[TEAM CODE - V]

IN THE HIGH COURT OF JUDICATURE AT NIRDHAN

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 999 OF 2015

JEOPARDY CONTRACTS INC. ...PETITIONER

VERSUS

REPUBLIC OF GARIBA&ANR. ...RESPONDENTS

ALONG WITH

WRIT PETITION NO. 1021 OF 2015

PEOPLES UNION FOR LIBERTIES AND
DEMOCRATIC REFORMS ...PETITIONER

VERSUS
REPUBLIC OF GARIBA ...RESPONDENTS

5TH JUSTICE R.K. TANKHA MEMORIAL MOOT COURT COMPETITION

NATIONAL LAW INSTITUTE UNIVERSITY, BHOPAL

SUBMITTED BEFORE THE HIGH COURT OF NIRDHAN

ON BEHALF OF THE

RESPONDENTS

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STATEMENT OF JURISDICTION

It is humbly submitted before the Hon'ble High Court of Nirdhan that, the Petitioners have filed this Writ petition by virtue of Article 226 of the Constitution of India. :

ARTICLE 226. POWER OF THE HIGH COURT 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

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

THIS MEMORANDUM SETS OUT THE GROUNDS OF THE RESPONDENTS AND THE SUBMISSIONS THERE UNDER

STATEMENT OF FACTS

1. The Republic of Gariba is a sovereign federation of states with several union territories. Nirdhan is the biggest of the States in the Republic. The territory was considered as backward till 2011, when the then Governor of Nirdhan decided to fast pace the development of roads and highways so that the benefits of infrastructure development can be harvested by its largely rural populace. So as to alleviate the liquidity crunch of the region, a new scheme was devised under which highways and arterial roads were to be constructed by private parties, and amount invested by them was to be recovered as toll. Powers with this regard were delegated to all the Panchayat Samitis, to issue detailed project reports on the official websites, and a single window scheme was provided for sanction of the projects.
2. Jeopardy Contracts Inc.(Jci) entered into an agreement with Jodhpur Gaon Panchayat Samiti (JGPS) on 21.09.2011 for 115 kms of road in a Scheduled area in Nirdhan. At the time of culmination of the project, certain issues cropped up regarding land acquisition, design of the bridges, etc. due to which JGPS terminated the contract on 21.09.2013.
3. As per contractual mechanism, JCi sent a legal notice dated 11.12.2014 for invoking arbitration and also asked for the 'termination payment' for the work already done. A reply was sent via email by JGPS' counsel on 12.12.2014 stating that the matter was covered under the MadhyasthamAdhikaranAdhiniyam, 1983 and therefore the Arbitration and Conciliation Act, 1996 was not applicable and no institution arbitration can take place.
4. JGPS invoked the performance bank guarantee on 12.12.2014 by sending an email to the Maxis Bank after business hours. On 13.12.2014, JCi moved the High Court of Nirdhan by filing an urgent civil writ petition, which was directed to be listed at 10.30 am on 15.12.2014. On 15.12.2013, the High Court of Nirdhan granted "…an ad-interim ex-parte stay on invocation of bank guarantee if not already encashed…" and also directed "….all further action in this regard by all parties to remain subject to the outcome of the proceedings…." with directions to be furnished to the concerned parties. By 11 am, the orders of the copy were furnished before JGPS and Maxis Bank. However, at 10 am the Manager of 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, which instantly froze all accounts and transaction-in-progress. Therefore, till the copy of the order was

served on the Maxis Bank, the amount due under the Bank Guarantee still remained in the account of JCi.

5. The writ petition was disposed of directing the parties to seek appropriate interim remedies from the Id.Arbitrators. Arbitration proceedings took place under the 1996 Act before the Council for Infrastructure Arbitration (CIA), and objections filed by JGPS regarding maintainability were rejected and the arbitration culminated into an award dated 21.1.2015 in favour of JCi, and inter alia held JCi entitled to the money under the performance bank guarantee.
6. JGPS immediately filed a petition under Sec.34 of the Act of 1996, before the High Court of Nirdhan on 25.01.2015. In the meanwhile, on 24.01.2015, JCi wrote to Maxis Bank with a copy of the 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. On 27.01.2015, Maxis Bank informed that admission of Petition under Sec.34 amounts to a stay on the award and therefore, until the final outcome of Sec.34, it is not obliged to pay anything to JCi. It also highlighted its difficulty regarding the strict compliance mandated by the Apex Court as well as the Reserve Bank with bank guarantee norms, since the invocation of bank guarantee was prior to the stay order of the High Court. In response, JCi on 28.02.2015 cited its concern about immediate requirement of liquidity due to erosion of net worth, expenses for litigation and pressure of the Amerasian Development Bank regarding the repayment of the loan etc. However, Maxis Bank did not release any payment to JCi. Realizing the difficulty, JCi challenged the constitutional validity of Sec.34 by way of a writ petition. The High Court of Nirdhan admitted the petition, and considering the nature of issues raised, issued notice to the Id. Attorney General.
7. In the meanwhile, the Governor of the State of Nirdhan, on 20.122014, promulgated an ordinance which came into effect from 24.12.2014 which amended the Nirdhan Panchayat Act, 1994 as :

   "**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-*

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(r) in case of a member of a ZilaParishad or a Panchayat Samiti, has not passed school examination of the Board of 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."

8. People's Union for Liberties & Democratic Reforms issued a public statement that the Ordinance was replete with malice in law, it amounted to promulgating the Ordinance for 5 years instead of 6 months and it is violative of the Constitution. People's Union for Liberties & Democratic Reforms moved the High Court of Nirdhan through its counsel on 29.12.2014 (during the annual winter holidays) for an urgent hearing and listing, since the election notification was to be issued on 03.01.2015. The PPS to the hon'ble Chief Justice informed that the listing has been denied. With its counsel's affidavit, the People's Union for Liberties & Democratic Reforms moved the Hon'ble Apex Court under Art.32 on 31.01.2014 through the Vacation Officer. The Vacation Officer accepted the papers and informed the counsels of the concerned parties assembled that instructions were being awaited from the Hon'ble Chief Justice. After a wait for 48 hours, the People's Union for Liberties & Democratic Reforms sought to escalate the matter. It was informed by the Id. Vacation officer that he can only speak to the Id. Registrar. On being approached, the Id. Registrar 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 election notification. Upon listing, the Apex Court was pleased to observe that the matter can now be heard by the High Court of Nirdhan.
9. Therefore, left with no time, the People's Union for Liberties & Democratic Reforms moved the High Court of Nirdhan by filing a pro-bono petition seeking to challenge the vires of the ordinance and other reliefs.
10. The High Court of Nirdhan accepted the petition, and given the important questions raised with respect to the interpretation of Constitution were involved, notices were issued to the Attorney General as well as the Republic of Gariba. The two petitions have been directed to be listed together for final hearing.

STATEMENT OF ISSUES

1. WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS NOT UNCONSTITUTIONAL.
2. WHETHER THE GOVERNORS ORDINANCE IS CONSTITUTIONAL AND NOT ULTRA VIRES PART XI OF THE CONSTITUTION.
3. WHETHER THE REMEDY AGAINST THE GOVERNORS ORDINANCE WAS NOT AFFECTED BY THE PROCEDURE FOLLOWED BY THE VACATION OFFICER

SUMMARY OF ARGUMENTS

1. SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS NOT UNCONSTITUTIONAL.

1.1. Section 34 of the Arbitration & Conciliation Act, 1996 provides for grounds under which the Court can set aside an award. When the parties have chosen the forum of arbitration and the Arbitrator of their choice, it is not necessary to make a provision for appeal against the Award rendered by the Arbitrator.

1.2 The period of limitation prescribed under S. 34 for filing application for challenging an award has been held to be absolute and unextendable. Section 5 of the Limitation Act has been held to be not applicable.

1.3 The letter dated 24/01/2015 addressed to Maxis Bank by the Petitioner herein to return the money pertaining to the performance bank guarantee, retained by it in a fixed deposit would amount to execution of the award dated 21/01/2015 which is not permitted under Section 36 of the Act as JGPS has preferred an application under Section 34 of the Act for setting aside of the said award.

1.5 A bank guarantee is an independent contract whereby the bank undertakes to unconditionally and unequivocally abide by its terms and it cannot be affected by disputes between the parties to the underlying transaction.

1.6 Section 36 was directly challenged in a later case before the Gujarat High Court on the ground that it is 'beyond the scope and the objectives' of the Act. The argument was rejected since no unconstitutionality could be demonstrated by way of S. 36 being either beyond the scope and objectives of the Act or in contravention of any other provision of the Constitution.

2. **THE GOVERNORS ORDINANCE IS NOT ULTRA VIRES THE CONSTITUTION OF INDIA**

2.1. It is submitted to the Hon'ble Court that the Governor has issued an Ordinance well within his authority and that the Ordinance is in conformity with the Constitution. The Ordinance does not violate any Fundamental Right enshrined in Part III of the Constitution.

2.2. Article 213 (1) of the Constitution of India empowers the Governor to promulgate Ordinances of the nature prescribed in the given situation.

2.2. The urgency to promulgate an ordinance is not a justiciable matter. Hence, it could be asserted that an enquiry into the question of satisfaction of the Governor as to the need for promulgating an Ordinance is not a justiciable matter.

2.3 The Ordinance does not violate any fundamental right of the citizens

2.3.1 Right to contest election is not a Fundamental right, but a statutory right. The qualifications imposed by the Governor's Ordinance are reasonable limitations imposed by the Governor, as empowered by Article 243F of the Constitution of India.

2.3.2 The Ordinance does not violate any constitutional provision or Fundamental Right. The provisions of Ordinance are just, fair and reasonable and as per the demands of time. It does not violate any fundamental right of the citizens, specifically, Article 14 of the Constitution.

Article14 prescribes equality before law. But the fact remains that all persons are not equal by nature, attainment or circumstances, and, therefore, a mechanical equality before the law may result in injustice.

3. **THE REMEDY AGAINST THE GOVERNORS ORDINANCE WAS NOT AFFECTED BY THE PROCEDURE FOLLOWED BY THE VACATION OFFICER**

3.1. The procedure of listing of urgent matters while the court is on vacations has not affected the remedy sought by the Petitioners.

3.2. The High Court derives its power of judicial review under Article 226 of the Constitution of India. But, as laid down by the Supreme Court in several matters, this power should be used cautiously depending on the circumstances of the case.

ARGUMENTS ADVANCED

1. **Sec. 34 of the Arbitration & Conciliation Act, 1996 is not unconstitutional**

   It is humbly submitted in front of the Hon'ble High Court of Nirdhan that the automatic stay on the arbitral award released in favour of the Petitioners does not amount to unconstitutionality under Section 34 of the Arbitration & Conciliation Act, 1996.

1.1 Constitutionality of Section 34 of the Arbitration and Conciliation Act, 1996

Section 34 of the Arbitration & Conciliation Act, 1996 provides for grounds under which the Court can set aside an award. The Constitutional validity of S. 34 was challenged because of the absence of appeal against an award. The High Court of Delhi refused to uphold the plea. The Court said;[1]

There is no compulsion and or imposition by any statute which compels the parties to resort to arbitration in case of dispute between the parties. The constitutionality of the provision of Section 34 of the Act is to be examined keeping in view this important and relevant aspect in mind. When the parties have chosen the forum of arbitration and the Arbitrator of their choice, it is not necessary to make a provision for appeal against the Award rendered by the Arbitrator. The legislature has the power to specify the grounds on which an Award can be challenged and it would be permissible for the party to challenge the Award only on those grounds and no others. Therefore, if, the Parliament in its wisdom has prescribed certain grounds on which the Award can be challenged, it is not permissible for the petitioners to say that there should be a right to challenge the Award even on merits and in the absence of such a provision Section 34 of the Act is unconstitutional. The parties agree to the resolution of dispute by arbitration knowing fully well the limitations envisaged by Section 34 of the Act in the event of the Award rendered by Arbitrator being challenged. Legally speaking such an argument has no legs to stand. In fact it may be noticed that even in the earlier Act, namely, Arbitration Act, 1940, there was neither any provision for appeal against an Award nor Award could be challenged on merits i.e. it was not the function of the Court to sit in appeal over the decision of the Arbitrator. In fact there is abundance of case law to conclude that Arbitrator was the best Judge of facts and even law and

[1] *TPI Ltd. v. Union of India [2001] 3 RAJ 70 (del)*

courts were not to interfere with the Award of the Arbitrator on merits. The scope of the objections to Award was limited even under provisions of the Arbitration Act, 1940 particularly, Section 33 of the Act. The vires of Section 33 of the Act were upheld by the Apex Court.

In the case of ***Bihar State Electricity Board v. M/s. Khalsa Brothers***[2] it was held that the jurisdiction of the Court to examine correctness of the arbitration Award is limited by the provisions of Arbitration Act which are based on the general principle applicable to arbitration proceedings. An Arbitrator is a Tribunal selected by the parties and his adjudication is binding on them. If it was permissible for the Court to re-examine the correctness of the Award, the entire proceedings would amount to an exercise in futility. The grounds on which the award can be set-aside are limited by statute.

The aforesaid observations dealing with the Arbitration Act, 1940 would apply to the present Act also. We may note here that the Arbitration and Conciliation Act, 1996 is substantially based on the model law adopted by the United Nations Commission on International Trade Law (UNCITRAL) in view of the policy of liberalisation pursed by this country. It became almost imperative to model the arbitration laws of the country after the UNCITRAL Model Code. The General Assembly of the United Nations recommended that all countries give due consideration to the said Model Law in view of the desirability of uniformity of the law of arbitral procedures. In global contracts it is customary to have provision for arbitration in the event of disputes. Therefore, it is only proper that all the participating countries should have uniform laws as far as possible. That was the need for a Model Code which resulted in the UNCITRAL Model Law on arbitration and most of the countries including India brought their local laws in line with the said Model Law.

The Supreme Court has also had occasion to remark on the scope of this jurisdiction. In the recent case of ***McDermott International***[3], S.B. Sinha J. held –

"The 1996 Act makes a provision role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors

[2]*Bihar State Electricity Board v. M/s. Khalsa Brothers[1988]AIR Patna 304*

[3]*McDermott International Inc. v. Burn Standard Co. Ltd. [2006] 2 AbrLR 498, at 517*

of the arbitrators. It can only quash the award leaving the parties free to begin arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as the prefer the expediency and finality offered by it."

1.2 Period of limitation

The period of limitation prescribed under S. 34 for filing application for challenging an award has been held to be absolute and unextendable. Section 5 of the Limitation Act has been held to be not applicable. This is further reinforced by the provision in S. 36 which mandates the enforcement of the award in the manner of a decree under the Civil Procedure Code after expiry of the time prescribed by Sec. 34 for setting aside.[4]

Therefore, the provisions of Sec. 34 and Sec. 36 are time bound and aim at speedy disposal of applications arising out of arbitration proceedings. This is in consonance with the objectives of the Arbitration and Conciliation Act, 1996.

1.3 The award cannot be enforced pending the application under Sec. 34

The letter dated 24/01/2015 addressed to Maxis Bank by the Petitioner herein to return the money pertaining to the performance bank guarantee, retained by it in a fixed deposit would amount to execution of the award dated 21/01/2015 which is not permitted under Section 36 of the Act as JGPS has preferred an application under Section 34 of the Act for setting aside of the said award.

In ***National Aluminum Co. Ltd. v. Pressteel& Fabrications Pvt. Limited***,[5] *"the mandatory language of Section 34 (Section 36) of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate*

[4] *Union of India v. Popular Construction Co. [2008] 8 SCC 470*

[5] *National Aluminum Co. Ltd. v. Pressteel & Fabrications Pvt. Limited,[2004] 1 SCC 540*

on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible."

For the purpose of S. 36 the Court cannot go behind the awarded amount and deal with the processes by which the amount was arrived at. It was also held that in case the award was challenged under S. 34, it could not be executed under S. 36.[6]

There is no dispute in the proposition laid down by the Supreme Court in case of ***National Buildings***[7] that if the arbitration petition is filed within the time prescribed under section 34(3) of the Act, the impugned award cannot be executed in view of section 36 of the Arbitration and Conciliation Act, 1996.

In ***Steel Authority Of India Ltd v. AMCI Pty Ltd &Anr***[8] relying on ***National Aluminium Co. Ltd. Versus Pressteel& Fabrications*** observed, *"The Supreme Court in Pressteel& Fabrications (P) Ltd. (supra) has held that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the Court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein."*

1.4 Nature of a Bank Guarantee

In the case of ***Lucky Exports v. Access Maritime Corporation***[9] before the Delhi High Court it was held that a bank guarantee is an independent contract whereby the bank undertakes to unconditionally and unequivocally abide by its terms and it cannot be affected by disputes between the parties to the underlying transaction. It creates an irrevocable obligation on the bank to perform the contract in terms thereof and on occurrence of the event mentioned therein, the bank guarantee becomes enforceable. It is only in rare exceptional cases like: (i) a case of fraud

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[6] *National Buildings Construction Corporation Ltd. v. Lloyds Insulation India Ltd, [2005] 2 SCC 367*

[7] *Ibid*

[8] *Steel Authority of India v. AMCI[2011]3 ArbLR 502 (del)*

[9] *Lucky Exports v. Access Maritime Corporation [1998]AIR Del 252*

of egregious nature of which the bank has knowledge and (ii) allowing an encashment would result in irretrievable harm to one of the parties concerned that the court may interdict encashment of a bank guarantee.

In the case at hand, none of the exceptional circumstances exist. However, if the bank guarantee were to be encashed in its terms, JGPS, who is not a party to the above matter would be entitled to the same in the event of non-performance of the contract entered into between JGPS and JCi. In light of the disputes that arose between the two parties, JGPS invoked the bank guarantee on 15/12/2014 after business hours which could not be encashed until the next day. Due to unavoidable circumstances, namely the hacking incident, Maxis Bank could not encash the same as the accounts were frozen and the money continued to remain in the account of JCi. Subsequently, the parties referred the matter for arbitration and an award dated 21/01/2015 came to be passed. The award entitled JCi to the bank guarantee but owing to the provisions of Section 36 the same could not be transferred to JCi as that would amount to enforcing the award before the time limit of 3 months had expired and/or the application under Section 34 was rejected. Therefore, Maxis Bank cannot be held liable for merely following the process prescribed by the law.

1.5 Constitutionality of Section 36

Section 36 was directly challenged in a later case before the Gujarat High Court on the ground that it is *'beyond the scope and the objectives' of the Act. The argument was rejected since no unconstitutionality could be demonstrated by way of S. 36 being either beyond the scope and objectives of the Act or in contravention of any other provision of the Constitution. The court was in agreement with the legislative wisdom of allowing for enforcement of arbitral award only after the time period in S. 34 is over so as to give the aggrieved party a reasonable opportunity to set aside the award.'*[10]

[10] *Madhavpura Mercantile Co-op Bank Ltd. v. Shah Bhimani Chemicals Pvt. Ltd. [2009] 2 ArbLR 287, 291 (Guj)*

2. The Governor's Ordinance is constitutional and is not it ultra vires to Part IX of the Constitution.

It is submitted to the Hon'ble Court that the Governor has issued an Ordinance well within his authority and that the Ordinance is in conformity with the Constitution. The Ordinance does not violate any Fundamental Right enshrined in Part III of the Constitution.

2.1 Governor has the power to promulgate an ordinance:

Article 213 (1) of the Constitution of India empowers the Governor to promulgate provides,

"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 ordinances as the circumstances appear to him to require: …"

2.2 The urgency to promulgate an ordinance is not a justiciable matter.

In the case of ***Lakhi Narayan Das v Province of Bihar***[11], the Supreme Court had held,

"The emergency of the situation which leads to the promulgation of an ordinance by the Governor cannot be questioned by any authority and the existence of such necessity is not a justifiable matter which the courts could be called upon to determine by applying objective tests."

In another case, ***S.K.G. Sugar Ltd. V. State of Bihar***[12], the Supreme Court stated as regards Governor's satisfaction to make an ordinance under Art. 213 that

"the necessity of immediate action and of promulgating an ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole judge as to the existence of the circumstances necessitating the making of an ordinance. His satisfaction is not a justiciable matter. It cannot be questioned on the ground of error of judgment or otherwise in a court."

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[11] *Lakhi Narayan Das v Province of Bihar, [1950] Supp SCR 102*

[12] *S.K.G. Sugar Ltd. V. State of Bihar[1974]AIR SC 1533*

Hence, it could be asserted that an enquiry into the question of satisfaction of the Governor as to the need for promulgating an Ordinance is not a justiciable matter.

2.3 The Ordinance does not violate any fundamental right of the citizens

2.3.1 Right to contest election is not a Fundamental right, but a statutory right.

In the case of ***Jamuna Prasad Mukhariya v. Lachhi Ram***[13], the Supreme Court had observed,

"…. The right to stand as a candidate and contest an election is not a common law right, It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by Statute…."

As held by Supreme Court in ***N.P. Ponnuswami v. Returning Officer, Namakkal Constituency***[14],

"The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it."

It is contended that the qualifications imposed by the Governor's Ordinance are reasonable limitations imposed by the Governor, as empowered by Article 243F of the Constitution of India. Article 243F of the Constitution of India states the grounds for disqualification for a person being chosen as a member of the Panchayat. The grounds for disqualification are as follows:

(1) A person shall be disqualified for being chosen as, and for being a member of a Panchayat-

(a) If he is so disqualified by or under any law for the time being in force for the purposes of election to the Legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty one years.

(b) If he is so disqualified by or under any law made by the Legislature of the State.

(2) If any question arises as to whether a member of a Panchayat has become subject to any of the disqualifications mentioned in clause(1) , the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide.

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[13] *Jamuna Prasad Mukhariya v. Lachhi Ram[1955] 1 SCR 608*

[14] *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency [1952] SCR 218*

As correctly laid down in ***Mukesh Kumar Ajmera v State of Rajasthan***[15], "*Article 243F permits a provision being raised by the State legislature, laying down disqualification of being chosen to continue as a member of the Panchayat Raj Institution. Conditions could be laid down by the State Legislature while legislating a law in this regard."*

Thus, it is submitted that the ordinance promulgated by the Governor is a mere means to set up qualifications for the post of Sarpanch, which are needed to be amended due to proximity of time.

2.3.2 The Ordinance does not violate any constitutional provision or Fundamental Right.

It is further submitted to the Hon'ble Court that the provisions of Ordinance are just, fair and reasonable and as per the demands of time. It does not violate any fundamental right of the citizens, specifically, Article 14 of the Constitution.

Article14 prescribes equality before law. But the fact remains that all persons are not equal by nature, attainment or circumstances, and, therefore, a mechanical equality before the law may result in injustice[16]. As stated in the case of ***Ashutosh Gupta v. State of Rajasthan***[17], *"to apply the principle of equality in a practical manner, the courts have evolved the principle that if the law in question is based on rational classification, it is not regarded as discriminatory."*

Article 14 forbids class legislation; it does not forbid reasonable classification by the Legislature for the purpose of achieving specific ends.

In ***LaxmiKhandsari v. State of Uttar Pradesh***[18], the classification to be reasonable was said to have fulfilled the following two tests:

(1) It should not be arbitrary or evasive. It should be based on an intelligible differentia, some substantial distinction, which distinguishes persons or things grouped together in the class from others left out of it.

(2) The differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question.

In ***K. Thimmappa v. Chairman, Central Board of Directors***[19], the Supreme Court observed,

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[15]*Mukesh Kumar Ajmera v State of Rajasthan [1997] AIR Raj 250*

[16]*M.P. Jain, Constitution of India, 6th Edition, 2008*

[17]*Ashutosh Gupta v. State of Rajasthan[2002] 4 SCC 34*

[18]*Laxmi Khandsari v. State of Uttar Pradesh[1981] 2 SCC 600*

"When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by the Court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of legislation."

Again, in ***Union of India v. M.V. Valliapapan***[20], the Supreme Court observed,

"It is settled law that differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution."

A Sarpanch of the panchayat is allocated funds for the development of the village. Handling such funds can be better done by those who are educated and can understand the transactions in which they are dealing. Any embezzlement cannot be excused on the grounds on illiteracy.

There is no closed category of classification; the extent, range and kind of classification depend on the subject-matter of the legislation, the conditions of the country, the economic, social and political factors at work at a particular time.[21]

In the given matter, the objective of the legislation is to promote and encourage literacy amongst the gram sabha, which has a direct nexus to making a qualification of being literate to contest in elections, the said provision creates an incentive to get educated.

Thus, the intelligible differentia distinguishes the groups of people on a basis that has a direct nexus to the objective of making such a classification.

Certain other ordinances mentioning qualifications to contest panchayat elections have been issued earlier. Some of them include to not have more than two children, or to have functional sanitary toilet in a working condition. Ordinances have stated that the Candidates shall give an undertaking that neither they nor their family members shall defacet in the open. Such ordinances have proved to be progressive and not a violation of any fundamental or constitutional right.

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[19] *K. Thimmappa v. Chairman, Central Board of Directors[2001]2 SCC 259*

[20] *Union of India v. M.V. Valliapapan[1999] 6 SCC 259, 269*

[21] *M. P. Jain, Constitution of India, 6th Edition, 2008, pg 858*

A similar stand was taken by the Supreme Court in ***Javed v State of Haryana***[22], a landmark case in which qualifications were set out for contesting election in the Panchayati Raj system under Part IX of the Constitution. An amendment to the Haryana Panchayat Raj Act 1994 provided for disqualification to contest the election for a person who is having more than two children. When challenged, it was held that the disqualification on the right to contest the election by having more than two children does not contravene any fundamental right nor it does cross the limits of reasonability. The court held, *"Rather it is a disqualification conceptually devised in national interest. It was further observed that right to contest elections is neither a fundamental right nor a common law right. It is a right conferred by Statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an offence in Panchayat may be said to be constitutional right – a right to contest originating in the Constitution and given shape by the Statute. But even so, it cannot be equated to a fundamental right. There is nothing wrong in the same statute which confers a right to contest election also to provide for the necessary qualification without which a person cannot offer his candidature for an elective office and also to provide for disqualification which would disable a person from contesting for or holding an elective statutory office."*

Thus, if a reasonable restriction is placed on any fundamental right for some ostensible interest of the society, that would not mean violation of the principles of fundamental rights, as also stated in ***People's Union for Civil Liberties v. Union of India***.[23]

Hence, as mentioned in ***Jagjit Singh v. State***[24], a reasonable classification is only not permitted but is necessary if society is to progress. Therefore, it is submitted that the qualification laid down in the Ordinance is one of such kind and should not be struck down on the grounds of unreasonableness.

Thus, as held by the Supreme Court in ***Anuj Garg v. Hotel Association of India***[25], "the Constitutional validity of law is to be decided as per societal conditions prevalent at relevant time. The changed social psyche and expectations are important factors to be considered in

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[22] *Javed v State of Haryana[2003] 8 SCC 369*

[23] *People's Union for Civil Liberties v. Union of India. [2004]2 SCC 476*

[24] *Jagjit Singh v. State [1954]AIR Hyd 28*

[25] *Anuj Garg v. Hotel Association of India AIR [2008] SC 663*

upkeep of law. In the presiding conditions, the classification holds relevant and necessary to keep pace with dynamic development in villages.

3. The remedy against the Governor's ordinance was not affected by the procedure followed by vacation officer.

It is humbly submitted to the Hon'ble Court of Nirdhan that the procedure of listing of urgent matters while the court is on vacations has not affected the remedy sought by the Petitioners.

The High Court derives its power of judicial review under Article 226 of the Constitution of India. But, as laid down by the Supreme Court in several matters, this power should be used cautiously depending on the circumstances of the case.

In ***Lakshmi CharanSen v. A.K.M. Hassan Uzzaman***[26], the Supreme Court has observed,

"… though the High Court did not lack the jurisdiction to entertain the writ petition and to issue appropriate directions therein, no High Court is the exercise of its power under Art. 226 of the Constitution should pass any orders, interim or otherwise which had the tendency or effect of postponing an election, which is reasonably imminent and in relation to which the writ jurisdiction is invoked. The High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass orders or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution."

Non-interference with the process of election is a matter of judicial policy, a matter of self-imposed discipline, and not a matter of judicial powers.

Also, in ***State of Himachal Pradesh v. Students's Parent, Medical College, Shimla***[27], the Supreme Court has cautioned that public interest litigation is a weapon which has to be used with

[26] *Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman[1985] 4 SCC 689*

[27] *Himachal Pradesh v. Students's Parent, Medical College, Shimla[1985] 3 SCC 169*

great care and circumspection and that the judiciary has to be careful to see that under the guise of redressing a public grievance it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature.

The Governor's Ordinance was passed on 20th December 2014, whereas the Hon'ble Apex Court was moved on 31st December 2014. It is to be taken note that the election notification would be passed on 3rd January 2015. The interference by any court, once the election process begins, would lead to delay in the election procedure. In such circumstances, the courts have resisted in taking last minute actions and interrupting with the process on which the basic concept of democracy relies.

Similar stand was taken by a High Court of Rajasthan when a petition on same grounds was filed before it, saying that once the electoral process for panchayat elections had begun, it cannot intervene at that stage.

It is further contended that proper procedure for listing during holidays is established in the Courts. It is the discretion of the chief justice whether the petition is considered urgent enough to be listed during holidays or no. The court might not have felt the urgency to hear because it was already too late.

Arguendo, even if there had been a delay in processing, it would not have affected the remedy to the Petitioners, as no action would have been taken at this short a notice.

Thus, it is submitted that the remedy against ordinance, if any, would not have changed the decision of the Court or affected it adversely in any other manner.

PRAYER

The Respondent submits that the above grounds are without prejudice and alternative to one another and seek leave of this Hon'ble Court to add, amend or alter the same if and when need arises.

Wherefore in light of the facts mentioned, issues raised, arguments advanced and authorities cited, it is humbly prayed before this Hon'ble High Court of Nirdhanthat it may be pleased to:

a. Dismiss Writ Petition Nos. 999 of 2015 and 1021 of 2015;
b. Costs of the Petitions be provided for;
c. Such other and further reliefs that this Hon'ble Court may deem fit to grant in the above facts and circumstances.

All of which is most respectfully submitted and to pass any such judgment as the Court may deem fit.

And for this act of kindness the Respondents shall as duty bound ever humbly pray.

Sd/-

Counsel for the Respondent