TEAMCODE – A1

BEFORE THE HON'BLE HIGH COURT OF NIRDHAN

PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCi

..PETITIONERS

VERSUS

REPUBLIC OF GARIBA AND MAXIS BANK

..RESPONDENTS

WRIT PETITON NO. 999 / 2015

CLUBBED WITH

WRIT PETITON NO. 1021 / 2015

ON SUBMISSION TO THE HON'BLE HIGH COURT OF NIRDHAN

UNDER ARTICLE 226 OF THE CONSTITUTION

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONERS

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STATEMENT OF JURISDICTION

1) THE PETITONER IN WP.NO 999/2015 HAS APPROACHED THE HON'BLE HIGH COURT OF NIRDHAN UNDER ARTICLE 226 OF THE CONSTITUTION.

2) THE PETITONER IN WP.NO 1021/2015 HAS APPROACHED THE HON'BLE HIGH COURT OF NIRDHAN UNDER ARTICLE 226 OF THE CONSTITUTION.

STATEMENT OF FACTS

The Governor of Nirdhan, the biggest state in Gariba, decided to fast pace infrastructural development with the aid of private parties. One such Company was Jeopardy Contracts Inc. [JCi] which entered into an agreement with Jodhpur Gaon Panchayat Samiti [JGPS]. However this contract was terminated. JCi issued a legal notice invoking the arbitration clause and asking for the termination payment for the work done. An email was sent by JGPS after business hours invoking the performance of the bank guarantee. The following day JCi moved the High Court under an urgent writ petition. The court granted an ex-parte ad-interim order that operated as a stay on the invocation of the bank guarantee if not already encashed. The amount that was to be encashed was not paid to JGPS due to a security breach. Subsequently, the writ petition was disposed off as the matter was to be adjudicated by the arbitrators. This was followed by a petition under Sec.34 of the Arbitration and Conciliation Act of 1996. Meanwhile JCi called for the return of money of the bank guarantee including the interest. JCi then challenged the constitutional validity of Sec.34 by way of WP 999/2015. In the meantime the governor of the state promulgated an ordinance that amended the Panchayati Raj Act, 1994 listing qualifications for the election of the Panch. People's Union for Liberties & Democratic Reforms moved the High Court for urgent listing and hearing during the annual winter holidays, since the election notification was to be issued on 3rd January, 2015. The Chief Justice denied the same. PULDR moved the Apex Court under Art. 32. There was a substantial delay in response and no listing was granted till the issuance of the election notification. Upon listing, the Apex Court was pleased to observe that the matter can now be heard by the High Court. A *pro-bono* petition was filed by PULDR to challenge the vires of the ordinance under WP(C) 1021/15. The High Court admitted the petition. The two writ petitions have been directed to be listed together for final hearing.

STATEMENT OF ISSUES

IN W.P NO. 999/2015

1) WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS UNCONSTITUIONAL.

IN W.P NO. 1021/2015

1) WHETHER THE WRIT PETITION IS MAINTAINABLE IN THIS HON'BLE COURT
2) WHETHER LAPSES IN PROCEDURE IS UNCONSTITUTIONAL.
3) WHETHER ORDINANCE IS *ULTRA VIRES* OF THE CONSTITUTION.

SUMMARY OF ARGUMENTS

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

A petition under section 34 introduces litigation into the arbitral process resulting in huge delays, defeating the objective of speedy disposal of conflicts which in turn negates the UNICITRAL model which is the basis for the act. Moreover the grant of an automatic stay without looking into the three cardinal principles of granting a stay is bad in law defeating the principles of natural justice.

2. WHETHER THE WRIT PETITION IS MAINTAINABLE

The ambit of Article 226 is much wider in the scheme of judicial review and it has the power to issue writs for "other purposes". The power of the high court to issue writs is twofold, one for the violation of a fundamental right and the other for any non-fundamental or ordinary legal rights, as in this case.

3. WHETHER LAPSES IN PROCEDURE IS UNCONSTITUTIONAL

Non availability of a vacation bench and a notified procedure for listing resulting in the dismissal of the case *in limine* is violative of Art. 14. There has been no application of mind and the same is arbitrary in nature. Denial of listing before the issuance of election notification cannot affect the merits of the case, as the doctrine of laches does not apply.

4. WHETHER ORDINANCE IS *ULTRA VIRES* OF THE CONSTITUTION.

The Ordinance promulgated by the governor tampers with the constitutional status provided to Panchayati Raj Institutions by Part IX. The Ordinance suffers from non-application of mind violating the Right to Equality since it discriminates between the population of the state in terms of literacy and domicile.

ARGUMENTS ADVANCED

FOR WRIT PETITON NO. 999/2015

1. WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT OF 1996 IS CONSTITUTIONAL.

Section 34 of the Arbitration Act explicitly provides for challenge of the arbitral award in a court of law. However, *in lieu* of the same, it is the contention of the Petitioners that the same is unconstitutional due to the following:

1.1 INTRODUCTION OF LITIGATION GOES AGAINST THE BASIC TENETS OF ARBITRATION

Sec. 34 of the Arbitration and Conciliation Act explicitly provides for bringing arbitration under the purview of the court, under the conditions stipulated by the legislation. The object with which the legislature sought to enact the Arbitration and Conciliation Act, 1996 was to reduce the scope of judicial intervention.[1] In fact, the statement of objects and reasons of the Arbitration and Conciliation Bill, 1995 specifies that one of the objectives is to reduce the supervisory role of the courts in the arbitral process. Sec. 5 of the Act was included in the Act of 1996 to ensure explicit judicial exclusion, except for matters under Part 1 of the legislation. Sec. 34 falls under Chapter 7 of Part 1.[2] It is however seen that the same is an abuse of the time and process of the court and introduction of litigation in the process of arbitration defeats the very purpose of arbitration and the process of alternate dispute resolution as a whole. In the case of *Bharat Heavy Electricals Ltd. v. C.N. Garg and Ors.*[3] it

[1] *Municipal Corporation of Greater Mumbai v. Prestress Products (India),* 2003 (3) Bom CR 117.

[2] *Municipal Corporation Of Greater Mumbai v. Prestress Products (India*), 2003 (3) Bom CR 117.

[3] *Bharat Heavy Electricals Ltd. v. C.N. Garg and Ors.*, 2001 (57) DRJ 154 (DB).

was provided that the very idea of arbitration itself is to ensure that judicial intervention is barred and the time of the court itself is not wasted.

Thus, in order to convey the same, a provision in the form of Sec. 5 of the act was inserted to show that judicial intervention is barred except as provided for by the act itself. It was further held in the case that while executing the provision of legislation, the very idea or the rationale behind such an enactment should be kept in mind and the same should not be defeated in the course of its execution. The *sentential legis* of the legislation needs to be kept in mind while executing the same. It is also humbly contended that where the court takes notice of a petition that abuses the process explicitly done away with by the legislation such petitions should not be encouraged in the court of law.[4] The legislative intent itself is to ensure that any arbitral award passed by the tribunal should not come under the purview of the judiciary to prevent the abuse of the process of law.[5] It was also held in the case of *H.P.State Electricity Board v. R.J.Shah & Company*[6] it was held that the court is duty bound to effectuate the letter and spirit of the legislation. Therefore, Sec. 34 is in direct contradiction with the statement of objects and reasons and has acted as a weapon in abusing the process of law. Therefore, the same should be declared unconstitutional.

1.2 A PETITION UNDER SECTION 34 AMOUNTS TO DELAY AND IS IN CONTRADICTION TO THE COUNTRY'S INVESTMENT TREATIES

Article 253 of the constitution provides for enactment of legislations by the legislature to give effect to international treaties and agreements and provides for implementation of the same with respect to any decision made in an international conference as well. The rationale of

[4] *Bharat Heavy Electricals Ltd. v. C.N. Garg and Ors.,* 2001 (57) DRJ 154 (DB).

[5] *Konkan Railway Corporation Ltd. v. Mehul Construction Co.,* (2000) 7 SCC 201.

[6] *H.P.State Electricity Board v. R.J.Shah & Company*, (1999) 4 SCC 214.

introducing arbitration as a means for alternate dispute resolution was to ensure speedy disposal of cases and providing an alternate forum to ensure disposal of cases.

The introduction of litigation into the arbitral process via Sec. 34 of the Arbitration and Conciliation Act exhausts the purpose of arbitration itself and makes the process redundant. The *raison d'etre* for ADR is to obviate delays attendant upon normal litigative remedies.[7] Moreover, Article 39 (A) has been casted with a positive duty to ensure that the judicial system is structured in such a way that it grants speedy relief to those who approach the judicial machinery.[8] The Arbitration Act of 1996 replaced the Indian Arbitration Act, 1940, the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention) Act, 1937. By one stroke the arbitration legislations were repealed and a new legislation was enacted in accordance with the pattern of Modern Law as enshrined in the United Nations Commission on International Trade Law to ensure consolidation of both domestic and international commercial arbitration.[9] It was held in the case of *Bharat Heavy Electricals Ltd. vs C.N. Garg And Ors.*[10] that the Arbitration and Conciliation Act, 1996 is substantially based on UNICITRAL in view of the policy of liberalisation and it became imperative to modify the laws after the UNICITRAL model code to ensure uniformity. One fact which permeates this code is the pertinent need for speedy disposal of arbitration proceedings to ensure minimal judicial intervention at various stages in the arbitration proceedings. This explains the introduction of Sec. 5 to bar judicial interference. The very object of adopting the UNICITRAL model code shows that the emphasis was laid on speedy

[7] *Municipal Corporation Of Greater Mumbai v. Prestress Products (India),* 2003 (3) Bom CR 117.

[8] *A Sathyapal & Ors. v. Smt. Yasmin Banu Ansari & Anr.,* AIR 2004 Kant 246.

[9] *The Bihar State Electricity Board v. Usha Beltron Ltd.,* AIR 2000 Pat 183.

[10] *Bharat Heavy Electricals Ltd. v. C.N. Garg and Ors.,* 2001 (57) DRJ 154 (DB).

disposal and pendency of suits by virtue of Sec.34 is in direct contradiction to the same and therefore violates the Model Law of the United Nations Commission on International Trade Law. In fact, Article 51 (c) intends to foster respect for international law and the country's treaty obligations. It was held in the case of *Maganbhai v. Union of India*[11] that national courts generally interpret statutes to maintain harmony with rules of international law. In the present case, as the object of enacting the Act of 1996 based on the UNICITRAL Model law itself is in contradiction, the same is deemed to be violative of the same.

1.3 GRANT OF AUTOMATIC STAY WITHOUT CONSIDERATION OF MERITS IS BAD IN LAW

Filing of objections under Sec. 34 operates as an automatic stay on the arbitral award.[12] In the case of *Chambers v. Executive Engineer*[13] it was held that once a petition is filed under Sec. 34 and is filed within the prescribed period of limitation as provided under Sec.34(3), the implementation and execution of the arbitral award gets automatically stayed. It is humbly contended that the grant of such an automatic stay is *per se*, bad in law. It is contended that the grant of such an automatic stay is bad in law due to the non- examination of three important factors which are to be analysed while granting a stay, namely, establishment of a *prima facie* case, balance of convenience and irreparable injury. It is a universally accepted principle that the court should exercise restraint with matters concerning arbitration and the parties should keep to their bargain.[14] The language of Sec. 34 itself implies that the balance of convenience should be examined to see if the matter brought into the purview of the court could be adequately dealt with by the court, i.e whether the nature of the dispute is such that

[11] *Maganbhai v. Union of India,* AIR 1969 SC 783.

[12] *Parkash Textile Mills Ltd. v. Mani Lal and Ors.,* AIR 1955 P&H 197.

[13] *Chambers v. Executive Engineer*, ARBITRATION PETITION (L) NO. 761 OF 2014, unreported.

[14] *Ram Bahadur Thakur v. Thakur Das,* AIR 1958 All 522.

the adequate remedy can be provided by the court, which the process of arbitration itself failed to provide.

The object of Sec. 34 itself is to ensure that the arbitration agreement is enforced and to prevent injury to any party who is a part of the agreement. It acts as an injunction against the party, who is contradiction to the agreement itself, files the suit.[15] The three cardinal principles of granting a stay or an interim order have to be analysed before a stay is given.[16] In the present case, by mere admission of the petition the arbitral award itself was stayed thereby defeating the whole purpose of the arbitration. Moreover, the court needs to ascertain whether there is in actuality a *prima facie* case due to which the court has been approached to ensure that the process of the court itself is not abused.[17] In addition to establishment of a *prima facie* case and the balance of convenience, no irreparable injury should be caused by virtue of such an automatic stay. A stay can only be given if the balance of convenience is in favour of the same.[18] In the present case, the execution of the arbitral award was automatically stayed by virtue of mere admission of the petition under section 34, thereby causing irreparable injury to the plaintiffs. The plaintiffs humbly contend that by virtue of such an automatic stay, the same would lead to an erosion of the net worth of JCi in addition to the immediate requirement of liquidity and expenses of unnecessary litigation as well. Therefore, it is humbly contended that due to the grant of an automatic stay and non-examination of the cardinal principles of granting such a relief, the same is bad in law. It is also contended that the court has to take into consideration the three cardinal principles and

[15] *Vaisyaraju Subramanyam Raju v. Vaisyaraju Chandramauli Raju and Others*, AIR 1987 Ori 23.

[16] *A.M. Krishnamurthy v. Sokab Products Private Limited by its Executive Director, D. Karthikeyanand and Ors.,* (1996) 1 MLJ 218.

[17] *Prabhjot Singh Mand and Ors. v. Bhagwant Singh and Ors.* (2009) 9 SCC 435.

[18] *Dalpat Kumar v. Prahlad Singh*, (1993) 3 SCR 522.

especially irreparable injury and make a provision for the compensation of the same in case of non grant of injunction.[19] The constitutional mechanism of the country itself is based on the principles of natural justice and the same espouses the principle of *audi altrem partem* whereby every person should be given a right to be heard. In light of the same, the grant of automatic stay without adjudication of the three cardinal principles itself defeats natural justice and therefore it is contended that such an automatic stay is not constitutionally sound.

FOR WRIT PETITION NO. 1021/2015

2. WHETHER THE WRIT PETITION IS MAINTAINABLE

The ambit of Article 226 is much wider as it has the power to issue writs for "other purposes" as well.[20] The power of the high court to issue writs is twofold, one for the violation of a fundamental right and the other for ordinary legal rights.[21] A discriminatory administrative decision can be quashed by the court by issuing a mandamus.[22] It follows the principle that when discretion is conferred on an authority, it is placed under an obligation to exercise the same lawfully without abuse of the same. The High Court acts in its administrative capacity when it settles its holidays or days of sitting and a writ under Article 226 shall lie against such an order/ decision exercised in pursuance of this power.[23]

[19] *Dalpat Kumar v. Prahlad Singh*, (1993) 3 SCR 522.

[20] *Fertilizer Corporation Kamgar Union v. Union of India*, AIR 1981 SC 344.

[21] *State of Orissa v. Madangopal Rungta,* (1952) SCR 28.

[22] *Union of India v. Brij Fertilizers Pvt. Ltd*., (1993) 3 SCC 564.

[23] *Pramatha Nath Mitter and Ors. v. Hon'ble The Chief Justice,* AIR 1961 Cal 545.

2.1 VIOLATION OF FUNDAMENTAL AND CONSTITUTIONAL RIGHTS

Article 14 entails reasonableness of state action.[24] Any decision when taken without considering the relevant facts can be termed as arbitrary and violative of Art.14.[25] In the present case the ordinance passed took no regard of the educational backwardness of the state and the entry barrier it posed to the members willing to contest. Additionally, the judiciary by the non listing of this matter during vacation time has denied the aggrieved of an opportunity to present their case before a competent authority, thereby violating their rights under Art.14.

Additionally, the right to contest in elections is a political right guaranteed and Article 226 can be used for the enforcement of these political rights.[26] In the present case remedy is not to be denied as the court was approached after the very violation of the legal right, and therefore, must not be disadvantaged. The concept of *lex non logit ad impossibilia* will find its application here.

2.2 FAILURE OF PRINCIPLES OF NATURAL JUSTICE

The *audi alterem partem* rule enforces the equality clause of Art.14 and that any person adversely affected by state action be given the right to be heard before an adverse order is passed against him.[27] The counsel for petitioners humbly submit that the obligation to give reasons introduces clarity and excludes or minimises the clauses of arbitrariness and the correctness of those reasons can be put into question[28] and absence of the same as in the present case holds the petitioners at a disadvantaged position. In a number of cases,[29] the

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[24] SEERVAI, H.M., CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY, 4th Edition, p. 437.

[25] *Union of India v. Dinesh Engineering Corpn.,* (2001) 8 SCC 491.

[26] *Re. Chakka Rai,* AIR 1953 Mad 96.

[27] *Delhi Transport Corporation v. DTC Mazdoor Union*, AIR 1991 SC 101.

[28] *State of Haryana v. Ramesh Kumar,* (2008) 11 SCC 435.

[29] *Gram Panchayat, Bari v. Collector, Sonepat and Anr.,* AIR 1991 SC 1082.

Supreme Court has remanded the writ petition to the high court concerned for fresh disposal on merits because the writ petition had been dismissed *in limine* without any speaking orders as in the present case.

3. WHETHER LAPSES IN PROCEDURE IS UNCONSTITUTIONAL.

The rules framed by the High Court under Article 225 of the Constitution come within the ambit of Article 13(3) (a) thereby are subject to the fundamental rights such as Article 14.[30] The rule making power of the High Court is subject to two limitations, namely the provisions of the constitution and the legislation by the appropriate legislature. The administrative act of the court in formulating these rules have been challenged on the following grounds- that the action taken was an exercise of the power by an unfair procedure[31] and the action was not conducive to public interest.[32]In the present case the acts of the High court has been arbitrary due to the lack of an adequate determining principle.[33]

3.1 NON-AVAILABILITY OF A NOTIFIED VACATION BENCH IS UNCONSTITUTIONAL

The constitution of benches falls within the administrative powers of the Chief Justice of the Hon'ble High Court.[34] The "Practice and Procedure" adopted by the Hon'ble court are said to relate to the legal rules directing the manner of bringing parties into the Court, and the method of the Court after they are brought in, in hearing, dealing with, and disposing of, matters in disputes between them. Practice in its larger sense denotes the mode of proceeding by which a legal right is enforced, distinguished from the law which gives or defines the right

[30] *In Re. Sant Ram.*, AIR 1960 SC 932.

[31] *Aeltemesh v. Union of India,* AIR 1988 SC 1768.

[32] *Kasturi v. State of J&K*, AIR 1980 SC 1992.

[33] *Sharma Transport v. Government of A.P*, AIR 2002 SC 322.

[34] *D.P. Chadha v. Triyugi Narain Mishra & Ors.,* 2000 (5) Suppl. SCR 345.

and which by means of the proceedings the Court is to administer.[35] The manner of constitution of these vacation benches, the constituents of the vacation benches and specificities regarding the same has not been succinctly outlined. Lack of procedure deprived the Petitioners of their fundamental rights and violation of the principles of natural justice thereby rendering it unconstitutional.

3.2 LACK OF PROCEDURE FOR LISTING DURING VACATION IS UNCONSTITUTIONAL

In the present case, the Hon'ble court in exercise of its inherent powers[36] has dismissed the petition *in limine* without listing the matter. The procedure for such dismissal has not been outlined, thereby resulting in an act that has been done "without there being law", justifying the present writ petition. The high court has been endowed with this discretion to devise a suitable procedure for writ petitions since there is a dire need for a reasonable, inexpensive and expeditious process that prevents miscarriage or delay of justice. [37] Presently, the very same discretion has been misused due to non application of mind as the judiciary has not heard the matter to make a conclusive decision regarding the same. Judicial or quasi judicial bodies are bound to hear each case on merit.[38] They cannot make a rule that is to be applied in every case without hearing[39] and a generic rule cannot and should not be applied to dismiss the present case.

Several Courts have held that the High Court is not empowered to act arbitrarily by dismissing a writ petition *in limine* when the petitioner complains that one or more of his

[35] *Poyser* v. *Minors,* (1881) 7 QBD 329.

[36] Article.225, CONSTITUTION OF INDIA, 1950.

[37] *Tej Singh v. Union Territory of Chandigarh,* AIR 1982 P&H 169.

[38] *E. v. Holborn Licensing JJ.,* (1926) 136 Lt 278(281).

[39] *R. v. Torquary Licensing JJ.,* (1951) 2 All ER 656.

fundamental rights constitutionally guaranteed are infringed.[40] If the standard for dismissal itself is set so high then presence of a similar if not a more rigid standard is necessitated in the case of non listing without hearing.

3.3 ***ACTUS CURAIE NEMINEM GRAVABIT***

The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands it.[41] The underlying principle of the doctrine of restitution is that on the date when the application was filed, the direction which was executed was reversed/modified and therefore status quo ante has to be restored as no litigant should suffer on account of a wrong order passed by the court.[42]

The doctrine of *laches* will not be applicable in the present case as the Petitioners at no point of time have delayed approaching the Hon'ble Court. The counsel for petitioners humbly submits that this Hon'ble court be pleased to recognise that *vigilantibus et non dormientibus jura subveniunt* principle would be applicable in the present case as the Petitioners have not sat over their rights and have ensured that they seek the remedy of the court prior to the election notification coming into operation. The ordinance was passed on 20th December, 2014 and they approached the court prior to the 3rd January 2015.

Ex hypothesi, every discretion must be exercised fairly and justly so as to promote justice and not defeat it. In the present case, no wastage of time from the side of the petitioners goes on to prove that the court cannot dismiss the same without listing on account of delay filing the writ petition. The lack of a proactive stance taken by the High Court has been the cause for the delay and this must not place the petitioners in a disadvantaged position.

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[40] *Sushil Kumar v. State of Madhya Pradesh,* AIR 1992 MP 79.

[41] *Kavita Trehan v. Babara Hygiene Products Ltd.,* AIR 1995 SC 441.

[42] *Mahd. Abdul Majid Khan v. Afsar Khan,* (1996) 2 AnLt 131.

4. WHETHER ORDINANCE IS *ULTRA VIRES* OF THE CONSTITUTION.

The Ordinance promulgated by the governor is against the vires of the constitution since it tampers with the constitutional status provided to Panchayati Raj Institutions by Part IX of the constitution In addition it also violates the Right to Equality enshrined in the constitution and marginalises women and other weaker sections of the society.

4.1 THE ORDINANCE IS MADE IN *MALA FIDES* AND IS RETROACTIVE IN APPLICATION

Article 213 (1) of the Constitution[43] provides for the power of the governor to promulgate Ordinances when he believes to his satisfaction that there exists circumstances which require his immediate action. Furthermore, the subsequent clause of the Article also necessitates the ordinance to be laid before the Legislative Assembly in the State within six weeks of reassembly.[44]

The Petitioner humbly contends that the action taken by the governor is uncalled for and is detrimental to the governance of the Panchayats. Article 213 of the constitution stipulates that the ordinance shall cease to operate after six weeks of the re assembly of the legislature and since the maximum duration of a vacation is six months,[45] the effect of the ordinance as intended by the constitution should not exceed seven and a half months. An ordinance if not re promulgated by the Legislature does not become void *ab initio,*[46] its effect shall continue even after six months and in the present scenario for a period of five years which defeats the intention of the constitution itself.

[43] Article 213, CONSTITUTION OF INDIA, 1950.

[44] Article 213, CONSTITUTION OF INDIA, 1950.

[45] Article 174, CONSTITUTION OF INDIA, 1950.

[46] *T. Venkata Reddy v. State of Andhra Pradesh,* AIR 1985 SC 724.

An ordinance is equivalent to a legislation[47] and thus cannot be questioned on the grounds of non application of mind and *mala fides.*[48] However, the Apex court in *S.R. Bommai* [49] opined that the ordinance making power is amenable to judicial review to the extent of examining whether conditions precedent to the issuance has been satisfied or not. However this facet was left unanswered by the Hon'ble court and it is pertinent that this Hon'ble court may fill the void and set precedent by examining the conditions precedent to the ordinance. Non presence of an emergency yet a hasty decision, indicates non application of mind which is an arbitrary exercise of power negating equality.[50] Thus, when an ordinance is against the basic tenants of Rule of Law, it cannot be supported.[51] Importantly, the Supreme Court has held that a plea of *mala fides* will succeed if it appears that the President or the Governor acted upon no evidence at all, as to the urgency of the situation.[52]

4.2 THE ORDINANCE IS *ULTRA VIRES* OF PART IX

Through the 73rd amendment of the Constitution, Panchayats were made as institutions of self governance with the intent of better local governance.[53] Through Part IX, Panchayats were made constitutional bodies with uniform characteristics throughout the Union.[54]

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[47] *State of Orissa v. Bhupendar Kumar Bose,* AIR 1962 SC 945.

[48] *T. Venkata Reddy v. State of Andhra Pradesh,* AIR 1985 SC 724.

[49] *S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

[50] *Onkar Lal Bajaj v. Union of India*, AIR 2003 SC 2562.

[51] *Re. Cauvery Disputes Tribunal,* AIR 1992 SC 522.

[52] *Rohtas industries v. S.D. Agarwal & Anr.* AIR 1969 SC 707: *Barium Chemicals v. Company Law Board*, AIR 1967 SC 295.

[53] *Than Singh v. State of Madhya Pradesh*, AIR 2005 MP 170: *Velpur Gram Panchayat v. Asst. Director of Marketing, Guntur*, AIR 1998 AP 142.

[54] *Gujarat Pradesh Panchayat Parishad v. State of Gujarat*, (2007) 7 SCC 718.

In *State of Uttar Pradesh v. Pradhan Sangh Kshetra Samiti*,[55] the Supreme Court in light of Articles 40 and 243G held that for the objectives of the constitution to be satisfied (a) the Panchayats are to be the self governing units at the lowest end of the democratic polity; (b) for being self-governing units, those who are governed by them, and for whose benefit they are going to operate, will have a direct or indirect representation in them; (c) they will have an effective say in the conduct of their affairs including their policies and programmes and thus (d) they will have not only a sense and satisfaction of participation but also an experience in the governance of their own affairs. In the present case, the ordinance bars certain classes of people who are a component of the society form participating in its administration. Hence, the object of making Panchayats as constitutional bodies in itself is defeated by the ordinance.

Further, in the case of *Pradhan Sangh Kshettra Samiti v. State of Uttar Pradesh*,[56] the Hon'ble court held that provisions that are not compatible to the relevant provisions of the constitution would be repugnant and *ultra vires*. Additionally Article 243F(1)[57] deals with disqualifications of memberships and lays down that a person shall be disqualified if he is so disqualified for the purpose of election to the Legislature of the state concerned and if there is any law operating which disqualifies him. Since uniformity is warranted in the operation of Panchayats throughout the country, the ordinance takes away this homogeneity and makes Panchayat Raj institutions arbitrary and discriminatory in Nirdhan. By virtue of the Amendment being incongruous with the ideals of the constitution, it is outside the vires of Part IX.

[55] *State of Uttar Pradesh v. Pradhan Sangh Kshetra Samiti,* AIR 1995 SC 1512.

[56] *Pradhan Sangh Kshettra Samiti v. State of Uttar Pradesh,* AIR 1995 All 162.

[57] Article 243F, CONSTITUTION OF INDIA, 1950.

4.3 THE ORDINANCE IS VIOLATIVE OF THE RIGHT TO EQUALITY UNDER ARTICLE 14

The ordinance which amended the Nirdhan Panchayat Raj Act, 1994 is discriminatory, arbitrary and is against the *vires* of the constitution. Firstly, it bars people below a minimum educational qualification from participating in self governance.[58] Secondly, the ordinance is excessively arbitrary in disallowing members who have not studied in Nirdhan in participating in Panchayat Raj.[59] Thirdly, the ordinance was passed in haste without any reasonable logic making it arbitrary and hence striking against equality.

The core constitutional philosophy of our constitution is equality of status and opportunity afforded to all citizens as indicated by the Preamble. The Ordinance passed, which amends the Nirdhan Panchayat Act, 1994 seeks to prohibit a large segment of the population on the ground of educational qualifications. Considering that Nirdhan was considered a backward state until recently,[60] it is not well reasoned to establish educational qualifications as a mode of disqualification. Educational qualifications are not pertinent tin discharging the duties and functions of Zila Parishads and Panchayats.

4.4 FAILURE OF THE OBJECT-NEXUS TEST

It is well settled that the Article 14 forbids class legislation, however it does not forbid reasonable classification for the purpose of legislation.[61] To satisfy the test of permissibility two conditions should be complied with i.e. (1) the classification should be founded on an intelligible differentia and (2) that such differentia has a rational relation to the object sought to be achieved by the Statute in question. As held in *Budhan Choudhry and Ors. v. State of*

[58] Factsheet ¶ 16.

[59] Factsheet ¶ 16.

[60] Factsheet ¶ 3.

[61] *Nakara v. Union of India*, AIR 1983 SC 130: *Javed &. Ors. v. State of Haryana & Ors.*, (2003) 8 SCC 369.

Bihar,[62] the basis for classification may rest on conditions which may be geographical or according to objects or occupation or the like. In the present case the ordinance is not based on any intelligible differentia as it discounts a large number of population from participating in elections. Seeing how Nirdhan was a backward state, it is certainly not viable to make demarcations on basis of formal education. Additionally in the prevailing literacy levels of the country the amendment will further marginalise women and other weaker sections of the society.

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 a material object to achieve, such as the character, integrity or morality of the person to represent. Any other disqualification will negate the object of self governance at grass root level, people's participation and social justice, as educational qualifications have nothing to do with the administrative activities of a village Panchayat. More importantly, the object-nexus test as mentioned above fails again because the Amendment prescribes another unnecessary standard which is not sound for want of reason, i.e. a candidate should have studied in a school in Nirdhan.[63] This condition is misinformed and has no reasonable object that it can achieve. Therefore an action taken in undue haste may be held as *mala fide*.[64] In conclusion, an important consequence of the Right to Equality is the element of reasonableness. Classification which is unreasonable is open to challenge and to this extent the policy of the legislation is open to Judicial Review.[65]

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[62] *Budhan Choudhry and Ors. v. State of Bihar,* 1955 AIR 191.

[63] Factsheet ¶ 16.

[64] *Inderpreet Singh Khalon v. State of Punjab*, AIR 2006 SC 2571.

[65] *Nagpur Improvement Trust v. Vithal Rao*, AIR 1973 SC 689.

PRAYER

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

1. Section 34 of the Arbitration and Conciliation Act, 1996 be declared as unconstitutional.
2. Non-availability of a notified vacation bench and listing procedure is unconstitutional.
3. Declaration of the ordinance as unconstitutional thereby resulting in the withdrawal of the election notification.
4. Issuance of a fresh election notification, ensuring equality of participation.

And pass any such order, writ or direction as the Honourable Court deems fit and proper, for this the Petitioners shall duty bound pray.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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COUNSEL FOR THE PETITIONERS