

THE 5TH NLIU
JUSTICE R.K. TANKHA MEMORIAL NATIONAL MOOT
COURT COMPETITION 2015

IN THE HIGH COURT OF NIRDHAN

UNDER ART. 32 OF THE CONSTITUTION OF GARIBA

JEOPARDY CONTRACTS INC.

Vs.

THE REPUBLIC OF GARIBA & MAXIS BANK

WRIT PETITION NO.999 OF 2015

&

PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS

Vs.

THE REPUBLIC OF GARIBA

WRIT PETITION (C) NO.1021 OF 2015

MEMORANDUM ON BEHALF OF THE PETITIONER

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| Aharn Prakash Vs State of Haryana | (1986) 2 SCC 249 | 8 |
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| Election Commission of India Through Secretary Vs. Ashok Kumar & Ors | AIR 2000 SC 729 | 10 |
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| Pandurangarao Vs A.P.P.S.C | AIR 1963 SC 268 | |
| People's Union for Civil Liberties (PUCL) And Another Vs. Union of India And Another | (2003) 4 SCC 399 | 8 |
| R Vs Dairy Produce Quota Tribunal | (1990) 2 All ER 790 | 12 |
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| Ram Prasad Vs State of Bihar, | 1953 SCR 1129. | 15 |
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| Shibu Soren Vs Dayanand Sahay | (2001) 7 SCC 425 | 10 |
| State of H.P. v. Umed Ram Sharma | AIR 1986 SC 847 | 15 |

| | | |
|--|---|-----|
| State of Kerala Vs Haji K. Kutty Naha, | AIR 1969 SC 378. | 15 |
| State of Maharashtra Vs Manubhai Pragaji Vashi, | AIR 1996 SC 1 | 13, |
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| Suneel Vs State of Haryana | AIR 1984 SC 1534 | 9 |
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| Vinod Natha Bhagat Vs. Returning Officer | AIR 2005 Bom 402 | 11 |
| White Industries Australia Ltd. Vs Republic of India | , UNCITRAL, Final Award (30 November, 2011) | 3 |

TREATISES:

| |
|---|
| ARVIND P. DATAR, COMMENTARY ON THE CONSTITUTION OF INDIA (2 nd ed, 2007) |
| H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4 th ed., 1993) |
| M.P. JAIN, INDIAN CONSTITUTIONAL LAW (6 TH ed., 2010) |
| D.D BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, (VOL2 8 TH ED, 2007) |

TREATIES & STATUTES & CONSTITUTIONS REFERRED:

| |
|---------------------------------------|
| REPRESENTATIVE OF PEOPLE ACT, 1951 |
| CONSTITUTION OF INDIA |
| CODE OF CIVIL PROCEDURE, 1908 |
| NEW YORK CONVENTION, 1958 |
| ARBITRATION AND CONCILIATION ACT 1996 |

STATEMENT OF FACTS

The Republic of Gariba is a sovereign federation of states with several union territories. The countryside of the Republic displays a very diverse geographic profile, with hills in the north and the east, seas in the south and the south-west, and desert in the northwest. Most part of the desert is situated in Nirdhan, which is the biggest of the States in the Republic.

The territory was considered as backward till 2011. 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. Powers in this regard were delegated to all the Panchayat Samitis.

A company Jeopardy Contracts Inc. [*“hereinafter **Petitioner 1**”*] entered into an agreement with Jodhpur Gaon Panchayat Samiti [*“hereinafter **JGPS**”*] on 21.9.2011 for 115 kms of road in a Scheduled area in Nirdhan. Due to certain issues, regarding land acquisition, design of the bridges etc., JGPS terminated the contract on 21.9.2013.

As per the contractual mechanism, Petitioner 1 sent a legal notice on 11.12.2014 for invoking arbitration as per contractual clause and also asked for ‘termination payment’ for the work already done. To which JGPS refuted the arbitration jurisdiction and further invoked the performance bank guarantee on 12.12.2014 by sending an email after business hours to the Maxis bank.

On 13.12.2014, Petitioner 1 moved the High Court of Nirdhan by filing an urgent civil writ petition being WP (C) No. 99/2014, which was directed to be listed at 10.30 am on 15.12.2014.

The High Court then granted “an ad-interim ex-parte stay on invocation of bank guarantee if not already encashed”, and also directed matter to the arbitration proceedings. By 11.00 am, the copies of the order were served upon JGPS, and the Maxis Bank [*“hereinafter **Respondent 1**”*]. However, in the meantime, at 10.00 am, the branch manager of the Jodhpur Gaon branch of

Respondent bank had acted on the email of JGPS and encashed the bank guarantee, but due to a massive security breach it remained unenforced.

Subsequently, arbitration proceedings took place under the Act of 1996, before the Council for Infrastructure Arbitration (CIA), and objections regarding maintainability filed by JGPS were dismissed by the Id. Arbitrators and further gave award in favour of Petitioner 1.

JGPS immediately filed a petition under Sec. 34 of the Act of 1996, before the High Court of Nirdhan, on its original side. While the Petitioner 1 asked for enforcement of arbitral award, which the Respondent bank refused to enforce and cited its inability due to directions of the Apex Court as well as the Reserve Bank with bank guarantee norms. Hence the said writ petition challenged the validity of Sec 34. In the meanwhile, the Governor of the State of Nirdhan, promulgated an Ordinance which came into effect from 24th of December 2014, laying down qualifications for election as Panch and Sarpanch.

This was first time such a provision had been brought into vogue in the entire Republic. People's Union for Liberties & Democratic Reforms [**Petitioner 2**] filled a writ petition before the vacation bench of High Court of Nirdhan challenging this ordinance and asked for immediate relief since election notification was to be issued on 3-01-2015. The said petition was denied any listing. To which the petitioner approach the apex court under Art 32 on 31-12-2014. After much delay by the authorities, listing was granted after the issuance of the election notification.

The apex court directed the petitioner to approach the High Court of Nirdhan, to which, the said writ petition lies before this Hon'ble Court challenging the validity of Ordinance and the asking for a procedure for the setting of the vacation benches. The High Court of Nirdhan admitted the petition, and issued notices to the Id. Attorney General as well as the Republic of Gariba. The High Court of Nirdhan functions in the same manner like the Delhi High Court.

STATEMENT OF JURISDICTION

JEOPARDY CONTRACTS INC. AND PEOPLE'S UNION FOR LIBERTIES AND DEMOCRATIC REFORMS, the Petitioners in the instant case, has the honour to submit this Memorial before the Hon'ble High Court of Gariba, under the aegis of Article 226 of the Constitution of Gariba.

QUESTIONS PRESENTED

1. SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS UNCONSTITUTIONAL
2. THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN IS UNCONSTITUTIONAL AND LIABLE TO BE SET ASIDE.
3. THAT NON AVAILABILITY OF (A) NOTIFIED VACATION BENCH AND (B) NOTIFIED PROCEDURE DURING ANY HOLIDAYS IS UNCONSTITUTIONAL.

SUMMARY OF ARGUMENTS

1. SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS UNCONSTITUTIONAL

It amounts to introduction of 'litigation' in the arbitral process which is against the basic tenets of arbitration and the objects and reasons of the act of 1996. The pendency of §34 petitions is huge and the delay thereon amounts to expropriation. Grant of an automatic stay, without adjudication on prima-facie case, balance of convenience and irreparable injury is per se bad in law.

2. THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN IS UNCONSTITUTIONAL AND LIABLE TO BE SET ASIDE.

That the ordinance is *ultra vires*, unconstitutional as it violates Article 14. There is no educational qualification for Members of Parliament or State Legislature. There is Regional discrimination and the Ordinance contravenes the objectives of the 73rd Amendment is against the Preamble. The High Court of Nirdhan can interfere in the election process.

3. THAT NON AVAILABILITY OF (A). NOTIFIED VACATION BENCH AND (B) NOTIFIED PROCEDURE. DURING ANY HOLIDAYS IS UNCONSTITUTIONAL.

That the High Court of Nirdhan can issue a writ of Mandamus to The Republic of Gariba and a Cause of action arose in the state of Nirdhan. That the Union is competent to pass the requisite orders and has a duty to pass orders regarding the Non availability of a notified vacation bench and their procedure during any holiday.

ARGUMENTS

1. SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS UNCONSTITUTIONAL

1.1. It amounts to introduction of ‘litigation’ in the arbitral process which is against the basic tenets of arbitration and against the objects and reasons of the act of 1996

The sum and substance of ‘Introduction, Statement of Objects and Reasons and Preamble to the Arbitration & Conciliation Act, 1996 [*hereinafter*: Act of 1996] is that the outdated Arbitration Act, 1940 was replaced by the Act of 1996 to make it more responsive to contemporary requirement; to make provisions for an Arbitral procedure which is fair, efficient and capable of meeting the needs of specific arbitration; to minimize the supervisory role of the courts in the arbitral process and to provide that every final Arbitral Award is enforced in the same manner as if it were a decree of the Court.¹

Objective (e) and Objective (g) of the Act of 1996 read; “To minimize the supervisory role of courts in the arbitral process”, “To provide that every final arbitral award is enforced in the same manner as if it were a decree of the court” respectively.

The Supreme Court of India has held that §5 of the Act of 1996 brings out clearly the object of the Act², namely that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the Court’s intervention should be minimal. Further it was held that, §5 was inserted to discourage judicial intervention³.

¹ M/S M D Overseas Ltd Vs. Canara Bank 2011 SCC Online Del 4516

² P.Anand Gajapathi Raju Vs. PVG Raju (2000) 4 SCC 539

³ Bharat Heavy Electricals Ltd.Vs. C.N. Garg and Ors (2001) CLA-BL Supp 6 (Delhi).

If we read the provisions of § 35, 36 & 37 of the Act and Order XLI Rule 5 of the C.P.C in the light of the laudable objects of the Act of 1996, we find that there is no manner of doubt that the very purpose of Act of 1996 is to curb the procedural delays as are inherent in the routine civil disputes in the courts. In fact a summary procedure has been envisaged in the Act in contradistinction to the Arbitration Act of 1940.⁴

1.1.1. Section 34 of the Arbitration and Conciliation Act, 1996 is against the objects of the act and therefore violates Article 14 of The Constitution of India

If, in laying down the qualifications for an appointment, the State lays down qualifications which have no nexus with the object to be achieved, the rule or order in question shall be invalid⁵. Similarly § 34 of Act of 1996 has no nexus with the object sought to be achieved by the Act and to the contrary introduces litigation into the arbitral process.

1.2. The pendency of §34 petitions is huge and the delay thereon amounts to expropriation.

It is humbly submitted that one of the objects of New York Convention was to evolve consensus amongst covenanting States to facilitate international trade and commerce by removing technical and legal bottlenecks which directly and indirectly impede the smooth flow of the international commerce. India has also acceded to the Convention and it would be reasonable to assume that it also subscribes to the philosophy of the New York Convention.⁶

⁴ *Supra* *Nt.1*

⁵ Pandurangarao Vs A.P.P.S.C, AIR 1963 SC 268 (at Pg 271).

⁶ Oil & Natural Gas Commission v. Western Co. of North America, AIR 1987 SC 674

It has been held that where the local courts interfere in the proceedings of an international commercial arbitration, a State could breach a BIT with other States⁷.

It has been held that the delays on the part of the Indian judiciary amounted to a breach of India's commitment on providing investors "effective remedies"⁸.

1.3. Grant of an automatic stay, without adjudication on prima-facie case, balance of convenience and irreparable injury is per se bad in law

§36 of the Act of 1996 makes it clear that an arbitral award becomes enforceable as a decree only after the time for filing a petition under §34 has expired or after the §34 petition has been dismissed. In other words, the pendency of a §34 petition renders an arbitral award unenforceable.⁹ The Act of 1996 instead of being an efficient and speedy remedy would be reduced to a remedy worse than what we already had, that is the civil suits and the deep routed procedural delays till passing of the decree and even thereafter but we may hasten to add that even in civil suits' decrees there is no automatic stay on pendency of the Appeal and stay even if granted in execution of civil suits' decrees is more often than not a conditional stay and preferably subject to deposit of the decretal amount.¹⁰ This automatic suspension of the execution of the award, the moment an application challenging the said award is filed under §34

⁷ Saipem S.p.A Vs The People's Republic of Bangladesh, (ICSID Case No ARB/05/7, Award of 30-06-2009)

⁸ White Industries Australia Ltd. Vs Republic of India, UNCITRAL, Final Award (30 November, 2011) ; Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877

⁹ National Aluminum Co. Ltd. v. Press steel & Fabrications, (2004) 1 SCC 540

¹⁰ *Supra Nt. 1*

of the Act leaving no discretion to the court to put the parties on terms, and defeats the very objective of the alternate dispute resolution system to which arbitration belongs¹¹

1.3.1. The Legislature did not intend to enact automatic stay

Had the legislature intended to give the provision of stay of execution on filing of an Appeal under §37 of the Act, it would have given the provision in the Act itself, in *pari materia* with Order XLI Rule 5 of the Code of Civil Procedure. Since it has not been done by the legislature, it will not be possible to provide unconditional automatic stay under the principle of merger.¹²

There is a recommendation made by the concerned Ministry to the Parliament to amend §34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In order to rectify this mischief, certain amendments have been suggested by the Law Commission to §36 of the Act of 1960, which provide that the award will not become unenforceable merely upon the making of an application under §34.¹³

1.4. That the absence of differentiated treatment of parties subscribing to arbitration

Implicit in the concept of equality is the concept that persons who are in fact unequally circumstanced cannot be treated on a par.¹⁴ Parties that resolve to settle disputes through arbitration form a separate class as against parties that are litigants. The separation is necessary as parties to arbitration put their faith in an alternate justice system that has been set up to provide speedy remedies at a much greater cost to parties. It is antithetical to Article 14 that these parties are relegated to ordinary litigation procedure on a regular basis thus turning the arbitral process into another layer in the hierarchy of courts.

¹¹ *Supra* Nt. 9

¹² *Supra* Nt.1

¹³ 246th Report of the Law Commission

¹⁴ T.M.A Pai Foundation Vs State of Karnataka, (2002) 8 SCC 481

The court has to apply a dual test in examining the validity *viz.* whether the classification is rational and based upon intelligent differentia and whether the basis of differentiation has any rational nexus or relation with the avowed policy and objects. Moreover the inequality must arise under the same piece of legislation or under the same set of laws which have to be treated together as one investment.

1.5. Public Policy

Sub section (2)(b)(ii) of §34 states that an Arbitral Award may be set aside by the Court only if the Court finds that the Arbitral Award is in conflict with the Public Policy of India. The range of Public Policy was broadened by the Apex Court in *ONGC v. Saw Pipes*¹⁵ wherein the Court also read ‘patent illegality’ into the dimensions of Public Policy. This decision opened up the floodgates of litigation by parties challenging arbitral awards, thereby not only overburdening the overworked judiciary, but also rendering arbitration helpless¹⁶.

2. THE ORDINANCE PROMULGATED BY THE GOVERNOR OF NIRDHAN IS UNCONSTITUTIONAL AND LIABLE TO BE SET ASIDE.

2.1. That the ordinance is *ultra vires*.

It is submitted that the Ordinance No.2/2014 is *ultra vires* the powers of the Governor. It was promulgated only to defeat the constitutional process. There was no urgency to introduce a vital disqualification through an Ordinance, which could have awaited a duly enacted law.

¹⁵ AIR .2003 SC 2629

¹⁶ Karishma Amar; ARBITRATION IS HELPLESS WHEN THE JUDICIARY IS INEVITABLY INFLUENCE BY THE EXECUTIVE,

<http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=67f7236e-a88c-435b-beaf-4dda0b6a0010&txtsearch=Subject:%20Arbitration> (Last Visited on 14-02-2015)

The Ordinance has been promulgated on the eve of the elections, in colorable exercise of power¹⁷, both on the ground that there was no urgency to promulgate the Ordinance on an issue which required extensive debate, and further on the ground that it is violative of Article 14 of the Constitution of India.

Article 243F of the Constitution of India permits the State Legislature to enact laws regarding disqualifications for membership of Panchayats. 'Qualification' and 'Disqualification' for the membership of are two different concepts and 'lack of qualification' would not be tantamount to 'disqualification'¹⁸. It is the parliament alone which is empowered to prescribe any additional qualification, not only for membership of the Parliament but also for membership of state legislatures.¹⁹

2.2. The ordinance is unconstitutional

It is competent for the court to enquire whether in exercising his constitutional power the president or governor has exceeded the limits imposed by the constitution upon the exercise of that power. Governor cannot assume legislative function in excess of strictly defined limits set out in the constitution²⁰

2.2.1. That the Ordinance violates Article 14.

¹⁷ Dr. D.C. Wadhwa & Ors Vs State Of Bihar & Ors

¹⁸ Baljeet Singh Vs Election Commission of India, AIR 2001 Del 1 (FR).

¹⁹ Arts 84(c), 102(1)(e), 173(c) and 191(1)(e).

²⁰ Dr D C Wadhwa v State of Bihar (1987) 1 SCC 378 (Para. 3678)

The requirement of formal educational qualification is not essential for effectively discharging the duties and functions, vested in the Panchayats and Zila Parishadas²¹.

The impugned Ordinance cannot be sustained on the ground of object-nexus test as imposing disqualifications on the uneducated will not meet the objects of the Legislature²² i.e. Women and child development²³ and Welfare of the weaker sections²⁴

Numerous disqualifications in election have been struck down by courts exercising powers of judicial review, as violative of Article 14 of the Constitution of India on the ground that they are arbitrary and unreasonable.²⁵

A classification which is not in tune with the Constitution is per se unreasonable and cannot be permitted²⁶. The rationale of classification should be based on empirical data or survey or scientific study and not on assumptions as to existence of a State of affairs²⁷.

2.2.1.1. There is no educational qualification for Members of Parliament or State Legislature

In lieu of the fact that education based qualifications are not prescribed for contesting the elections of other local bodies, Legislative Assembly, or Parliament and that Cabinet Ministers,

²¹ Ibid

²² Kedar Nath Bajoria Vs State of W.B, AIR 1953 SC 404

²³ Item 25, Schedule XI, The Constitution of India

²⁴ Item 27, Schedule XI, The Constitution of India

²⁵ People's Union for Civil Liberties (PUCL) and Anr. Vs. UOI (2003) 4 SCC 399 (¶122),

²⁶ Aharn Prakash Vs State of Haryana, (1986) 2 SCC 249.

²⁷ Kailash Chand Sharma Vs State of Rajasthan, (2002) 6 SCC 562

the Prime Minister, or even for the President of India need not be educated it is arbitrary to impose education based disqualifications for Panchayat elections.

2.2.1.2. Creates Regional discrimination

Any policy decision to give preference to a candidate belonging to rural areas or preference given to residents of a particular district is void and discriminatory²⁸. In the instant matter the Sarpanch of a Panchayat of a scheduled area and the Sarpanch of a Panchayat of a non-scheduled area is expected to have completed class 5 and class 8 respectively from a school in Nirdhan. This Differentiation on a territorial basis will be unconstitutional if there is no reasonable nexus between the territorial basis and the object sought to be achieved by the Order²⁹..

2.2.2. That the Ordinance contravenes the objectives of the 73rd Amendment.

The 73rd Amendment to the Constitution of India provided for inclusive governance at the grass root level.³⁰ The disqualification for membership, under Article 243F of the Constitution, to be prescribed by the Legislature of the State, could not have provided for any such condition attached, which may have taken away the rights of the self-governance, except for disqualifications, which have material object to achieve, such as the character, integrity or morality of the person.

The Ordinance is plainly against the objective of the Amendment, providing for representative democracy for the weaker sections of the society. The 73rd Amendment of the Constitution of

²⁸ *Ibid.*

²⁹ Suneel Vs State of Haryana, AIR 1984 SC 1534

³⁰ Bhanumati And Others Vs. State of Uttar Pradesh Through its Principal Secretary And Others, 2010 (12) SCC 1 (¶12 and 19),

India gives the Panchayati Raj Institutions a constitutional status, inserting Part IX in the Constitution of India, defining 'Panchayat', to mean an institution of self-governance constituted under Article 243B, for the rural areas. It is stated that the Panchayati Raj Institutions are the representative institutions, to give equal opportunity to all including those, who do not have formal education in schools to represent in local governance³¹.

All these will show that framers of Constitution did not mention “literacy” as a Qualification to be a Member of Parliament and the same was omitted intentionally.³²

It was observed that the disqualification provision must have a substantial and reasonable nexus with the object sought to be achieved and the provision should be interpreted with the flavour of reality bearing in mind of object of enactment³³.

2.2.2.1. It is the will of the people which is reflected in the result of the election³⁴ therefore by prescribing a qualification the State legislature is restricting the “will of the people”

2.3. The ordinance is against the Preamble

It is violative of the core constitutional philosophy of democratic governance in India, which is based upon equality of status and opportunity, featuring in the preamble to the Constitution of India. Republicanism is also featured in the constitution.

³¹ Bhanumati and Ors Vs. State of U.P. Through its Principal Secretary And Ors.

³² Baljeet Singh Vs Election Commission of India, AIR 2001 Del 1 (FR).

³³ Shibu Soren Vs Dayanand Sahay, (2001) 7 SCC 425

³⁴ Sham Lal Vs State Election Commission, Chandigarh, AIR 1997 P&H 164.

2.4. The High Court of Nirdhan can interfere in the election process

This court needs only to extend the dates for filing the nominations without disturbing the dates for casting of votes and counting of ballots. It is submitted that by extending the dates for nominations, the Court will not interfere in the elections and will, thus, not violate the mandate of Article 243-O of the Constitution of India.

It is held that there is scope for the High Court to issue appropriate direction to correct grave errors in the election process subject to certain restriction³⁵ or matters going to the root of the matter³⁶. Article 243O (b), in itself, does not impose complete bar on court's interference in electoral matters by courts as otherwise the citizen will be left with no remedy in law³⁷.

Article 243O does not per se bar judicial review which is part of basic structure of The Constitution of India, although such jurisdiction should not ordinarily be exercised³⁸.

2.5. Non Grant of listing before the issuance of the election notification cannot affect the merits of the case since the court was moved well in time.

Where the constitutional validity of an Act or Rules or provision of an Act affecting election is challenged, or where error of exercising such jurisdiction or *mala fides* or non-compliance of rules of natural justice is established, the High Court has ample power to render justice by exercising the power of judicial review conferred on it under Art. 226 of the Constitution³⁹.

³⁵ Chand Prasad Vs State of Bihar, AIR 2002 Pat 17

³⁶ Vinod Natha Bhagat Vs. Returning Officer, AIR 2005 Bom 402

³⁷ Election Commission of India Through Secretary Vs. Ashok Kumar & Ors AIR 2000 SC 729

³⁸ Harmek Singh Vs Charanjit Singh, (2005) 8 SCC 383.

³⁹ S.K Khasim Bee Vs State Election Commission, AIR 1996 AP 324

While considering the question of delay and laches in filing the petition, the court has also to consider the inaction on the part of the authorities who had to perform the statutory duty⁴⁰. The real test to determine delay in such cases is that the petitioner should come to writ court before a parallel right is created and the lapse of time is not attributable to any laches or negligence⁴¹. In the instant matter there was inaction on the part of the relevant authorities and it is submitted that the petitioner moved the court well in time and was not negligent in any way. Further it is submitted that 'the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision....it is absolutely necessary in fairness to the persons affected by the decision'⁴².

It is observed that in appropriate cases, the court has not only the power, but a duty to take note of subsequent events and changed circumstances, especially in cases where the relief claimed becomes inappropriate or becomes useless⁴³. The relief originally claimed for will become useless if this court does not strike down the *Vires* of the Ordinance '*ab initio*' and therefore the court must use its powers to do complete justice in the instant matter.

It is not phraseology of the statute that governs the situation; but the effect of the law that is decisive⁴⁴. The Ordinance in the instant matter will affect the elections for 5 year irrespective of ratification

⁴⁰ Ram Chand Vs Union of India, (1994) 1 SCC 44

⁴¹ Dehri Rohtas Light Railway Co Vs District Board, Bhojpur, AIR 1993 SC 802

⁴² R Vs Dairy Produce Quota Tribunal, (1990) 2 All ER 790

⁴³ Bai Dosabai Vs Mathurdas, AIR 1980 SC 1334.

⁴⁴ Khandig Sham Bhat Vs Agrl. ITO, AIR 1963 SC 591

3. THAT NON AVAILABILITY OF (A). NOTIFIED VACATION BENCH AND (B) NOTIFIED PROCEDURE. DURING ANY HOLIDAYS IS UNCONSTITUTIONAL.

3.1. That the High Court of Nirdhan can issue a writ of Mandamus to The Republic of Gariba

Article 226A of the Constitution was repealed by The Constitution (Forty-third Amendment) Act, 1977, the objects and reasons of which make amply clear the intent of the legislature in enabling the High Courts to be able to question the validity of Central Legislation. It is therefore submitted that this court may call into question the Union of India in case of inaction or slow action of the executive⁴⁵. It is an established point in law that the High Court may give direction to the Union if it deems fit⁴⁶ and in innumerable cases, where the Supreme Court has issued directions while exercising power under Art 32 the said power could be equally exercised by the High Court under Art 226⁴⁷.

3.1.1. Cause of action arose in the state of Nirdhan

The phraseology used in Section 20(c) of the Code of Civil Procedure and Clause (2) of Article 226, being in *pari materia*, the decisions of this Court rendered on interpretation of Section 20(c) of CPC shall apply to the writ proceedings also.⁴⁸

Keeping in view the expression cause of action in article 226(2) indisputably even if a small fraction thereof accrues within the jurisdiction thereof, the court will have jurisdiction.⁴⁹

⁴⁵ State of Maharashtra Vs Manubhai Pragaji Vashi, AIR 1996 SC 1

⁴⁶ All India Judges Association Vs Union of India AIR 1992 SC 165

⁴⁷ D.D. Basu, Commentary on the Constitution of India, Vol6, 8th Ed., pg 6983

⁴⁸ M/S. Kusum Ingots & Alloys Ltd vs Union Of India And Anr

⁴⁹ Ambika Industries v CCE (2007) 6 SCC 769

3.1.2. A writ of Mandamus can be issued in policy decisions

It is humbly submitted that in instances of inaction or slow action of the executive the court may issue appropriate orders where inactivity leads to a violation of Fundamental rights.⁵⁰ Further it has been held that the government's policy decision can be questioned under Art. 14⁵¹.

3.2. That the Union is competent to pass the requisite orders.

It is inferable from the language of Article 145(1) and a perusal of the other provisions of the Constitution⁵² using similar phraseology; 'Subject to the provisions of any law made by Parliament...' , that the Parliament may legislate on any of the issues enumerated in Article 145(1)(a) to (j).

Article 246 of the Constitution of India read with Entry 77 of the Union List enables the Parliament to pass laws regulating the constitution of vacation benches as well as the procedure for listing when the court is not in session as the relevant entry permits the Parliament to legislate on the 'Organization' and 'Powers' of the Supreme Court⁵³ which includes the organization of vacation benches and procedure for listing when court is not in session.

3.3. The Union has a duty to pass orders regarding the Non availability of a notified vacation bench and their procedure during any holidays

3.3.1. It violates Article 21

⁵⁰ Supra Nt. 48

⁵¹ Government of A.P Vs Maharishi Publisher Ltd

⁵² Article 10(read with article 11), 142(2), 324(2), 338(2), 338(5)(f), 338A(2), and 338A(5)(f)

⁵³ O.N. Mohindroo v Bar council of Delhi and ors.

It is well settled principle of law that right to speedy justice is an integral component of right to life as ensured under article 21 of the Constitution of India.⁵⁴ The non-availability of Vacation Benches for urgent matters and absence of notified procedure for listing when court is not in session is a blatant violation of the right to speedy justice and therefore a violation of the right to life as enshrined in Article 21.

It is further submitted that 'it is the duty of the state to create a climate where members of society belonging to different faiths may live together and the state has the duty protect the life of all and if it is unable to do so it cannot escape the liability to pay compensation'.⁵⁵ Article 21 is a positive right although couched in negative language as numerous judgements of the supreme court make amply clear⁵⁶.

It follows naturally that right to Equal Justice as elaborated in Article 39A is part of Article 21 and is enforceable.

A decision which violates the basic principles of natural justice is contrary to the procedure established by law and therefore violative of Article 21 of the constitution.

3.3.2.It is against Article 14

Discrimination may result in refusal to make rational classification as it creates inequality⁵⁷ Matters arising during vacations are classified differently from matters arising when the court is

⁵⁴ Dilip Kumar Mukharjee v CBI 2007 (CHN 278)

⁵⁵ Kehar Singh v State of chattisgarh AIR 2002 Chatt. 14

⁵⁶ State of H.P. v. Umed Ram Sharma AIR 1986 SC 847 Mohini Jain v. State of Karnataka AIR 1992 SC 1858

⁵⁷ State of Kerala Vs Haji K. Kutty Naha, AIR 1969 SC 378.

in session. This is an irrational and arbitrary classification and causes grave injustice to those having urgent business before the court during its vacations and denies people of ‘the right to have legal dispute adjudication and legal rights enforced by a court of law; which is a right which belongs to every individual under the general law.’⁵⁸

It is arguable that litigants that have business before the court during vacations must be given the same rights as litigants who have business when the courts are in session pursuant to their right to equality. As it is necessary that all litigants who are similarly situated are able to avail themselves of the same procedural rights for relief with like protection and without discrimination⁵⁹.

It is further submitted that if there is absence of notified procedure for listing when court is not in session there is no policy or standard for the guidance of the Executive which is violative of Art 14.⁶⁰ When a statutory provision is plainly violative of Art 14, since the exercise of discretion of power is unguided and unfettered, the court cannot uphold its constitutionality.⁶¹

The selection is left to the absolute and unfettered discretion of the court administration, “with nothing to guide or control its action”, the difference in treatment rests solely on arbitrary selection by the administrative body, and then it violates Art14⁶².

⁵⁸ Ram Prasad Vs State of Bihar, 1953 SCR 1129.

⁵⁹ State of W.B Vs Anwar Ali, 1952 SCR 248 (322 **MUKHERJEA J.**)

⁶⁰ Kunnathat Vs State of Kerala, (1961) 3 SCR 77

⁶¹ B.B Rajwanshi Vs State of U.P., (1988) 2 SCC 415

⁶² State of W.B Vs Anwar Ali, 1952 SCR 284 (310) **RAZI ALI, J.**

PRAYER

Wherefore, in the light of facts stated, arguments advanced and authorities cited, it is most humbly prayed that this Hon'ble Court may be pleased to adjudge and declare that:

- §34 of The Arbitration and Conciliation Act, 1996 be declared unconstitutional and struck down.
- The impugned ordinance be declared unconstitutional and struck down.
- The non-availability of a notified vacation bench and procedure is bad in law and hence unconstitutional.

and pass any other order, direction, or relief that it may deem fit in the interests of justice, equity and good conscience.

All of which is most humbly submitted.

Place: Nirdhan

S/d-

Date: 11-01-2015

On Behalf of the Petitioners