

Team Code - P

Before

THE HON'BLE HIGH COURT OF NIRDHAN

AT

STATE OF NIRDHAN

WP 999/2015 & WP (C) No. 1021/2015

U/A 226 OF THE CONSTITUTION OF REPUBLIC OF GARIBA

JUSTICE R.K. TANKHA MEMORIAL

MOOT COURT COMPETITION, 2015

PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCI (PETITIONERS)

v.

REPUBLIC OF GARIBA AND MAXIS BANK (RESPONDENTS)

MEMORANDUM *for* RESPONDENTS

SUBMITTED TO THE REGISTRY OF HIGH COURT OF NIRDHAN

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STATEMENT OF JURISDICTION

**THE PETITIONER HAS THE HONOUR TO SUBMIT BEFORE THE HON'BLE HIGH COURT OF
NIRDHAN, THE MEMORANDUM FOR THE PETITIONER UNDER ARTICLE 226 OF THE
CONSTITUTION OF INDIA, 1950**

**THE PRESENT MEMORANDUM SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN
THE PRESENT CASE**

STATEMENT OF FACTS

W/P 999/2015

A. State of ‘Nirdhan’ was considered as a backward state in the Republic of Gariba. In order for development of the state, Jodhpur Gaon Panchayat Samiti (JGPS) entered into an agreement with a Company Jeopardy Contracts Incorporation (JCI) on 21.9.2011 but the contract was terminated on 21.9.2013. They went under arbitration. The arbitral award was granted in favor of JCI it was entitled for the payment of performance bank guarantee by the Maxis bank. JGPS filed petition before the Hon’ble High Court of Nirdhan for setting aside of the arbitral award under section 34 of the Arbitration and Conciliation Act, 1996. Upon this JCI challenged the constitutional validity of section 34 by way of a writ petition WP 999/2015.

W/P 1021/2015

B. In the meanwhile, the Governor of the State of Nirdhan, on 20th December 2014, promulgated the ordinance which came into effect from 24th December 2014, amending section 19 of the Nirdhan Panchayati Raj Act, 1994. It set up minimum educational qualification as criteria for disqualifying a person in participating in the Panchayat elections. People’s Union for Liberties & Democratic Reforms moved to High Court of Nirdhan on 29th December 2014(during annual winter holidays) for urgent listing but listing was denied.

C. Further the People’s Union for Liberties & Democratic Reforms moved the Hon’ble Apex Court under Article 32 on 31.12.2014 through Vacation Officer. Despite a wait of 48 hours and several reminders the listing was not granted till the issuance of election notification on 3rd January. Upon, listing the Apex Court was pleased to observe the matter and directed the party to the High Court of Nirdhan. The petitioners immediately moved the Hon’ble High Court filing a pro-bono petition WP (C) No. 1021/2015 challenging the vires of the Ordinance and certain other reliefs.

STATEMENT OF ISSUES

THE FOLLOWING ISSUES ARE PRESENTED BEFORE THE AUTHORITY FOR RULING IN THE INSTANT MATTER:

ISSUE-1: WHETHER OR NOT PETITIONS UNDER SECTION 34 OF ARBITRATION AND CONCILIATION ACT, 1996 AMOUNTS TO ‘LITIGATION’ IN THE ARBITRAL PROCESS.

ISSUE-2: WHETHER OR NOT THE PENDENCY UNDER SECTION 34 LEADS TO EXPROPRIATION AND VIOLATES THE COUNTRY’S BILATERAL COMMITMENTS.

ISSUE-3: WHETHER OR NOT FILING AN APPLICATION UNDER SECTION 34 AMOUNTS TO AUTOMATIC STAY ON THE AWARD.

ISSUE -4: WHETHER OR NOT THE ORDINANCE PASSED BY THE GOVERNOR IS ULTRA VIRES OF THE CONSTITUTION.

ISSUE-5: WHETHER OR NOT NON-AVAILABILITY OF A NOTIFIED VACATION BENCH AND NOTIFIED LISTING PROCEDURE IS UNCONSTITUTIONAL.

ISSUE-6: WHETHER OR NOT NON-GRANT OF LISTING SHOULD NOT AFFECT THE MERITS OF THE CASE AS THE COURT WAS MOVED WELL IN TIME AND ACTUS CURAIE NEMINEM GRAVABIT.

SUMMARY OF ARGUMENTS

A. SECTION 34 AMOUNTS TO INTRODUCTION OF ‘LITIGATION’.

Section 34 of the Arbitration and Conciliation Act, 1996 amounts to litigation in the arbitral process as under this section proceedings are being initiated in the court of law for enforcement of a right or seeking a remedy. It is leading to violation of article 21 as the right to speedy justice is being denied to the parties.

B. THAT THE PENDENCY UNDER SECTION 34 LEADS TO EXPROPRIATION AND VIOLATES THE COUNTRY’S BILATERAL COMMITMENTS.

The pendency under section 34 is causing delay thereby amounting to expropriation which is violating article 21 of the constitution. It affects the country’s bilateral and multilateral commitments as the arbitration act has been created in pursuance of international obligations and section 34 is defeating its basic purpose by introducing litigation.

C. THAT THE FILING OF AN APPLICATION UNDER SECTION 34 RESULTS IN THE GRANT OF AUTOMATIC STAY ON THE AWARD WHICH IS IMPROPER.

It is submitted that the award given by the Arbitral tribunal in favor of jeopardy Contracts Incorporation (JCI) is automatically stayed due to filing of an application under section 34 by Jodhpur Gram Panchayat Samiti(JGPS). This automatic stay is unjustified because it immobilizes the process for the winning party of the arbitral award. The award given by the arbitral tribunal should be executed at the first place. Also, the balance of convenience is not maintained and the irreparable injury is caused to the party and hence it is proved to be bad-in-law.

**D. THAT THE ORDINANCE PASSED BY THE GOVERNOR IS ULTRA VIRES THE BASIC
STRUCTURE AND IS VIOLATIVE OF THE PROVISIONS OF THE CONSTITUTION.**

It is submitted that the ordinance passed by the governor of Nirdhan is ultra vires the powers of the governor under article 213 and part IX of the Constitution. Also, it is in violation with fundamental rights and Preamble of the Constitution. The satisfaction of the governor exceeds the prescribed limits of the Constitution. Also, the Ordinance violates article 14 and it restricts a person from participating freely and equally in a democratic government.

**E. THAT THE NON-AVAILABILITY OF A NOTIFIED VACATION BENCH AND NOTIFIED
PROCEDURE FOR LISTING IS UNCONSTITUTIONAL.**

Non availability of notified vacation bench and notified listing procedure when court is not in session is unconstitutional as it leads to violation of fundamental rights. Handbook is not a statutory authority and Supreme Court rules do not provide with the notified listing procedure.

F. THAT NON-GRANT OF LISTING SHOULD NOT AFFECT THE MERITS OF THE CASE.

The court should maintain status quo ante and should not affect the merits of the case because of non-grant of listing as the court was moved well in time and should be treated as would have been before the issuance of notification.

ARGUMENTS ADVANCED

ISSUE-1: WHETHER OR NOT PETITIONS UNDER SECTION 34 OF ARBITRATION AND CONCILIATION ACT, 1996 AMOUNTS TO ‘LITIGATION’ IN THE ARBITRAL PROCESS.

[[1.] Arbitration is regarded as substitute for the court litigation and results in the passing of a binding award¹ and is considered to be an important Alternative Dispute Redressal process which is to be encouraged because of high pendency of cases in the courts and cost of litigation.² It leads to introduction of ‘litigation’ [1.1] and is violating article 21 of the Constitution.[1.2]

[1.1] SECTION 34 IS AMOUNTING TO INTRODUCTION OF LITIGATION IN ARBITRATION.

[[2.] Section 34(1) of the Act of 1996 provides a remedy to an aggrieved party to take recourse to a Court against an arbitral award³ initiated in a Court of Law with the purpose of enforcing a right or seeking a remedy.

[[3.] The expression litigation means a legal action including all proceedings therein.⁴ Also it has been held that an application under section 34 of the Act should be registered as an arbitration suit and that the proceedings shall be conducted as in the case of a suit.⁵

[[4.] Hence section 34 is providing remedy through recourse to the court, thus it is amounting to litigation. Thus section 34 of the Act is defeating the purpose of the Arbitration Act by introducing litigation in the arbitration.

¹ Chloro Controls Pvt. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 S.C.C. 641, p. 11.

² Justice S.B. Malik, Commentary on the Arbitration and Conciliation Act, (4th ed. 2009), p. 3.

³ Fountain Head Developers v. Mrs. Maria Arcangela Sequeira, A.I.R. 2007 Bom. 49, p. 6.

⁴ Janata Dal v. H.S. Chowdhary, A.I.R. 1993 S.C. 892, p. 9.

⁵ Fiza Developers and Inter-Trade Pvt. Ltd. v. AMCI (I) Pvt. Ltd., (2009) 17 S.C.C. 796, p. 5.

[1.2] THERE HAS BEEN A VIOLATION OF ARTICLE 21 OF THE CONSTITUTION.

[¶5.] It has been held by the Hon’ble Supreme Court that “Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right.”⁶

[¶6.] Also Hon’ble Allahabad High Court has opined that “With widening horizon, article 21 of the Constitution of India has also been amplified so as to include the right, to speedy trial/ Justice as a fundamental right.”⁷

[¶7.] Due to introduction of litigation in the arbitration process, right to get speedy justice is being violated, which in turn is leading to violation of article 21.⁸ It has been observed in a case that application filed in the court under section 34 for the correctness of award took 14 years to get disposed of.⁹

[¶8.] Hence it is humbly submitted that section 34 of the Act is going against the purpose as it is increasing the burden of the courts by making parties to litigate even after resorting to arbitration.

ISSUE-2: WHETHER OR NOT THE PENDENCY UNDER SECTION 34 LEADS TO EXPROPRIATION

AND VIOLATE COUNTRY’S BILATERAL COMMITMENTS.

[¶9.] It is humbly submitted before the Hon’ble High Court that the purpose of the Arbitration and Conciliation Act, 1996 was to provide speedy justice¹⁰ but pendency in the disputes have

⁶ Noor Mohammed v. Jethanand, A.I.R. 2013 S.C.1217, p. 9.

⁷ Rajendra Singh v. State of U.P., 2004 1 A.W.C. 736 All, p. 5.

⁸ India Const. art. 21.

⁹ Kerala State Construction Co. Ltd. v. Projects and Equipment Co. of India, (2008) 151 P.L.R. 8, p. 6.

¹⁰ Arbitration and Conciliation Act, No. 26 of 1996, Statement of Objects and Reasons.

resulted the purpose to be ineffective.¹¹ The pendency is leading to expropriation [2.1] and is violating country's bilateral commitments.[2.2] Therefore, it violates article 21.[2.3]

[2.1] THE PENDENCY OF PETITIONS UNDER SECTION 34 OF THE ARBITRATION ACT, 1996 IS

LEADING TO EXPROPRIATION.

[10.] Expropriation is governmental taking or modification of individual's property¹² rights esp. by eminent domain.¹³ In the present case, delay in justice delivery is leading to erosion of net worth¹⁴, increasing expenses of litigation¹⁵ thereby amounting to expropriation.

[2.2] VIOLATION OF COUNTRY'S BILATERAL AND MULTILATERAL COMMITMENTS UNDER

VARIOUS CONVENTIONS AND INVESTMENT TREATIES.

[11.] Arbitration and Conciliation Act, 1996 under section 34 provides grounds to challenge the award.¹⁶ In the Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA)¹⁷ article 5(2) facilitates the investor¹⁸ with a right to judicially review and imposes an obligation on the contracting party that the review by judiciary is carried out without delay. Thus filing an application under section 34 will render the purpose, under these agreements, meaningless and hence affects Bilateral and Multilateral Commitments.

¹¹ Union of India v. D.K. Gupta of Sudhir Brothers, 13 (1977) D.L.T. 334, p. 12.

¹² Bombay Dyeing Co. v. State of Bombay, A.I.R. 1958 S.C. 328, p. 12.

¹³ BLACK'S LAW DICTIONARY, 662 (9TH ed. 2009).

¹⁴ Moot Proposition, p. 3, para 13.

¹⁵ *Id.*

¹⁶ Arbitration and Conciliation Act, No. 26 of 1996, Statement of Objects and Reasons.

¹⁷ Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA), art. 5(2), p. 3.

¹⁸ *Id.*, art.1(c), p. 2.

[Memorandum for Petitioners]

[Arguments Advanced]

[¶12.] Moreover, the Constitution of India under article 51¹⁹ itself imposes a duty to respect international law and treaties and settlement of disputes by arbitration. The purpose for which Arbitration and Conciliation Act, 1996 was adopted is not being fulfilled as section 34 is hampering the international relations through introducing litigation and is discouraging the settlement of disputes promptly.

[2.3] VIOLATION OF ARTICLE 21.

[¶13.] Speedy justice is a sine qua non of article 21. In *Salem Advocate Bar Association, Tamil Nadu v. Union of India*, Apex court have propounded that speedy justice is a right guaranteed under article 21 of Indian Constitution.²⁰ Here, in the present case, pendency is leading to delay in justice delivery which is ultimately leading to violation of article 21.

ISSUE-3: WHETHER OR NOT FILING AN APPLICATION UNDER SECTION 34 AMOUNT TO A

JUSTIFIED AUTOMATIC STAY ON THE AWARD.

[¶14.] It is humbly submitted to the Hon'ble High Court that in the present case, Jeopardy Contracts incorporation herein after referred as JCI is denied any kind of payment from the Maxis Bank reason being the admission of petition under section 34²¹ for setting aside the award which ultimately led to an automatic stay on the award given in favor of JCI.[3.1] Also, grant of automatic stay without adjudication on balance of convenience and irreparable injury is bad-in-law.[3.2]

[3.1] GRANT OF AUTOMATIC STAY IS IMPROPER.

[¶15.] The grant of such automatic stay almost immobilizes the process for the winning party of the arbitral award. The Apex Court in *National Aluminium Co. Ltd. v. Pressteel & Fabrications*

¹⁹ India Const. art.51.

²⁰ *Salem Advocate Bar Association, Tamil Nadu v. Union of India*, (2005) 6 S.C.C. 344, p. 3.

²¹ Arbitration and Conciliation Act, No. 26 of 1996, Statement of Objects and Reasons.

*Pvt. Ltd.*²², criticized the present situation and observed that:

“this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs.”

[3.1.1] The Award given by the arbitration tribunal should be executed.

[¶16.] The High Court in the case of *Vipul Aggarwal v. Atul Kanodia & Co.*²³ held that where the application under section 34 was pending in the Apex Court and meanwhile the application for execution of award was filed. The appeal was objected by the petitioner but the High Court held that since stay was not granted by the Hon’ble Apex Court, the execution should proceed because the main purpose of bringing in force the Arbitration & Conciliation Act, 1996 was to give a speedy remedy. And the same principle was followed in the Delhi High Court case of *Decor India Pvt. Ltd. v. National Building Const. Co.*²⁴ Therefore, in the present case the award should be executed and JCI should be given with the performance bank guarantee.

[3.1.2] Recommendation made by 246th Law Commission Report.

[¶17.] It is humbly submitted that as it was proposed by the Law Commission of India²⁵ to make provision that mere filing objection petition under section 34 will not operate as stay of the award and the court may grant stay of the operation of the award subject to imposition of such conditions as it may deem fit to impose. Hence, the award in the present case should be executed and the concept of automatic stay without adjudication should not be encouraged.

²² *National Aluminium Co. Ltd. v. Pressteel & Fabrications Pvt. Ltd.*, (2004) 1 S.C.C. 540, p. 4.

²³ *Vipul Aggarwal v. Atul Kanodia & Co.*, A.I.R. 2003 All 280, p. 2.

²⁴ *Decor India Pvt. Ltd. v. National Building Const. Co.*, 2007 (3) A.R.B.L.R. 348 Delhi, p. 4.

²⁵ Law Commission Report of India, No. 246 of 2014, p. 25.

[3.2] THE GRANT OF AUTOMATIC STAY WITHOUT ADJUDICATION ON BALANCE OF CONVENIENCEAND IRREPARABLE INJURY IS BAD IN LAW.

[¶18.] It is also submitted that there must be proper balance between the parties and the balance cannot be a one-sided affair.²⁶ The filing of an application under section 34 in the present case leads to an improper balance between both the parties. JCi being the winning party in the arbitral award is left with no interim remedy and in fact is facing a huge loss because of the stay as it is not able to pay off the loan taken from the Amresian Development Bank for the project. Balance of Convenience is the comparative mischief for inconvenience to the parties; the inconvenience to the petitioner if temporary Injunction is refused would be balanced and compared with that of the opposite party, if it is granted.²⁷ The status quo should be maintained. In this case nothing such is considered and JCi is left with no such remedy and hence because of this faces an irreparable injury which cannot be adequately remedied by damages.

[¶19.] The remedy by damages would be inadequate if the compensation ultimately payable to the plaintiff in case of success in the suit would not place him in the position in which he was before injunction was refused.²⁸ Here, irreparable injury will be suffered by JCi because of non-payment of loan to the Amresian Development Bank as it will affect its goodwill and reputation in the business world and might further affect its contractual agreements and deals with other entities.

[¶20.] In the case of *Steel Authority of India Ltd. v. AMCI PTY Ltd.*²⁹ the interim measure of

²⁶ *Bikash Chandra Deb v. Vijaya Minerals Pvt. Ltd.*, 2005 (1) C.H.N. 582, p. 3.

²⁷ *Antaryami Dalabehera v. Bishnu Charan Dalabehera*, 2002 (I) O.L.R. 531, p. 3.

²⁸ *Orissa State Commercial Transport Co. Ltd. v. Satyanarayan Singh*, (1974) 40 Cut. L.T. 336, p. 10-11.

²⁹ *Steel Authority of India Ltd. v. AMCI PTY Ltd.*, 2011 VII A.D. (Delhi) 644, p. 16.

[Memorandum *for* Petitioners]

[Arguments Advanced]

protection was granted to the petitioner against the respondent in order to protect the interest of the petitioner from any kind of irreparable injury and asked the respondents to furnish security to the satisfaction of the court.

[¶21.] Therefore, in such cases the grant of stay without adjudication on balance of convenience and irreparable injury proves to be bad in law. It is humbly submitted that the award should be executed and the petition filed by JGPS should be dismissed.

ISSUE-4: WHETHER OR NOT THE ORDINANCE PASSED BY THE GOVERNOR IS ULTRA VIRES

THE BASIC STRUCTURE AND CONSTITUTION.

[¶22.] It is humbly submitted that the ordinance passed by the governor of Nirdhan is ultra vires the powers of the governor and part IX of the Constitution.[4.1] Also, it is in violation with fundamental rights and Preamble of the Constitution.[4.2]

[4.1]THE ORDINANCE IS ULTRA VIRES THE POWERS OF THE GOVERNOR AND PART IX OF THE CONSTITUTION.

[4.1.1] Ordinance is ultra vires article 213 of the Constitution.

[¶23.] The Ordinance in the present case is promulgated only to defeat the constitutional process. According to article 213³⁰ the governor can use the Ordinance making power to promulgate ordinances only in the emergent situations and this power is in the nature of an emergency power for taking immediate action where such action may become necessary at a time when the Legislature is not in session.³¹

[¶24.] But in the present case there was no urgency to introduce a vital disqualification through an Ordinance, which could have awaited a duly enacted law. The dates of election could have

³⁰ India Const. art. 213.

³¹ Dr. D.C. Wadhwa v. State of Bihar, A.I.R. 1987 S.C. 579, p. 13.

been worked out after the process of duly enacting a law in the State Assembly.

[4.1.2] The 'Satisfaction' of the governor exceeds the defined limits of the Constitution and can be reviewed by the court.

[¶25.] In the case of *S.K.G. Sugar Ltd. v. State of Bihar*³², it was laid down that promulgating of an Ordinance is a matter purely for the subjective satisfaction of the governor. An aggrieved person can challenge the ordinance making power if in the case there is no genuine satisfaction can be deferred from the circumstances and facts of the case.³³ Regarding the promulgation of the ordinances, court has the view that governor cannot assume legislative function in excess of strictly defined limits set out in the Constitution.³⁴ In the present case the satisfaction of the governor is not genuine and the qualification criteria brought up by him violates various provisions of the Constitution and hence goes above the prescribed limits of the Constitution.

[4.1.3] The Ordinance is ultra vires Part IX of the Constitution of India.

[¶26.] The inclusion of Part IX by the 73rd Amendment³⁵ to the Indian Constitution gave the Statement of Objects and Reasons which clearly contemplated democratic decentralization to pursue the legitimate governmental objective of ensuring that the traditionally marginalized groups should progressively gain a foothold in local self government.³⁶

[¶27.] The Ordinance dissolves the main purpose of the 73rd Amendment Act by unreasonably classifying the already underprivileged by introducing literacy as criteria for participating in the election process.

³² *S.K.G. Sugar Ltd. v. State of Bihar*, 1974 A.I.R. 1533, p. 7.

³³ *R.C. Cooper v. Union of India*, A.I.R. 1970 S.C. 564, p. 586-87.

³⁴ *Dr. D.C. Wadhwa v. State of Bihar*, A.I.R. 1987 S.C. 580, p. 15.

³⁵ The Seventy Third (Amendment) Act, 1992, No. 3, Acts of Parliament, 1992 (India).

³⁶ *Union of India v. Rakesh Kumar*, (2010) 4 S.C.C. 50, p. 18.

[[28.] The ‘Panchayat’ is defined under article 243(d) as an institution of self-governance constituted under article 243B, for the rural areas. For the purpose of self-governance entire body of villagers are given rights to participate and it is irrespective of any educational qualification. article 243-F which gives the grounds for ‘disqualification of members’, one of them is to prescribe a law made by the Legislature of the State, which could not have provided of any such condition attached which may take away the rights of self governance, except the disqualifications which have material object like character, integrity, engaging in unlawful activities etc.

[[29.] Therefore, there exists no ground in Part IX of the Constitution where on the basis of educational qualification one must be disqualified for participating in the electoral process.

[4.2] THE ORDINANCE VIOLATES THE FUNDAMENTAL RIGHTS AND PREAMBLE OF THE CONSTITUTION.

[4.2.1] The Ordinance is in violation of article 14.

[[30.] Article 14 guarantees every person, equality before law. The requirement of formal educational qualification is not essential for effectively discharging the duties and functions, vested in the Panchayats and Zila Parishads.

[[31.] The Constitution of India or the Representation of the People Act, 1951 do not provide for disqualification on the ground of any educational qualifications for contesting the elections for the Members of legislative Assemblies and the members of parliament.

[4.2.1.1] Arbitrariness and unreasonableness exists in the impugned Ordinance.

[[32.] It is submitted that the government of Nirdhan did not collect any empirical data regarding the availability of educational facilities and the sufficient number of candidates in providing disqualification on the ground of education. The ordinance is arbitrary in nature. It is

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submitted that the court can, while exercising powers of judicial review, declare any legislation as violative of article 14 of the Constitution of India on the ground that it is arbitrary and unreasonable.³⁷

[4.2.2] The Ordinance violates the aspects of the basic structure of the Constitution and free and equal participation in a democratic government.

[[33.] It is stated that the Panchayati Raj Institutions are representative institutions, to give equal opportunity to all including those, who do not have formal education in schools to represent in local governance. The impugned Ordinance effectively excludes the direct representation in the posts of members of Panchayat Samiti, Zila Parishad and Sarpanch. This is in violation with the core constitutional philosophy of democratic governance in India which is based upon equality of status and opportunity, which has been featured in the Preamble.³⁸

[[34.] In order to lead in democratic governance, a person is required to understand the needs of social development and require the mental attribute of being wise in the estimation of the people, who elect the person for representation.

[[35.] As mentioned in the facts of the case that the head of JGPS was also an illiterate villager but has won awards for taking up decisions which saved the life of the people of the village. Any law which disqualifies a large section of rural population on the ground of not attaining the educational qualifications is prima facie, arbitrary and unreasonable.

[[36.] It dissolves the purpose the Constitution to provide for free and equal participation in a democratic setup.

³⁷ Tamil Nadu v. K. Shyam Sundar, (2011) 8 S.C.C. 737, p. 22.

³⁸ India Const. Preamble.

ISSUE-5: WHETHER OR NOT NON-AVAILABILITY OF A NOTIFIED VACATION BENCH AND**NOTIFIED LISTING PROCEDURE IS UNCONSTITUTIONAL.**

[¶37.] It is humbly submitted to the Hon'ble High Court that Judiciary in its rule making power is considered "State" under article 12 of Constitution of India.³⁹ So, the petitioner can claim fundamental rights against the administrative department of judiciary.

[¶38.] The non-availability of a notified vacation bench leads to violation of right to hearing is guaranteed under article 14⁴⁰ and access to justice under article 21 of the Indian constitution.⁴¹ The right of equal justice is essential part of article 21 and article 39A of the constitution.⁴² In the present case, the vacation bench was not available leading to of equal opportunity of being heard and violation of access to justice. The hearing was granted when the normal court proceedings begun i.e.; after the vacations. Timely justice is important facet to access to justice under article 21 of the constitution of India.⁴³ The handbook is just as a guideline [5.2] and it is violative of article 14.[5.2]

[5.1] HANDBOOK ACTS JUST AS A GUIDELINE.

[¶39.] Even though the handbook has been provided, but the handbook does not have statutory authority and just act as guidelines.⁴⁴ Also as per the definition of "rules" provided in Supreme Court rules, it does not include the handbook.⁴⁵

³⁹ H.M. Seervai, Constitutional Law of India, 225 (3rd ed. 1983).

⁴⁰ Union of India v. Tulsiram Patel, A.I.R.1985 S.C. 1416, p. 48.

⁴¹ Charan Lal Sahu v. Union of India, A.I.R. 1990 S.C.1480, p. 18; *see also* Delhi High Court Bar Association v. Govt. of NCT of Delhi, 203 (2013) D.L.T. 129, p. 168.

⁴² Brij Mohan Lal v. Union of India, (2012) 6 S.C.C. 502, p. 35-36.

⁴³ Imtiyaz Ahmad v. State of Uttar Pradesh, A.I.R. 2012 S.C. 642, p. 14.

⁴⁴ Ramesh Rout v. Rabindra Nath Rout, A.I.R. 2012 S.C. 329, p. 4.

⁴⁵ Supreme Court Rules 2013, Sub rule 1(p), rule 2 of Order 1.

[[40.] In the present case no procedure has been provided for listing the matters, even though it was an urgent matter of public importance.

[5.2] VIOLATION OF ARTICLE 14.

[[41.] Due to lack of definite notified procedure, it gives scope for the arbitrary use of power. Arbitrariness thereby leads to violation of article 14⁴⁶. Also arbitrary exercise of discretion will lead to violation of article 14.⁴⁷ It has also been opined by the Hon'ble Supreme Court that discretion must be exercised in furtherance of public good and for public cause.⁴⁸

[[42.] Hence it is humbly submitted before the Hon'ble Court that lack of definite listing procedure when the court is not in session leads to arbitrariness, thereby violating the article 14 of the constitution.

ISSUE- 6: WHETHER OR NOT NON-GRANT OF LISTING SHOULD NOT AFFECT THE MERITS OF

THE CASE AS THE COURT WAS MOVED WELL IN TIME AND ACTUS CURAIE NEMINEM

GRAVABIT.

[[43.] It is submitted on behalf of the petitioner that the maxim *actus curaie neminem gravabit*⁴⁹ means that an act of court shall prejudice no one.⁵⁰ In a landmark case it has been stated that this maxim includes all those acts of courts which may form the opinion of the court.⁵¹

[[44.] Non-granting of listing before the issuance of election notification should not affect the merits of the case as the court was moved before the notification was issued so it should be

⁴⁶ India Const. art.14.

⁴⁷ *Style (Dress Land) v. Union Territory Chandigarh*, (1999) 7 S.C.C. 89, p. 3.

⁴⁸ *Consumer Action Group v. State of Tamil Nadu*, (2007) 7 S.C.C. 425, p. 15.

⁴⁹ Moot Proposition p. 4, para 20.

⁵⁰ *State of Rajasthan v. Khandaka Jain Jeweller*, A.I.R 2008 S.C. 509; *see also* BLACK'S LAW DICTIONARY, 1816 (9TH ed. 2009).

⁵¹ *South Eastern Coal Fields Limited v. State of Madhya Pradesh*, (2003) 8 S.C.C. 648, p. 10.

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treated in the same way as it would have been admitted before the issuance of notification.

[¶45.] The court should maintain *status quo ante*⁵² i.e.; ‘state in which previously’ the situation that existed before something else occurred and hear the case on merits.

⁵² BLACK’S LAW DICTIONARY, 1543 (9TH ed. 2009).

PRAYER

It is humbly prayed before the Hon'ble Court that in light of the issues raised, arguments advanced, and authorities cited, that this Hon'ble Court may be pleased to adjudge and declare that:

1. *Section 34 of the Arbitration and Conciliation Act, 1996 as unconstitutional.*
2. *The award given by the arbitration tribunal should be executed and JCI should be given with the performance bank guarantee and automatic stay is per se bad-in-law*
3. *The Ordinance as ultra vires part IX of the Constitution and is in violation of the fundamental rights and the Preamble, and stay should be granted on the election process.*
4. *The non-availability of a notified vacation bench and a notified listing procedure and unconstitutional, and provide with a proper notified vacation bench with a notified procedure for listing during vacations.*

And Pass any other Order, Direction, or Relief that it may deem fit in the Best Interests of Justice, Equity and Good Conscience.

For This Act of Kindness, the Respondent Shall Duty Bound Forever Pray.

Sd/-

(Counsel for the Petitioner)