

TEAM CODE-T

IN THE HIGH COURT OF JUDICATURE AT NIRDHAN

WRIT PETITION NO. 999 OF 2015

---IN THE MATTER OF---

1. JCi.....Petitioner 1

Versus

1. Maxis Bank.....Respondent 1

2. Republic of Gariba.....Respondent 2

WRIT PETITION NO. 1021 OF 2015

---IN THE MATTER OF---

1. People's Union for Liberties and Democratic ReformsPetitioner 1

Versus

1. Republic of Gariba.....Respondent 1

**MEMORANDUM FILED AND SUBMITTED BY THE
COUNSELS FOR THE RESPONDENTS**

TABLE OF CONTENTS

1. INDEX OF AUTHORITIES

a) LIST OF STATUES_____	ii
b) LIST OF ABBREVIATIONS AND ACRONYMS_____	ii
c) BOOKS AND COMMENTARIES_____	iii
d) DICTIONARIES_____	iii
e) ELECTRONIC MEDIUM _____	iii
f) LIST OF CASES_____	iv
2. STATEMENT OF JURISDICTION_____	1
3. STATEMENT OF FACTS _____	2
4. STATEMENT OF ISSUES_____	3
5. SUMMARY OF ARGUMENTS_____	4
6. ARGUMENTS ADVANCED_____	6
I. Whether the WP 999/2015 and WP 1021/2015 is maintainable or not?_____	6
II. Whether Section 34 of the Arbitration and Conciliation Act 1996 is constitutionally valid or not?_____	8
III. Whether the Ordinance, which was promulgated on 20th December, 2014 by the Governor of the State of Nirdhan is constitutionally valid or not?_____	13
IV. Whether non-availability of a notified vacation bench during holidays and non-availability of a notified procedure for listing when the Court is not in session is unconstitutional?_____	19
7. PRAYER_____	20

INDEX OF AUTHORITIES

LIST OF STATUES

- ↻ Arbitration and Conciliation Act, 1996
- ↻ The Constitution of India
- ↻ The General Clauses Act, 1897
- ↻ Representation of People's Act, 1951

LIST OF ABBREVIATIONS AND ACRONYMS

1. AIR : All India Reporter
2. Anr.: Another
3. Art. : Article
4. Edn. /ed. : Edition
5. Hon'ble : Honourable
6. ILR.: Indian law report
7. Ltd. : Limited
8. Ors.: Others
9. p. : Page
10. para. : Paragraph
11. rep. : reprint
12. SC : Supreme Court
13. SCC : Supreme Court Cases
14. Sec. ; u/ s. : Section; under Section
15. v. : versus

BOOKS AND COMMENTARIES

1. Markanda P.C, '*Law Relating to Arbitration and Conciliation*', 8th Ed., Lexis Nexis, Haryana.
2. Justice Malik S.B, '*Commentary on the Arbitration and Conciliation Act*', 6th Ed., Universal Law Publishing Co., New Delhi.
3. Basu Durga Das, '*Commentary On The Constitution Of India*', 8th Ed.,2008, Vol. 1,3,5,6,7, Lexis Nexis Butterworths Wadhwa Nagpur, New Delhi.
4. Dr. Singhvi L.M., '*Constitution of India*', 2nd Ed.,2006, Modern Law Publications, New Delhi.
5. Jain M.P., '*Indian Constitutional Law*', 7th Ed., Lexis Nexis, Haryana.

DICTIONARIES

6. Bryan A. Garner, '*Black's Law Dictionary*', 9th Ed., 2009, West Group.
7. Greenberg Daniel, '*Strouds Judicial Dictionary of Words and Phrases*', 7th Ed. Sweet and Maxwell Co.
8. Ramanatha Aiyar P., '*Concise Law Dictionary*', 3rd Ed., Rep. 2006, Wadhwa, Nagpur.
9. *Wharton's Law Lexicon*, 15th Ed., Rep. 2011, Universal Law Publishing Co., New Delhi.

ELECTRONIC MEDIUM

1. <http://www.manupatra.com>
2. <http://www.jstor.com>
3. <http://www.indiankanoon.com>
4. <http://www.judis.nic.in>
5. <http://www.legalsutra.com>

LIST OF CASES

1. **Bharat Petroleum Corpn. Ltd v. Maddula Ratanvalli**, (2007) 6 SCC 81
2. **Bhavesh D. Parish And Others Vs. Union of India And Another**, (2000) 5 SCC 471.
3. **Board of Trustees, Ayurvedic and Unani Tibia College, Delhi v. State of Delhi & Anr.**, AIR 1962 SC 458
4. **Boddula Krishnaiah v. State Election Commission** (1955) 1 SCR 608
5. **Charanjit Lal Chowdhury v. The Union of India**, 1950 SCR 869
6. **Collector of Customs, Madras v. Nathella Sampathu Chetty**, AIR 1962 SC 316
7. **Commissioner of Sales Tax, M.P. v. Radhakrishan**, (1979) 2 SCC 249
8. **Election Commission of India Through Secretary Vs. Ashok Kumar & Ors.**, (2000) 8 SCC 216.
9. **Hans Muller v. Supdt.**, AIR 1995 SC 367
10. **Isha Beevi v. Tax Recovery Officer**, AIR 1975 SC 2135
11. **J.P. Unni Krishnan v. State of Andhra Pradesh**, AIR 1993 SC 2178.
12. **Javed v. State of Haryana**, AIR 2003 SC 3057.
13. **Kaylan Singh v. State of U.P**, AIR 1962 SC 1183
14. **M. Anasuya Devi v. M. Manik Reddy**, (2003) 8 SCC 565
15. **M. Nagraj v. Union of India**, AIR 2007 SC 71.
16. **Mafatlal v. U.O.I**, (1997) 5 SCC 536
17. **Mohanlal Tripathi v. District Magistrate, Rae Bareilly**, AIR 1993 SC 2042
18. **Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors.**, (1978) 1 SCC 581
19. **Mst. Swarwati v. Wall**, AIR 1935 All 456

20. **Mukesh Kumar Ajmera v. State of Rajasthan**, AIR 1997 Raj 250
21. **Mylapore Club v. State of Tamil Nadu**, (2005) 12 SCC 752
22. **Namit Sharma v. Union of India**, (2013) 1 SCC 745
23. **Orissa Mining Corporation Ltd. v. Ministry of Environment and Forest and Ors.**, (2013) 6 SCC 476
24. **P.A. Transport Corpn. Ltd. v. V. K. Velayudham & Sons**, (1993) 1 MLJ 249 (Mad)
25. **R.K. Garg v. Union of India**, AIR 1981 SC 2138
26. **R.N. Jadi and Brothers and Ors. v. Subhashchandra**, AIR 2007 SC 2571
27. **Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises**; (1999) 9 SCC 283
28. **Ram Beti v. District Panchayat Rajadhikari**, AIR 1998 SC 1222.
29. **Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors**, AIR 1958 SC 538
30. **Ramavtar Meena & Anr. v. State of Rajasthan & Ors.**, D.B. CIVIL WRIT PETITION NO.1/2015
31. **S.T. Muthusami v. K. Natarajan and Ors.**, AIR (1988) SC 616
32. **Smt. Rani Kusum v. Smt. Kanchan Devi & Ors.**, AIR 2005 SC 3304
33. **State of Rajasthan v. Mukund Chand**, AIR 1964 SC 1633
34. **Steel Authority of India Ltd. v. National Union Water Front Workers**, AIR 2001 SC 3527.
35. **Suresh Kumar Koushal and Anr. v. NAZ Foundation**, AIR 2014 SC 563
36. **Union of India v. Elphinstone Spn. & Wvg. Co.**, (2001) 4 SCC 139
37. **Union of India v. Rallia Ram**, [1964] 3 SCR 164
38. **Venkata v. State of A.P**, AIR 1985 SC 724
39. **Virender Singh Hooda and Ors. v. State of Haryana and Anr**, AIR 2005 SC 137

STATEMENT OF JURISDICTION

The respondents have approached this Hon'ble Court under Article 226¹ of the Constitution in response to WP No. 999/2015 and WP No. 2021/2015 as the *vires* of Section 34 of the Arbitration and Conciliation Act, 1996 and the *vires* of the Ordinance promulgated on 20.12.14 amending the Nirdhan Panchayati Raj Act, 1994 has been challenged in the aforementioned petitions respectively. The two matters have been listed together by this Hon'ble Court. The Counsels for the respondents accept and submit to the jurisdiction of this Court.

¹.226 (1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises 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*, *prohibition*, *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.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

STATEMENT OF FACTS

❖ **Facts of Writ Petition No. 999/2015**

- On 21.9.2011, a company named Jeopardy Contracts Inc.[JCI] entered into agreement with Jodhpur Goan Panchayat Samiti [JGPS] which was terminated by JGPS on 21.9.2013
- On 12.12.2014, JGPS invoked the performance bank guarantee by sending email to the Maxis bank which could not be released due to some reason and on 13.12.2014, the High Court of Nirdhan granted an interim stay order on the bank guarantee.
- Subsequently, the High Court directed the parties to seek interim remedies from Id. Arbitrator under the Act of 1996. An award culminated in favor of JCI on 21.1.2015.
- Before the award could be enforced, JGPS challenged the award U/s. 34 of the Act of 1996 before the High Court of Nirdhan on its original side.
- On 28.1.2015, JCI challenged the constitutional validity of Sec. 34 of the Act of 1996 by way of Writ petition being WP 999/2015.

❖ **Facts of Writ Petition No. 1021/2015**

- On 20.12.2014, Governor of Nirdhan promulgated an Ordinance which came into effect from 24.12.2015 which provided for the educational qualifications of a Panch or a member of the Panchayat
- On 29.12.2014, the Petitioner moved the High Court of Nirdhan for listing and hearing during winter break but listing was not granted. On 31.12.2014, the petitioner moved the Supreme Court under Art. 32 through the “Vacation Officer”.
- No listing was granted till the issuance of election notification. Upon listing the Apex Court was pleased to observe that the matter can be heard by High Court of Nirdhan
- People’s Union immediately moved the High Court filing a pro-bono petition WP(C) No.1021/2015 for challenging the *vires* of the Ordinance and for certain other reliefs.

STATEMENT OF ISSUES

- I. Whether the WP 999/2015 and WP 1021/2015 is maintainable or not?**
- II. Whether Section 34 of the Arbitration and Conciliation Act, 1996 is constitutionally valid or not?**
- III. Whether the Ordinance, which was promulgated on 20th December, 2014 by the Governor of the State of Nirdhan is constitutionally valid or not?**
- IV. Whether non-availability of a notified vacation bench during holidays and non-availability of a notified procedure for listing when the Court is not in session is unconstitutional?**

SUMMARY OF ARGUMENTS

I. Whether the WP 999/2015 and WP 1021/2015 is maintainable or not?

- It is submitted that the Writ Petition no. 999/2015, challenging the *vires* of Section 34 of the Arbitration and Conciliation Act, 1996 is not maintainable as the constitutional validity of a statute or a provision can only be challenged if it violates any constitutional provision and not on the ground that it causes hardship or is unreasonable.
- It is submitted that Writ Petition no. 1021/2015 is not maintainable as the Petitioner does not have a *locus standi* in the instant case because the impugned Ordinance is not affecting any of their rights. Further, the impugned Ordinance is not violating Part III of the Constitution. It is also submitted that the Writ is not maintainable as the Court cannot interfere in the election procedure, once it has commenced.

II. Whether Section 34 of the Arbitration and Conciliation Act 1996 is constitutionally valid or not?

It is most humbly submitted before this Hon'ble Court that Section 34 is constitutionally valid. The grounds for the submission are-

- That Section 34 does not amount to introduction of "litigation" in the arbitral process as the grounds of challenging the award and scope of Sec. 34 is very limited.
- That grant of automatic stay is not bad in law because if the petition has been challenged under one of the grounds mentioned under Sec. 34 then it is important that the Court interferes in the arbitral proceedings to prevent miscarriage of justice.
- That the arbitrator is appointed by the parties and can misconduct the proceedings or act arbitrarily and therefore, the interference of the Courts is necessary.
- That the delay caused in the enforcement of award is minimal and can be compensated and does not violate country's bilateral and multilateral commitments under various conventions and investment treaties.

- That whenever the *vires* of a provision is challenged then the presumption is in favour of the constitutionality of the statute.

III. Whether the Ordinance, which was promulgated on 20th December, 2014 by the Governor of the State of Nirdhan is constitutionally valid or not?

- That the Ordinance is not *ultra vires* Part IX of the Constitution as Art. 243F allows qualifications to be laid down for panchayat elections. It is not marginalizing women and the weaker sections of the society as different qualifications have been laid down taking into consideration the literacy standards of different areas.
- That the retroactive effect of the Ordinance does not affect its constitutional validity.
- That the Ordinance is not in violation of aspects of basic structure like the preamble, single citizenship and equal participation in democratic government and it does not abridge any fundamental and constitutional rights.
- That this Ordinance does not abridge valuable fundamental and constitutional rights as right to contest elections is a statutory right and not a fundamental right.
- That the Ordinance is not a colourable exercise of authority by the State Government as the intention of the law maker cannot be questioned.

IV. Whether non-availability of a notified vacation bench during holidays and non-availability of a notified procedure for listing when the Court is not in session is unconstitutional?

- It is submitted that non - availability of a notified procedure for listing and a notified vacation bench during the holidays does not violate any constitutional provision and is thus, not unconstitutional.
- It is further submitted that although there is no notified procedure for listing during the holidays but an informal procedure exists where depending on the urgency of the matter, listing is granted.

ARGUMENTS ADVANCED

I. Whether the WP 999/2015 and WP 1021/2015 is maintainable or not?

It is most humbly submitted before this Hon'ble Court that both the Writ petitions are not maintainable. Following are the grounds for the submission.

A. That WP 999/2015 is not maintainable.

- It is submitted that the instant Writ petition is not maintainable as Section 34 does not violate any constitutional provision and therefore, its constitutionality cannot be challenged. It is also submitted that the constitutionality of a statute is determined by the Courts on the ground of violation of any justiciable provision of the Constitution and no such provision has been violated by Section 34.
- It is further submitted that a statute cannot be challenged on the ground that it causes hardship or is unreasonable. The *vires* of a statute can only be challenged if it goes against a constitutional provision. The Apex Court in the case of **Collector of Customs, Madras v. Nathella Sampathu Chetty**² held that if a statute is valid, it cannot be declared invalid if it is administered unreasonably.

It was also held in the case of **Bharat Petroleum Corpn. Ltd v. Maddula Ratanvalli**³ by Hon'ble Court that "*a statute cannot be declared ultra vires on the sole ground that such statute causes hardship*". In the case **Mafatlal v. U.O.I**⁴, the Hon'ble Court held that "*Power under Art. 226 has to be exercised to effectuate the regime of law and not for abrogating it*". Thus, the *vires* of Section 34 of the Arbitration and Conciliation Act, cannot be challenged on any ground and therefore, the instant Writ petition is not maintainable.

² AIR 1962 SC 316

³ (2007) 6 SCC 81

⁴ (1997) 5 SCC 536

B. That WP 1021/2015 is not maintainable on the following grounds.

- It is submitted that People's Union for Liberties & Democratic Reforms are having no *locus standi* in the instant case as no rights of People's Union for Liberties & Democratic Reforms have been infringed and, a Writ petition by a person not aggrieved is not maintainable.⁵In a case **Hans Muller v. Supdt.**⁶, the Apex Court held that, a Court will not listen to an objection made to the constitutionality of an Act by a party whose right it does not affect and who has consequently no interest in defeating it. It is only the person whose rights have been infringed who may apply for the Writ of *mandamus* except in the cases where the doctrine of public interest litigation applies.⁷ It was also held in **Kalyan Singh's case**⁸ that the right to maintain a petition postulates a subsisting personal right in the claim which the petitioner makes and in the protection of which he is personally interested in. Hence the Writ is not maintainable.
- It is submitted that right to contest elections is a legal right under Section 62 of the Representation of People Act, 1951 and a constitutional right under Article 326. Under the impugned Ordinance the distinction made on educational basis for election of a person as a Sarpanch or a member is not violating Art. 14 or any other fundamental right because it has been held that "*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*"⁹.

⁵ P.A. Transport Corpn. Ltd. vs. VS. K. Velayudham & Sons, (1993) 1 MLJ 249 (Mad)

⁶ AIR 1995 SC 367

⁷ Isha Beevi vs. Tax Recovery Officer, AIR 1975 SC 2135

⁸ Kaylan Singh vs. State of U.P, AIR 1962 SC 1183

⁹ *Jumuna Prasad Mukhariya v Lachhi Ram* (1955) 1 SCR 608, NP Punnuswamy vs.

Returning Officer, (1952) 1 SCR 218; Jyoti Basu vs. Debi Ghoshal, (1982) 3 SCR 318

- It is submitted that the Court cannot interfere in an election process once it has commenced. In the case of **Boddula Krishnaiah v. State Election Commission**¹⁰ it was held by the Supreme Court that by virtue of Art. 243(O) of the Constitution, once an election process has been set in action, the Court, in a Writ proceeding, would not be justified in interfering with the election proceeding or in directing a fresh poll on any ground whatsoever. The only remedy will be before the statutory machinery set up under Art. 243(O)(2). Hence, the instant Writ petition challenging the Ordinance after issuance of election notification is not maintainable.

II. Whether Section 34 of the Arbitration and Conciliation Act, 1996 is constitutionally valid or not?

It is most humbly submitted before this Hon'ble Court that Section 34 of the Arbitration and Conciliation Act, 1996 is constitutionally valid. Following are the grounds for the submission.

A. That Section 34 does not amount to introduction of "litigation" in the arbitral process as the grounds of challenging the award and scope of Sec. 34 is very limited.

It is submitted that no frivolous litigation can take place under Sec. 34 of the Act of 1996 as the grounds on which an award can be challenged are very limited. It is also submitted that the Court does not have *suo motu* power unless when the award on the face of it is a nullity, or if the award directs a party to do an act which is prohibited by law or is otherwise void or illegal. Thus, the exercise of *suo motu* power of the Court is drastically curtailed. It is further submitted that Section 5 of the Act curtails the intervention of the Court but also allows the Court to interfere where it has been provided for in the Act. It was held in the case of **M. Anasuya Devi v. M. Manik Reddy**¹¹ that, "*Undisputedly, an*

¹⁰ AIR 1996 SC 1595

¹¹ (2003) 8 SCC 565

application for setting aside the award would not lie on any other ground, which is not enumerated in Sec. 34 of the Act”

B. That grant of automatic stay is not bad in law because if the petition has been challenged under one of the grounds mentioned under Sec. 34 then it is important that the Court interferes in the arbitral proceedings to prevent miscarriage of justice.

It is submitted that automatic stay imposed on the enforcement of the award once a petition under Sec 34 has been challenged is justified as a petition U/s 34 can be filed only on limited conditions and if any of these conditions are fulfilled then the Court should definitely interfere in the arbitral process as the abstinence of the Court might result in grave injustice.

It is further submitted that if the award is allowed to be enforced even when it has been challenged under this Section then the rights of the party against whom the award has been decided would be affected and if the subject matter of the award has been disposed of during the pendency of application u/S 34 then the rights of third party would also be jeopardized. Thus, it is necessary that *status quo* be maintained while an award has been challenged u/S 34 of the Act.

It is also submitted that the possibility of the abuse of the statute otherwise valid does not impart to it any invalidity.¹² It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.¹³

¹² R.K. Garg vs. Union of India, AIR 1981 SC 2138; Union of India vs. Elphinstone Spn. & Wvg. Co., (2001) 4 SCC 139.

¹³ Ram Krishna Dalmia vs. Shri Justice S.R. Tendolkar and Ors.,(CB), AIR 1958 SC 538

C. That the arbitrator is appointed by the parties and can misconduct the proceedings or act arbitrarily.

It is submitted that the right of parties to choose their own arbitrator is recognized as one of the pillars of the principle of ‘party autonomy’ as envisaged by the UNITRAL model law and incorporated u/S 11 of the Arbitration and Conciliation Act, 1996. Since the Arbitrator is an individual appointed by the parties, therefore, it is necessary to ensure that the arbitration proceedings have not been misconducted by him or he has not acted unreasonably in favor of one party. Thus, Section 34 provides a recourse to the parties to approach the Courts in such a case.

It is also submitted that apart from Section 34, no other Section provides any remedy on the grounds that are mentioned in Section 34. It is necessary to have a forum where the decision of the arbitrator can be challenged and Section 34 provides that forum.

The Supreme Court in the case of **Union of India v. Rallia Ram**¹⁴ held that, “*The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or willful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous.*”

D. That the delay caused in the enforcement of award is minimal and can be compensated.

It is submitted that delay caused in the enforcement of award when the petition is challenged under Sec. 34 is justified as it is better to provide justice at a slow pace than to do injustice in haste. This is also justified by the Latin maxim ‘*Justice hurried is justice buried*’. The Apex Court in the case of **R.N. Jadi and Brothers and Ors.**

¹⁴ [1964] 3 SCR 164; Mst. Swarwati vs. Wall, AIR 1935 All 456; Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises, (1999) 9 SCC 283

v. Subhashchandra¹⁵ held that, “*While justice delayed may amount to justice denied, justice hurried in some cases may amount to justice buried.*” It is further submitted that any injury due to such delay can be compensated by the order of the Court. Thus, such delay does not render Sec. 34 constitutionally invalid.

E. That the delay caused does not violate country’s bilateral and multilateral commitments under various conventions and investment treaties.

It is submitted that the Arbitration and Conciliation Act, 1996 is based on the Model Law (a set of 36 Articles) which was drafted to govern all international arbitrations by a working group of the U.N. Commission of the International Trade Law on June 21, 1985. The preamble of the Act of 1996 also provides that, ‘it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law.’ Article 34 of the Model Law provides the same grounds for challenging the award as provided under Section 34 of the Act of 1996. Thus, Section 34 is in consonance with the international law on which the Act of 1996 is based and is not violative of Gariba’s international commitments.

F. That whenever the *vires* of a provision is challenged then the presumption is in favour of the constitutionality of the statute.

It is submitted that every legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality. This is founded on the premise that the legislature, being a representative body of the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution.¹⁶ It is further submitted that a statute or a provision should be presumed to be valid unless proved otherwise. It was held in the case of **Ram Krishna Dalmia v. Shri Justice S.R.**

¹⁵ AIR 2007 SC 2571; Smt. Rani Kusum vs. Smt. Kanchan Devi & Ors., AIR 2005 SC 3304

¹⁶ Suresh Kumar Koushal and Anr. vs. NAZ Foundation, AIR 2014 SC 563

Tendolkar and Ors.¹⁷ that, “*there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.*”

Another significant canon of determination of constitutionality is that the Courts would be reluctant to declare a law invalid or *ultra vires* on account of unconstitutionality. The Courts would accept an interpretation, which would be in favour of constitutionality rather than the one which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the Courts. The Courts would preferably put into service the principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. These are the principles which clearly emerge from the consistent view taken by this Court in its various pronouncements including the recent judgment in **Namit Sharma v. Union of India**¹⁸.

It is also submitted that a statute cannot be struck down merely because the Court thinks it to be arbitrary or unreasonable. Any such ground of invalidity must be related to a constitutional provision. Challenge on ground of wisdom of legislature is not permissible as it is for the legislature to balance various interests.¹⁹

¹⁷ AIR 1958 SC 538; Commissioner of Sales Tax, M.P. vs. Radhakrishan, (1979) 2 SCC 249

¹⁸ (2013) 1 SCC 745

¹⁹ Mylapore Club vs. State of Tamil Nadu, (2005) 12 SCC 752

III. Whether the Ordinance, which was promulgated on 20th December, 2014 by the Governor of the State of Nirdhan is constitutionally valid or not?

It is most humbly submitted before this Hon'ble Court that the Ordinance is constitutionally valid. Following are the grounds for the submission.

A. That the Ordinance is not *ultra vires* Part IX of the Constitution and is not marginalizing women and the weaker sections of the society.

It is submitted that Article 243F permits the State Legislature to lay down disqualification of being chosen and to continue as a member of the Panchayati Raj Institution. Hence, conditions could be laid down by the State Legislature while legislating a law in this regard.²⁰

That in **Javed v. State of Haryana**,²¹ it was held that *“right to contest an election 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 to the Constitution, a right to contest an election for an office in Panchayat may be said to be a constitutional right- a right originating from the Constitution and given shape by a statute. There is nothing wrong in the same statute which confers a right to contest an election also to provide for 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. the disqualification on the right to contest an election to Sarpanch, Up-Sarpanch and Panch to persons by having more than two living children does not contravene any fundamental right nor does it cross the limits of reasonableness. It is a disqualification conceptually devised in national interest”*

²⁰ Mukesh Kumar Ajmera vs. State of Rajasthan, AIR 1997 Raj 250

²¹ AIR 2003 SC 3057

Thus, in the instant case the Ordinance is not *ultra vires* Part IX as the State Legislature is empowered to lay down disqualifications for contesting elections of Panchayati Raj institutions.

- It is further submitted that the Ordinance is not marginalizing the weaker sections of the society as the level of education has been lowered for being elected as Sarpanch in a Scheduled Area. The educational requirement for scheduled area is class fifth while in all other areas it is class eighth. Scheduled areas²² correspond to tribal areas. So it is evident that Ordinance has been formulated keeping in mind the lower educational standards of the marginalized sections. Further women folk are not being subjected to any discrimination whatsoever because this is a gender neutral law and if any special preference will be given to women then it will go against Part III of the Constitution as Part III provide for political and social justice.²³

B. That the retroactive effect of the Ordinance does not affect its constitutionality.

That a valid law, retrospective or prospective, enacted by the legislature cannot be declared *ultra vires* on the ground that it would nullify the benefit which otherwise would have been available. In the case of **Virender Singh Hooda and Ors. v. State of Haryana and Anr**²⁴, the Supreme Court recognized the power and competence of the Legislature to make a valid law and make it retrospective, so as to bind even past transactions. Hence in the instant case the retrospectivity of the Ordinance does not render it unconstitutional. In several cases, the Hon'ble Supreme Court has upheld judicial restraint, unless the provision is manifestly unjust or glaringly unconstitutional²⁵.

²² Orissa Mining Corporation Ltd. vs. Ministry of Environment and Forest and Ors., (2013) 6 SCC 476

²³ M. Nagraj vs. Union of India, AIR 2007 SC 71

²⁴ AIR 2005 SC 137

²⁵ Bhavesh D. Parish And Others Vs. . Union of India And Another, (2000) 5 SCC 471

C. That the Ordinance is not in violation of aspects of basic structure like the preamble, single citizenship and equal participation in democratic government and it also abridges valuable fundamental and constitutional rights.

- **That non-grant of listing before the issuance of election notification is affecting the merits of the case as judicial intervention after the commencement of Election proceedings is *ultra vires* Part IX of the Constitution.**

It is submitted that there is a Constitutional bar of Article 243-O on the intervention of the Courts in the Election proceedings and Hon'ble Supreme Court has laid down the principle that the Courts should not ordinarily interfere with the election process, once it has started. In the present case, the impugned Ordinance was promulgated on 20.12.2014 and the election proceedings commenced on 03.01.2015 with the issuance of the first election notification. Article 243-O prohibits any interference in the elections, once elections have been notified. In **S.T. Muthusami Vs. K. Natarajan and Ors.**²⁶, the Supreme Court, held that though no legislature can impose limitations on the constitutional powers of the Courts, it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights, and to resolve election disputes after the elections are over.

- **That the Ordinance does not violate the Preamble and the basic tenets of democracy.**

It is submitted that the Preamble to the Constitution is the lodestar and guides those who find themselves in a grey area while dealing with its provisions.²⁷ In the instant case, the Ordinance is not in violation of the Preamble because the Preamble speaks of socio-economic equality and justice which has been specifically enshrined in Part III and it has

²⁶ AIR (1988) SC 616; Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors., (1978) 1 SCC 405; Election Commission of India Through Secretary Vs. Ashok Kumar & Ors., (2000) 8 SCC 216

²⁷ Steel Authority of India Ltd. vs. National Union Water Front Workers, AIR 2001 SC 3527

been laid down in a plethora of cases that electoral rights are statutory rights and hence can be legislated upon as the fundamental rights chapter has no bearing on such right. It is also submitted that the Ordinance has been promulgated to make education an important criterion for contesting elections which would in turn encourage the masses to strive for education.

That democracy is a concept, a political philosophy, an ideal practiced by many nations culturally advanced and politically mature by resorting to governance by representatives of the people elected directly or indirectly. But electing representatives to govern is neither a “fundamental right” nor a “common right” but a special right created by the statutes, or a “political right” of “privilege” and not a “natural”, “absolute” or “vested right”. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. Right to remove an elected representative, too, must stem out of the statute as in the absence of a constitutional restriction it is within the power of a legislature to enact a law for the recall of officers. Its existence or validity can be decided on the provisions of the Act and not as a matter of policy.²⁸

A true democracy is one where education is universal, where people understand what is good for them and the nation and know how to govern themselves.²⁹ In the instant case the allegation of changing the Preamble from “we the people” to we the literate people is farfetched and baseless because this is a global age and the importance of education for sustainable development and growth cannot be overlooked. Moreover the argument that there is no educational qualification for elections to Parliament or State Legislature then introducing educational qualification in Panchayat will be against the single citizenship concept because Panchayat is the smallest self-government institution so if we are able to

²⁸ Mohanlal Tripathi vs. District Magistrate, Rae Bareilly, AIR 1993 SC 2042; referred in Ram Beti vs. District Panchayat Rajadhikari, AIR 1998 SC 1222

²⁹ J.P. Unni Krishnan vs. State of Andhra Pradesh, AIR 1993 SC 2178

promote education at the grass root level then we will be able to reach better literacy ratio and also with better literacy standards we will be able to stand at a better position as a nation.

- **That this Ordinance does not abridge any valuable fundamental and constitutional rights.**

It is submitted that it is a well settled principle that while dealing with a challenge to the constitutional validity of any legislation, the Court should prima facie lean in favour of constitutionality and shall support the legislation.³⁰

In **Jumuna Prasad Mukhariya v Lachhi Ram**³¹ a five-judge bench held: “*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*”. Hence in the instant case there is no question of violation of any right conferred by Part III of the Constitution.

That in **Javed v State of Haryana**³² the Court rejected a challenge to a statutory provision disqualifying potential Panchayat election candidates with more than two children. The Court rejected contention based on Article 14. It is further submitted that it is well settled that classification on the basis of educational qualification is a reasonable one and satisfies the doctrine of equality as adumbrated in Article 14 of the Constitution.³³ So in the instant case there lies no question of the Ordinance being *ultra vires* Part III in general and Article 14 in particular.

³⁰ Charanjit Lal Chowdhury vs. The Union of India, 1950 SCR 869

³¹ *Supra* footnote 9

³² *Supra* footnote 21

³³ State of Rajasthan vs. Mukund Chand, AIR 1964 SC 1633

That in **Ramavtar Meena & Anr. Vs. State of Rajasthan & Ors.**³⁴, it was held that “*The satisfaction of the Governor in such matters, in issuing an 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.*”

That in the instant case the Ordinance is in accordance with all the provisions of the Constitution and does not abridge any Constitutional or Fundamental right.

D. That the Ordinance is not a colourable exercise of authority by the State Government.

It is to be humbly submitted that an Ordinance made by the President or Governor is not an executive but a legislative act.³⁵ In **Board of Trustees, Ayurvedic and Unani Tibia College, Delhi v. State of Delhi & Anr.**³⁶, that it was held that the doctrine of Colourable Legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine revolves itself on the question of the competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. Hence in the instant case there is colorable exercise of power as the Governor is empowered to promulgate such an Ordinance.

³⁴ D.B. CIVIL WRIT PETITION NO.1/2015

³⁵ Venkata vs. State of A.P, AIR 1985 SC 724

³⁶ AIR 1962 SC 458

IV. Whether non-availability of a notified vacation bench during holidays and non-availability of a notified procedure for listing when the Court is not in session is unconstitutional?

It is most humbly submitted before this Hon'ble Court that the non-availability of a notified procedure for listing and a notified vacation bench during the holidays is not unconstitutional. Following are the grounds for the submission.

- A.** It is submitted that non - availability of a notified procedure for listing and a notified vacation bench during the holidays does not violate any constitutional provision and is thus, not unconstitutional.

It is also submitted that no right of the petitioners have been violated by non-availability of a notified procedure for listing during the holidays as their matter was entertained by the Apex Court after the holidays. Further Section 10(1) of the General Clauses Act, 1897 provides that, 'Where, by any [Central Act] or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open.' Thus, the Court has power to entertain the matter without any prejudice to the rights of the parties after the holidays.

- B.** It is submitted that though there is no notified procedure for the entertainment of petitions during the holidays but there is an informal procedure for the same. During the vacations, any petition can be entertained if it is considered to be of an urgent nature by the Chief Justice of that Court. It is further submitted that the winter vacations of the High Court extend from December 26 to December 31, therefore, the non-availability of a notified procedure for listing for such a short span of time is not unconstitutional.

PRAYER

Wherefore in the light of facts stated, issues raised, arguments advanced and authorities cited, it is most humbly prayed before this Hon'ble Court, that it may graciously be pleased to–

1. To dismiss the Writ Petition 999/2015 with costs.
2. To dismiss the Writ Petition 1021/2015 with costs.
3. To pass any other order which the Court may deem fit in the light of justice, equity and, good conscience.

All of which is most humbly and respectfully prayed.

Sd/-

Counsels for the respondents