1)(g) was treated as inapplicable on the basis on the above-mentioned logic. As stated in case of *P.S. Sadasivaswamy* v. *State of Tamil Nadu*[56] that Article 14 prohibits is class legislation and not reasonable classification for the purpose of legislation. If the rule making authority takes care to reasonably classify persons for a particular purpose and if it

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[51] (2013) 10 SCC 1

[52] (1955) 1 SCR 608 [MANU/SC/0104/1954 (¶ 5)]

[53] (2003) 8 SCC 369 [MANU/SC/0523/2003 (¶ 8,11)]

[54] *infra* note 59

[55] (1955) 1 SCR 1004 [MANU/SC/0093/1954][¶ 9, 10]

[56] 1975(1) SCC 152

deals equally with all persons belonging to a well defined class then it would not be open to the charge of discrimination

In other words, the *only* protection that is available against statutes creating the right to contest is the test for reasonable classification and rational nexus. There are two aspects here:

1. The substantive fundamental/constitutional right to contest and
2. The consistency of the statute creating the right to contest with other fundamental rights.

3.3.4 As mentioned in case of *The State of West Bengal* v. *Anwar Ali Sarkar*[57] both stand on a dubious footing. The former is absent and the latter is susceptible only to a check of reasonableness. This trend is quite concerning and has the potential to undermine free and fair elections and democracy, both declared to be part of the "basic structure" of the Constitution. As it was mentioned in case of *Raja Ram Pal* v. *The Hon'ble Speaker, Lok Sabha & Ors*[58] that while it is true that the right to vote and be represented is integral to our democratic process, it must be remembered that it is not an absolute right. There are certain limitations to the right to vote and be represented.

"For example, a citizen cannot claim the right to vote and be represented by a person who is disqualified by law or the right to be represented by a candidate he votes for, even if he fails to win the election."

3.4 The Ordinance cannot be questioned for Malafide Grounds.

3.4.1 In case of *Government of Andhra Pradesh & Ors.* v. *Smt. P. Laxmi Devi*[59]**,** it was held that the constitutional validity of a statute, unlike a policy decision, where the executive decision could be rendered invalid on the ground of malafide, unreasonableness and

[57] 1952 SCR 284 [MANU/SC/0033/1952 (¶ 54)]

[58] (2007)3SCC184 [MANU/SC/0241/2007 (¶ 93)]

[59] (2008) 4 SCC 720 [MANU/SC/1017/2008 (¶ 8)]

arbitrariness alone and no other grounds. However the fact that an Ordinance was issued just a few days before the scheduled session of Parliament, did not show any mala fide and was not sufficient ground for setting it aside.

3.4.2 As it was also mentioned in case of *K. Prabhakaran* v. *P. Jayarajan*[60] that the right to contest an election is a statutory right and further substantiated in the case of *Union of India vs. Association for Democratic Reforms and Anr*[61]. In order to be eligible for exercising such right the person should be qualified in the terms of the stature. Thus, the Legislature creating the office is well within its power to prescribe qualifications and disqualifications subject to which the eligibility of any candidate for contesting for or holding the office shall be determined. In *Jyoti Basu* v. *Debi Ghosal*[62] the Court pointed out in no uncertain terms 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."

3.4.3 An Ordinance is valid for 6 months only, not for 5 years as contention placed by the other side, the same held in case of *D C Wadhwa v. State of Bihar*[63] and *Krishna Kumar Singh* v.*State of Bihar*[64]**.** Further ordinance is a law formed through notification by the Governor as a policy decision, so one cannot question the executive in their policy decision.

In the case of *Namit Sharma* v. *Union of India*[65] it has been held *"Legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not*

[60] (2005) 1 SCC 754 [MANU/SC/0025/2005 (¶ 29)]

[61] (2002) 5 SCC 294 [MANU/SC/0394/2002 (¶ 31)]

[62] [1982] 3 SCR 318 [MANU/SC/0144/1982 (¶ 9)]

[63] 1987 SCC (1) 378 [MANU/SC/0072/1986 (¶ 4)]

[64] (1998)5SCC643 [MANU/SC/0358/1998 (¶ 72)]

[65] (2013) 1 SCC 745 [MANU/SC/0744/2012 (¶ 19)]

constitute a ground." As stated in case of *Ashoka Kumar Thakur* v. *Union of India (UOI) and Ors*[66]. As mentioned by the Apex Court in case of *Dinesh Trivedi, M.P. and Ors.* v. *Union of India and Ors*[67] that it is important to realize that undue popular pressure brought to bear on decision makers in Government can have frightening side-effects. If every Action taken by the political or executive into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision maker who may find it safer not to take any decision.

3.5 **The Rules of " Actus curaie neminem gravabit" applies to procedural areas only.**

3.5.1 It is not possible to lay down rigid rules as to when the principles of natural justice are to apply nor as to their scope and extent. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice as held in case of *Lloyd* v. *McMohan*[68]

3.5.2 There is no substance in contention regarding the "***Actus Curiae Neminem Gravabit"*** as according to the *A.R. Antulay* v. *R.S. Nayak & Anr.*[69] in which Court held that the area of operation of the maxim is, generally, procedural. Errors in judicial findings, either of facts or law or operative decisions consciously arrived at as a part of the judicial-exercise cannot be interfered with by resort to this maxim.

[66] (2008) 6 SCC 1 [MANU/SC/1397/2008 (¶ 191)]

[67] (1997) 4 SCC 306 [MANU/SC/1138/1997 (¶ 19)]

[68] (1987) 1 ALL ER 1118

[69] (1988) 2 SCC 602 [MANU/SC/0002/1988 (¶ 113)]

PRAYER

WHEREFORE, in the light of arguments advanced and authorities cited, the Respondents humbly submit that the Hon'ble Court graciously be pleased to:

- Reject the present Petitions, namely W.P No. 999/2015 & W.P No. 1021/2015.
- Adjudge that Section 34 of the Arbitration & Conciliation Act, 1996 is intra vires of the Constitution of Gariba.
- Adjudge that the impugned Ordinance is intra vires of Part IX and Part III of the Constitution of Gariba.
- Award costs of the present Petitions to the Respondents.

*And pass any order in favour of the Respondents that it may deem fit in the ends of justice***.**

For this act of kindness, the Respondents shall duty bound forever pray.

SD/-

Dated this..... Day of , 2015.

(Counsels for the Respondents)