

Before

THE HIGH COURT OF NIRDHAN

W.P. No. 999/2015

and

W.P. No. 1021/2015

WRIT JURISDICTION U/ A. 226 OF
THE CONSTITUTION OF INDIA

JCi

.....Petitioner

v.

Republic of Gariba and Maxis Bank

.....Respondent

AND

*People's Union for Liberties & Democratic
Reforms*

.....Petitioner

v.

*Republic of Gariba and State Election
Commission*

.....Respondent

MEMORANDUM ON BEHALF OF THE PETITONER

5TH JUSTICE R.K. TANKHA MEMORIAL MOOT COURT COMPETITION, 2015

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STATEMENT OF JURISDICTION

The defendants Republic of Gariba and Jci have been summoned to the High Court of Nirdhan and the court has jurisdiction to hear the matter under Article 226 of the Constitution.

STATEMENT OF FACTS

1. The Republic of Gariba is a sovereign federation of states with several union territories. Nirdhan, was considered as backward till 2011, The Governor of Nirdhan decided to develop roads and highways for the benefit of rural populace. Power was delegated to all the Panchayat Samitis for the same..
2. Jeopardy Contracts Inc. [“**JCi**”] entered into an agreement with Jodhpur Gaon Panchayat Samiti [“**JGPS**”] which was terminated by JGPS on which an award was culminated into, on 21.1.2015 in favour of Jci. JGPS immediately filed a petition under Sec. 34 of the Act of 1996, before the High Court of Nirdhan, on its original side on 25.1.2015.
3. Meanwhile on 24.1.2015, JCi wrote to Maxis Bank asking for money .On 27.1.2015, Maxis Bank informed until the final outcome of Sec. 34, it is not obliged to pay anything to JCi. It also highlighted its difficulty to Jci regarding the strict compliance mandated by the Apex Court as well as the Reserve Bank with bank guarantee norms. JCi challenged the constitutional validity of Sec. 34, by way of a writ petition, being WP 999/2015.
4. On 20th December 2014, The Governor promulgated an Ordinance which came into effect from 24th of December 2014, which amended the Nirdhan Panchayati Raj Act, 1994. People’s Union for Liberties & Democratic Reforms moved to the High Court of Nirdhan during winter vacations on 29th of December 2014 for an urgent listing and hearing. The PPS to the Hon’ble Chief Justice informed the listing has been denied.
5. Further they moved to the Hon’ble Apex Court under Art. 32 on 31.12.2014 through the “Vacation Officer”. No listing was granted till the issuance of election notification. The apex court sent them back to the High Court. They filed a pro-bono petition WP (C) No. 1021/2015 in the High Court of Nirdhan challenging the constitutionality of the ordinance

STATEMENT OF ISSUES

W.P. No. 999/2015

- I. Whether the present Writ Petition filed by the petitioner is maintainable?**
- II. Whether Section 34 of The Arbitration And Conciliation Act of 1996 is Constitutional ?**

W.P. No. 1021/2015

- I. Whether Non-availability of a vacation bench during any holidays is unconstitutional ?**
- II. Whether The ordinance is in violation of Fundamental Rights and is Ultra Vires of Part IX of the Constitution?**
- III. Whether The ordinance is in violation of the basic structure of the Constitution like the preamble, single citizenship , free and equal participation and also Constitutional Rights?**

SUMMARY OF ARGUMENTS

Writ Petition No. 99/ 2014

I. The present Writ Petition filed by the petitioner is not maintainable.

The Petitioner has the locus standi as there is infringement of Article 14 and the violation of fundamental rights gives right for challenging constitutionality of an act under Article 226.

II. Section 34 of arbitration and conciliation act of 1996 is unconstitutional.

It amounts to introduction of 'litigation' in the arbitral process which is against the basic tenets of arbitration thus violating fundamental rights. Also pendencies under Section 34 is huge and the delay is amounting to expropriation, which is leading to violation of country's bilateral and multilateral commitments under various conventions and investment treaties and grant of automatic stay is per se bad in law.

In regards to Writ Petition No. 1021/2015

I. The Writ Petition is maintainable under Article 226 of the Constitution.

The writ is maintainable as it is in pursuance of public Interest.

II. Non-availability of a vacation bench during any holidays is unconstitutional.

Non-availability of a vacation bench is unconstitutional as it is an arbitrary action of the state. Both these actions are arbitrary and unjust. They further move on to violate Article 14 and 21 of the Constitution with the Rule of Law and Natural Justice. Furthermore, The issuance of the election notification does not affect the merits of the petition as the court was moved well in time.

III. The ordinance violates valuable Fundamental Rights and is ultra vires of Part IX of the Constitution of India

The Ordinance is in violation of Articles 14 and 21 and ultra vires of the Part IX of the Constitution of India. The ordinance is discriminatory and arbitrary and violates Right to Live with Dignity and Right to Development. It abridges the basic principle of Part IX i.e. democracy at grass root level.

IV. The ordinance violates the basic structures of democracy like the preamble, single citizenship, free and equal participation in democratic government and also constitutional rights.

The ordinance breaches the concepts of social justice and socio-politico-democratic notions of the principle. Democracy contemplates free and fair elections and unanimous participation in the government. The ordinance further abridges the constitutional right of Contesting Election.

ARGUMENTS ADVANCED

In regards to Writ Petition No. 99/ 2014

I. THAT THE PRESENT WRIT PETITION FILED BY THE PETITIONER IS MAINTAINABLE.

The writ petition filed by the petitioner is maintainable. The Petitioner has the locus standi under Article 226 of the Constitution of India as there is an infringement of Article 14 by denial of the Arbitral Award. The violation of fundamental rights gives right for challenging constitutionality of an act can be challenged under Article 226.

II. THAT SECTION 34 OF ARBITRATION AND CONCILIATION ACT OF 1996 IS UNCONSTITUTIONAL.

It is amounting to introduction of ‘litigation’ in the arbitral process which is against the basic tenets of arbitration.[A]The pendencies under Section 34 petitions is amounting to expropriation, violating bilateral and multilateral commitments.[B]

A. IT AMOUNTS TO INTRODUCTION OF ‘LITIGATION’ IN THE ARBITRAL PROCESS WHICH IS AGAINST THE BASIC TENETS OF ARBITRATION.

Basic tenets of arbitration is discretion of the parties to choose arbitration, as a method of dispute resolution.[i] Speedy justice and right to development are fundamental rights.[ii] Once the parties have chosen arbitration further introduction of litigation into arbitral process[iii] through Section 34 amounts to delay violating fundamental rights of the parties, thus unconstitutional.[iv]

i. Basic tenets of arbitration is choice of the parties for opting arbitration.

Basic tenets of Arbitration is a private dispute resolution mechanism agreed upon by the parties, contained in the arbitration agreement.¹A consensual arbitration is the result of agreement

¹ *P. Manohar Reddy v. Magrashtra Krishna*, AIR 2009 SC 1776.

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between the parties.² It is always in the discretion of the parties to choose arbitration, as a method of resolution of disputes.³ Appointment of arbitrator against the will of one of the parties is almost rarity; and in fact, it runs contrary to the very spirit of arbitration.⁴ Arbitration Act⁵ is an attempt to introduce and enforce some sort of disciplined expediency to alternative disputes resolution.⁶ The essence of arbitration was confidence of each of the parties and an arbitrator derives his authority from this confidence and any step calculating to reduce it was against the spirit of arbitration.⁷ The Act intends to promote and strengthen arbitration, as a mechanism for resolution of disputes⁸ and for economic reforms to become fully effective.⁹

ii. Fundamental right to speedy justice and Right to development

The fundamental requirement of good judicial administration is speedy justice. Any procedure or course of action which does not ensure a reasonable quick adjudication has been termed to be unjust and contrary to the maxim *Actus Curiae Neminem Gravabit* that an act of the Court shall prejudice none.¹⁰ The right to development which forms an integral part of human rights includes the whole spectrum of civil, cultural, economic, political and social process, for the improvement of peoples' well-being and realization of their full potential.¹¹ It is recognised that the right to

² *P.M.A Shukkoor v. Muthoot Vehicle And Asset Finance Ltd.*, 2011 (2) RAJ 121 (ker).

³ *M/s Uma Engineering Co. v. The superintending Engineer Irrigation & CAD*, LNIND 2008 AP 1004.

⁴ *id.*

⁵ The Arbitration and Conciliation Act, 1996.

⁶ *M/S. R.R. Constructions Co. v. Union of India & Others*, LNIND 2009 AP 754.

⁷ *Satya Narayan Agarwall v. Baidyanath Mandal*, AIR 1972 PAT 29.

⁸ *A. Ramakrishna v. Union of India (UOI)*, rep. by Chief Engineer (SZ.II) 2004 (5) ALD 762; *Central Public Works Department and Ors*, 2005 (1) ARB LR 1 (AP).

⁹ *M/S. Abbas Cashew Company v. M/S. Bond Commodities*, LNIND 2010 KER 5641.

¹⁰ *Anil Rai v. State Of Bihar*, AIR 2001 SC 3173.

¹¹ *K. Guruprasad Rao v. State Of Karnataka And Ors*, (2013) 8 SCC 418.

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development as the State's primary responsibility to create conditions favourable to the realisation of the right to development¹² and brighten their self development.¹³

iii. Section 34 is amounting to introduction of litigation into arbitral process.

The law Commission finds that in most Courts, arbitration matters are kept pending for years altogether, one of the major considerations was the need to curtail delays in the arbitral process.¹⁴

The role of the court when it enters into the arena of commercial disputes must be to facilitate an efficacious and expeditious determination of disputes. The object of the alternative dispute resolution process of arbitration is to have expeditious, effective disposal of the disputes through a private forum of parties' choice¹⁵ demolish various stages and proceedings through which an award was required to pass¹⁶ and to reduce the intervention of the courts in such proceedings.¹⁷

Therefore because of the delay caused in the courts in dealing with matters of arbitration, section 34 is violating article 21.

iv. Section 34 is unconstitutional as it violates Article 14.

Traditionally law could be declared unconstitutional on very limited grounds but as law developed, grounds for unconstitutionality also widened.¹⁸ Further in judging the Constitutional validity of the Act, the subsequent events, namely, how the Act has worked out, have to be looked into with having regard to object and reasons as well as the legislative history of the

¹² *Boat and Ors. v. V. B. D. Sardana and Ors.*, (1997) 8 SCC 522.

¹³ *Murlidhar Dayatideo Kesekar v. Vishwanath Pandu Barde and Anr.*, [1995] 2 SCR 260; *R. Chandeverappa and Ors. v. State of Karnataka and Ors.*, (1995) 6 SCC 309.

¹⁴ Law commission of India, Report no. 246, *Amendments to the Arbitration and Conciliation Act 1996*, August 2014.

¹⁵ *Union of India v. Singh builders Syndicate*, (2009) 4 SCC 523.

¹⁶ *Western Shipbreaking Corps. v. Clare Haven Ltd.*, (1998) 1RAJ 367 (Guj).

¹⁷ *A. Ramakrishna v. Union Of India*, 2004(3) RAJ 554 (AP).

¹⁸ *Namit Sharma v. Union Of India*, (2013) 1 SCC 745.

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statute.¹⁹ Further the Supreme Court has laid down that law under article 21 has to be in consonance with article 14 and 19.²⁰ It is now well settled that Article 14 forbids class legislation, but does not forbid reasonable classification.²¹Intelligible differentia is based on practical and real classification and the defacto classification should be based on intelligible differentia²² and not herding together of certain persons and classes arbitrarily²³ which can be availed by non citizens also.²⁴ Section 34 imposes certain restrictions on the right of the court to set aside an arbitral award. It provides, in all, seven grounds for setting aside an award and an arbitral award can be set aside only if one or more of these seven grounds exists.²⁵The classification made by section 34 is arbitrary and unreasonable.

B. THE PENDENCY OF SEC. 34 PETITIONS IS HUGE AND THE DELAY THEREON AMOUNTS TO EXPROPRIATION, IN AS MUCH AS IT TAKES AWAY THE FRUITS OF THE AWARD WHICH LEADS TO VIOLATION OF COUNTRY'S BILATERAL AND MULTILATERAL COMMITMENTS UNDER VARIOUS CONVENTIONS AND INVESTMENT TREATIES;

Pendencies under section 34 is huge[i]. Delay caused by section 34 is amounting to indirect expropriation[ii]. The law of expropriation in india recognises indirect expropriation and thereby this is violating article 300-A.[iii]

i. Pendencies under Section 34 is huge.

The law Commission finds that in most Courts, arbitration matters are kept pending for years for the lack of dedicated benches looking at arbitration cases.²⁶ The judicial system is over-burdened with work and is not sufficiently efficient to dispose cases, especially commercial cases, with the

¹⁹ *id.*

²⁰ The Constitution of India, 1950; *Mrs. Maneka Gandhi v. Union Of India And Anr.*, AIR 1978 SC 597.

²¹ *Deepak Sibal v. State Of Punjab*, AIR 1989 SC 903.

²² *R.K. Garg v. Union of India*, (1981) 4 SCC 675.

²³ *id.*

²⁴ *The State of West Bengal v. Anwar Ali Sarkar*, 1952 CriLJ 510.

²⁵ *Fiza Developers and Inter-Trade P. Ltd. v. AMCI (I) Pvt. Ltd. and Anr.*, (2009) 17 SCC 796.

²⁶ *Supra* Note 14, Law Commission Rep. ¶.23.

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speed and dispatch that is required and the bar for judicial intervention (despite the existence of section 5 of the Act) has been consistently set at a low threshold by the Indian judiciary²⁷

ii. Delay caused by section 34 is amounting to expropriation.

Indirect expropriation involves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure. The single most important development in state practice has become the issue of indirect expropriation. referred as ‘regulatory taking,’ host States invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or cancelling investors’ legal title to their assets or diminishing their control over them.²⁸ Essentials to prove indirect expropriation on the basis of state practice, doctrine and arbitral awards,

- An act attributable to the State:-“whether the organ exercises legislative, executive, judicial or any other functions,”²⁹ Thus the impugned section is a composite part of Arbitration act 1996³⁰ attributable to state.
- Interference with property rights or other protected legal interests :- Republic of Gariba has incorporated indirect expropriation in its BITand Model BIT³¹ which explicitly notes that investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation.³² Thus it is evident that investments are protected from expropriation both direct and indirect.

²⁷ *id.*

²⁸ *Suez et al. v. Argentina*, Decision on Liability, 30 July 2010, ¶ 121

²⁹ *International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Article 4.

³⁰ The Arbitration and Conciliation Act, 1996.

³¹ The Model Bilateral Investment Treaty, Article 1.

³² *id.*

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- Of such degree that the relevant rights or interests lose all or most of their value or the owner is deprived of control over the investment:-Section 34 of arbitration act which is a regulatory measure is taking away the benefits accrued through award. It was held by the Hon'ble Supreme Court that the very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award.³³ In the instant case, Maxis Bank denied to pay anything to Jci as there was a stay on the award. Therefore the benefits arising from the award is being denied.³⁴ A deprivation has occurred through section 34.

iii. The law of Expropriation and violation of article 300-A.

a. Law of Indirect expropriation in India

Indirect expropriation is recognised in India. The Supreme Court has held that virtually depriving property amounts infringement of article 300-A³⁵ further Deprivation of property may take place in various ways, such as 'destruction'³⁶ 'confiscation'³⁷, revocation of a proprietary right granted by a 'private proprietor', 'seizure of goods' or 'immovable property', from the possession of an 'individual'³⁸(supra) or 'assumption of control of a business'³⁹ further there is a 'deprivation' where a municipal authority, under statutory power, pulls down 'dangerous premises'⁴⁰

b. A statute can be held unconstitutional if it violates Article 300-A.

The expression 'Property' in Article 300A confined not to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognised by

³³ *Supra* Note 25.

³⁴ Moot proposition, ¶12

³⁵ *V. Subramaniam v. Rajesh Raghuvandra Rao*, AIR 2009 SC 1858.

³⁶ *Chiranjit Lal Chowdhuri v. Union of India*, (1950) 1 SCR 869.

³⁷ *Ananda Behera v. State of Orissa*, (1955) 2 SCR 919.

³⁸ *Wazir Chand v. State of H.P.*, 1954 CriLJ 1029.

³⁹ *Virendra Singh v. State of U.P.*,(1955) 1 SCR 415.

⁴⁰ *Nathubhai Dhulaji v. Municipal Corporation*, AIR 1959 Bom 332.

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law.⁴¹ Public purpose is, a condition precedent, for invoking Article 300A.⁴² The requirement of public purpose is invariably the rule for depriving a person of his property, violation of which is amenable to judicial review. The legislation providing for deprivation of property under Article 300A must be "just, fair and reasonable" as understood in terms of Articles 14, 19(1)(g), 26(b), 301, etc. As section 34 is leading to arbitrary results it is against rule of law and article 300-A. In other words, the main object is to drastically curtail supervisory role of Courts, demolish various stages and proceedings through which an award was required to pass through in the mechanism of old enactment so that the object of speedy resolution of dispute is achieved.⁴³

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

The arbitration culminated into an award dated 21.1.2015 in favour of JCI, and inter alia held JCI entitled to the money under the performance bank guarantee.⁴⁴ On 27.1.2015, Maxis Bank informed that admission of Petition under Sec. 34 amounts to a stay on the award, and therefore until the final outcome of Sec. 34, it is not obliged to pay anything to JCI.⁴⁵ This stay on the performance bank guarantee is *per se* bad in law.

In regards to Writ Petition No. 1021/2015

I. THAT NON-AVAILABILITY OF A VACATION BENCH DURING ANY HOLIDAYS IS UNCONSTITUTIONAL.

A. NON-AVAILABILITY OF A NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION IS UNCONSTITUTIONAL.

The non-availability of a vacation bench during any holiday is unconstitutional as it is *vires* Article 14 of the Indian Constitution because it infringes the Right to Hearing as Article 14

⁴¹ *K T Plantation v. State Of Karnataka*, (2011) 9 SCC 1.

⁴² *id.*

⁴³ *Western Shipbreaking Corps. v. Clare Haven Ltd.*, (1998) 1RAJ 367 (Guj).

⁴⁴ Moot Proposition, ¶4.

⁴⁵ Moot Proposition, ¶12.

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guarantees a right of hearing to the person adversely affected by an administrative order⁴⁶. The writ petition was expected to be heard before the 3rd of January due to the impending issuance of the election notification. Despite of the urgency of the matter, a vacation bench was not provided to the petitioners. Urgency being, election process bars the courts to interfere in the matter, As the superintendence, direction and control of the entire process is vested in the Election Commission⁴⁷ under Article 243-O of the constitution. Hence, for expedient hearing the court was approached during the winter breaks. Herein, the entire journey from the initial denial, approaching the SC and then coming back to the HC has lead the petition to become completely infructuous due to the above stated reason.

The act of not listing the matter and not granting a vacation bench is arbitrary, unreasonable and unjust. The denial is an arbitrary action as no reason was provided for the same. The Apex court's order of sending the matter back to the HC proves the fact that the court should have had heard the matter and the procedure adopted by the petitioners should have been valued. Article 14 out-laws arbitrary administrative action⁴⁸ It's moreover vires the concept of Natural Justice as delayed justice is equivalent to denied justice. Non-granting of a vacation bench is an act of prevention of delivering justice when sought. The right to natural justice is included in Article 14⁴⁹. This act is also violative of Article 21 of the constitution as it infringed their right to access to justice. The right of access to justice must be deemed to be part of Article 21.⁵⁰ Judicial

⁴⁶ M.P. Jain, *A Treatise on Administrative Law*, I, Chs. X and XI. 304-447(Wadhwa and Co. Agra 1996); M.P Jain, *Cases and Materials on Indian Administrative Law*, I Chs. IX and X, 641-919(1st ed., LexisNexis Buttersworths 1994).

⁴⁷ *Election Commission of India v. Ashok Kumar*, (2000) 8 SCC 216: AIR 2000 SC 2979; *Lalji Shukla v. Election Commission*, AIR 2002 All 73.

⁴⁸ *A.P. Aggarwal v. Govt. of NCT of Delhi*, AIR 2000 SC 205.

⁴⁹ *Tulsi Ram v. Union of India*, [1985] Supp. 2 SCR 131.

⁵⁰ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597: (1978) 1 SCC 248.

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Review by the HC under Article 226 of the constitution is a part of the inviolable basic structure of the same⁵¹

B. NON-AVAILABILITY OF A NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION IS UNCONSTITUTIONAL.

The procedure provided in the proposition illustrates the petitioners were denied proper hearing on grounds unknown to the petitioners both at the High Court and the Apex court. There is a failure in observing as to what procedure is adopted to analyze the merits of urgency to set up a vacation bench or grant a listing. This is an outright violation of Article 14 as the decision was arbitrary and unreasonable as there is no procedure provided on the public forum to understand what procedure is taken up for listing when the court is not in session.

The doctrine of *Actus curiae neminem gravabit* can be applied in this case. This means that " An act of the court shall prejudice no man". Where a delay is caused by the court, neither party shall suffer for it.⁵²

II. THAT THE SECTION 19 OF THE NRIDHAN PANCHAYATI RAJ ACT, 1994 IS IN VIOLATION OF THE FUNDAMENTAL RIGHTS AND IS ULTRA VIRES OF PART IX OF THE CONSTITUTION OF INDIA.

A. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS IN VIOLATION OF ARTICLE 14 OF THE CONSTITUTION OF INDIA, 1950.

Article 14 bars discrimination and prohibits arbitrary state action. Two concepts are involved in article 14, viz , ‘equality before law’ and ‘equal protection of laws’.⁵³They postulate the application of the same laws alike and without discrimination to all persons similarly situated.⁵⁴ People’s Union for Liberties and Democratic Reforms (PULDR) contends that the impugned

⁵¹ *L. Chandrakumar v. Union of India*, AIR 1977 SC 1125: (1973) 3 SCC 261.

⁵² *Ram Chandra Singh v. Savitri Devi*, (2003) 8 SCC 319: (2003) 8 SCALE 505(2); *Bharat Damodar Kale v. State of A.P.*, (2003) 8 SCC 559: AIR 2003 SC 4560.

⁵³ M.P.Jain, *Indian Constitutional Law* 930 (6th ed. LexisNexis 2010).

⁵⁴ *Jagannath Prasad v. State of Uttar Pradesh*, AIR 1961 SC 1245.

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ordinance strikes at the very heart of Art. 14 by denying the less educated occupants of Nirdhan to take part in their very own Village Panchayats.

i. The classification is reasonable

This law has limitations that distress those most marginalised by the political process. This particular ordinance has created a classification among the people of nirdhan belonging to the district and scheduled areas into two Categories, which prima facie seems to be less educated and more educated. Classification to be reasonable should fulfill the test of intelligible differentia either real or substantial and rational nexus to the object sought to be achieved by the law⁵⁵

Reiterating the above words, intelligible differentia is present when the classification makes substantial categories. Herein the ordinance is just successful in isolating and reprimanding those who are less educated in a region which has the lowest levels of literacy. This condition is interpreted from the fact that Nirdhan had remained backward till 2011.⁵⁶ The educational backwardness further is established through the following excerpt from a Supreme Court Judgement⁵⁷

“The High Court held that economic backwardness plays a part in social backwardness and in educational backwardness. Poverty or economic standard is a relevant factor. Economic backwardness contributes to social backwardness.”

In furtherance of the argument a judgement holds⁵⁸ that any classification should not aggravate the inequality. There also exists no rational nexus between the classification and the objective sought to be achieved by the impugned ordinance. In order to be an effective representative one

⁵⁵ *Javed v. State of Haryana*, (2003) 8 SCC 369, *State of Haryana v. Jai Singh*, (2003) 9 SCC 114 ; *Laxmi Khandasari v. State of Uttar Pradesh*, AIR 1981 SC 873; *The State of Jammu and Kashmir v. Shri Triloki Nath Khosa and Ors.* AIR 1974 SC 1 ; *R.K Garg v. Union of India*(1981) 4 SCC 675.

⁵⁶ Moot Proposition , ¶ 3 , line f.

⁵⁷ *Kumari K.S. Jayasree and Anr. v. The State of Kerala and Anr*, AIR 1976 SC 2381.

⁵⁸ *Lachman Dass v. State of Punjab*, AIR 1963 SC 222; *Roop Chand Adlakha v. DDA*, AIR 1989 SC 307.

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must have an acute sense of problems plaguing one's constituency ever more so for local governments and formal education to the point of 5th, 8th or 10th standard has very little bearing on this and there is not much difference in what a 5th or a 8th pass will be able to do that a politically and socially aware and efficient prudent man cannot in his village. The Supreme Court in Deepak Sibal case, mentions that

*“if there is little or no difference between persons or things which have been grouped together and those left out of the group, then the classification cannot be regarded as reasonable.”*⁵⁹

Therefore the ordinance does not pass the test of reasonability and is violative of article 14.⁶⁰ It marginalises the rural poor and denies them the chance to get involved in their local governments.

ii. The law marginalizes women

This ordinance further discriminates against the rural women as they have lower literacy rates in comparison to the men⁶¹. This creates a disparate impact for one sect of the population and hence is discriminatory. The ordinance distinguishes less educated sect from the more educated. With the apparent lower levels of literacy prevailing amongst the women they clearly fall in the former category of less educated and this leads to the inference that the particular ordinance has the effect of preventing a major part of the women's population from taking part in the elections. This makes the law to be discriminatory and arbitrary due to the state foregoing its responsibility to preserve the rights of the women.

⁵⁹ *Deepak Sibal v. Punjab University*, AIR 1989 SC 903.

⁶⁰ *Kangshari v. State of W. B.*, AIR 1960 SC 457.

⁶¹ International Literacy Data, 2014 ,UNESCO Institute for Statistics.

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B. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS IN VIOLATION OF ARTICLE 21 OF THE CONSTITUTION OF INDIA, 1950

The ordinance infringes the Right to live with human dignity of the rural populace who are disqualified from contesting elections. This particular law creates a certain social stigma and isolates the aggrieved for being unqualified and incompatible for the role of a Village Panch. 'Life' in Art. 21 does not mean merely animal existence, but living with 'human dignity' be able to express oneself in diverse forms and in another case⁶². Few relevant case laws illustrates⁶³ concur with the same the court posed to itself a question "*if dignity or honour vanishes what remains of life*". Right to Development is also being violated. The aggrieved persons have the right to be developed socially and politically and this particular law hampers the political development of the less educated rural populace.⁶⁴

C. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS ULTRA VIRES OF PART IX OF THE CONSTITUTION OF INDIA.

The 73rd amendment to the constitution was pioneered to give local self government a constitutional and democratic status and was passed in pursuance of the Directive Principles Contained in Art. 40 and it is designed to establish efficient local governance which may lead to rapid implementation or rural development programmes.⁶⁵ The Supreme Court in a case⁶⁶ provides an excerpt which limits the power of the State Legislature ,

“Although the substantive power of the State Legislature to enact a law with respect to Panchayats is traceable to Art. 246 read with Entry 5, List II of the seventh schedule, that power has no overriding effect vis-a-vis the provisions of Part IX of the Constitution. Hence no State law which is inconsistent with any of the provisions of Part IX can survive for more than a maximum period of one year.”

⁶² *Khedat Majdoor Chetna Sangath v. State of M.P* , (1994) 6 SCC 260.

⁶³ *Francis Coralie v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746; *CERC v. Union of India*, AIR 1995 SC 922; *Danial Latifi v. Union of India*,(2001) 7 SCC 740.

⁶⁴ *K. Guruprasad Rao v. State of Karnataka*, (2013) 8 SCC 418.

⁶⁵ *Supra* Note 53, M. P Jain, 1844.

⁶⁶ *Vasanth Rao v. Govt. of A.P* , AIR 1995 AP 274.

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The leader so chosen represents the will of the people and that is where the ordinance strikes the worst. Ultimately the ordinance becomes Ultra Vires of Part IX of the Constitution of India as it breaches the cardinal principle of grassroot level democracy.

III. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS IN VIOLATION OF THE BASIC STRUCTURE LIKE THE PREAMBLE, SINGLE CITIZENSHIP, FREE AND FAIR PARTICIPATION IN DEMOCRATIC GOVERNMENT AND CONSTITUTIONAL RIGHTS ?

A. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS IN VIOLATION OF THE PREAMBLE

The preamble to the Constitution lays down the goals of politico-social-economic democracy for the citizens of India⁶⁷ and to ensure equality of status and of opportunity and Fraternity assuring the dignity of the individual.⁶⁸ The impugned ordinance here seeks to curb the basic principles that are enshrined the Preamble .The Preamble to the Constitution read with Directive Principles promote the concept of social justice. The aim of social justice is to attain a substantial degree of social, economic and political equality. In course of time, the courts have raised social and economic justice to the high level of a Fundamental Right.⁶⁹

B. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS IN VIOLATION OF CONSTITUTIONAL RIGHTS AND FREE AND EQUAL DEMOCRATIC PARTICIPATION.

i. Are any constitutional rights violated

Reiterating the words of the court in *Javeed v. State of Haryana*⁷⁰

“Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute. At the most, in view of Part IX having been added to the constitution , a right to contest election for an office in

⁶⁷ *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 4 SCC 37.

⁶⁸ *Supra* Note 53, 1486.

⁶⁹ *C.E.S.C Ltd. v. S.C Bose*, AIR 1992 SC 573 ; *LIC of India v. Consumer Education and Research Centre*, AIR 1995 SC 1811.

⁷⁰ *Javed v. State of Haryana*, AIR 2003 SC 3057.

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Panchayat may be said to be a constitutional right- a right originating in the Constitution and given shape to the statute”.

Generally in the above tiers of the government, the right to stand for an election cannot be easily tampered with⁷¹. The ordinance therefore bars a majority rural population from exercising their Right to Contest Elections which just further illustrates the malice in this particular law.

ii. Is free and equal participation in democratic government violated

Raising the point of free and equal participation in democratic government, excerpt from the Supreme Court ⁷² judgment addresses this issue by saying that democracy is an essential feature and cannot be damaged Republican democracy is based upon the core idea that every citizen has the freedom to participate in the workings of democracy, whether by voting or by standing for elected office. It is held in a case that democracy is a part of basic structure of our constitution and the rule of law and free and fair elections are basic creatures of democracy.⁷³ The law violates this principle as it denies the aggrieved to be a fraction of the government and hence operates against the very notion of democracy.

⁷¹ *Supra* Note 53, M.P.Jain, 875.

⁷² *Smt. Indira Nehru Gandhi v. Raj Narain And Anr.*, AIR 1975 SC 2299.

⁷³ *Kihoto Hollohan v. Zachillhu*, AIR 1993 SC 412.

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PRAYER

Wherefore, in the light of facts stated, issues raised, arguments advanced and authorities cited, It is humbly prayed before the Hon'ble court :

With regards to W.P. No. 999/2015

To declare Sec. 34 of The Arbitration And Conciliation Act, 1996 as unconstitutional.

With regards to W.P. No. 1021/2015

- 1) To declare the ordinance as unconstitutional.
- 2) To lay down procedures for the listing and availability of vacation bench and procedure during any holidays.
- 3) Pass any other declaratory order as the Hon'ble court may deem fit in the interest of Justice, Equity and Good Conscience.

Date:

Place:

Counsel(s) for the Petitioner