-MEMORIAL ON BEHALF OF THE PETITIONER-

TEAM CODE: L

JUSTICE R.K. TANKHA MEMORIAL MOOT COURT COMPETITION – 2015

IN THE HIGH COURT OF NIRDHAN

Under Article 226 of the Constitution of Republic of Gariba

Writ Petitions WP 999/2015 & WP 1021/2015

People's Union for Liberties & Democratic Reforms and JCi

[Petitioners]

Versus

Republic of Gariba and Maxis Bank

[Respondents]

WRITTEN SUBMISSION ON BEHALF OF THE PETITIONERS

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STATEMENT OF JURISDICTION

The Hon'ble High Court of Nirdhan has the inherent jurisdiction to try, entertain and dispose of the present case by virtue of Article 226 of the Constitution of Republic of Gariba.

STATEMENT OF FACTS

1. Governor of Nirdhan, the largest state of Republic of Gariba, delegated power to Panchayat Samitis of the state to issue project reports for the scheme of infrastructural developments in the backward territories of the state. Thereafter, Jodhpur Gaon Panchayat Samiti [JGPS] and Jeopardy Contracts Inc. [JCi] entered into an agreement for construction of 115 kms of road. Various issues cropped up and JGPS terminated the contract.
2. As per the contractual clause, JCi sent a legal notice to JGPS invoking arbitration and termination payment for the work already done. Thereafter, JGPS invoked the performance bank guarantee from the Maxis Bank.
3. JCi filed an urgent civil writ petition WP (C) No. 99/2014 in the High Court of Nirdhan and an ad interim ex-parte stay on invocation of bank guarantee was granted by the High Court. The writ petition was disposed of directing the parties to seek remedies under the Act of 1996, before the Council of Infrastructure Arbitration (CIA) and objections regarding maintainability filed by JGPS were dismissed.
4. An award in favor of JCi was granted and inter alia JCi was held entitled to the money under the performance bank guarantee. JGPS immediately filed a petition before the High Court,

under section 34 of the Act of 1996, to set aside the award. Meanwhile, JCi wrote to the Maxis Bank to furnish performance bank guarantee with interest but the Bank refused the same on the ground that admission of Petition under Sec. 34 amounts to an automatic stay on the award. Thereafter, JCi challenged the constitutional validity of Sec. 34, by way of writ petition WP 999/2015.

5. Meanwhile, the Governor promulgated an Ordinance which amended the Nirdhan Panchayati Raj Act, 1994 providing for minimum educational qualification for a member of a Zila Parishad, member of Panchayat Samiti and Sarpanch of Panchayat in scheduled and non scheduled area. People's Union for Liberties and Democratic reforms opposed the ordinance and were denied listing during the vacations due to the non availability of a notified vacation bench. They filed a pro bono petition WP (C) No. 1021/2015 in High Court of Nirdhan to challenge the constitutional validity of the ordinance and the non availability of a notified vacation bench.
6. As the ld. Attorney General was to appear in these two matters, WP 999/2015 and WP 1021/2015 have been directed to be listed together for final hearing.

STATEMENT OF ISSUES

The Petitioners impugn 3 issues for consideration,

1. Whether Section 34 of Arbitration and Conciliation Act, 1996 is constitutional?

2. Whether the non-availability of a notified vacation and a notified procedure for listing during any holidays is constitutional?

3. Whether the Ordinance promulgated by the Governor of State of Nirdhan is constitutional?

SUMMARY OF ARGUMENTS

1. **Section 34, Arbitration and Conciliation Act, 1996 is constitutionally invalid.**

1.1 It amounts to introduction of 'litigation' in the arbitral process which is against the basic tenets of arbitration. The objective of arbitration is defeated. Arbitration system prioritizes finality over fairness. Section 34 provides for unnecessary grounds for setting aside the award.

1.2 The pendency of section 34 petitions leads to violation of country's bilateral and multilateral commitments. Section 34 affects the investor's ability to use or enjoy the fruits of the award in case of breach of contract and hence, amounts to expropriation

1.3 Grant of an automatic stay without adjudication on prima-facie case is per say bad in law. It is violative of *audi alteram partem* principle envisaged in Article 14 of Constitution and also violative of due process doctrine envisaged under Article 21 of the Constitution.

2. **The non-availability of a notified bench and notified procedure for listing during holidays is unconstitutional.** The Supreme Court Rules, 2013 under Order II Rule 6 say that the Chief Justice 'may' constitute a vacation bench for vacations. So, it is required to constitute a bench for summer and winter vacations. Listing is merely procedural formality.
3. **The ordinance promulgated by the Governor of Nirdhan is unconstitutional.** The ordinance passed by the Governor of Nirdhan infringes the Fundamental Right of the citizens under Article 14 of the Constitution as a large section of the rural populace mainly women and the weaker sections would not get equal opportunities to participate due to the prevailing skewed literacy standards.

ARGUMENTS ADVANCED

1. SECTION 34, ARBITRATION AND CONCILIATION ACT, 1996 IS CONSTITUTIONALLY INVALID.

1.1 It amounts to introduction of 'litigation' in the arbitral process which is against the basic tenets of arbitration.

[1.1.i] The objective of arbitration is defeated.

The fundamental feature of arbitration is that the arbitral award (the decision of the tribunal) is a final and binding determination of the parties' rights and obligations.[1] Speedy arbitration and least court intervention are the main objectives of the Act.[2] Interminable, time consuming, complex and extensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolutions of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940.[3] It is submitted that Section 34 results in introduction of litigation in the arbitral process which renders the basic objective of arbitration otiose as the award is long pending and not final.

In the Law Commission report[4], it was pointed out that resort to intervention by a court during the arbitral proceedings was often used only as a delaying tactic and was more often a source of

[1] Matti S Kurkela and Shanttu Turumen, *Due Process in International Commercial Arbitration* (2nd edn, OUP 2010) 1 para 3.

[2] Law Commission of India, *The Arbitration And Conciliation (Amendment) Bill* (Law Com Report 176, 2001) 109 para 1.

[3] *Guru Nanak Foundation v Rattan Singh* AIR 1981 SC 2075 [1].

[4] Law Commission of India, *The Arbitration And Conciliation (Amendment) Bill* (Law Com Report 176, 2001) 30 para 2.

abuse of the arbitral proceedings than it was a protection against abuse. Furthermore, it is submitted that the object of the Act is expedition. This object would be defeated if the disputes remain pending in courts for months and years even before commencement of arbitration. [5]

It was held in *All India Judges Association & Ors v Union of India & Ors*[6] that it is our constitutional obligation to ensure that the backlog of cases is decreased and efforts are made to increase the disposal of cases. It is submitted that the Law Commission Report 2001, proposed certain amendments in the Arbitration Act, 1996 because the pendency of the case was huge in the Courts. Considering that the same situation is prevalent and the pendency of case is huge, it is submitted that section 34 is in violation of basic tenets of the arbitration and the same must be rendered unconstitutional.

[1.1.ii] <u>Arbitration system prioritizes finality over fairness.</u>

In the case of *National Thermal Power Corpn v R S Avtar Singh and Co*[7] it was held that the Model Law reflects the modern movement towards finality of arbitral awards. The parties are expected to be prepared to accept the decisions of the arbitral tribunal even if they consider it to be wrong, so long as the correct procedures are observed. If a court is allowed to review this decision on the law or on the merits, the speed and, above all, the finality of the arbitral process that would lead, by way of successive appeals, to the highest appellate court at the seat of arbitration. Considering that the judicial review on the merit of the case is also not allowed, it is submitted that priority to finality over fairness has been given in the whole scheme of Arbitration. Hence, it is submitted that Section 34 is in contravention of the finality principle and

[5] *Shin Etsu Chemical Co Ltd v Aksh Optifibre Ltd* (2005) 7 SCC 234 [26].

[6] *All India Judges Association & Ors v Union of India & Ors* AIR 2002 SC 1752 [24].

[7] *National Thermal Power Corpn v R S Avtar Singh and Co* 2002 (2) Arb LR 135 (Del) [10].

results in undue delay in obtaining the fruit of arbitral award and thereby, it is against the basic tenets of arbitration. It is also submitted that dispensing with appellate review significantly reduces both litigation costs and delays. [8] The parties choose arbitration over regular court proceedings in order to save the cost and time inclusive of the delay that these proceedings incur.

[1.1.iii] <u>Section 34 provides for unnecessary grounds for setting aside the award.</u>

Furthermore, it is submitted that the Act is enacted mainly in the pattern of the Modern Law adopted by the United Nations Commission on International Trade Law [9] and the model law provides a ceiling effect to the court's intervention. The predominant tendency of contemporary arbitration legislation (including UNCITRAL Model Law) is to limit the grounds on which an award can be annulled to ones paralleling those permitted, for non recognition of an award, under Article 5 of New York Convention**.**[10] It is submitted that section 34 provides unnecessary ground of challenging an award on the ground of jurisdiction of arbitrator which is already provided to the arbitrator under section 16 of the Act. The negative effect of the *Kompetenz Kompetenz* principle is that arbitrators are entitled to be the first to determine their jurisdiction which is later reviewable by the court.[11] Therefore, challenging an award on a ground which is prima facie available to the arbitrator results in undue challenging of the award. Furthermore, challenging an award on ground of public policy is too vague and provides broad discretion to

[8] Gary B Born, *International Commercial Arbitration,* vol 1 (Wolters Kluwer Law & Business Publication 2009) 82 para 1.

[9] *Olympus Superstructures Pvt Ltd v Meena Vijay Khetan & Ors* AIR 1999 SC 2102 [20]; *Dharam Prakash v Union of India and another* AIR 2007 Del 155 [5]; *TPI India Limited v Union Of India* 2001 (3) RAJ 70 (Del) [2].

[10] Gary B Born, *International Commercial Arbitration,* vol 1 (Wolters Kluwer Law & Business Publication 2009) 2552 para 2.

[11] *Chloro Controls(I) P Ltd v Severn Trent Water Purification Inc* JT 2012 (10) SC 187 [77].

the courts to set aside the award. The Law commission report also recommended to further restrict the court's interference, in certain respects than what is permitted by the Model Law or the 1996 Act, both for international and purely domestic arbitration.[12]

1.2 The pendency of section 34 petitions leads to violation of country's bilateral and multilateral commitments.

The test of whether government measures amount to an expropriation is to measure their actual effect on an investor's ability to use or enjoy its investment. Where the government measures interfere with an investor's legitimate expectation that the state will honour the assurances it offered to induce the investment and those measures substantially deprive an investor of the use or enjoyment of its investment, expropriation may be proven.[13] It is humbly submitted that the pendency of the cases under section 34 affects the investor's ability to use or enjoy the fruits of the award in case of breach of contract and hence, amounts to expropriation.

It is humbly submitted that setting aside the award violates country's bilateral and multilateral commitments because if the award is set aside, it is a nullity a priori, unenforceable under section 36. It will be a dead letter in India and unenforceable in any other country. This is because, under both the New York Convention and the Model Law, the competent court may refuse to grant recognition and enforcement of an award that has been 'set aside' by a court of the seat of

[12] Law Commission of India, *The Arbitration And Conciliation (Amendment) Bill* (Law Com Report 176, 2001) 64 para 4.

[13] Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (5th edn, OUP 2009) 501 para 3.

arbitration. [14] Absent the possibility of binding arbitration, some transactions will remain unconsummated. Others will be consummated only at increased prices, to reflect the risk of potentially biased adjudication. [15] For instance, Republic of Gariba enters into a bilateral/multilateral investment treaty with another State (s) where the juridical seat of arbitration is Gariba and an arbitral award had been passed and subsequently challenged under Section 34 and is long pending before the court. It is submitted that, such a long pendency of a case is in violation/contravention of Article 51(c) of the Constitution of India which states that *"the State shall endeavor to foster respect for International law and treaty obligations in the dealings of organized people with one another;"* (the laws of which are in *pari materia* to the laws of Republic of Gariba) as it takes away the fruit of the award.

Lastly, it is submitted that for the claimant, there would be a equally daunting task of showing that the vacated award did not have a *res judicata* effect that barred enforcement of the result in the subsequent arbitral proceeding. This also further, leads to violation to countries bilateral and multilateral investment commitments as the fruits of the award are taken away as the award cannot be enforced in another State.

1.3 Grant of an automatic stay without adjudication on prima-facie case is per say bad in law.

[14] Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, OUP 2004) 404-405 para 9-03.

[15] William W Park, 'Why Courts Review Arbitral Awards' (2001) 2 para 2 <http://www.williamwpark.com/documents/Why%20Courts%20Review%20Awards.pdf> accessed on 13 February 2015.

Procedural due process envisages a reasonable procedure, i.e, the person affected should have fair right of hearing which includes opportunity to be heard and on orderly procedure.[16] *Audi Alteram Partem* (right to hear) is a part of Article 14 of the constitution.[17] It is submitted that an automatic stay on mere filing of application under Section 35 on prima facie case without hearing the other party is violative of *audi alteram partem* principle envisaged in Article 14 of Constitution and also violative of due process doctrine envisaged under Article 21 of the Constitution.

In the case of *National Aluminum Co Ltd v Pressteel & Fabrications (P) Ltd*[18], the Supreme Court held, "we do notice that this automatic suspension of the execution of the award, the moment an application is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs." Therefore it is submitted that such a grant of automatic stay is per say bad in law.

[In Arguendo] the Law report proposed amendments to speed up pending and future arbitrations and recommended that mere filing of such an application should not amount to automatic stay of the award.[19]

[In Arguendo] in the case of *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd*[20] (Singapore case) the court laid down principles for grant of stay that the court does not

[16] M P Jain, *Indian Constitutional Law*, vol 1 (6th edn, LexisNexis Butterworths Wadhwa, Nagpur 2010) 1549 para 4.

[17] *Cantonment Board, Dinapore v Taramani Devi* AIR 1992 SC 61 [5].

[18] *National Aluminum Co Ltd v Pressteel & Fabrications (P) Ltd* (2004) 1 SCC 540 [10].

[19] Law Commission of India, *The Arbitration And Conciliation (Amendment) Bill* (Law Com Report 176, 2001) 255 para 2.

deprive a successful litigant of the fruits of his litigation and lock up funds to which he is, on the face of it entitled, pending an appeal; and a stay will be granted if it can be shown that if damages and costs are paid by the appellant there is no reasonable probability of getting them back if the appeal succeeds.

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

Article 32 of the Constitution of India the laws of which are in *pari materia* to the laws of the Republic of Gariba has been described as the cornerstone of democratic edifice raised by the Constitution it embodies the fundamental right to move to the Supreme Court.[21] Further, it has been held by the Indian Supreme Court in *R D Shetty v International Airport Authority*[22] that no matter whether the violation of the fundamental right arises out of an executive action/inaction or action of the legislature, Article 32 can be utilized to enforce the Fundamental Rights vested in either event. The right to move the Supreme Court where a Fundamental Right has been infringed is itself a Fundamental Right.[23] Any law which renders nugatory or illusory the powers of Supreme Court under Article 32 is void.[24] Further, the Supreme Court of India has held since, the right to move the Supreme Court, in case of a violation of Fundamental Right is in itself a

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[20] *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] SLR(R) 1053 [8].

[21] *Shatrughan Chauhan v Union of India* (2014) 4 SCC 1 [7].

[22] *R D Shetty v International Airport Authority* (1979) 3 SCC 489 [10].

[23] *Kochunni v State of Madras* AIR 1959 SC 725 [8].

[24] *Gopalan v State of Madras* (1950) SCR 88 [143].

Fundamental Right it is the duty of the Supreme Court to grant relief under Article 32, where the existence of Fundamental Right and its breach is prima facie established.[25]

Hence, it is a Fundamental Right of every citizen to move the Apex Court in case of a breach of Fundamental Right the Constitution of Gariba guarantees to every citizen Fundamental Right at every time. Therefore, it is humbly submitted that these Fundamental Rights cannot be suspended for any duration of time. In the instant case, the petitioner's had been refused a chance of being heard during the winter vacations by the vacation bench.[26] This clearly is a violation of Article 32 and the Fundamental Right guaranteed by it. Hence, a proper procedure for listing of the matter and as well as for hearing the petition should have been made available to the petitioners even during the winter vacations as time was also determining factor with relation to the facts of the instant case.[27]

It has very well been established by convention that all matters that require immediate redressal from the courts the vacation bench or some judges always been designated to hear matters of these sorts. No matter if it was a vacation period the challenge to the Gauhati High Court Judgment[28] on CBI being unconstitutional was considered by the then Chief Justice of India in his official residence during Diwali vacations.[29] Matters of public importance have also been taken up during the vacations as in the case of Delhi Gang Rape Case where the death sentence

[25] *Kochunni v State of Madras* AIR 1959 SC 725 [16].

[26] Moot Proposition [19].

[27] Moot Proposition [18 & 19].

[28] *Sh Navendra Kumar v Union of India & Another* 2013 CriLJ 5009.

[29] 'SC stays Gauhati HC's order that declared CBI 'unconstitutional' *The Times of India* accessed on 13th February <http://timesofindia.indiatimes.com/india/SC-stays-Gauhati-HCs-order-that-declared-CBI-unconstitutional/articleshow/25507364.cms>.

of the 2 convicts was stayed by the 2 judges of the Supreme Court during the Holi holidays.[30] It is also set by convention that for exigencies during other occasion even though there are exceptional situations litigants are afforded an opportunity by providing a sitting either in the Court or the residence of the judge for instance the death sentences being stayed overnight after hearing at Chief Justice of India's residence.[31] It is the firm belief of the petitioners that the matter involved was of utmost public importance and should have been heard before the election process commenced as that led to infringement of Fundamental Rights that have already been pleaded by the petitioners in the preceding issues. The petitioners are of the view that if there is no notified procedure a litigant will not be able to approach the Court during vacations but since, it has already been set by convention that listing is but a procedural formality to expedite the functioning of the process of justice the ultimate goal of litigation must be to secure justice as the Supreme Court of India has rightly observed that the compliance with natural justice was implicit in Article 21.[32] Hence, it is in the spirit of justice that the petitioners also plead under Article 21 for availability of a notified procedure for listing as well as a bench during vacations.

3. WHETHER THE ORDINANCE PASSED BY THE GOVERNOR OF NIRDHAN IS UNCONSTITUTIONAL.

[30] 'Relief for 2 Delhi rapists' accessed on 13th February <http://www.telegraphindia.com/1140316/jsp/nation/story_18086929.jsp>.

[31] Utkarsh Anand, 'Nithari case: Supreme Court stays death sentence of Nithari killer Surinder Koli for one week' *Indian Express* accessed on 13th February <http://indianexpress.com/article/india/india-others/sc-stays-death-sentence-of-nithari-killer-koli/>.

[32] *Maneka Gandhi v Union of India* AIR 1978 SC 597 [56].

The petitioners pray for an appropriated writ, order or direction to hold and declare the ordinance promulgated by the Governor of Nirdhan dated 20.12.2014 amending Section 19 of Nirdhan Panchayati Raj Act, 1994 as unconstitutional on the following grounds. By the ordinance clauses (r), (s) and (t) were added to Section 19 providing for educational qualifications for the members of Zilla Parisahd or Panchayat Samitis, Sarpanch of a Panchayat in Scheduled area and of a Sarpanch of a Panchayat other than in a Scheduled area for contesting the elections for Panchayati Raj Institutions within the State of Nirdhan. The ordinance provided that every person who is registered as a voter in the list of voters of the respective institutions shall be qualified for election as a Panch, or as the case maybe unless such person is not stopped by disqualifications in clause (r), (s) and (t). These qualifications are based on educational qualifications of the candidate. If the candidates do not possess such minimum qualifications they have to be deemed disqualified from contesting the elections.[33]

So, it is prayed that on following grounds the Ordinance be held to be unconstitutional:

3.1 <u>The said ordinance is ultra vires Part IX and retroactive.</u>

The 73rd amendment of the Constitution of India (the law of which are in *pari material* to the laws of Republic of Gariba) gives Constitutional status to the Panchayati Raj institutions by insertion Part IX in the Constitution. Panchayat has been defined to be an institution of self-government for rural areas.[34]Under 73rd amendment Panchayat became an institution for self-governance with sweeping consequences in relation to de-centralization, grass root democracy,

[33] Moot Proposition [16].

[34] Constitution of India 1950, art 243(d).

people's participation, gender equality and social justice.[35] The Supreme Court of India has defined Part IX of the Constitution as very powerful tool of social engineering which has tremendous potential of social transformation to bring about a radical change in the age old oppressive anti-human and status quoist traditions.[36] Further, it is submitted by the Supreme Court that Part IX was added to strengthen the vision of democratic republicanism which is inherent in the constitutional framework.[37] Since, it is abundantly clear that Part IX of the Constitution aims at decentralization and makes it a constitutional right of every citizen to participate in the governance process as such, the exclusion of those who did not have an opportunity of formal education cannot be denied participation in these democratic institutions as this bar of qualification is not a pre-requisite to the election for the Legislative Assembly or the Parliament. Further, it also goes against the fundamentals of democratic governance where a person is required to understand the needs of social requirement and make his own assessment with regard to the ability of the person he has to choose. In these circumstances any law which disqualifies a large chunk of rural populace on the ground of not attaining educational qualifications in a backward considered state[38] goes against the principle of decentralized and participatory democracy as enshrined and mandated by the Part IX of the Constitution.

3.2 <u>The ordinance violates Fundamental rights of the citizens of rural areas of the state of Gariba.</u>

[35] *Bhanumati v State of Uttar Pradesh* (2010) 12 SCC 1 [22].

[36] *Bhanumati v State of Uttar Pradesh* (2010) 12 SCC 1 [24].

[37] *Bhanumati v State of Uttar Pradesh* (2010) 12 SCC 1 [26].

[38] Moot Proposition [3].

The ordinance goes against the fundamental right to equality before law provided in Article 14 of the Constitution. A fair section of the backward considered state of Gariba with a sizeable section of population that is illiterate[39] will be barred from contesting election. The test of constitutionality as discussed by the Supreme Court in *Javed v State of Haryana*[40] does not seem to be applicable here. This test put down much earlier by the Supreme Court held that there can be a reasonable classification if such classification has a nexus with the object sought to be achieved. However in the instant case it cannot be said that having only formally educated representatives in the Panchayats will make the system more efficient for mainly two reasons. Firstly, because in order to ensure proper decentralization it has to be ensured that representatives comes from each sections of the society, since a large chunk of the weaker sections and women are illiterate it would be very difficult for them to find a proper representative amongst themselves. Secondly, it is not always correct that only formally qualified people can be good representatives of the people, in this respect the example of the head of JGPS who did not have any formal education but could read and write and even find faults in the engineering designs, which saved hundreds of lives[41] is apt.

It also goes against the freedom of expression enshrined in Article 19 of the constitution in the sense that the voter after making an assessment is free to make his vote to the candidate of his choice without force[42], here by the ordinance he is being forced to vote only formally educated contestants.

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[39] Moot Proposition [20].

[40] *Javed v State of Haryana* (2003) 8 SCC 369 [8].

[41] Moot Proposition [9].

[42] *PUCL v Union of India* (2009) 3 SCC 200 [7].

3.3 The ordinance further marginalizes women and weaker sections due to prevailing skewed literacy standards.

Nirdhan is a State that was considered backward and largely has rural populous[43] in these circumstances it is sufficiently clear that only a selected few would get the opportunities for formal education due to the prevailing skewed literacy rate.[44]As such the weaker sections of the rural society and women who generally are less educated than men would be unreasonably excluded from the Panchayati Raj Institutions, which otherwise is aimed at the upliftment of the weaker sections of the rural society. The poor, underprivileged and women cannot be denied inclusion in the democratic process, merely on the ground that they do not have educational qualifications. This goes against the guarantee of equality under Article 14 of the Constitution of India, as the weaker sections of the society have been unreasonably excluded. Article 14 is a part of the rule of law and it is the duty of the judiciary to enforce the rule of law[45]. In *Subramanian Swamy v Director, Central Bureau of Investigation*, the Supreme Court held that the courts can hold a legislation to be unconstitutional if it fails the test of Article 14[46]. This goes against the principle of a welfare state as contained in the Directive Principles of State Policy which has been classified as amongst the Basic Structure of the Constitution by the Supreme Court of India[47].

3.4 The Ordinance is in violation of the Basic Structure of the Constitution:

[43] Moot Proposition [3].

[44] Moot Proposition [20].

[45] *I R Coelho v State of Tamil Nadu* (2007) 2 SCC 1 [69].

[46] *Subramanian Swamy v Director, Central Bureau of Investigation* (2014) 8 SCC 682 [48].

[47] *Kesavananda Bharti v State of Kerala* (1973) 4 SCC 225 [582].

It has been held by the Apex Court of India in *Kuldeep Nayar v Union of India*[48]that violation of the basic structure can be a ground to challenge an Act of the legislature. In this light the said ordinance goes against the principles enshrined in the Basic Structure of the Constitution on the following grounds:

i) **Preamble:**

The Seventy third Amendment was introduced for strengthening the Preambular vision of democratic republicanism that is inherent in the constitutional framework as per the Apex Court of India[49]. This vision of democratic republicanism has been held by the Supreme Court of India to be one of the basic structures of the Constitution[50]. As such an ordinance of this kind which bars a significant portion of illiterate citizens from participating goes contrary to the ideals of democratic republicanism. Further the Preamble also upholds social justice as its ideals, one of its main features is to protect the interests of the weaker sections of the society[51]. It has been already held by a majority of the Full Bench constituted in *Keshavananda Bharti* case that the objectives specified in the Preamble contain the basic structure of the Constitution and these features are so vital in importance that they cannot be amended under Article 368 of the Constitution[52]. Keeping in view the importance given by the Apex Court of the provisions and ideals enshrined in the Preamble, it is clear that the ordinance in question goes against the basic structure as enshrined in the Preamble by disadvantaging the downtrodden and illiterate masses

[48] *Kuldeep Nayar v Union of India* AIR 2006 SC 3127 [40].

[49] *Bhanumati v State of Uttar Pradesh* (2010) 12 SCC 1 [26].

[50] *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294 [21].

[51] *Sadhuram v Pulin* AIR 1984 SC 1471 [29], [70], [73].

[52] *Kesavananda Bharti v State of Kerala* AIR 1973 SC 1461 [292], [599], [682], [1164], [1437].

and those who could not afford formal education by alienating them from the democratic process.

ii) Free and equal participation in democratic government:

Democracy and free and fair elections are part of the basic structure of the Constitution[53], it was also held that democracy can function only when elections are free and fair and the people are free to vote for the candidates of their choice.[54] Further in *Kihoto Hollohon v Zachillhu and Ors*[55] democracy has been held to be a basic structure of the constitution. Therefore it is in this light it is contended that the ordinance in question violates this basic structure of the constitution as it does not give the ordinary voter the right to choose his own representative using his own wisdom, with knowledge of what is best for him. It may not always be correct to hold that a person having formal educational qualification will always be more capable than a person not having any such qualification[56]. Further, in *Secretary, Ministry of Information and Broadcasting, Government of India and Others v Cricket Association of Bengal and others* the Supreme Court held that "True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country[57]. As such the ordinance limits the exercise of democracy and goes openly against the basic structure of the constitution.

[53] *PUCL v Union of India* 2013 (6) ABR 910 [45].

[54] *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299 [198].

[55] *Kihoto Hollohan v Zachillhu and Ors* 1992 (Supp) 2 SCC 651 [11].

[56] *PUCL v Union of India* AIR 2003 SC 2363 [132].

[57] *Secretary, Ministry of Information and Broadcasting, Government of India and Others v Cricket Association of Bengal and others* (1995) 2 SCC 161 [82].

PRAYER FOR RELIEF

WHEREFORE, in light of the issues raised, arguments advanced and authorities cited it is most humbly and respectfully requested that this Hon'ble Court to adjudge and declare that:

1. Section 34, Arbitration and Conciliation Act, 1996 should be held unconstitutional.

2. The non-availability of a notified vacation bench and a notified listing procedure during holidays be held unconstitutional.

3. The ordinance promulgated by the Governor of Nirdhan be held unconstitutional.

The court may also be pleased to pass any other order, which this Hon'ble Court may deem fit in light of justice, equity and good conscience.

Sd/-

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(Counsel for the Petitioner)