

**5<sup>TH</sup> JUSTICE R.K. TANKHA MEMORIAL NATIONAL MOOT COURT  
COMPETITION 2015**

**MEMORIAL FOR THE PETITIONERS**

**IN THE HIGH COURT OF NIRDHAN**

**AT GARIBA.**

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Writ petition no. 999/2015 and 1021/2015  
(Under Art. 226 of The Constitution of the Republic of Gariba)

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**People's Union for Liberties & Democratic Reforms and JCi** .....Petitioners

**V.**

**Republic of Gariba And Maxis Bank** .....Respondents

**TEAM CODE : C**

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**STATEMENT OF JURISDICTION**

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Writ petition no.999/2015

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The petitioners has approached this Hon'ble Court under Art. 226 of the Constitution of the Republic of Gariba which states that:

**226. Power of High Courts to issue certain writs :**

*(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose*

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

**STATEMENT OF FACTS**

1. The Republic of Gariba is a sovereign Federation which got independent from imperial rule in the year 1947 ; having a written constitution.
2. The state of Nirdhan was considered as backward till 2011 , when the then Governor decided to to devise a new scheme to construct the highways and arterial roads and by private parties and all the Panchayat Samitis were delegated powers to issue detailed project reports.
3. A company named Jeopardy Contracts Inc. [ “JCI”] entered into an agreement with Jodhpur Gaon Panchayat Samiti [“ JGPS”] on 21.9.2011 for 115 kms of road in a Schedule area in Nirdhan . At the time of culmination of the project , certain issues cropped up regarding land acquisition , design of the bridges etc . due to which the JGPS terminated the contract on 21.9.2013.
4. As per contractual mechanism and clause, JCI sent a legal notice on 11.12.2014 asking to invoke arbitration and the termination payment for the work already done.
5. JGPS sent an email on 12.12.2014 informing that the matter is covered under the Madhyaastham Adhikaran Adhiniyam, 1983 and not the Arbitration and Conciliation Act, 1996. They also invoked the performance bank guarantee on 12.12.2014 by sending an email to Maxis bank after business hours.
6. On 13.12.2014 , JCI moved to the High Court of Nirdhan by filing an urgent civil writ Petition being WP (C) No. 99/2014 . The High Court took this matter as the first item on board on 15.12.2014 and granted “...an ad- interim ex-parte stay on invocation of bank guarantee if not already encashed ...” , and also directed “...all further action in this regard by all parties to remain subject to the outcome of the proceedings...”, with



directions to immediately furnish copy by all means to the concerned parties. By 11:00 am , the copies of the order were served upon JGPS, and the Maxis Bank .

7. In the meantime, at 10:00 am , the branch manager of the Jodhpur Gaon branch of Maxis bank had acted upon the email of JGPS and encashed the bank guarantee. At 10:01 am , all the accounts and transactions in progress were instantly frozen due to a massive security breach and the amount under bank guarantee still remained in the account of JCi.
8. The head of the JGPS immediately convened a press conference alleging that the act of hacking is attributable solely to JCi . The corporate headquarters of JCi issued a statement to the press in response, denying such allegations.
9. The writ petition was disposed of directing the parties to seek appropriate interim remedies from the Id. Arbitrators under the Act of 1996, before the council for infrastructure Arbitration (CIA), and the objections regarding maintainability filed by the JGPS were dismissed. The Arbitration culminated into an award dated 21.1.2015 in favour of JCi which held JCi entitled to the money.
10. JGPS immediately filed a petition under Sec. 34 of the Act of 1996, before the High Court of Nirdhan on 25.01.2014. On 24.1.2015, JCi wrote to Maxis bank to return the money pertaining to performance bank guarantee, with the interest accumulated thereon, which was thrice the principal.
11. On 27.1. 2015, Maxis Bank informed that admission of petition under Sec. 34 amount to a stay on the award until the final outcome of award. In response, on 28.1.2015, JCi cited its concern about of liquidity and pressure of the Amerasian Development Bank regarding the repayment of loan etc. The Maxis Bank did not release any payment to JCi.

12. JCI challenged the constitutional validity of Sec. 34 by way of the writ petition, being WP 999/2015 . The High Court of Nirdhan admitted the petition.
13. In the meanwhile, the Governor of the State of Nirdhan, on 20<sup>th</sup> December 2014 promulgated an ordinance which came into effect from 24<sup>th</sup> December 2014, which amended the Nirdhan Panchayati Raj Act , 1994 regarding the qualification for election as a panch or a member.
14. People’s Union for Liberties & Democratic Reforms issued a public statement that the ordinance was replete with malice in law which promulgated the ordinance for 5 years instead of 6 months, and it is violative of the constitution since “ We the people” does not , and cannot mean “ We the literate people”.
15. People’s Union for Liberties & Democratic Reforms moved the High Court of Nirdhan on 29<sup>th</sup>December,2014 for an urgent listing and hearing, since the election notification was to be issued on 3<sup>rd</sup> January, 2015. The PPS to the Hon’ble Chief Justice informed the counsel that listing has been denied .
16. The People’s Union for Liberties & Democratic Reforms moved the Hon’ble Apex Court under Art. 32 on 31.12.2014 through the “Vacation Officer”. After the wait of 48 hours, the counsels for People’s Union for Liberties & Democratic Reforms sought to escalate the matter .
17. People’s Union for Liberties & Democratic Reforms filed a pro-bono petition WP (C) No. 1021/2015 in the High Court of Nirdhan challenging the vires of the ordinance .
18. The High Court of Nirdhan admitted the petition and given that important questions pertaining to the interpretation of constitution were involved , notices were issued to the Id. Attorney General as well as Republic of Gariba.

## **STATEMENT OF ISSUES**

### **Regarding WP 999/ 2015 :**

1. Whether Sec. 34 of the Arbitration and Conciliation Act , 1996 is Constitutional ?
2. Whether JCi is entitled to Bank Guarantee from Maxis Bank ?

### **Regarding WP 1021/2015 :**

3. Whether the non- availability of a notified procedure and vacation bench is violative of Art. 21 of the Constitution of Republic of Gariba.?
4. Whether the ordinance promulgated on 20<sup>th</sup> December, 2014 is Constitutional?

## **SUMMARY OF ARGUMENTS**

### **1. Sec. 34 of the Arbitration and Conciliation Act, 1996 is not Constitutional.**

Sec. 34 of the Act is not constitutional as it amounts to litigation in the arbitral process which causes delay and hence amounts to expropriation. It also leads to violation of country's bilateral and multilateral commitments.

### **2. JCI is entitled to Bank Guarantee from Maxis Bank.**

The contract was terminated by JGPS itself. Thus, the arbitral award which makes JCI entitled of the bank guarantee is maintainable. Also grant of an automatic stay, without adjudication causes irreparable injury to the petitioner.

### **3. The non- availability of a notified procedure and vacation bench is violative of Art. 21 of the Constitution of Republic of Gariba.**

The non-availability of a notified procedure and vacation bench is violative of Art. 21 as the petitioner has the right to speedy trial under Art. 21. Also, no clear indication of filing objection through petition before the issuance of election notification in vacations is totally unconstitutional but it doesnot affects the merits of the case.

### **4. The ordinance promulgated on 20<sup>th</sup> December,2014 is not Constitutional.**

The ordinance is unconstitutional and ultra vires as it is an outcome of malice and bad intention. It not only marginalises women and weaker sections of society due to prevailing skewed literacy standards but also adversely affects the basic structure of the Constitution.

**ARGUMENTS ADVANCED**

**1.WHETHER SEC. 34 OF THE ARBITRATION AND CONCILIATION ACT , 1996**

**IS CONSTITUTIONAL ?**

**[1.1]. Sec 34. of the Act amounts to litigation in the Arbitral process:**

Sec 34.of the Act is not constitutional as it amounts to the litigation in the arbitral process. It defeats the very purpose of the arbitration i.e. out of the court settlement; being a mode of Alternative Dispute Redressal and is selected by their own free will which gives a go-by to the normal judicial forum otherwise available to the parties.<sup>1</sup>

In the case of **M/s. Navodaya Mass Entertainment Ltd. v/s M/s. J.M. Combines<sup>2</sup>**, it reappraises the matter as if it was an appeal and even if two views are possible, the view taken by Arbitrator would prevail.

**[1.2]. The Pendency of Sec 34. leads to delay and hence amounts to expropriation:**

It is obvious that both the parties had agreed upon the idea of moving to Arbitration in case of any dispute in order to avoid the wastage of time and litigation expenses which are to be generally incurred upon the litigation process .Moreover, according to Sec 35. Of the Arbitration and Conciliation Act, 1996 the award of Arbitrator is final and binding upon the

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<sup>1</sup> 1982 JBL 123, *citing* William H. Gill, THE LAW OF ARBITRATION; John Parris, THE LAW AND PRATICE OF ARBITRATION , p 8. *See* further, M. Rutherford , *Arbitration and consumer Protection*, 131 New LJ 389

*Northern Health Authority v. Derek Crouch Ltd.*, [1984] 2 All ER 175 CA

*Mitsubishi Motors Corpn v Soler Chrysler- Plymouth Inc.*, 87 L ED 2d 444 (1985) at p 459 (Australia SC )

*Cited* by Frank Bates , *Commercial Arbitration and the Courts in Australia : Signs of Change* , 1987 JBL 527 at p 531

<sup>2</sup> 2014 (3) Apex Court Judgements 595 (S.C.)

parties. **Sec 35.** Of the Act states that: **Finality of arbitral awards** : *Subject to this part an arbitral award shall be final and binding on the parties and persons.*

This fact was known to both the parties. In this way, the petition filed by the JGPS on 25.1.2015 is just causing the delay for JCI to get the performance bank guarantee of which the petitioner is entitled. It also amounts to expropriation as it has deprived JCI of the bank guarantee over which it has proprietary rights.

In **Hindustan Steel Works Const. Ltd. v/s Government of Tamil Nadu**<sup>3</sup>, the award of Arbitrator cannot be set aside by invoking Sec. 34 when the matter decided by Arbitrator is in accordance with terms of contract and the Arbitrator has acted within his authority.

**[1.3] The application of Sec. 34 leads to violative of country's bilateral and multilateral commitments :**

In the year 1985, the UNCITRAL brought in a model Arbitration law to achieve uniform domestic & international award and hence a friendly atmosphere. India responded to it & enacted Arbitration & Conciliation Act, 1996 which intended to:

- (a) To recognise the importance of having a uniform arbitration law all over the world.
- (b) To reduce the interference of the courts into the arbitral proceedings.
- (c) To encourage Commercial disputes to be resolved by the arbitration.

In this way, the application made by the respondents under section 34 of the Act defeats the purpose of such enactments and violates the country's bilateral and multilateral commitments.

**2. WHETHER JCI IS LIABLE TO BANK GUARANTEE FROM MAXIS BANK ?**

**[2.1]. JCI is entitled to bank guarantee from Maxis Bank :**

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<sup>3</sup> 2011(6) MLJ 21 : 2012 (1) ArbiLR 51 :2012 (7) R.C.R. (Civil) 271 (Madras)

First of all, JCI has no fault in the termination of contract. It accomplished the major portion of the task assigned to it by the JGPS. However, at the time of culmination of the project, certain issues cropped up regarding land acquisition, design of the bridges etc. due to which the JGPS terminated the contract on 21.9.2013. Thus, it was completely the decision of JGPS. Hence JCI is entitled to bank guarantee as it has an immediate requirement of liquidity due to erosion of net worth, expenses for litigation and pressure of Amerasian Development Bank regarding the repayment of loan. Similarly, in the case of **Union of India v/s R.K. Traders**<sup>4</sup>, it was held that there was a fundamental breach of contract amount towards loss of profit, and the proper appeal dismissed. In another case of **Office Equipments v/s Power Grid Corporation of India Ltd.**<sup>5</sup>, the same situation arised as that of the instant case ; where the Arbitrator held that the respondents were left with no right to encash the bid guarantee therefore , they were not entitled to encash the same. Since the respondents itself abandoned the contract so it was held that forfeiture of bid guarantee by the respondent was only an attempt to make themselves more richer illegally, which cannot be justified.

**[2.2]. Grant of an automatic stay, without adjudication causes irreparable injury to JCI**

The Principal of natural justice – *audi alteram partem* enshrined under article 14 of Constitution shall be violated as the automatic stay was granted without proper adjudication and without giving equal opportunity of being heard to both parties.<sup>6</sup> It not only causes irreparable injury but also this will not be any balance of convenience. Earlier also, Maxis bank had been partial and supported the JGPS. It has been clearly mentioned that JGPS

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<sup>4</sup> 2013(7) ADJ 258 : 2013 (5) All. LJ 412 : 2014 (9) R.C.R. (Civil) 2756 (Allahabad)

<sup>5</sup> 2011 (1) ArbILR 109 : 2011 (177) DLT 55C: 2012 (7) R.C.R. (Civil) 1015 (Delhi)

<sup>6</sup> Central Inland Water Transport Corpn. Ltd. v/s Brojo Nath AIR 1986 SC 1571

Delhi Transport Corporation v/s D.T.C. Mazdoor Congress AIR 1991 SC 101

F.C.I. v/s Kam Dhenu Cattle Feed Industries (1993) 1 SCC 71

Mahesh v/s Regional Manager , UPFC (1993) 2 SCC 229

invoked the performance bank guarantee on 12.12.2014 by sending an email **after business hours** to Maxis Bank.<sup>7</sup> Consequently, on 15.12.2014, the branch manager of the Jodhpur Gaon branch of Maxis Bank had acted on the email of JGPS and encashed the bank guarantee, sharp at 10:00 am i.e. right after the opening of the opening of the bank. Similarly, grant of an automatic stay again shows the favouritism on the part of the Maxis Bank.

**[2.3]. The Arbitral award is maintainable:**

The objection regarding maintainability filed by JGPS were dismissed by the Id. Arbitrators. Hence the Arbitrators culminated into an award dated 21.1.2015 in favour of JCi and inter alia held JCi entitled to the money under the performance bank guarantee.

**3. WHETHER THE NON- AVAILABILITY OF A NOTIFIED PROCEDURE AND VACATION BENCH IS VIOLATIVE OF ART. 21 OF THE CONSTITUTION ?**

**[3.1] The petitioner have right to speedy trial under Art. 21 of the Constitution:**

In the instant case the petitioner moved the court within time but the court did not hear them. A petition for the writ of Habeas Corpus was filed by a number of under-trial prisoners who were in jails in the State of Bihar for years awaiting their trial, the Supreme Court held that Right to Speedy Trial is a fundamental Right implicit in guarantee of life and personal liberty enshrined in Article 21 of the Constitution.<sup>8</sup> According to Bhagwati J.; (as he then held that) although, unlike the American Constitution speedy trial is not specifically enumerated as a fundamental right it is implicit in the broad sweep and content of Article 21 as interpreted in **Menaka Gandhi's** case.<sup>9</sup>

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<sup>7</sup> Factsheet

<sup>8</sup> Hussainara Khatoon (No1) V. Home Secretary State of Bihar, AIR 1979 SC 1360

<sup>9</sup> United States Constitution; Sixth Amendment, Maneka Gandhi V. Union of India, (1978 (1) SCC 248)



Supreme Court laid down detailed guidelines for speedy trial of an accused in criminal case but it declined to fix any time limit for trial of offences. The burden lies on the prosecution to justify and explain the delay. The Apex Court held that the right to speedy trial flowing from Article 21 is available to accused at all stages namely the stage of investigation inquiry, trial, appeal, revision and re-trial.<sup>10</sup> The accused persons who were being tried for waging war against state filed writ petition under Article 136 before the Supreme Court for quashing the proceeding before the special judge on ground of violation of their Right of Speedy Trial under Article 21 of the Constitution. The Court held that the Right of Speedy trial is one of the dimensions of fundamental right to life and liberty granted by Article 21 of the Constitution.<sup>11</sup>

The problem of delay in disposal of cases is not a new problem and has been in existence since a long time. However, it has now acquired terrifying proportions. On one hand, it has put the judicial system under strain and on the other hand, it has shaken the confidence of the people also. Even the Law Commission of India in its 77<sup>th</sup> Report has observed: "Long delay in the disposal of cases has resulted in huge arrears and a heavy backlog of pending file in various courts in the country. A bare glance at the statements of the various types of cases pending in different courts and of the duration for which those cases have been pending is enough to show the enormity of the problem."<sup>12</sup> The Commission further noticed that no reform may prove useful if the existing courts remained burdened with heavy backlog of pending cases. In this connection, it referred to the following observation of Rankin Committee, 1925: Improvement in methods is of vital importance, we can suggest improvements, but we are convinced that where the arrears are unmanageable, improvement

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<sup>10</sup> Abdul Rehman Antuley v. R.S. Nayak, AIR 1992 SC 1630

<sup>11</sup> Raghubir Singh V. State of Bihar (1986) 4 SCC, 481

<sup>12</sup> Seventy Seventh Report, the Law Commission of India, 1978, 1.

in methods can only palliate.<sup>13</sup> The speedy trial of offences has been the prime objective of the criminal justice delivery system. It is a desirable goal as long and inordinate delay may defeat the ends of justice. There are common proverbs - 'delay defeats justice' and 'justice hurried is justice buried'. Hence, the object of speedy justice should not be at the cost of legal justice. Thus, it is necessary to strike a reasonable balance between the considerations of speed and justice.<sup>14</sup> In the area of speedy trials, **Antulay**<sup>15</sup> is a case of cardinal importance. Holding that the fair, just and reasonable procedure implicit in Art. 21 created a right in the accused to be tried speedily. The court explained undue delay in following words:

While determining whether undue delay has occurred (resulting in violation of Right to speedy trial) one must have regard to all the attendant circumstances including nature of offence, need of trial, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on - what is called the systemic delays.<sup>16</sup>

**3.2 No clear indication of filing objection through petition before the issuance of election notification in vacations is totally unconstitutional:**

It is humbly submitted that a clear indication should be made by the concerned authority regarding the limited period for filing the objection. Judges or the Registry to receive the election petitions during the Sankranthi vacation. As mentioned already, the notification says that the High Court of Andhra Pradesh will remain closed for the Sankranthi vacation from January 2, 1990 to January 12, 1990 (both days

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<sup>13</sup>. *Id* at 2.

<sup>14</sup>. S.N. Sharma, Fundamental Right to Speedy Trial : Judicial Experimentation 38 *ILLI*(1996) 236.

<sup>15</sup>. *A.R. Antulay v R.S. Nayak* (1992) 1 SCC 225.

<sup>16</sup>. *Id* at 271.

inclusive). The nomination does not clarify that the Judges of the High Court alone would refrain from work between January 2, 1990 and January 12, 1990 and that the Registry would function normally during the said period of vacation.<sup>17</sup> Clear indication and procedure for filing objections through election petition against the elections and election notification should be stated by the Election Commission of India, if not so granted is totally unconstitutional.<sup>18</sup>

**3.3 Non grant of listing before the issuance of election notification cannot affect the merit of the case since the court was moved well in time and *actus curiae neminem gravabit*:**

In the instant case the petitioner approached the court on 29<sup>th</sup> of December 2014 i.e. 4 days before the issuance of election notice. Thus, it is contended that the non grant of listing was not a fault on behalf of the petitioner and hence it should not affect the merits of the case as our justice system presumes that ‘an act of the court shall prejudice no one’.

It was held that an election process can only be stopped, if the petition is filed and admitted before the application or issuance of election notification, once an election notification is formulated and objections are filed and admitted after that; electoral process cannot be stopped. The petition was admitted 3 days before the issuance of election notification, Petition Allowed.<sup>19</sup> Election petitions shall be admitted even if the court is on vacation before or within 45 before the election notification. Dates for filing election petition can be extended

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<sup>17</sup> Simhadri Satya Narayana Rao vs M. Budda Prasad on 21 December, 1990, 1990 SCR, Supl. (3) 701 1994 SCC Supl. (1) 449

<sup>18</sup> Sk. Md. Moozahar Ali vs State Of West Bengal And Others on 14 August, 2013 , Kolkata High Court W.P. 23871(W) of 201

<sup>19</sup> L.Shivashankar Reddy. Revision vs The Government Of Andhra Pradesh, ... on 19 March, [2014](#), Writ Petition No.17131 of 2013, Date: 19-03-2014

if not defined.<sup>20</sup> Non availability of vacation bench and listing is unconstitutional, presentation of an election petition on the next day following the vacations, would render the election petition to have been filed during the prescribed period, if that period fell during the vacations, No period for filing of an election petition is prescribed under the Indian Limitation Act.<sup>21</sup> Therefore the non availability of a notified procedure and vacation bench is unconstitutional and violative of Art. 21 of the Constitution of the Republic of Gariba.

**4.WHETHER THE ORDINANCE PROMULGATED ON 20 DEC, 2014 IS CONSTITUTIONAL?**

**4.1The ordinance is ultra-vires and was an outcome of malice and mala-fide intention:**

Where the reasons are available, the plea of mala fides will succeed if it appears that-

(a) The President or the Governor acted upon no evidence at all as to the urgency of the situation<sup>22</sup> or

(b)The circumstances which were acted upon by him are not relevant to the object for which the subjective power had been conferred by the Constitution upon the Executive<sup>23</sup>

Furnishes a glaring example of the abuse of the ordinance making power by the executive.

The five judges of the Hon'ble SC held that such a practice was a "subversion of the democratic process" and "colorable exercise of power and amounted to fraud upon the

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<sup>20</sup> Sukhbeer Singh vs Amarinder Singh on 9 July, 2008, CM No.5-E of 2007,Election Petition No.22 of 2007, Punjab and Haryana High Court

<sup>21</sup> Lachhman Das Arora vs Ganeshi Lal & Ors on 1 September, 1999, Supreme Court of India relied on Hari Shanker Trpathi v. Shiv Harsh and others , (1976) 1 SCO 897 and Simhadri Satya Narayana Rao v. M. Budda Prasad and others , (1994) Supp (1) SCC 449

<sup>22</sup> Cf. Rhotas Industries V. Agarwal, AIR 1969 Sc 707; (1969) 1 SCC, 325 (Paragraph 16, 38)

<sup>23</sup> Barium Chemicals V. Company Law Board, AIR 1969 SC 295 (Paragraph 39,64)

constitution and therefore unconstitutional”. The court called it “usurpation by the executive of the law making function of the legislature”. The power to promulgate an ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be “perverted to serve political ends”.<sup>24</sup> A Governor’s Ordinance made without previous instructions is void.<sup>25</sup>

The Supreme Court has ruled that a proclamation issued by the President under Article 356 on the advice of the council of ministers is amenable to judicial review at least to the extent of examining whether the condition precedent to issuance of the proclamation has been satisfied or not. Thus while an act passed by a legislature may not be challengeable on the ground of mala-fide, the same ought not to be said of an executive.<sup>26</sup> Justice Fazil Karim of the Pakistan Supreme Court has also stated that an Ordinance can be challenged on the ground of mala-fide. The learned judge has placed reliance on **Benoari Lal Sharma’s** case<sup>27</sup>, where Section 72 of the Government of India Act, 1935 was in question.

Since, in the instant case, there were no such circumstances which required the Governor to take an immediate action which had for the first time been brought into vogue in the Republic.<sup>28</sup> Hence such an ordinance may score in letter but loses in spirit.

The Court is not entitled to examine whether the conditions precedent for the exercise of the power of the Governor under Article 213 existed or not, for the purpose of determining the validity of an Ordinance and in support of this proposition, strongly relied upon the decisions

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<sup>24</sup> D.C. Wadhwa V. State of Bihar (1987) 1 SCC, 378

<sup>25</sup> Aga Constructions V. Chief Engineer, AIR 1982 AP 70 (Paragraph 18,20)

<sup>26</sup> S.R. Bommai V. Union Of India (1994) 3 SCC 1; AIR 1994 SC 1918, followed in Rameshwar Prasad V. Union of India (2006) 2 SCC 1: AIR 2006 SC, 980

<sup>27</sup> Fazalul Quadar Chowdhury V. Muhammed Abdul Haque, PLD 1963 SC, 486

<sup>28</sup> Factsheet

reported in *Bhagat Singh & Ors. v. Empire*, AIR 1931 PC 111, *Rajaram Bahadur Kamlesh Narain Singh v. Commissioner of Income Tax*, AIR 1943 PC 818; *Laxmidhar Misra v. Rangalal & Ors.*, AIR 1950 PC 59 and *R.C. Cooper v. Union of India*, [1970] 3 SCR 530. They do not at all deal with the question which we are called upon to decide here. It is true that, according to the decisions of the Privy Council and this Court, the Court cannot examine the question of satisfaction of the Governor in issuing an Ordinance, but the question in the present case does not raise any controversy in regard to the satisfaction of the Governor. The only question is whether the Governor has power to re-promulgate the same Ordinance successively without bringing it before the Legislature. That clearly the Governor cannot do. He cannot assume legislative function in excess of the strictly defined limits set out in the Constitution because otherwise he would be usurping a function which does not belong to him.<sup>29</sup> Hence the ordinance is void under Article 13(2) of the Indian Constitution 1950 as ordinance is also a law; and the ordinance is in contravention of rights conferred in Part III.

**4.2 The ordinance marginalizes participating of women & weaker section in the Elections due to the prevailing sewed literacy standards:**

Art. 243(D) envisages the reservation of seats for Panchayats elections for SC/STs and women in proportion to their population. The purpose for 73<sup>rd</sup> and 74<sup>th</sup> Constitutional amendment with reservation for marginalized social groups and women was to empower them and deepen their participation in governance. This ordinance would debar majority of selected representatives of the Panchayati Raj Institutions in the state of Nirdhan from contesting, hence defeating the objective of affirmative action enshrined in the Constitution. Social justice has become a victim by this ordinance. Thus, it abridges the valuable

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<sup>29</sup> *Bhagat Singh & Ors. v. Empire*, AIR 1931 PC 111, *Rajaram Bahadur Kamlesh Narain Singh v. Commissioner of Income Tax*, AIR 1943 PC 818; *Laxmidhar Misra v. Rangalal & Ors.*, AIR 1950 PC 59 and *R.C. Cooper v. Union of India*, [1970] 3 SCR 530.

fundamental and constitutional rights granted under Art. 14 as well as the purpose of CEDAW convention which works for the empowerment of women.

**4.3 The ordinance is against the basic structure of constitution like Preamble and Free and Equal participation in Democratic Government:**

The Preamble declares “We the people of India solemnly resolved to constitute India into an Sovereign, Socialist, Secular, Democratic, Republic and to secure to all its citizen.

JUSTICE, Social, Economic and Political

EQUALITY of status and of opportunity;

and to promote among them all.

It is submitted that here “We the people” does not mean that “we the literate people”.

The Preamble stating Political Justice and Equality of opportunity has infringed in the present case. The Supreme Court rejected the provision held in **Beru-Bari Case**<sup>30</sup> and held that Preamble is the part of the constitution. The basic structure of the constitution cannot be amended.<sup>31</sup> Every citizen has right to free and equal participation in democracy. In the case of **S.Rangarajan v. P.Jagjivan Ram**<sup>32</sup>, the Supreme Court had held that the democracy is a government by the people via open discussion. The democratic form of government itself demands its citizens an active and intelligent participation in the affairs of the community. The public discussion with peoples participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of government. The democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value. The Supreme Court further

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<sup>30</sup> AIR 1960 SC 845

<sup>31</sup> Kesavananda Bharati V. State of Karela AIR 1973, SC, 1461

<sup>32</sup> S.Rangarajan v. P.Jagjivan Ram (1989) 2 SCC 574

held that there must be freedom of thought and the mind must be ready to receive new ideas, to critically analyse and examine them. Each and every citizen of India has right to participate in elections.<sup>33</sup>

The Patna High Court stated that the Citizen of India has, (a) right to vote; (b) right to choose their representatives in a free and fair manner and; (c) right to participate in the self governance. Any law seeking to abrogate the inherent right of the people, which flows from the preamble, including right to have a democratic Government and equality of status and opportunity, such law must be held to be offending the basic feature/structure of the Constitution. According to the petitioners, to participate in democratic process is an inherent right and /or basic right flowing from the Constitution itself, the same is not dependent on any of the particular Article or provisions of the Constitution, nor is dependent on any statutory grace. It was submitted that selection in various authorities, such as, Panchayat, Municipality, Legislative Assembly etc. the legislative competence, though wide, has to remain confined only as a regulatory measures of general applications without offending or curtailing the basic right of the people.<sup>34</sup> Thus, this ordinance hits the soul of participatory and illusive democracy i.e. free and equal participation in the governance.

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<sup>33</sup> C.Sakthivel vs The Commissioner Of Police on 23 August, 2010, Madras High Court W.P.No.17016 of 2010

<sup>34</sup> Krishna Kumar Mishra And Anr. Etc. ... vs State Of Bihar And Ors. Etc. Etc. on 19 March, 1996, AIR 1996 Pat 112



**PRAYER**

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

1. Sec. 34 of the Arbitration and Conciliation Act , 1996 is not Constitutional.
2. JCi is entitled to Bank guarantee from Maxis Bank.
3. The ordinance promulgated by the Governor of the State of Nirdhan on 20<sup>th</sup> December 2014 is not Constitutional.
4. The non- availability of a notified procedure and vacation bench is violative of Art. 21 of the Constitution of the Republic of Gariba.

And to pass any other order as the Hon'ble Court may deem fit in the interests of justice, equity and good conscience and for this act of kindness, the counsel shall always pray.

Counsel for the Petitioners