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BEFORE THE HON'BLE HIGH COURT, NIRDHAN

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IN THE MATTERS OF:

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PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCI ...PETITIONER

v.

REPUBLIC OF GARIBA AND MAXIS BANK

...RESPONDENT

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WRIT PETITION NOS. 1021 /2015, 999/2015

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ON SUBMISSION TO THE HON'BLE HIGH COURT OF NIRDHAN

UNDER ARTICLE 226 OF THE CONSTITUTION OF GARIBA

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WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENTS

COUNSEL APPEARING ON BEHALF OF THE RESPONDENTS

MEMORANDUM ON BEHALF OF THE RESPONDENT:

REPUBLIC OF GARIBA AND MAXIS BANK

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**STATEMENT OF JURISDICTION**

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**FIRST RESPONDENT**

The hon'ble high court has the jurisdiction in this matter under article 226<sup>1</sup> of constitution of Gariba challenging the vires of the ordinance issued under article 213<sup>2</sup>. The 1<sup>st</sup> respondent humbly submits to the jurisdiction of this high court.

**SECOND RESPONDENT**

The hon'ble high court has the jurisdiction in this matter under article 226<sup>1</sup> of the constitution of Gariba checking the constitutional validity of section 34<sup>3</sup> of arbitration and conciliation act 1996. The 2<sup>nd</sup> respondent humbly submits to the jurisdiction of this high court.

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<sup>1</sup> **Art. 226.** Power of High Courts to issue certain writs

(1) 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

<sup>2</sup> **Art. 213.** If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require.

<sup>3</sup> **Art.34.** Application for setting aside arbitral award. —

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

**STATEMENT OF FACTS**

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**PART 1-**

The republic of Gariba is a sovereign federation of states with several union territories getting independence in year 1947 and having longest ever written constitution. Nirdhan is the biggest state in the republic but backward in development so there was a new scheme that was launched under which the private parties construct the highways and arterial roads and recover the money invested through tolls.

**BACKGROUND**

1. 1 private party *JEOPARDY CONTRACT INC.*( JCi) entered into an agreement with *JODHPUR GAON PANCHAYAT SAMITI* (JGPS) on 21 9 2013 for 115 kilometre of road which was terminated on 21 9 2013 because of certain land acquisition and design issues and as per contract JCi send legal notice for invoking arbitration with JGPS replied that it can't be invoked since the matter is under *madhayastham adhikaran adhiniyam 1983* And arbitration and conciliation act 1996 will not be applicable and to invoke the performance bank guarantee by mailing to maxis bank after business hour to the high court of nirdhan on 31 12 2014 filing urgent civil writ petition.

2. On 15.12.2014, the High Court took this matter as the first item on board, and Ordered stay on invocation o bank guarantee till further order. By 11.00 am, the copies of the order were served upon JGPS, and the Maxis Bank. However, in the meantime, at 10.00 am, the branch manager of the Jodhpur Gaon branch of Maxis bank had acted on the email of JGPS and encashed the bank guarantee. At 10.01 am, there was a massive security breach in the systems of the Maxis Bank. This triggered the cyber security systems, which instantly froze

all accounts and transactions- -in-progress. Subsequent investigation revealed that it was due to an attack by a group of hackers. Therefore, till the order copy was served on the Maxis Bank, the amount under the Bank guarantee still remained in the account of JCI.

3. JGPS tried hard for vacation of stay order and petition was disposed directing remedies from independent arbitrators. the whole process took place before the council for infrastructure arbitration and JCI was held entitled for money under performance bank guarantee.

### **AFTERMATH**

4. Ggps filed petition under section 34 of the act of 1996 and on other side JCI wrote to the maxis bank for money with a copy of award which was declined by maxis bank stating that the matter is under the high court and it follows the rbi bank guarantee norms.

5. JCI challenged the constitutional validity of Sec. 34 (§ 34) , by way of a writ petition, being WP 999/2015 on the grounds of introduction of litigation, the pendency is huge which takes away the fruits of the award and the grant of the automatic stay.

### **PART 2-**

### **BACKGROUND**

6. Meanwhile governor issued in ordnance amending the Nirdhan Panchayati raj act 1994 for qualification for election returns for a member for example member of Zila parishad should have passed exam of the board of secondary education board and more.

### **REACTION**

7. People union for liberties and democratic reform (PULDR) issued a public statement that order was replete with law and went to the high court during winter holidays on 29

December 2014 for listing since the election notification issued on 3rd January 2015 but the listing was denied.

8. PULDR moved to the apex court under Article 32 through vacation officer but no clear response was given even by registrar too. Despite several reminders listing was not granted. Upon listing the apex court was pleased to observe that the matter can be heard by the high court of Nirdhan.

### **AFTERMATH**

9. They filed a *pro bono* petition in the high court on certain grounds (a) non availability of notified vacation bench (b) non availability of notified procedure for listing (c) Non-grant of listing before the issuance of election notification cannot affect the merits of the case since the Court was moved well in time and *actus curiae neminem gravabit*.(d) the Ordinance being ultra vires Part IX, and retroactive;(e) the Ordinance further marginalizes women and weaker sections due to the prevailing skewed literacy standards, and it is in violation of aspects of basic structure like the preamble, single citizenship, and free and equal participation in democratic government, and it also abridges valuable fundamental and constitutional rights.

### **CONCLUSION**

10. 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 Id. Attorney General as well as the Republic of Gariba. Given that the Id. 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 listing.



**STATEMENT OF ISSUES**

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THE FOLLOWING QUESTIONS ARE PRESENTED FOR ADJUDICATION IN THE  
INSTANT MATTER:

**ISSUE 1** - WHETHER THE WRIT PETITION FILED AT THE HIGH COURT OF  
NIRDHAN IS MAINTAINABLE?

**ISSUE 2-** WHETHER THE GROUNDS PUT FORWARD BY THE PEOPLE'S UNION  
FOR LIBERTIES AND DEMOCRATIC REFORMS ARE LEGITIMATE?

**ISSUE 3-** WHETHER THE GROUNDS PUT FORWARD BY THE JEOPARDY  
CONTRACT INC. ARE LEGITIMATE?

**SUMMARY OF ARGUMENTS**

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**1. THAT THE WRIT PETITION FILED BEFORE THE HIGH COURT OF**

**NIRDHAN IS NOT MAINTAINABLE**

IN **PART A** It is humbly submitted before the Hon'ble court that present PIL is not maintainable against the public of Gariba. There has been no gross violation of Article 14 of the Constitution and neither the State has done anything wrong in passing ordinance which puts certain restriction for contesting election and in **PART B** the exercise of writ jurisdiction of high court under Article 226 is largely discretionary in nature it is argued that the present position is not maintainable as(1) That domestic law may not be questioned on the ground of counter veining other commitments as they do not confer any right on public (2) That the writ petition is based on pure apprehension.

**2. THE GROUNDS PUT FORWARD BY THE PEOPLE'S UNION FOR LIBERTIES AND DEMOCRATIC REFORMS ARE ILLEGITIMATE.**

The making of the ordinance can be initiated by the state executive. The scope of the ordinance making power of the governor is co- extensive with the legislature power of the State Legislature

**3- THE GROUNDS PUT FORWARD BY THE JEOPARDY CONTRACT INC.**

**ARE ILLEGITIMATE**

The section 34 of the Arbitration and Conciliation Act, 1996 gives a chance to the aggrieved party to go to the court if they think that the award being conferred is not up to their expectation. So in this case also, the basic tenets of arbitration too give the party a right to go to the court which is not against the constitution.

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**ARGUMENTS ADVANCED**

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**ISSUE 1 - THAT THE WRIT PETITION FILED IN HIGH COURT OF NIRDHAN IS**

**NOT MAINTAINABLE.**

***1.1 THE WRIT PETITION FILED BY PEOPLE'S UNION FOR LIBERTIES AND DEMOCRATIC REFORMS IS NOT MAINTAINABLE.***

1. It is humbly submitted before the Hon'ble Court that present PIL is not maintainable against the public of Gariba. There has been no gross violation of Article 14 of the Constitution and neither the State has done anything wrong in passing ordinance which puts certain restriction for contesting election.

2. Art 226 of the Constitution of Gariba allows for the enforcement of any of the rights conferred by Part III and for any other purpose. The latter means that a legal right has to be present and that such right must have been infringed.<sup>4</sup> It is submitted that the Constitution is considered to be supreme over any signed international treaty.<sup>5</sup> The people of Gariba get their legal rights from the international conventions. It is submitted that for those international conventions to have effect, there must be no local law contrary to the convention.

3. It is submitted that the aim is to make everyone accessible throughout the country to contest election and represent the community. This will promote the right to life, equality and freedom of expression throughout the country. Removal of the issue to not to contest election can have serious concerns and though affect the right to equality and right to freedom of expression sidelining illiterate people out of the mainstream of the society

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<sup>4</sup> St of Orissa v. Madan Gopal Rungta, SCR 28(SC.1952)

<sup>5</sup> Reid v. Covert, 354 U.S. 1 (1957)

4. A proceeding under Art 226 has been held to constitute an independent civil proceeding where it affects civil rights within the purview of Art 133. For an appeal to be made under Art 133, it must be a final order under Art 226. An order dismissing an application ‘*in limine*’ , e.g. that it is not maintainable, is not construed as final orders since they do not determine the rights of the parties.<sup>6</sup> Fundamental Rights of a foreigner are confined to Art 21 and do not enjoy all privileges that are guaranteed to the Citizens. The principles enshrined in Art 21 of the constitution are equally applicable to foreigners as they are deemed to be a citizen.<sup>7</sup> These rights are enjoyed by them only if they are lawfully admitted to the territory so that they have all the rights to lead an ordinary private life.<sup>8</sup>

***1.2 THE WRIT PETITION FILED BY JEOPARDY CONTRACT INC. IS NOT MAINTAINABLE.***

5. The exercise of writ jurisdiction of high court under Article 226 is largely discretionary in nature it is argued that the present position is not maintainable as

- 1) That domestic law may not be questioned on the ground of counter veining other commitments since they do not confer right on member of the public Per se
- 2) That the writ petition is based on pure apprehension.

Writ Jurisdiction of the High Courts’ flows from Article 226, which confers wide powers enabling the Court to issue writs, directions, orders for the enforcement of fundamental or legal rights. The exercise of writ jurisdiction by the High Court is discretionary in nature.

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<sup>6</sup> Vishwanathan, R. v. Abdul Wajid, S, AIR 261 (MYS. 1960 )

<sup>7</sup> O. Konavalov v. Commander, Coast Guard Region, (4) SCC 620, 643. (SC.2006)

<sup>8</sup> Sarbananda Sanowal v. Union of India, (5) SCC 665, 723(SC.2005)

**1.2.1 That domestic law may not be questioned on the ground of counter veining other commitments.**

6. The Primary condition which must exist in order to move to the high court under Article 226 is that a fundamental or legal right must vest with petitioner<sup>9</sup>. In the present case ,a writ petition as been filed before the High Court of Nirdhan claiming the Constitutional validity of one of the sections in the Arbitration and Conciliation Act 1996 .It is concluded that a writ petition under Article 226 purely for the enforcement of constitutional validity of the section is not maintainable. Arbitral law being subsequent to substantive law unless it is considered with law it is now well settled that the courts in exercise of their jurisdiction will not transgress into the field of policy decisions<sup>10</sup>. And such matters do not ordinarily attract the power of judicial review<sup>11</sup>.

**1.2.2 Writ petition is based on pure apprehension.**

7. A writ petition may be liable to be dismissed if it is premature.<sup>12</sup> Ordinarily, a Court confines itself to the facts at hand and does not delve into assumptions.<sup>13</sup> In *HMT Ltd v. Mudappa*,<sup>14</sup> it was held that a writ petition against a notification for the proposed acquisition of land under the Karnataka Industrial Areas Development Act, 1966 was premature. Similarly, in the present case the grounds expressed by the JCi are not legitimate. The subsequent validity of the section of arbitration and conciliation Act 1996, that is, in question

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<sup>9</sup> Calcutta Gas Company Vs The State Of West Bengal AIR 267 (Cal.1961 )

<sup>10</sup> Narmada Bachao Andolan V. Union of India 10 SCC 664(SC.2000)

<sup>11</sup> Shri sitaram sugar corporation ltd. V. Union of India 3 SCC 223(SC.1990)

<sup>12</sup> Kapan v. Jagmohan, AIR 1981 SC 126

<sup>13</sup> Chanan Singh v. Registrar. Co-op Societies, 3 SCC 361 (SC.1976)

<sup>14</sup> HMT Ltd v. Mudappa, 9 SCC 768(SC. 2007)

is considered as an illegitimate question even if everyone having a right to protest anything which displeases him<sup>15</sup>.

**ISSUE 2- THE GROUNDS PUT FORWARD BY THE PEOPLE'S UNION FOR LIBERTIES AND DEMOCRATIC REFORMS ARE ILLEGITIMATE.**

The making of the ordinance can be initiated by the state executive. The scope of the ordinance making power of the governor is co- extensive with the legislature power of the State Legislature.

***2.1 THE VACATION BENCH WAS PRESENT DURING THE HOLIDAY***

8. Vacation bench as the name suggests is the bench duly constituted for discharging the function of the tribunal during the vacations. No appeal for application of civil nature will be received during the vacation except in cases where it is sought urgently to obtain an order of injunction or attachment or stay of proceedings etc<sup>16</sup>.

9. Petitioner seeks relief on the ground that there was no notified vacation bench is just illegitimate .When the petitioner moved to apex court through the affidavit under Article 32, through vacation officer , the vacation officer accepted the papers and gave relevant information to the counsel. Then, the Presence of vacation officer clearly states that there was a notified vacation bench present during holidays. It was just a blank allegation being put forward by the petitioner side.

***2.2 NOTIFIED PROCEDURES FOR LISTING WAS THERE EVEN WHEN THE COURT IS NOT IN SESSION.***

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<sup>15</sup> Morris vs The Crown Office 1 ALL ER 1079(CA.1970)

<sup>16</sup> P. Naranappa vs A. Shanker Alva And Ors AIR Kant 78 (SC.1973)

**10.** As it has been put that there was no notified procedure for listing, this can only be attributed as a false allegation. There is a perfect prescribed procedure for listing in the court even when the court is not in session. The urgent matters are taken up by the court during vacations too. So, saying that there was no notified procedure is just an illegitimate ground being put forward by the other counsel.

**11.** Supreme Court going through its rules: As prescribed under the Supreme Court “practice and procedure”, the fresh matters which are registered on Monday, Tuesday, and Wednesday are listed on next to next Monday. However, a fresh matter where the accused is in custody and a Habeas Corpus petition, if registered in between Monday and Wednesday, will be listed on next Monday but the matter which was submitted does not constitute any of the custody or any of the Habeas Corpus petitions.

***2.3 LISTING OF CASE CAN EFFECT THE MERITS OF THE CASE EVEN AFTER THE ELECTION NOTIFICATION IS ISSUED***

**12.** Whenever a case is filed in Supreme Court, it needs to be listed as per the rules prescribed by the Supreme Court’s “practice and procedure”. If that fresh matter is registered on Monday, Tuesday and Wednesday, then, it’s to be listed on next to next Monday. So in the present case it cannot be said that the listing was denied because the court will always work according to its “practice and procedure”. Court was no where wrong.

**13.** Under the Orissa municipal Act, election took place to certain offices in the Cuttack Municipality. The High Court set aside the municipal election. To overcome the difficulty thus created, an ordinance was validating the election. This ordinance was also declared to be invalid by the High Court. The councillors filed an appeal in the Supreme Court. The argument was that the ordinance lapsed as the legislature failed to enact the necessary

legislation and so the councillors lost their offices<sup>17</sup>. The ordinance passed in this State also Act as an Act passed. The next election notification will not be affected by the court decision since it is the bona fide work done accordingly.

***2.4 ORDINANCE IS NOT ULTRA VIRES PART IX, AND RETROACTIVE***

**14.** The State executive has ordinance making power similar to that enjoyed by central executive. According to Article 213 which is in *pari materia* with Article 123, the Governor may promulgate such ordinance as the circumstances appear to him which require:

(1) When the State Legislature assembly is not in session; or if the State has two Houses and one of the Houses is not in session. ( 2) The governor is satisfied that circumstances exist which render it necessary for him to take an immediate Action.

**15.** An ordinance has the same force and effect as an Act passed by the State Legislature. The ordinance making power is co-extensive with the legislative power of the State. Just as the Legislature can make a law under Article 209 to expedite financial business in the Houses , so can an ordinance. An ordinance cannot make a provision which cannot be validity enacted by an Act of the State Legislature [Article 213(3)]. In the Concurrent list, an Act of the State Legislature repugnant to an Act of parliament with respect to a matter in that list may become ineffective is the president has assented to it. So an ordinance, in a similar situation, will be valid if enacted with the president's prior consent [Article 213(1) (c)]<sup>18</sup>.

**16.** In the present case, the ordinance being made is not ultra vires. This ordinance being made is totally in compliance with the existing society. Today there is a need that the ruling

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<sup>17</sup> State of Orissa v. Bhupendra Kumar Bose 2 Supp.SCC 380 (SC.1962)

<sup>18</sup> Bhupendra bose vs State of Orissa AIR 46(Ori.1960)



people should have a prerequisite knowledge of certain basics of society. It is just an irony that the people who rule are not having knowledge. Do we want such a type of society?

Two basic reasons:(1) According to provisions of the Indian constitution, regional classification can be done under Article 14. (2) The State Government by reasonable nexus and differential intelligentsia has made distinction between the illiterate and literate candidates. The State has done no wrong by introducing the concept of “literate people” for contesting election and it is neither ultra vires and nor unconstitutional.

***2.4 THE ORDINANCE IN NO WAY MARGINALIZES WOMEN AND IN NO WAY VIOLATIVE TO THE CONSTITUTION***

**17.** Article 14 of the Indian constitution was to confer right to equality in India. The idea of Article 14 is vast. The ordinance passed by the executive does not confer much of the legitimate issue of Article 14. In the present scenario, the right to equality is maintained and the state executive has worked accordingly in compliance with Article 14.

**18.** According to the provisions of the Indian Constitution, regional classification can be done under Article 14 of the Indian constitution. State government has classified with reasonable nexus and differential intelligentsia and made distinction between the literate and illiterate candidate. So it can't be argued that State executive has ever exercised more of its jurisdiction and it entertained the matter of ordinance within its own scope.

**19.** The supreme court can veto any conferment of discretionary power on an authority if it too broad, sweeping or uncanalised . The Supreme Court laid down the principle in the following words in Narain Das<sup>19</sup> : “Article 14 ensures equality before law and strikes arbitrary and discriminatory State Action..... If power is conferred by statute on any authority

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<sup>19</sup> Narain Das v. State of Madhya Pradesh 4 SCC 788 (SC.1974)

of the State is vagrant and unconfined and no standards or principle are laid down by the statute to guide and control the exercise such power, the statute would be violative of the equality clause because it would permit arbitrary and capricious exercise of power, which is antithesis of equality before law”.

In Sudhir Chandra<sup>20</sup>, the Supreme Court has observed:

“.....Our constitution envisages a society governed by rule of law. Absolute discretion uncontrolled by guidelines which may permit denial of equality before law is antithesis of rule of law. Absolute discretion not judicially reviewable inheres the pernicious tendency to be arbitrary and is therefore violative of Article 14 .equality before law and absolute discretion to grant or deny benefit of the law are diametrically opposed to each other and cannot co-exist”. The present case no more signifies that the State was vagrant and there was too a particular set of guiding principle that the State followed.

**20.**As regards of laying down of principles or guiding norms, it has been held, for instance, that it is not essential that every section in the statute which confers power ,should also lay down the rules of guidance or the policy for the administrator to follow<sup>21</sup>. The ordinance in no way marginalises women. The present laws, be it Nyaya panchayat bill 2009 or any other State regulation requires a conceived understanding. A person who is well educated will not be able to understand the panchayat related Act at the first instance, leave a person who is not educated. *Therefore it is humbly submitted that the ground are not up to the mark to prove ordinance as violative of the constitution. The state government is no wrong in passing that ordinance.*

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<sup>20</sup> Sudhir Chandra v. Tata Iron & Steel Co. Ltd. 3 SCC 369(SC.1984)

<sup>21</sup> Chandra Kanta Saha v. Union of India 1 SCC 285(SC.1985); Organo Chemical Industries v. Union of India 4 SCC 573(SC.1979)

**ISSUE 3- THE GROUNDS PUT FORWARD BY THE JEOPARDY CONTRACT INC.**

**ARE ILLEGITIMATE**

**21.** The section 34 of the Arbitration and Conciliation Act, 1996 gives a chance to the aggrieved party to go to the court if they think that the award being conferred is not up to their expectation. So in this case also, the basic tenets of arbitration too give the party a right to go to the court which is not against the constitution.

***3.1 INTRODUCTION OF LITIGATION IS NOT AGAINST THE BASIC TENETS OF THE ARBITRATION***

**22.** To attract the confidence of international mercantile committee and growing volume of India's trade and commerce relationship with the rest of the world after the new liberalization policy of government, Indian Parliament enacted Arbitration and Conciliation Act, 1996 on the basis of UNCITRAL model AND therefore interpreting any provision of Act of 1996, the courts must not ignore the object and purpose of enactment of 1996. Provisions of Arbitration and Conciliation Act, 1996 would unequivocally indicate that 1996 limits the intervention of court with an arbitral process to minimum<sup>22</sup>.

**23.** The basic tenets, as told by petitioner side, were only to minimise the intervention of the courts and not to totally reject it. The beneficial features of the Act have been described by the Supreme Court to be as follows, (i) fair resolution of a dispute by an impartial tribunal without any unnecessary delay or expense (ii) party autonomy is paramount subject only to such safeguards as are necessary in public interest; and (iii) the arbitral tribunal is enjoined with a duty to act fairly and impartially<sup>23</sup>.

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<sup>22</sup>Konkan Railway Corpn. Ltd. & Ors vs M/S. Mehul Construction Co.7 SCC 201(SC.2000)

<sup>23</sup> Centrotrade Minerals&metals Inc vs Hindustan copper Ltd. 11 SCC 245 (SC.2006)

24. The basic tenets of arbitration didn't have any description that litigation process should not be introduced. It only tried to minimise it. "Minimising it" will not be in compliance with rejecting or seeking constitutional invalidity.

25. The success of arbitration without an iota of doubts would not have been possible without the mechanism of judicial control as a safety net in the background .In certain situations, without necessary court support the arbitral process will find itself in a helpless situation. In the case of Coppec – lavelin v Ken Ren Chemicals and Fertilizers ltd<sup>24</sup>, Lord Mustill said that it is impossible to doubt that at least in some instances, the intervention of court may not only permissible but highly beneficial.

26. The § 2 (e) of Arbitration and Conciliation Act, 1996 further provides for judicial intervention by the court in provisions such as § 8, § 9, § 13, § 14, § 16, § 17, § 34, § 37 etc. The Supreme Court of India confirmed the powers of the court to entertain § 34 applications while dealing with the case MC Dermott International Corporation v. burn standard co ltd<sup>25</sup>.

27. Ironically, in so far 1996 Act the reality has been removed from the ideals. A panoramic view of judgement shows that judicial interference which was supposed to be warded off has been followed by the court to set aside the arbitral award. Even in cases, such as **S.B.P. & Co V. M/S Patel Engineering Ltd.**<sup>26</sup>, it has been held that the order passed by the Chief Justice appointing an arbitrator is a judicial order and hence can be appealed<sup>27</sup>. In the first instance

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<sup>24</sup> 2 ALL ER 449,466(HC.1994)

<sup>25</sup> 11 SCC 181(SC.2006)

<sup>26</sup> 8 SCC 618(SC.2005)

<sup>27</sup>Jain Studios Ltd. Vs Shin satellite public co. Ltd. 5 SCC 501(SC.2006); Punjab Agro Industries Corporation Ltd. V. Kewal Singh Dhillon 10 SCC 128 (SC.2008)

the JCI moved to the high court of Nirdhan and filed urgent civil writ petition. They too followed the path of litigation of which they have raised an issue in later stage.

**Arbitration and litigation**

**28.** A Court is inevitably governed by procedural rules or course or precedent as to the way in which cases are conducted. On the other hand, and arbitral tribunal is not bound by any provisions and the parties are free to agree on the procedures to be followed by the arbitral tribunal. Arbitration presents an alternative to the judicial process in operating procedural flexibility .It too ensures confidentiality of all matters related to arbitral proceedings.

**29.** But under the present scenario, the parties to arbitration agreement rarely exercised their discretion to specify arbitral procedures. They had subscribed to an adjudicatory process that included flexible and adaptable procedures and were content to have it implemented.

However, arbitration has retained a core of defining the characteristic throughout its history, no matter the context of its application or the character of the dispute submitted to arbitration. And according to the other counsel, in later stage it becomes against basic tenets of arbitration.

***3.2 PENDENCY OF A SECTION CANNOT BE THE SOLE CRITERIA TO CHECK THE CONSTITUTIONAL VALIDITY AND NEITHER IT LEADS TO VIOLATION OF ANY BILATERAL COMMITMENTS***

**30.** According to the Arbitration and Conciliation Act 1996, it was assumed that the aggrieved party who gave their consensus for the arbitration should not come for the lengthy court proceedings because if they again come for court then the basic tenets of arbitration will stand violated. The Arbitration Act 1996 clearly states that the arbitral Action will be outside court. But if the party is there and doesn't get into consensus with award being conferred,

then, according to § 34 of Arbitration and Conciliation Act they can go to the court and it is not a hidden fact that the court proceedings are lengthy. If there is a provision being given for the party for going to the court, then arguing for constitutional validity is illegitimate. Just having much pending cases doesn't make section doesn't make the section unconstitutional.

**Bilateral commitments**

**31.** The arbitration and conciliation Act 1996 has certain commitment regarding certain foreign award. (1) New York convention awards- this convention too States that, if the award is outside the scope of reference, then, one can approach the court, in spite of, the fact that the court process is lengthy.

**32.** §48(1)(c) specifies that the enforcement of a foreign award may be refused, if it deals with a difference- (a) Not contemplated by the reference or (b)not falling within the terms of reference (c) it contains a decision on matter beyond the scope of reference.

**33.** According to § 48(3), if an application for setting aside or suspension of the award has been made to a competent court then, the court may, if it consider proper, adjourn the decision on the enforcement of the award.

**Geneva Convention awards**

**34.** § 53 defines foreign award for the purposes of chapter 2 of part II which deals with enforcement of Geneva Convention awards. In terms of § 53 of the act: “ foreign awards means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28<sup>th</sup> day of July 1924.

**Power of judicial authority to refer parties to arbitration**

**35.** § 54 makes it mandatory for any judicial authority when seized of a dispute regarding a contract made between parties to whom §53[Geneva Convention] applies, to refer the parties

to arbitration. This can be done on the application of either party. this section reads:

Notwithstanding anything contained in part I or in the code of civil procedure, 1908(5 of 1908) a judicial authority, on being seized of a dispute regarding contract made between persons to whom § 53 applies and including an arbitration agreement, whether referring to present or future differences, which is valid under that section and capable of being carried into effect shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrator and such a reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed for becomes inoperative.

**Appealable orders [S.59]**

**36.** § 59 deals with orders which are appealable.

1. §59(1) provides that an appeal shall lie(a) From judicial authority's order refusing to refer the party to arbitration under § 54, and (b) From the court's order refusing to info foreign award under § 57. Appeal lies to the court authorised by law to hear appeals from such orders. 2. § 59(2) bars a second appeal against the appellate order passed under this section. However, the right to appeal to the Supreme Court is not affected. This award too forms the opinion that if a dispute arises regarding any of the arbitral awards, we can move to the Court.

***3.3 GRANT OF AUTOMATIC STAY WITHOUT ADJUDICATION ON PRIMA FACIE CASE, BALANCE OF CONVENIENCE AND IRREPARABLE INJURY IS PER SE BAD IN LAW***

**37.** When a writ petition is filed, the court may make an interim or interlocutory order. The purpose of such order is to preserve in status quo the rights of the parties, so that, the

proceedings do not become in fructuous or ineffective by any unilateral overt Acts by one side or the other during pendency of the writ petition as held in the case of Kihota hollohan vs zachillu<sup>28</sup> .

**38.** The scope and effect of an interim order would depend upon terms of the order itself. In case of any ambiguity, the interim order should be understood in the light of prayer made for interim relief, facts of the cases and terms of the contract<sup>29</sup> . While § 9 provides for taking of an interim measure by the court in certain matters, §17 provide for taking of interim measures in respect of subject matter of dispute by the Arbitral tribunal.

**39.** Even assuming that the power to direct interim measures under §17 is concurrent with the power vested in the court is limited to certain areas. Under § 9, the very fact that the Arbitral tribunal could also be approached for a proper interim measures would not deprive the civil court of its jurisdiction under § 9 to make an appropriate direction in a fit case brought before it<sup>30</sup> . The jurisdiction of the court and arbitral tribunal under these provisions no doubt appears to be concurrent but they are radically different in the scope and effect. The distinction between the two jurisdictions has been brought out in detail by a single judge of Bombay High Court in Maharashtra State electricity board vs Datar Switchgear Ltd. & Ors<sup>31</sup> . Court by themselves under § 9 of Arbitration and Conciliation Act 1996 before giving the subsequent interim relief always considered the factors for granting the relief which was held in DEORAJ CASE by Supreme Court namely prima facie case, irreparable injury, and balance of convenience.

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<sup>28</sup> 2 Supp.SCC,651(SC.1992)

<sup>29</sup> BPL Ltd. v. R.sudhakar 7 SCC 219(SC.2004)

<sup>30</sup> Yenepoya Minerals And Granites v. Maharashtra Apex Corporation 2 KarLJ 198 2004

<sup>31</sup> 11 JT 252(SC.2010)



**40.** In the particular case too, the matter was subsequently heard and seeing all evidence the stay was awarded therefore the allocation of granting an automatic stay will be void. In the first instance the Court took the matter of writ petition WP(C) No.99/2014 being first on board so it cannot be said that this court can do wrong regarding examination of the petition and granting of stay.

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**PRAYER**

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

1. That the writ petition filed by People's union for liberties and democratic reforms is not Maintainable.
2. That the writ petition filed by jeopardy contract inc. is not maintainable.
3. That the grounds by PULDR are illegitimate and the ordinance is not ultra vires to the Constitution
4. That the grounds by JCi are illegitimate and the section 34 in question is not Unconstitutional.

***And pass any other relief, that this Hon'ble High Court of Nirdhan may deem fit and proper in the interest of justice, equity and good conscience.***

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

**Sd. /-**

**(Counsel for petitioner)**