

TEAM CODE:

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BEFORE THE HON'BLE HIGH COURT, NIRDHAN

IN THE MATTERS OF:

PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCI ...PETITIONER

VS.

REPUBLIC OF GARIBA AND MAXIS BANK ...RESPONDENT

WRIT PETITION NOS. 999 /2015, 1021/2015

ON SUBMISSION TO THE HON'BLE HIGH COURT OF NIRDHAN

UNDER ARTICLE 226 OF THE CONSTITUTION OF GARIBA

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENTS

COUNSEL APPEARING ON BEHALF OF THE RESPONDENTS

This Memorandum has been prepared for Petitioners:

PEOPLE'S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCI

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STATEMENT OF JURISDICTION

FIRST PETITIONER

The Hon'ble High Court has the jurisdiction in this matter under article 226¹ of Constitution of Gariba challenging the vires of the ordinance issued under article 213².

SECOND PETITIONER

The Hon'ble high court has the jurisdiction in this matter under article 226¹ of the Constitution of Gariba checking the constitutional validity of section 34³ of Arbitration and Conciliation Act, 1996.

¹ **Art. 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 **Art. 213.** If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require.

³ **Art.34.** Application for setting aside arbitral award. —

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

STATEMENT OF FACTS

PART 1-

The republic of Gariba is a sovereign federation of states with several union territories getting Independence in year 1947 and having longest ever written Constitution. Nirdhan is the biggest state in the republic but backward in development so there was a new scheme that was launched under which the private parties construct the highways and arterial roads and recover the money invested through tolls.

BACKGROUND

1. A private party *JEOPARDY CONTRACT INC.*(JCi) entered into an agreement with *JODHPUR GAON PANCHAYAT SAMITI* (JGPS) on 21- 9 -2011 for 115 kilometre of road which was terminated on 21- 9- 2013 because of certain land acquisition and design issues. And as per contract, JCi send legal notice for invoking arbitration. JGPS replied that it can't be invoked since the matter is under Madhayastham Adhikaran Adhiniyam ,1983 and Arbitration and Conciliation Act, 1996 will not be applicable and invoked the performance bank guarantee by mailing to Maxis bank after business hours. JCi moved the High Court of Nirdhan on 31- 12- 2014 by filing urgent civil writ petition.

2. On 15.12.2014, the High Court took this matter as the first item on board, and Ordered stay on invocation of bank guarantee till further orders .By 11.00 am, the copies of the order were served upon JGPS, and the Maxis Bank. However, in the meantime, at 10.00 am, the branch manager of the Jodhpur Gaon branch of Maxis bank had acted on the email of JGPS and encashed the bank guarantee. At 10.01 am, there was a massive security breach in the systems of the Maxis Bank. This triggered the cyber security systems, which instantly froze all accounts and

transactions- -in-progress. Subsequent investigation revealed that it was due to an attack by a group of hackers. Therefore, till the order copy was served on the Maxis Bank, the amount under the Bank guarantee still remained in the account of JCi.

3. JGPS tried hard for vacation of stay order and petition was disposed directing remedies from independent arbitrators. The whole process took place before the council for infrastructure arbitration and JCi was held entitled for money under performance bank guarantee.

AFTERMATH

4. JGPS filed petition under section 34 (§ 34) of the Act of 1996 and on other side JCi wrote to the Maxis bank for money with a copy of award which was declined by Maxis bank stating that the matter is under the High Court and it follows the RBI bank guarantee norms.

5. JCi challenged the constitutional validity of Sec. 34, by way of a writ petition, being WP 999/2015 on the grounds of introduction of litigation, the pendency is huge which takes away the fruits of the award and the grant of the automatic stay.

PART 2-

BACKGROUND

6. Meanwhile governor issued in ordnance amending the Nirdhan Panchayati raj act 1994 for qualification for election returns for a member for example member of Zila parishad should have passed exam of the board of secondary education board and more.

REACTION

7. People union for liberties and democratic reform (PULDR) issued a public statement that order was replete with law and went to the high court during winter holidays on 29 december

2014 for listing since the election notification issued on 3rd January 2015 but the listing was denied.

8. PULDR moved to the apex court under article 32 through vacation officer but no clear response was given even by registrar too. Despite several reminders listing was not granted. Upon listing the apex court was pleased to observe that the matter can be heard by the high court of Nirdhan.

AFTERMATH

9. They filed a *pro bono* petition in the high court on certain grounds (a) non availability of notified vacation bench (b) non availability of notified procedure for listing (c) Non-grant of listing before the issuance of election notification cannot affect the merits of the case since the Court was moved well in time and *actus curiae neminem gravabit*. (d) the Ordinance being ultra vires Part IX, and retroactive; (e) the Ordinance further marginalizes women and weaker sections due to the prevailing skewed literacy standards, and it is in violation of aspects of basic structure like the preamble, single citizenship, and free and equal participation in democratic government, and it also abridges valuable fundamental and constitutional rights.

CONCLUSION

10. 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 the Republic of Gariba. Given that the Id. Attorney General was to appear in these two matters, (i.e. WP 999/2015 and WP 1021/2015) they have been directed to be listed together for final listing.

STATEMENT OF ISSUES

THE FOLLOWING QUESTIONS ARE PRESENTED FOR ADJUDICATION IN THE INSTANT MATTER:

ISSUE 1 - WHETHER THE WRIT PETITION FILED AT THE HIGH COURT OF NIRDHAN IS MAINTAINABLE?

ISSUE 2- WHETHER THE GROUNDS PUT FORWARD BY THE PEOPLE'S UNION FOR LIBERTIES AND DEMOCRATIC REFORMS ARE LEGITIMATE?

ISSUE 3- WHETHER THE GROUNDS PUT FORWARD BY THE JEOPARDY CONTRACT INC. ARE LEGITIMATE?

. SUMMARY OF ARGUMENTS

**1. THAT THE WRIT PETITION FILED BEFORE THE HIGH COURT OF
NIRDHAN IS MAINTAINABLE**

In **PART A** it is humbly submitted before the Hon'ble court that present PIL is maintainable against the Republic of Gariba since there has been gross violation of article 14 of constitution and on account of the same relief is sought and in **PART B**, the present petition is maintainable on two grounds There are the two grounds:

1) The locus standi of the party to present the petition before the high court(2) The court involvement in regarding to providing assistance in arbitration process.

**2. THAT THE GROUNDS STATED BY PEOPLE'S UNION FOR LIBERTIES
AND DEMOCRATIC REFORMS ARE LEGITIMATE.**

The PULDR has stated certain grounds on which the ordinance is challenged. The ordinance act as a weapon to sideline the illiterate people from contesting election which totally violates the right to equality conferred by the constitution of India and certainly it further marginalize women and weaker section of the society.

**3 – THAT THE GROUNDS PUT FORWARD BY THE JEOPARDY
CONTRACT INC. ARE LEGITIMATE**

The Arbitration and Conciliation Act, 1996 was brought into effect with the aim of making court intervention as less as possible. But the aim fulfilment looked dubious. The section 34 of the arbitration act 1996 gives the privilege to the party for going to the court when they are not satisfied by the award by the arbitral tribunal which somehow violates the tenets of arbitration act.

ARGUMENTS ADVANCED

**ISSUE 1 - THAT THE WRIT PETITION FILED IN HIGH COURT OF NIRDHAN IS
MAINTAINABLE.**

**1.1 THE WRIT PETITION FILED BY PEOPLE'S UNION FOR LIBERTIES AND
DEMOCRATIC REFORMS IS MAINTAINABLE.**

1. It is humbly submitted before the Hon'ble court that present PIL is maintainable against the Republic of Gariba since there has been gross violation of article 14 of constitution and on account of the same relief is sought.

2. A PIL can be filed against the state for the violation of fundamental rights⁴. Under article 32 of the constitution, therefore the PIL is maintainable against union of Gariba. Further, under the well established doctrine of *parens patriae* it is the obligation of state to protect and take into custody the rights and privileges of its citizens for discharging its obligation⁵.

3. In the present scenario, the state government has sidelined the illiterate to certain extent by making it compulsory to have certain educational qualification in order to compete in the elections. Thus, it can be concluded that there is violation of article 14 of constitution of Gariba. Women and other backward class people who are not in literacy standard are totally neglected. Hence, it is humbly submitted that PIL is maintainable.

**1.2 THE WRIT PETITION FILED BY THE JEOPARDY CONTRACT INC IS
MAINTAINABLE.**

⁴ Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi 1 SCC 421 (SC.1975)

⁵ Charan Lal Sahu Etc. Etc v. Union Of India 1 SCC 613(SC.1990)

4. The exercise of writ jurisdiction of the high court under Article 226 is largely discretionary in nature. It is argued that the present petition is maintainable on two grounds:

1) That the “jeopardy contract incorporation” has *locus standi* to file the present petition since they are private party and have a presence in Nirdhan and therefore the provision is concerned with the extent of judicial intervention in the arbitral process.

2) That the right of every party to see court assistance and giving effect to the arbitration process agreed by the parties. It is evident that the court has reasonably accepted and endorsed these two primary objectives of the act i.e. upholding party autonomy and ensuring and exclusively supporting role for court.

5. Writ jurisdiction of high court flows from Article 226 which confers wide powers enabling the court to issue writs, directions and orders for enforcement of right conferred through arbitral process or even fundamental or legal right. In public law, the rule that only aggrieved person is entitled to seek judicial redress has been liberalised to include any public spirited individual or association⁶. In case of class of people have a collective grievance, even an unrecognised association may initiate a writ proceeding⁷.

6. In England, ‘Greenpeace’ was granted standing on the basis that they are acting in public interest rather than for their own members⁸. In instance of public wrong or injury if an Act or omission by the state runs contrary to the constitution then any member of public has locus standi.⁹

⁶ S.P. Gupta vs President of India and Ors.2 SCR 365 (SC.1982); Banwasi Sewa Ashram vs State Of U.P. And Ors 4 SCC 753 (SC.1986)

⁷ Akhil Bharatiya Soshit Karamchari Sangh(Railway) v.Union of India 1 SCC 246(SC. 1981)

⁸ R v. Inspectorate of Pollution ex parte Greenpeace 4 All ER 329 [DC.1994]

⁹ People’s union of democratic rights vs. Union of India 1 SCR 456 (SC.1983)

7. In the present case, JCI is a private party which has a presence in Nirdhan. The claims made by JCI relate to the widespread issue of the excessive interference of the court in the issue of arbitral process. The prima facie accuracy of the claims may be demonstrated by other independent facts such as the Supreme Court ruling in *First Day Lawson Ltd. vs. Jindal Export Ltd*¹⁰. Observing that the object of the act is to provide a speedy and alternate solution to the dispute and avoid protraction of litigation, the provisions of the act have to be interpreted accordingly.

ISSUE 2- THAT THE GROUNDS STATED BY PEOPLE'S UNION FOR LIBERTIES

AND DEMOCRATIC REFORMS ARE LEGITIMATE.

8. The PULDR has stated certain grounds on which the ordinance is challenged. The ordinance acts as a weapon to sideline the illiterate people from contesting elections which totally violates the right to equality conferred by the Constitution of India and certainly it further marginalizes women and weaker sections of the society.

2.1 THAT THE NON AVAILABILITY OF NOTIFIED VACATION BENCH DURING ANY HOLIDAY IS UNCONSTITUTIONAL.

9. Vacation bench, as the name suggests, is the bench duly constituted for discharging the function of the tribunal during the vacations. No appeal for application of civil nature will be received during the vacation except in cases where it is sought urgently to obtain an order of injunction or attachment or stay of proceedings etc¹¹.

¹⁰ 6 SCC 356 (SC.2001)

¹¹ P. Naranappa vs A. Shanker Alva and Ors AIR 1973 Kant 78.

10. Criminal Revision Petitions and urgent Criminal Petitions will be received during the Vacation. Only urgent matters will be disposed of by the Vacation Benches. According to the present scenario the case requires urgency as the election notification was about to be issued, it was necessary for the involvement of the court to prove the ordinance ultra vires.

2.2 THAT THE NON AVAILABILITY OF NOTIFIED PROCEDURE FOR LISTING IS UNCONSTITUTIONAL

11. Whenever the case is filed in Supreme Court or all the fresh matter in Supreme Court needs to be listed as per the rules prescribed by Supreme Court in “*practice and procedure*”. accordingly the list of business has been characterized into parts: part I consists of admission matters and part II includes regular hearing matter .Admission matters are listed on Monday and Friday where as Tuesday, Wednesday and Thursday are earmarked for regular hearing matters. Fresh matters are registered on Monday, Tuesday and Wednesday and are listed on next to next Monday and those registered on Thursday, Friday and Saturday are listed on next to next Friday.

12. Hence listing forms the base. But, what if the listing of the case has been denied? the fresh matters which are registered on the basis of undertaking given by the advocate concerned to file copies of the orders/judgements of the trial court / first appellate court / Tribunal etc. within a week’s time and copies of the relevant documents are not filed as per the undertaking even after the expiry of four weeks, such matter are listed before the Hon’ble court holding the Coram with appropriate office report mentioning there in about the non compliance of the undertaking given.

13. If the listing of the case is denied, as happened in the case where according to the facts the vacation officer accepted the papers and informed the counsel assembled in the premises. Even after 48 hours wait no clear response was shown which clearly shows loopholes in that

court's working. After getting informed by the vacation officer, the counsel approached the registrar after which he put the message to PPS.still showing no response

MATTER WAS URGENT

14. The matter in this case was urgent and may be listed during the vacation holidays since it is the matter relating to and of public importance. Urgent admission matter can be filed during vacation. Every request for listing needs to be accompanied by affidavit which was followed in this case too and so the PULDR moved the apex court through the affidavit.

2.3 THAT NON-GRANTING OF LISTING BEFORE ISSUANCE OF ELECTION NOTIFICATION DOES NOT AFFECT THE CASE

15. As high court ruling is binding over the lower court, its order too is subsumed to be of much effect over authorities. In the present issue, the listing was denied of the case on 29th December 2014. The election notification issued on 3rd January 2015. So the matter was urgent to be listed as soon as possible. But then also the listing was denied. The chaos that happened in the Supreme Court regarding instruction from chief justice and others and again delay in response wasted a lot of time. All these bought to the time when election notification was issued. Still all the delay will not affect the case as the court was moved well in time. The decision of High Court will still work and will act as a supportive principle for working. A High Court is a court of record under Article 215 and has power to punish for its own contempt. Under article 227, the high court has the power of superintendence over all courts and tribunals.

16. Under Article 129, the Supreme Court has been declared a court of record and can punish for its own contempt. The Supreme Court has made a creative use of Article 129 to protect the honour and integrity of the lower court. In *Delhi judicial service association vs. Gujarat*,

the Supreme Court has given a broad and liberal interpretation of its contempt power. Supreme Court has observed: their protection is necessary to preserve the confidence in the efficacy of court and to ensure unsullied flow of justice at its base level. The Supreme Court has emphasized it has power of judicial superintendence and control over all the courts and tribunals.

2.4 THE ORDINANCE BEING ULTRA VIRES PART IX, AND RETROACTIVE

17. The state executive has ordinance making power similar to that enjoyed by central executive. According to article 213 which is in pari materia with article 123, the Governor may promulgate such ordinance as the circumstances appear to him which require:

1) When the state legislature assembly is not in session or if the state has two houses and one of the houses is not in session.(2) The government is satisfied that circumstances exist which render it necessary for him to take an immediate action

The position as regard justiciability of the governor's satisfaction to issue an ordinance is similar to that of president's satisfaction.

18. The governor of Andhra Pradesh issued an ordinance reducing the age of retirement of civil servants from 58 to 55. The ordinance was challenged inter alia on the ground of non application of mind. Rejecting the argument, the Supreme Court asserted in NAGARAJ¹² that issuing an ordinance is a legislative act of the executive. The court stated in this connection. "The power to issue an ordinance is not an executive power but is the power of executive to legislate". This power is plenary within its field like the power of state legislature to pass laws and "there are no limitations upon that powers except those to which the legislative powers of state legislature is subject". Therefore, an ordinance cannot be declared invalid for

¹² K nagaraj vs. State of Andhra Pradesh 1 SCC 523 (SC. 1985)

the reason of non-application of mind “any more than any other can be. An executive act is liable to be struck down on the ground of non-application of mind not the act of legislature.”

19. The Court also rejected the ground of mala fides with the remark that the ordinance making power being a legislative power, the argument of mala fides was misconceived. The Court also observed “the legislature, as a body, cannot be accused of having a law for an extraneous purpose”. The Court cannot examine the motives of the legislature in passing and act.

20. The power to promulgate ordinances is meant to be used sparingly and only in an emergency and when the legend state legislature is in recess. An ordinance has only a limited life. Article 213 is so structured that no ordinance made by the state government can remain in force for more than seven and half months without being approved by the state legislature and enacted into an act. Under article 213, the governor can promulgate an ordinance in the state assembly is not in session. An ordinance lapses if not passed by the legislature within six weeks from the reassembly of the legislature. The assembly has to meet within six months of its last session; in effect, the maximum life of an ordinance can thus be seven and half months. All this pertains to the case of Bihar where the *Bihar sugar cane ordinance* was kept in force for more than 13 years through re- promulgation.

21. Ordinance being made in this case is totally void as it bars certain people from contesting elections. In the Nyaya Panchayat bill 2009, the chapter 2 clause 4 doesn't contain any certain prescribed written statement for qualification. Our constitution too didn't demarcate any certain criteria for fighting election. The election should not be on the ground of

religion, caste, race, sex [Article 125] .Equality has been awarded to each and every citizen in the matter of franchise and electoral roll is prepared on secular basis¹³.

2.5 ORDINANCE FURTHER MARGINALIZE WOMEN AND WEAKER SECTION, VIOLATIVE OF BASIC STRUCTURE OF PREAMBLE; ABRIDGES VALUABLE FUNDAMENTAL AND CONSTITUTIONAL RIGHTS

22. Undoubtedly, the ground put forward by PULDR is perfectly legitimate. At the time of at the time of India got Independence in 1947, most of the Indian people were landless, illiterate, poor livelihood and India adopted democratic form of government. So gradually certain basic section of society remained economically, socially and educationally backward as they were being denied certain basic rights. The scenario of disparities leads to a situation that needs special measures to uplift the status of marginalised and depressed groups.

23. The constitution of India right to equality is guaranteed to Article 14 to 18 equality is one of the magnificent cornerstones of Indian democracy¹⁴. The doctrine of equality before law is a necessary corollary of rule of law which pervades Indian constitution¹⁵. A Constitutional bench of Supreme Court has declared in no uncertain term equality is a basic feature of constitution and although the emphasis in the earlier decisions evolved around discrimination and classification, the content of article 14 got expanded conceptually and has recognised the principles to comprehend the doctrine of promissory, estoppels, non –arbitrariness and compliance with the rule of natural justice¹⁶. The underlying object of Article 14 is the secure

¹³ . V.v giri v. D.S. Dora 1 SCR 426 (SC.1960)

¹⁴ Thommen j. In Indira Swahney vs. Union of India 3 Suppl.SCC 217(SC.1992)

¹⁵ Aushutosh gupta vs. State of Rajasthan 4 SCC 34 (SC. 2002)

¹⁶ M nagaraj vs. Union of India 8 SCC 212 (SC.2006)

to all person citizen or non citizen the equality of status and opportunity referred to in the preamble of Constitution.¹⁷

25. Article 14 of constitution embodies the principles of non discrimination. It emphasises on the point of having a non discriminatory nature of the rules to be followed¹⁸. Article 14 bars discrimination and prohibits discriminatory laws. Article 14 is now providing as a bulwark against any arbitrary or discriminatory state action. The rights are legitimate expectation which are not only much short of indefeasible right but were evolved to protect a person from unfair or arbitrary exercise of power¹⁹. Gradually the horizon of article 14 has been expanding due to the judicial pronouncement. It can be said as “highly activist magnitude”²⁰.

26. The condition as stated in the fact of no different consequences. The ordinance totally bars every person who does not comes under the said criteria from election as a panch which is per se discriminatory for them .Article 14 now firmly established, strikes at any arbitrary state action both administrative and legislative .The basic test to be applied in cases where administrative action is attacked as arbitrary is to see whether there is any discernible principle emerging from impugned action and if so, does it satisfy the test of reasonableness²¹ and non compliance with the natural justice amounts to arbitration²². ***Therefore, the grounds put forward by the state in the ordinance are ultra vires and it is humbly requested that ordinance being replete with malice in law is violative of the constitution.***

¹⁷ Natural resource allocation , in re special reference no. 1 of 10 1 SCC 77 (SC.2012)

¹⁸ Reliance energy ltd. Vs. Maharashtra state road development corporation ltd. 8 SCC 1 (SC. 2007)

¹⁹ Food corporation vs. Kamdhenu cattle feed industries 1 SCC 71 (SC.1993)

²⁰ Renu vs district and session judge , tis hazari, civil appeal no. 979 of 2014

²¹ Union of India vs. International trading co. 5 SCC 437 (SC.2003)

²² Rajasthan state road transport corporation vs. Bal mukund 4 SCC 299(SC. 2009)

ISSUE 3 – THAT THE GROUNDS PUT FORWARD BY THE JEOPARDY

CONTRACT INC. ARE LEGITIMATE.

27. The Arbitration and Conciliation Act, 1996 was brought into effect with the aim of making court intervention as less as possible. But the aim fulfilment looked dubious. The section 34 of the arbitration act 1996 gives the privilege to the party for going to the court when they are not satisfied by the award by the arbitral tribunal which somehow violates the tenets of arbitration act.

3.1 INTRODUCTION OF ‘LITIGATION’ IS AGAINST THE BASIC TENETS OF ARBITRATION

Intention of legislature:

28. Though the legislative intention is a very slippery phrase²³, if it is not unreal, myth or fiction but a reality founded the very nature of legislation. Legislation is usually the product of much debated and compromise, both public and private. The intention that emerges as the resultant of forces is not to be dismissed as illusion in any sense. In other words the legal meaning corresponds to the legislative intention. What was the intention was deviated by what was the contention. As it is said, that the consideration of the purpose of an enactment is always a legitimate part of the process of interpretation²⁴.

Arbitration and litigation:

29. Courts inevitably governed by procedural rules or course or precedent as to the way in which cases are conducted. On the other hand, and arbitral tribunal is not bound by any provisions and the parties are free to agree on the procedures to be followed by the arbitral

²³ Sloman vs. Sloman and co. Ltd. AC 22,38 (HL.1897)

²⁴ Fothergill vs. monarch airlines ltd. AC 251, 272(HL.1981)

tribunal. Arbitration presents an alternative to the judicial process in operating procedural flexibility .it too ensures confidentiality of all matters related to arbitral proceedings. The Arbitration and Conciliation act 1996 was formed for implementing an important objective of minimising the court's role but the reality speak that the court's intervention is maximum in cases of arbitration .

30. The beneficial features of the act have been described to be as follows ,(i) fair resolution of a dispute by an impartial tribunal without unnecessary delay or expense; (ii) party autonomy is a paramount subject only to such safeguard as are necessary in public interest and (iii) the arbitral tribunal is enjoined with a duty to act fairly and impartiality.²⁵ Even in one case Supreme Court observed that after passing of the award the court should also dispose of proceeding expeditiously so that party should get the benefit of the award²⁶.

***3.2 PENDENCY OF S.34 IS SO HUGE THAT IT GRABS THE FRUITS OF AWARD;
VIOLATING THE COUNTRY'S BILATERAL AND INVESTMENT TREATIES.***

31. The main beneficial features of bringing the Arbitration and Conciliation Act, 1996 was to ensure resolution of a dispute by an impartial tribunal without any unnecessary delay or expense and the party autonomy is paramount subject only to such safeguard as are necessary in public interest as was held in the case of *centrotrade minerals*²⁷. It follow that after passing of the award the court should also dispose of the proceeding expeditiously so that the party in whose favour the award has been passed, Actually gets the benefit of arbitration clause as was held by in the case of *paradeep anand*²⁸.Even in the case of *feurst day Lawson*²⁹, the

²⁵ Centrotrade minerals and metals inc. vs. Hindustan copper ltd. 11 SCC 245 (SC.2006)

²⁶ Paradeep anand vs. ITC ltd. 6 SCC 437 (SC.2002)

²⁷ 11 SCC 245(SC.2006)

²⁸ 6 SCC 437(SC.2002)

²⁹ 6 SCC 356 (SC.2001)

Supreme Court observed that the object of the act is to provide speedy and alternate solution to the dispute.

32. But the reality is certainly different from the ideals. The cases regarding the petitions under the § 34 is certainly huge and it's not only violates the basic tenets of arbitration but also violates the effective principles of speedy trial .in public law, the rule that only the aggrieved person is entitled to seek judicial review has been liberalised to include any public spirited individual or association to approach the court as was held in S.P. Gupta case³⁰.

Even in case of people who are having a collective grievance and they are unrecognised association doesn't make them unrecognised-they can initiate writ proceeding³¹ but in the ambit of all these judicial rights conferred to all the people somewhere the basic tenets of arbitration is violated.

International and bilateral commitments

Arbitration and conciliation Act 1996 has certain commitments regarding certain foreign awards.

New York conventions award

33. The essence of the theory of transitional arbitration is that the institutional of international commercial arbitration is an autonomous juristic entity which is independent of all national courts and all national system of law, "one of the primary purpose of transitionalist movements is to break the links between the arbitral process and the courts of

³⁰ 2 SCR 365(SC.1982)

³¹ Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India, 2 SCR. 185(SC.1981)

the country in which the arbitration takes place”. *The convention clearly states the non involvement of the court to least possible extent.*

Geneva Convention award

34. § 53 defines foreign award for the purposes of chapter 2 of part II which deals with enforcement of Geneva Convention awards. In terms of § 53 of the act: “ Foreign awards means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July 1924.

35. The § 54 makes it mandatory for any judicial, authority when seized of a dispute regarding a contract made between parties to whom § 53 (Geneva Convention applies), to refer the parties to arbitration. This can be done on the application of either party. The main aim is to make least possible intervention of the court in the arbitral process and to get the benefit of the awards as soon as possible.

Hence the pendency of § 34 being so huge that the awards benefit are bound not to get to the parties. Hence the constitutional validity can be questioned.

3.3 GRANT OF AUTOMATIC STAY WITHOUT ADJUDICATION ON PRIMA FACIE CASE, BALANCE OF CONVENIENCE AND IRREPARABLE INJURY IS PER SE BAD IN LAW

36. When a writ petition is filed, the court may make an interim or interlocutory order. The purpose of such order is to preserve in status quo the rights of the parties, so that, the proceedings do not become in fructuous or ineffective by any unilateral overt Acts by one side or the other during pendency of the writ petition as held in the case of Kishota hollohan vs zachillu³². The scope and effect of an interim order would depend upon terms of the order

³² 2 Suppl.SCC 651 (SC. 1992)

itself. In case of any ambiguity, the interim order should be understood in the light of prayer made for interim relief, facts of the cases and terms of the contract.³³.

37. Exceptional situations can emerge where the granting of an interim relief would tantamount to granting the final relief itself. and then there maybe converse cases where withholding of an interim relief would tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. in such cases the availability of a very strong prima facie case of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of the case totally in favour of the applicant may persuade the court to grant an interim relief through it amounts granting the final relief itself.

38. The court has the coercive power to enforce its order but arbitral tribunal is not competent to exercise any such power. The lack of power to directly enforce an interim measure of protection leaves the tribunal with no effective way of forcing the party to obey the order or rather saying it has no teeth. It is therefore primarily dependent on the good will of the parties. In certain situation where the tribunal's order is not honoured, a party in need of an interim relief- a result that is not conducive to promotion of dispute resolution by arbitration.

Accordingly, the case too dealt with same situation in which the tribunal's order is not honoured and which applied to the court and as said correctly is not conducive to promotion of dispute resolution. Without the adjudication on prima facie case balance of convenience and irreparable injury as correctly said in the statements and the subsequent grounds stated.

3.4 OTHER GROUNDS AS ADVISED BY ID. COUNSEL

³³ BPL ltd. Vs R.sudhakar 7 SCC 219 (SC.2004)

39. There are certain more grounds that can question the constitutional validity of § 34. A claim for damages made prior to invocation of arbitration becomes a dispute under 1996 Act. Furthermore, the scope of reference becomes enlarged when parties file their statements putting forth claims not covered by the original reference. Sub section (2) of § 34 does not specify the failure of the arbitral tribunal to decide some of the claims referred to it as a ground for setting aside the award. It does not appear whether, if the arbitral tribunal refuses to make an additional award, the court can interfere under § 34 and remit the arbitral award for deciding the claims left undecided by the tribunal or set aside an award.

40. An award may be referred back to the arbitrator when he has left undetermined any of the matters referred to him, or where he determines any matter not referred to him and such matter cannot be separated without affecting the determination of the matter referred. The award either falls short of the whole of the reference or goes beyond it in such a way that the excess part cannot be separated without affecting the whole of the award. The cases relating to such an award have already been noted under the requisites of a valid award. A further illustration is to be seen in a decision of the Supreme Court in *prakash narain v durgadutta moda*³⁴. Several matters relating to a family and property dispute were referred to an arbitrator, including valuation, validity of an adoption and the consequent division of the properties. The arbitrator failed to decide these and, therefore, the validity of the award was challenged. § 34 gives the recourse for going to the court but the same section fails to specify about the failure of arbitral tribunal. Then, what is the need of having such section as a remedy? Its constitutional validity can be challenged. *Therefore, the ground put forward by the JCI is legitimate and requires no further clarification regarding the constitutional validity of section 34.*

³⁴ 3 SCC 290 (SC.1970)

PRAYER

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

1. That the writ petition filed by people's union for liberties and democratic reforms is Maintainable.
2. That the writ petition filed by jeopardy contract inc. is maintainable.
3. That the grounds by PULDR are legitimate and the ordinance is ultra vires to the Constitution.
4. That the grounds by JCi are legitimate and the section 34 in question is Unconstitutional.

And pass any other relief, that this Hon'ble High Court of Gariba may deem fit and proper in the interest of justice, equity and good conscience.

For this act of kindness, the Petitioner shall duty bound forever pray.

Sd. /-

(Counsel for petitioner)