

BEFORE

THE HON'BLE HIGH COURT OF NIRDHAN

WRIT PETITION FILED UNDER ARTICLE 226 & 227 OF THE CONSTITUTION

People's Union for Liberties & Democratic Reforms and JCI.....First Side

v.

Republic of Gariba and Maxis Bank.....Second Side

MEMORIAL ON BEHALF OF SECOND SIDE

TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	III
INDEX OF AUTHORITIES	IV
STATEMENT OF JURISDICTION	VI
STATEMENT OF FACTS	VII
STATEMENT OF ISSUES.....	XII
SUMMARY OF ARGUMENTS.....	XIII
ARGUMENTS IN DETAIL.....	1
1. Whether Sec.34 of Arbitration And conciliation act justifies the object of act.....	1
2. Whether admission of petition under section 34 of Arbitration and Conciliation act amounts to Stay on the enforcement of Arbitral award?..	3
3. Whether the Ordinance passed by the Governor is ultra-vires of Part IX of Constitution of India or not?.....	5
4. Whether the notified vacation bench and notified procedure for Listing was available to People’s Union for Liberties And Democratic reforms or not?.....	10
PRAYER.....	11

III

LIST OF ABBREVIATIONS

§.....	Section
¶.....	Paragraph
JGPS.....	Jodhpur Gaon Panchayat Samiti
AIR	All India Reporters
Arb.....	Arbitration
Art.....	Article
Corp.....	Corporation
Gov.....	Government
JCi.....	Jeopardy Contracts Inc.
HC.....	High Court
WP.....	Writ Petition
Inc.....	Incorporation
Ors.	Others
SC.....	Supreme Court
SCC.....	Supreme Court Cases
CIA.....	Council for infrastructure Arbitration
v.....	Verses
ld.....	learned

INDEX OF AUTHORITIES

CASES

Babar Ali Vs Union of India (2000) 2 SCC 178

Charanjit Lal Chowdhury v. the Union of India and Ors. [1950] 1 SCR 869

Union of India v. Elphinstone Spinning and Weaving Co. Ltd. and Ors, [2001] 1 SCR 221

National Aluminium Co. Ltd. Vs. Pressteel and Fabrications Pvt. Ltd. And Anr. In Para 10, AIR 2005 SC 1514

Damodar Valley Corporation Vs. CESC Ltd in Para 9, AIR 2005 Cal 67

K.Nagraj and Others etc. etc. Vs. State of Andhra Pradesh AIR 1985 SC 551

T.Venkata Reddy etc. etc. Vs. State of Andhra Pradesh AIR 1985 SC 724

Shiv Ram & 5 Ors. Vs. The State of Rajasthan and Others 2004(4) WLC(Raj.) 412

State of Punjab Vs. Satyapal AIR 1969 SC 903

Javed and Others Vs. State of Haryana And Others (2003) 8 SCC 369

Ponnuswami Vs. Returning Officer, Namakkal Constituency and Ors AIR 1952 SC 64

S.T. Muthswami Vs. K.Natarajan and Ors. AIR 1988 SC 616

Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors, AIR 1978 SC 581

Ritesh Tripathi & Ors. Vs. State & Ors D.B. CIVIL WRIT PETITION NO. 3068/2011

STATUTES AND NOTIFICATIONS

CONSTITUTION OF INDIA

ARBITRATION AND CONCILIATION ACT 1996

United Nations Commission on International Trade Law (UNCITRAL) in 1985

BOOKS REFERRED

- Supreme Court on ARBITRATION, CONTRACTS & TENDERS by Hon'ble Justice S.N. PHUKAN, 2011 EDITION.
- Commentary on Law of ARBITRATION AND CONCILIATION by Justice R.P. Sethi, Volume 1.
- H.M Seervi,. Constitutional Law of India Vol. I & II, III
- Durga Das Bassu Commentary on the Constitution of India
- Indian Constitutional Law by MP JAIN 7th Edition
- C R Datta, Law of Arbitration and Conciliation (Including Commercial Arbitration),2008

STATEMENTS OF JURISDICTION

The counsel appearing on behalf of second side (Republic of Gariba and Maxis Bank) humbly submits the dispute concerning Constitutional Validity of Sec.34 of Arbitration and Conciliation Act, 1996 & Ordinance dated 20.12.2014 amending the Nirdhan Panchayati Raj Act, 1994 to the Original Writ Jurisdiction of the Hon'ble High Court of Nirdhan, pursuant to Article.226 & 227 of the Constitution of Republic of Gariba. Thereby, the Counsel on behalf of Second Side submits this memorial which sets forth the facts & the laws on which the disputes are based.

THE PRESENT MEMORIAL SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN THE
PRESENT CASE

VII

STATEMENT OF FACTS

The Republic of Gariba is a sovereign federation of states with several union territories. Nirdhan is the biggest of states in the Republic of Gariba. The territory of Nirdhan was considered backward till 2011, when the then governor of Nirdhan decided to fast pace the development of roads and highways. Powers in this regard were delegated to Panchayat Samitis, to issue detailed project report on the official website and a single scheme was provided for sanction of the projects.

21.09.2011:- Jeopardy Contracts Inc.(JCI) entered into an agreement with Jodhpur Gaon Panchayat Samiti (JGPS) for 115km of road in a scheduled area in Nirdhan.

21.09.2013:- At the time of culmination of project, certain issues cropped up regarding land acquisition, design of bridges etc. due to which JGPS terminated the Contract.

11.12.2014:- JCI sent a legal notice for invoking arbitration as per contractual clause and also asked for the termination payment for the work already done.

12.12.2014:-JGPS' counsel informs that Arbitration & Conciliation act, 1996 is not applicable as the matter is covered under the Madhyastham Adhikaran Adhiniyam, 1983. Also, an e-mail was sent after business hours to maxis bank for invoking performance bank guarantee.

13.12.2014:-JCI moved the High Court of Nirdhan by filing an urgent Civil Writ Petition WP (C) No. 99/2014, which was directed to be listed at 10:30am on 15.12.2014.

15.12.2014:- At 10:30 am High Court granted ad-interim ex parte stay on invocation of bank guarantee if not already encashed. Meanwhile at 10:00am, the branch manager of Jodhpur Gaon Branch of Maxis Bank had acted on e-mail of JGPS and encashed the bank guarantee but at 10:01am there was a massive security breach in the system of Maxis Bank which instantly froze all accounts and transactions-in progress. Therefore, till the

VIII

Order copy was served on the maxis bank, the amount under the bank guarantee still remained in the account of JCI.

Stay order was vacated by the High Court of Nirdhan directing the parties to seek appropriate interim remedies from the Ld. Arbitrators. Arbitration proceedings took place under the Act of 1996 before the council for Infrastructure Arbitration (CIA).

21.01.2015:- Arbitration culminated into an award in favour of JCI and inter alia held JCI entitled to the money under the performance bank guarantee.

24.01.2015:- JCI wrote to Maxis Bank with a copy of award, to return the money pertaining to the performance bank guarantee, retained by it in a fixed deposit, with the interest accumulated thereon, which was thrice the principal.

25.01.2015:- JGPS filed a petition under sec.34 of the Act of 1996, before the High Court of Nirdhan, on its original side.

27.01.2015:- Maxis Bank informed that admission of petition under sec.34 amounts to stay on the award, and therefore until the final outcome of sec.34, it is not obliged to pay anything to JCI.

28.01.2015:- JCI cited its concerns about immediate requirements of liquidity due to erosion of net worth, expenses for litigation, and pressure of the Amersian development bank regarding the repayment of loan etc. however, Maxis Bank did not release any payment to JCI.

JCI challenged the constitutional validity of Sec.34, by way of writ petition, being WP 999/2015 on the grounds that:-

- i. It amounts to introduction of 'litigation' in the arbitral process which is against the basic tenets of arbitration;

IX

- ii. The pendency of Sec. 34 petitions is huge and delay thereon amounts to expropriation, in as much as it takes away the fruits of the award which leads to violation of country's bilateral and multilateral commitments under various conventions and investment treaties;
- iii. And grant of an automatic stay, without adjudication on prima-facie case, balance of convenience and irreparable injury is per se bad in law;
- iv. Other grounds as advised by the Id. Counsel.

The High Court of Nirdhan admitted the Petition, and considering the nature of issues raised, issued notice to the Ld. Attorney General.

20.12.2014:- In the meanwhile, the Governor of state of Nirdhan promulgated an ordinance.

Ordinance came into effect from 24th December, 2014 and amended the Nirdhan Panchayati Raj, 1994 as under:-

“19. Qualification for election as a Panch or a member- Every person registered as a voter in the list of voters of a Panchayati Raj Institution shall be qualified for election as a Panch or, as the case may be, a member of such Panchayati Raj Institution unless such person-

(r) In case of a member of a Zila Parishad or a Panchayat Samiti, has not passed school examination of the Board of the Secondary Education, Nirdhan or of an equivalent Board;

(s) In case of Sarpanch of a Panchayat in a Scheduled Area, has not passed class V from a school in Nirdhan; and

(t) In case of a Sarpanch of a Panchayat other than in a Scheduled Area, has not passed class VIII from a School in Nirdhan;”

People's Union for Liberties and Democratic Reforms issued a public statement that the ordinance was replete with malice in law.

29.12.2014:- People's Union for Liberties and Democratic Reforms moved the High Court of Nirdhan through its counsel during the annual winter holidays, for an urgent listing and hearing, since the election notification was to be issued on 3rd January 2015. The PPS to the Hon'ble Chief Justice informed the counsel that listing has been denied.

31.12.2014:- With its counsel's affidavit, the People's Union for Liberties and Democratic Reforms moved the Hon'ble Apex Court under Art.32 through vacation officer. The vacation officer accepted the papers and informed the counsels that instructions from the Hon'ble Chief Justice are awaited. After a wait for 48 hours, it was informed by the Id. Vacation officer that he can only speak to the Id. Registrar (Judicial). On being approach, the Id. Registrar (Judicial) informed that he has put in a message with the PPS to the Hon'ble Chief Justice. However, despite several reminders, no listing was granted till the issuance of the election notification. Upon listing, the Apex Court was pleased to observe that the matter can now be heard by High Court of Nirdhan.

Therefore, left with no time, People's Union for Liberties and 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, and certain other reliefs on the ground of:

- i. Non availability of a notified vacation bench during any holidays is unconstitutional;
- ii. Non- availability of a notified procedure for listing when the Court is not in session is unconstitutional;
- iii. 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*,
- iv. The ordinance being ultra vires part IX, and retroactive;
- v. 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.

XI

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 hearing.

STATEMENT OF ISSUES

- 1. Whether Sec.34 of Arbitration and conciliation act justifies the object of Act?**
- 2. Whether admission of petition under section 34 of Arbitration and conciliation act amounts to stay on the enforcement of Arbitral award?**
- 3. Whether the Ordinance passed by the Governor is ultra-vires of Part IX of Constitution of India or not?**
- 4. Whether the notified vacation bench and notified procedure for listing was available to People's Union for Liberties and Democratic reforms or not?**

SUMMARY OF PLEADINGS

ISSUE 1: Whether Sec.34 of Arbitration and conciliation act justifies the object of act?

Your honour it is humbly submitted to the bench that basic object of the Arbitration and Conciliation Act, 1996 is minimum judicial interference but it does not imply that there should be no judicial interference. Judicial review being the basic structure of constitution has been laid in the act of 1996 through Section 34 where an Arbitral Award can be set aside on basis of certain specified conditions stipulated therein. Therefore the mere allegation that Section 34 introduces litigation in Arbitration proceedings is too vague to challenge the constitutional validity of Section 34 of Arbitration and Conciliation Act, 1996.

ISSUE 2: Whether admission of petition under section 34 of Arbitration and conciliation act amounts to stay on the enforcement of Arbitral award?

Your honour the counsel humbly wants to submit to the court that in cases where after the pronouncement of an Arbitral Award if any of the party involved in the Arbitral proceedings is not satisfied with the Arbitral Award and then files an application under Section 34 of the Arbitration and Conciliation Act, 1996 then this results to stay on the enforcement of Arbitral Award. Also, until the application is pending under the Section 34 of Arbitration and Conciliation Act, 1996 the Arbitral Award cannot be enforced.

ISSUE 3: Whether the Ordinance passed by the Governor is ultra-vires of Part IX of Constitution of India or not?

The Ordinance passed by the Governor is not ultra-vires of Part IX of the Constitution of India because of the following reasons,

XIV

Firstly, the Governor acted in its legislative capacity in passing such an Ordinance. A disqualification can be prescribed under Article 243F (1)(b) of the Constitution by the legislature of the State. The powers of the Governor to promulgate an Ordinance during the recess of Legislature under Article 213, is a legislative power. Any doubt on the proposition, has been cleared by clause (2) of Article 213 of the Constitution, which provides that an Ordinance promulgated under the Article shall have the same force and effect as an Act of Legislature of the State assented to by the Governor. Therefore, the Governor has acted in its legislative capacity.

Secondly, Disqualifications can be provided in public interest and it will not be ultra-vires of Part IX of the Constitution of India.

Thirdly, Court cannot Entertain such petitions which will cause interference in the election process.

ISSUE 4: Whether the notified vacation bench and notified procedure for listing was available to People's Union for Liberties and Democratic reforms or not?

Your honour, the counsel humbly wants to submit to the bench, in the present case notified vacation bench and notified procedure for listing was available to the People Union for Liberties and Democratic Reforms and it has been clearly given in the fact sheet in Para 18 were it is mentioned that PPS to the Chief Justice denied the listing. Listing had been denied because Vacation Bench does not hold the power to decide the cases challenging the Constitutional Validity of an Act or challenging the Constitutional validity of any provision of Act. There People Union for Liberties and Democratic Reforms cannot take the plea that there was non-availability of Vacation bench or there was non-availability of notified procedure for listing.

1.

ARGUMENTS ADVANCED

1. Whether Sec.34 of Arbitration and conciliation act justifies the object of act?

It is humbly submitted to the Hon'ble Court that Section 34 of Arbitration and Conciliation Act, 1996 justifies the basic object and tenets of the act which lays down the provisions of judicial interference, as it is given the Section 5 of the act which provides for judicial interference in the cases where it has been provided in the Act and thus, the Section 34 of Arbitration and Conciliation act 1996 is Constitutional.

Section 5 of Arbitration and Conciliation Act, 1996:-

Extent of judicial intervention.-Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this part.

Thus, Section 5 of Arbitration and Conciliation clearly provides for judicial intervention only in the cases where it has been given in the Act.

Section 34 which is laid in the chapter VII of Arbitration and Conciliation, 1996 which has the heading displaying "Recourse against Arbitral Award", it says:-

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). And certain conditions are laid in sub-section (2) and (3) through which an arbitral award can be set aside, therefore Section 34 is according to Arbitration and Conciliation Act, 1996 and thus constitutional.

Though section 34 introduces litigation but it is the basic object of this section only that limits and checks the powers of the arbitrator. Section 34 of Arbitration and Conciliation introduces the role judiciary and interference of court on certain specified grounds. Judicial review which is the basic structure of the

MEMORIAL ON BEHALF OF SECOND SIDE

2.

Constitution of India is introduced through this section only in this act. Therefore, section 34 of Arbitration and conciliation Act, 1996 is constitutional and interference of judiciary is thus necessary.

It is humbly submitted to the Hon'ble Court that in the case of:-

Babar Ali Vs Union of India¹ it was held by Supreme Court that , The Arbitration and Conciliation Act,1996 is neither unconstitutional nor in any way offends the basic structure of the Constitution of India, as Judicial review is available for challenging the award in accordance with the procedure laid down therein. The time and manner of the judicial scrutiny can be legitimately laid down by the Act passed by the parliament.

Therefore, your honour, the counsel humbly submits that the Sec. 34 of Arbitration and Conciliation Act, 1996 is Constitutional and justifies the object of the said Act.

Furthermore, the counsel also submits to Hon'ble Court that the burden of proof lies on the shoulders of the person who attacks the constitutionality.

For this the counsel wants to rely on some important cases:

It was held by the Hon'ble Court in the case of Charanjit Lal Chowdhury v. the Union of India and Ors.²

Indisputably, there exists a presumption as regard constitutionality of a statute. Rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles. But this rule is subject to the limitation that it is operative only till the time it becomes clear and beyond reasonable doubt that the legislature has crossed its limits.

¹ (2000) 2 SCC 178

² [1950] 1 SCR 869

3.

In *Union of India v. Elphinstone Spinning and Weaving Co. Ltd. and Ors.*,³ it was stated:

A statute is construed so as to make it effective and operative. There is always a presumption that the legislature does not exceed its jurisdiction and the burden of establishing that the legislature has transgressed constitutional mandates, such as those relating to fundamental rights, is always on the person who challenges its vires. Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution it must be allowed to stand as the true expression of the national will.

Therefore, for the cases cited above, it can be clearly seen that the burden of proof lies on the first side who has challenged the Constitutional validity of Section 34 of Arbitration and Conciliation Act, and also the burden of proof lies on the People Union for Liberties and Democratic Reforms to prove that the Ordinance passed was Unconstitutional.

-
2. Whether admission of petition under section 34 of Arbitration and conciliation act amounts to Stay on the enforcement of Arbitral award?
-

Yes, Admission of petition under sec 34 amounts to stay on the award. In, the present case JGPS i.e. Jodhpur Gaon Panchayat Samiti has filed an application under the arbitral award given on 21.01.2015 by the Ld. Arbitrators under the Arbitration and conciliation act,1996.

The petition has been filed by the JGPS in the High Court of Nirdhan on its original side on 25.01.2015 under sec 34 of the Arbitration and conciliation act, 1996 to set aside the order given by the Ld. Arbitrators.

³ [2001] 1 SCR 221

4.

JCI in whose favour the arbitral award was passed which entitled them to the bank guarantee which is retained by the Maxis bank in a fixed deposit. Maxis bank cannot encash the bank guarantee because of the petition pending under sec 34 of the Arbitration and Conciliation act.

Therefore, it is humbly submitted to the honourable court that bank gurantee being the part of arbitral award cannot be enforced or encashed due to the pendency of petition under sec of 34 arbitration and conciliation act,

The same has been held in the various cases

It was held by the Hon'ble Court in the case of National Aluminium Co. Ltd. Vs. Pressteel and Fabrications Pvt. Ltd. And Anr.⁴ In Para 10,

It was noticed by the lordships that from the mandatory language of Section 34 of the Arbitration and Conciliation Act, 1996 that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable.

Also, similarly findings were observed by the Hon'ble Court in the case of Damodar Valley Corporation Vs. CESC Ltd.⁵ In Para 9,

It has held by their Lordships in the decision that once a Section 34 application is filed, under the Act, an award simply becomes unexecutable.

⁴ AIR 2005 SC 1514

⁵ AIR 2005 Cal 67

3. Whether the Ordinance passed by the Governor is ultra-vires of Part IX of Constitution of India or not?

The Ordinance passed by the Governor is not ultra-vires of Part IX of Constitution of India and is thus constitutionally valid.

Your lordship the counsel would like to divide this issue in further sub-issues to prove that the Ordinance passed by the Governor was constitutionally valid and is not ultra-vires of the Part IX of the Constitution of India.

3.1 Whether the governor acted in its legislative capacity in passing such an ordinance or not?

Your lordship, the Ordinance was passed by the Governor in its legislative capacity only. Legislative powers of the governor, exercised by him under Article 213 of the Constitution of India, cannot be challenged on the ground that no such circumstances existed, which rendered it necessary to promulgate the Ordinance. The satisfaction of the Governor in such matters, in issuing the ordinance is not subject to judicial review. A disqualification can be prescribed under Article 243F (1)(b) of the Constitution by the legislature of the State. The powers of the Governor to promulgate an Ordinance during the recess of Legislature under Article 213, is a legislative power. Any doubt on the proposition, has been cleared by clause (2) of Article 213 of the Constitution, which provides that an Ordinance promulgated under the Article shall have the same force and effect as an Act of Legislature of the State assented to by the Governor.

It is relied on K.Nagraj and Others etc. etc. Vs. State of Andhra Pradesh⁶, and the constitution bench judgement of Supreme Court in T.Venkata Reddy etc. etc. Vs. State of Andhra Pradesh⁷, for defending the powers of the

⁶ AIR 1985 SC 551

⁷ AIR 1985 SC 724

6.

Governor to promulgate an Ordinance which cannot be challenged on the grounds of non application of mind or malafide.

Therefore, for the reasons mentioned and cases cited above the counsel humbly submits to the Hon'ble Bench that the ordinance was passed by the Governor acting in its Legislative capacity.

3.2 Whether the disqualifications prescribed in public interest are ultra-vires of Part IX of the Constitution or not?

It is humbly submitted to the Hon'ble Court that a disqualification can be added by the legislature of State under Article 243F (1)(b) of the Constitution. Clause (2) of Article 213 of the Constitution, which provides that an Ordinance promulgated under the Article shall have the same force and effect as an Act of Legislature of the State assented to by the Governor.

It is humbly submitted to the lordships that an ordinance cannot be declared unconstitutional and ultra-vires of part IX of the Constitution if it is passed in public interest. For this the counsel seeks to put reliance upon a Division Bench judgement of this court in Shiv Ram & 5 Ors. Vs. The State of Rajasthan and Others⁸, which challenged the Rajasthan Panchayati Raj (Third Amendment) Ordinance, 1999, inserting Section 19(g), 19(gg) and Proviso (ii) of Section 19 as disqualification was turned down. By an amendment of Section 19, the Ordinance substituted clause (g), providing that a person who has been convicted of an 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, Clause(gg), provided that if a person is under trial in the competent court which has taken cognizance of the offence and framed the charges against him of any offence punishable with imprisonment for

⁸ 2004(4) WLC(Raj.) 412

5 years or more, will be disqualified. 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.

Para 9:- The Division Bench held that the satisfaction of the Governor regarding emergency was not justiciable, in view of the judgement of the Supreme Court in State of Punjab Vs. Satyapal⁹ and that the disqualification of a person who has been convicted of any offence by a competent court and sentenced to imprisonment for 6 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 with 5 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 Article 21 of the Constitution of India. The Ordinance in the year 1999 was also promulgated on the eve of elections.

In the present case also, the ordinance has been passed for achieving goals favouring public interest. The Government for promoting the education amongst rural masses and ensuring that those who have to lead, must lead by example and for ensuring that any further delay in making educational qualification mandatory at the grass root level of the democracy, would postpone the implementation of the such provisions for at least 5 years, took a decision for enacting the law by advising the governor to promulgate the Ordinance.

Also, it is humbly submitted to the Hon'ble bench that right to contest election is not a fundamental right. It is a statutory right, for which qualification and disqualification can be prescribed by the legislature. Deliberations were made over the subject and since there was not much time left, and the legislative assembly was not in session it was decided to advise the Governor to promulgate the Ordinance. Hence, for the aforesaid reasons and cases mentioned above its crystal clear that an ordinance can be passed in public interest and it will constitutional and in the constitutionality cannot be challenged. Therefore your lordship it is humbly submitted

⁹ AIR 1969 SC 903

8.

that the ordinance was passed for the benefit of public, i.e. in public interest and hence it is constitutional and is not ultra-vires to the Part IX of the Constitution of India.

It is also submitted to the Hon'ble Bench that the ordinance does not excludes but operates to include qualified person. It is merely an election reform with the object to improve the working of the panchayati raj institution. It is relied upon the judgement of the Supreme Court in Javed and Others Vs. State of Haryana And Others,¹⁰ upholding the disqualification for those, who have more than 2 childrens in the State of Haryana, to contest the elections for panchayati raj institutions. In Javed and Others Vs. State of Haryana and Others (Supra) the Supreme Court did not sustain the arguments that the two children norm is discriminatory and is violative of Article of the Constitution of India. The Disqualification was not found to be violative of Article 14 and 21 of the Constitution.

3.3 Whether the Hon'ble court has power to interfere in the process of Election or not and whether the court can entertain such Writ Petition which interferes in Election Process?

It is humbly submitted to the Hon'ble court that entertaining the Petition challenging the Ordinance which amended the Panchayati Raj Act will lead to interference in the election process. For this the counsel would like to put reliance on the some cases where it has held that Court should not interfere with the process of elections. In the case of Ponnuswami Vs. Returning Officer, Namakkal Constituency and Ors.,¹¹ The restriction reflected under Article 329(b), has also been incorporated in Part IX of the Constitution, inserted vide 73rd Amendment in Article 243-O of the Constitution, which reads as follows:-

“243-O. Bar to interference by courts in electoral matters.- notwithstanding anything in this Constitution-

¹⁰ (2003) 8 SCC 369

¹¹ AIR 1952 SC 64

9.

- (a) The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made Article 243K, shall not be called in question in any court;
- (b) No election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the legislature of a state.”

Further, it is submitted to the Hon’ble court that since the election notification has been issued on 3rd January 2015, so any interference in the elections will cause difficulty in holding elections, for which all preparations have been made, officer trained and deputed and programme finalised, for which any delay is not permissible at this stage, nor is advisable. It is further relied upon the judgements of Hon’ble Supreme Court in S.T. Muthswami Vs. K.Natarajan and Ors.,¹² and in Election Commission of India Through Secretary Vs Ashok Kumar & Ors. (supra), in which the Supreme Court has cautioned the Courts against interference in the elections.

In the present case, the impugned Ordinance was promulgated on 2012.2014 and the Ordinance came into effect from 24.12.2014, and for which, notification was issued on 03.01.2015. Article 243-O prohibits any interference in the elections, once election has been notified. The principles laid down in Election Commission of India Through Secretary Vs. Ashok Kumar & Ors.,(supra), reiterating the principles laid down by a Six Judge Bench of the Hon’ble Supreme Court in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Ors.(supra), Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors.,¹³ and in S.T. Muthuswami Vs. K.Natarajan and Ors. (supra), clearly prohibit the Court from interfering in the election process, once it has started. In para 13 of the judgement in S.T. Muthuswami Vs. K.Natarajan and Ors.(supra), the Supreme Court, following the aforesaid judgements, accepted the opinion expressed by the Full Bench of the Madras High Court that though no legislature can impose limitations on the Constitutional powers of the Court, it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about

¹² AIR 1988 SC 616

¹³ AIR 1978 SC 581

10.

these special rights, and to resolve election disputes after the Elections are over. The Writ Petitions should not be Entertained in such class of cases.

Therefore your lordship the counsel humbly submits to the Hon'ble Court that for the aforesaid reasons mentioned above the Court should not entertain the Writ petition.

4. Whether the notified vacation bench and notified procedure for listing was available to People's Union for Liberties and Democratic reforms or not?

It is humbly submitted to the Hon'ble bench that notified vacation bench was available for hearing the cases and also, notified procedure for listing was there. As, it can be observed from para 18 of the fact sheet, that People's Union for Liberties and Democratic Reforms moved the High Court of Nirdhan through its counsel on 29th of December 2014(during the annual winter holiday) for an urgent listing and hearing, since the election notification was to be issued on 3rd of January, 2015. The PPS of the Hon'ble Chief Justice informed the counsel that listing has been denied.

Your lordship it can be seen that listing has been denied, it does not imply that there was no listing procedure or there was no vacation bench. It has been denied because the vacation bench does not power to decide the cases challenging the Constitutional validity of an Act or any provision of any Act.

Further, for this the counsel would like to put reliance on a case in which single bench denied the hearing of the case and it was observed that only Division Bench of High Court has power to decide those cases in which Constitutional validity of any Act or provisions of the Act has been challenged.

In case of Ritesh Tripathi & Ors. Vs. State & Ors.¹⁴, the learned Single Judge observed that, the Cases challenging the vires of any act or statute or any order of legislative nature or rule or regulation made under any act or statute shall be heard by Division Bench.

¹⁴ D.B. CIVIL WRIT PETITION NO. 3068/2011.

11.

PRAYER

Wherefore it is prayed, in light of the issues raised, arguments advanced, and authorities cited, that this Hon'ble Court may be pleased to:

1. To dismiss the Writ Petition (WP No. 999/2015).
2. To dismiss the Writ Petition (WP No. 1021/2015).

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

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

(Counsel for the Second Side)