-MEMORIAL ON BEHALF OF THE RESPONDENT-

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 RESPONDENTS

-MEMORIAL ON BEHALF OF THE RESPONDENT-

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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 in a Scheduled area of the state. 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. JGPS informed JCi that Arbitration and Conciliation Act, 1996 was not applicable as the matter was covered under the Madhyastham Adhikaran Adhiniyam, 1983 and 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 VALID.

1.1 It is not against the basic tenets of arbitration. Introduction of 'litigation' in the arbitral process is in consonance with UNCITRAL Model Law. Judicial Review of arbitral award is not violative of Constitution of Nirdhan. Introduction of litigation is in consonance with *lex proceduralia* principle.

1.2 The pendency of section 34 petitions does not lead to violation of country's bilateral and multilateral commitments. Section 34 being in Part I of the Act is not applicable to those awards whose juridical seat is not Gariba.

1.3 Grant of an automatic stay without adjudication on prima-facie case is not bad in law. Grant of the stay is necessary otherwise the award can be enforced when the case is pending and it would be prejudicial to the applicant party if the appeal succeeds.

2. The non availability of a notified vacation bench and a notified procedure for listing is not unconstitutional. Order II Rule 6 of the Supreme Court Rules, 2013 clearly states that the Chief Justice may at his discretion constitute a vacation bench during the summers and winter vacations. This rule provides that the Chief Justice may, if he feels necessary constitute a vacation bench during the Court holidays.

3. The Ordinance promulgated by the Governor is not unconstitutional. The Governor under the legislative powers give to him by Article 213 of the Constitution is well within his powers to issue the ordinance to such effect. The disqualification prescribed by the ordinance does not infringe Fundamental for Constitutional Rights as it was done keeping in view the larger public interest and need of the hour to promote the rural education.

ARGUMENTS ADVANCED

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

1.1 It is not against the basic tenets of arbitration.

[1.1.i] Introduction of 'litigation' in the arbitral process is in consonance with UNCITRAL Model Law.

It is to be noted that the aforesaid Act is enacted mainly in the pattern of the Modern Law adopted by the United Nations Commission on International Trade law. [1] The object and the reasons of the Act clearly indicate that the intention of the Act is to lay emphasis on speedy disposal of arbitration proceedings.[2] The Act also seeks to minimize judicial intervention in the progress and completion of arbitration proceedings.[3]

Further, it is humbly submitted that the section 34 is not in contravention of this object as the model law does not seek to put a complete bar on the introduction of litigation in the process but to minimize the same. It is also clear from the reading of section 5 of the Act which provides that no judicial authority would intervene except where so provided in the Act.[4] It is to be noted that the important purpose of Article 5, according to the UN Commission, was not to negate court

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[1] *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].

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

[3] *Dharam Prakash v Union of India and another* AIR 2007 Del 155 [5].

[4] Arbitration and Conciliation Act 1996, s 5.

intervention altogether or cut down the proper role of courts but to list out, in the national law, all the situations which permit court intervention and exclude any plea based on a remedy outside the Act or based on a residual power of the national courts.[5]

It is submitted that the preamble of the 1996 Act[6] shows that the Parliament of India intended to give effect to the rules framed by the United Nations Commission on International Trade Law (UNCITRAL).[7] Hence it is submitted that the intention of the legislature is to follow the UNCITRAL Model Law. It is the duty of the courts to promote intention of the Legislature by an intelligible interpretation of the provisions rather than frustrate their operation.[8] Therefore, it is humbly submitted that section 34 is not violative of the UNCITRAL Model law which is the foundation of the Arbitration Act and thereby not violative of basic tenets of arbitration.

[In Arguendo] if an annulment action can be properly brought in a particular forum, then the New York Convention and other leading international arbitration conventions impose no express international limits on the grounds available for annulment; these grounds are almost exclusively matters of local law.[9]

[1.1.ii] <u>Judicial Review of arbitral award is not violative of Constitution of Nirdhan.</u>

[5] Law Commission of India, *The Arbitration And Conciliation (Amendment) Bill* (Law Com Report 176, 2001) 29 [2].

[6] Arbitration and Conciliation Act 1996, Preamble.

[7] *TDM Infrastructure Private Limited v UE Development India Private Limited* 2008 (2) Arb LR 439 (SC) [10].

[8] *Union of India v Harman Singh* (1993) 2 SCC 162 [11].

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

A law to be constitutionally valid must be within the competence of legislature enacting it, and not violative of constitutional prohibition, nor impairing the guarantee of a Fundamental right. [10] It is submitted that legislature is competent to enact the instant provision[11]; Section 34 is not violative of any constitutional prohibition or any fundamental right. The power of judicial review is a fundamental right and part of basic structure of the constitution.[12] Therefore, it is submitted that the absence of a judicial review in arbitral proceedings and not its presence would be violative of Constitution of Gariba.

It is submitted that the judicial review of arbitral award is a necessary "bulwark against corruption, arbitrariness, bias, and sheer incompetence, in relation to acts and decisions with binding legal effect for others. No one having the power to make legally binding decisions in this country should be altogether outside and immune from this system. [13]

In the case of *J G Engineers Pvt Ltd v Union of India*[14], it is held that "Interference of Court is unwarranted in award passed by Arbitrator, unless it suffers infirmity and is perverse." Therefore, it is submitted that there is a desirability of providing a check on the arbitral award and not to completely do away with the interference by the courts. Furthermore, a limitation of

[10] *Rustom Cavasjee Cooper (Nationalisation) v Union of India* (1970) 1 SCC 248 [47].

[11] Constitution of India 1950, List III, entry 1.

[12] *L Chandra Kumar v Union of India* (1997) 3 SCC 261 [45]; *Minerva Mills ltd v Union of India* (1980) 3 SCC 125 [12]; *Kihoto Holhohan v Zaichillhu* 1992 Supp (2) SCC 651 [27]; *Namit Sharma v Union of India* (2013) 1 SCC 745 [100].

[13] Gary B Born, *International Commercial Arbitration,* vol 1 (Wolters Kluwer Law & Business Publication 2009) 2663 para 3.

[14] *J G Engineers Pvt Ltd v Union of India* AIR 2011 SC 2477 [ratio decidendi].

the authority of the courts to intervene in arbitral proceedings might constitute an unwarranted interference in the prerogatives of the judicial power.[15]

It is submitted that the Law Commission Report suggests that the principle of least court interference of the award may be a fine principle for international arbitration awards but having regard to Indian conditions and the fact that several awards are passed in India as between Indian nationals sometimes by lay men who are not well acquainted with law, the interference with such awards should not be as restricted as they are in the matter of international arbitrations.[16]

[1.1.iii] Introduction of litigation is in consonance with *lex procedaralia* principle.

Lex Proceduralia refers to the legal theoretical nature of due process requirements and fair arbitration.[17] The idea of fair arbitration would not refer to just the utter minimum limits for the procedure, but to the maximum of fairness in the proceedings.[18]It is submitted that litigation adds to the fairness in the arbitral scheme which is also a basic tenet of arbitration.

It was held in the case of *Hall Street Associates, LLC v Mattel Inc*[19], that judicial review accords with the principal of party autonomy, and does not detract from (but enhances) the parties 'judicial protections'. On the other hand, absence of judicial review means that a wildly

[15] UN Commission's Report, *Adaptation of Model Law* 1985 [62 and 63].

[16] Law Commission of India, *The Arbitration And Conciliation (Amendment) Bill* (Law Com Report 176, 2001) 30 para 3.

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

[18] Matti S Kurkela and Shanttu Turumen, *Due Process in International Commercial Arbitration* (2nd edn, OUP 2010) 202 para 3.

[19] *Hall Street Associates LLC v Mattel Inc* 552 U S 576 (2008) [IV].

eccentric, or simply wrong, arbitral decision cannot readily (if ever) be corrected.[20] Therefore, it is submitted that judicial review of the arbitral award is in accordance with the due process principle envisaged in Article 21 of the constitution. The grounds for challenging an award under the Model Law are derived from Article V of the New York Convention. Accordingly, authorities relating to Article V of the New York Convention are applicable to the corresponding provisions in Articles 34 and 36 of the Model Law.[21] Since, Section 34 is based on Article 34 of Model Law, so the abovementioned case is applicable.

[In Arguendo] it is submitted that although no system will perfectly reconcile the rival goals of finality and fairness, a middle ground provides judicial review for the grosser forms of procedural injustice. To this end, legislators and courts must engage in a process of legal fine tuning that seeks a reasonable counterpoise between arbitral autonomy and judicial control mechanisms.[22]

1.2 <u>The pendency of section 34 petitions does not lead to violation of country's bilateral and multilateral commitments.</u>

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

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

[21] Gary B Born, *International Commercial Arbitration,* vol 1 (Wolters Kluwer Law & Business Publication 2009) 2563 para 1.

[22] William W Park, 'Why Courts Review Arbitral Awards' (2001) 1 para 4 <http://www.williamwpark.com/documents/Why%20Courts%20Review%20Awards.pdf> accessed on 13 February 2015.

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.[23] It is submitted that an award cannot be said to be an investment and hence the pendency of same cannot amount to expropriation. It is vehemently submitted that an expropriation per se is not a ground for section 34 to be constitutionally invalid.

It is also submitted that no violation of country's bilateral and multilateral commitments under various treaties occurs because section 34 being in Part I of the Act is not applicable to those awards whose juridical seat is not Gariba.[24] In the case of *Bharat Aluminium Company and Ors v Kaiser Aluminium Technical Service, Inc*[25] it was held that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of Indian courts when the same are sought to be enforced in Indian accordance with the provisions contained in part II of the Arbitration Act, 1996.

It is furthermore, submitted that to the awards made in India under various treaties, court's intervention is justified because the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process.[26] A nation's support for the arbitral process, by allowing awards to be made within its borders arguably carries with it a duty to

[23] Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, OUP 2004) 501, para 3.

[24] Arbitration and Conciliation Act 1996, s 2(2).

[25] *Bharat Aluminium Company and Ors v Kaiser Aluminium Technical Service, Inc* (2012) 9 SCC 552 [197].

[26] *Bharat Aluminium Company and Ors v Kaiser Aluminium Technical Service, Inc* (2012) 9 SCC 552 [96].

monitor the quality of decisions benefitting from the treaty scheme. Consequently, any country serving as the place of arbitration can be expected to provide for annulment of awards proven to be biased, capricious or in excess of the arbitrator's authority.[27]

It is also submitted that section 34 ipso facto does not take away the fruits of an arbitral award made under treaties because the principle of *lex arbitrii* provides freedom to the parties to choose an arbitral seat of their choice. Lastly, it is submitted that mere pendency of the case does not amount to expropriation.

[In Arguendo] it is submitted that, commercial actors are unlikely to feel comfortable with a dispute resolution system allowing arbitrators to decide cases on a roll of a dice, or in a way that otherwise denies due process.[28] It is humbly submitted that section 34 provides a means of protection[29] to the investing parties and does not amount to expropriation.

[In Arguendo] it is natural that a State should wish (and even need) to exercise firmer control over such arbitrations, involving its own residents or citizens than it would wish (or need) to

[27] William W Park, 'Why Courts Review Arbitral Awards' (2001) 7 para 3 <http://www.williamwpark.com/documents/Why%20Courts%20Review%20Awards.pdf> accessed on 13 February 2015.

[28] William W Park, 'Why Courts Review Arbitral Awards' (2001) 2 para 3 <http://www.williamwpark.com/documents/Why%20Courts%20Review%20Awards.pdf> accessed on 13 February 2015.

[29] Norbert Horn, 'Arbitration and the Protection of Foreign Investment: Concepts and Means' in Norbert Horn (ed), *Arbitrating Foreign Investment Disputes* (Kluwer Law International 2004) 8 para 1.

exercise in relation to international arbitrations which may only take place within the state's territory because of geographical convenience." [30]

Therefore, it is submitted that above passage supports the view that in the matter of purely domestic arbitrations between Indian nationals, the State can desire that its courts should have greater or firmer control on the arbitrations. Lastly, it is submitted that pendency of cases under section 34, is not per se violative of Constitution of Gariba.

Furthermore, in the case of *TPI India Limited v Union of India*[31], it was held that Section 34 is not violative of Article 21 and 14 of the Constitution and it embodies the mature vision of a modern nation. It provides for greater autonomy in the arbitral process and limits judicial intervention to a narrower circumference.

1.3 Grant of an automatic stay without adjudication on prima-facie case is not bad in law.

In the case of *National Aluminum Co Ltd v Pressteel & Fabrications (P) Ltd*[32] the Supreme Court held that from mandatory language of section 34 of 1996 Act, that an award, when challenged under section 34, within the time stipulated therein, becomes unexecutable. There is no discretion left to the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any discretion from us contrary to that, also becomes impermissible.

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[30] Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (5th edn, OUP 2009) 14, 15 para 2.

[31] *TPI India Limited v Union of India* 2001(3) RAJ 70 (Del) [2].

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

It is humbly submitted that an automatic stay on the award is crucial in the case where an award is made in Gariba but enforced somewhere else. In such a scenario, the Court of Gariba would have jurisdiction to set it aside and an automatic stay would prevent it to be enforced in another country until the case is pending. If an arbitral award is rendered in, for example, the United States, and an American party seeks enforcement there, the award generally is not a foreign award and therefore a U.S. court has jurisdiction either to confirm and enforce the award or to set it aside. There is then no conflict between parallel proceedings. The problem arises when the losing party to arbitration tries to have the award set aside in the country of origin, while the winning party seeks to enforce the award elsewhere.[33]

2. THE NON AVAILABILITY OF A NOTIFIED VACATION BENCH AND A NOTIFIED PROCEDURE FOR LISTING IS NOT UNCONSTITUTIONAL.

Order II Rule 6 of the Supreme Court Rules, 2013 clearly states that the Chief Justice may at his discretion constitute a vacation bench during the summers and winter vacations. This rule provides that the Chief Justice may, if he feels necessary constitute a vacation bench during the Court holidays. However, the use of word 'may' here is not to mean a compulsion but rather it indicates a choice of action or an option in case of urgency. It has been held in *Sub-Committee on Judicial Accountability v Union of India*[34] by Sharma J. that the word 'may' has sometimes been understood in the imperative sense as 'shall', but ordinarily it indicates a choice of action and not a command.

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[33] W Michael Tupman 'Staying Enforcement of Arbitral Awards under the New York Convention' para 5 **<** http://arbitration.oxfordjournals.org/content/3/3/209**>** accessed on 13th February 2015.

[34] *Sub-Committee on Judicial Accountability v Union of India* (1991) 4 SCC 699 [90].

It is, an established practice in the Supreme Court that vacation bench sit regularly during the summer vacations to listen to urgent admission matters as well as old matters. The old matters are identified by the Registry and an advanced list thereof is circulated no matter is entertained and listed for listening before the vacation bench unless it is sufficient to indicate an urgency.[35] This is done in regulation of the work of the Apex Court this convention does not in any way take away the right if the litigant to move the court however, it only provides for a working mechanism during the vacations. In case, a litigant does not find a chance of listing before the vacation bench is merely a procedural delay he can any way come back or his petition may be listed further. However, if it is a case of some great urgency the Chief Justice is well within his powers under Order II Rule 6 of the Supreme Court Rules, 2013 to let the matter be heard before the vacation bench. Thus, the non availability of a notified vacation bench is in no way contrary to the rights guaranteed by the Constitution as it does not take away any of those rights. It is merely a part of the working of the Apex Court. The litigant is not in any way barred from filing a petition. Further, the instant case relates to a matter of a substantial question of law as to the interpretation of the Constitution that is whether the ordinance passed by the Governor of Nirdhan is unconstitutional as such it does not come within the jurisdiction of the vacation bench as provided in Order VI of the Supreme Court Rules.[36] Otherwise, the Supreme Court does provide for a procedure, to list and hear urgent matters.[37] It is well understood that through Article 32 the Constitution of Gariba provides for constitutional remedies as Fundamental Right

[35] Bibhuti Bhushan Bose (ed), *Supreme Court of India Practice & Procedure A Handbook of Information* (3rd edn, 2010) 19.

[36] SCR Ord VI, r 6(5).

[37] Bibhuti Bhushan Bose (ed), *Supreme Court of India Practice & Procedure A Handbook of Information* (3rd edn, 2010).

to every citizen. Further, the right to justice and to access the Apex court comes well within the Fundamental Rights guaranteed under Article 32 of the Constitution it is pertinent to quote Dr. B.R. Ambedkar, Chairman, Drafting Committee, Constitution of India (the laws of whom are *pari materia* to the laws Republic of Gariba) - *"If I was asked to name any particular Article in this Constitution as the most important – an Article without which this Constitution will be a nullity I could not refer to any Article than this one. It is the very soul of the Constitution and the soul of it."*[38] This right to move the Apex court has been described as the cornerstone of the democratic edifice raised by the Constitution by the Supreme Court of India.[39]

Hence, it is well established that it is well within the Fundamental Right of a person to move to the Supreme Court. It is well appreciated by the respondents as well the non-availability of a notified vacation bench or procedure for listing during vacations is only part of the functioning of the Apex court. It is no way a denial of the rights under Article 32 of the Constitution but only a process to regulate and expedite the system of justice as undertaken by the Apex Court. The litigant is well within his rights to move the Court under Article 32 once vacation period is ended and further, if the matter is of extreme urgency a proper procedure has been already expounded by the Supreme Court under which the matter would be listed and heard before a vacation bench. However, if the matter relates to a substantial question of law relating to the interpretation of the Constitution the Supreme Court realizing the general importance of such a decision would take the matter once the vacations have ended. This in no way a denial to hear such a case but, it only emphasizes the importance that is given to matters of Constitutional interpretation. It is done in the light of Article 145(3) of the Constitution of India the laws of which are *pari materia* to the

[38] *Minerva Mills v Union of India* (1980) 3 SCC 625 [93].

[39] *Shatrughan Chuahan v Union of India* (2014) 3 SCC 1 [6].

laws of Republic of Gariba which states that at least 5 judges must decide any case which involves a substantial question of law as to the interpretation of the Constitution. As such, the matter clearly could not have been taken up by a vacation bench and was rightly heard after the vacations.

3. THE ORDINANCE PROMULGATED BY THE GOVERNOR IS NOT UNCONSTITUTIONAL.

The ordinance cannot be held to be unconstitutional on following grounds:

3.1 The Governor has the power to issue an ordinance to such effect.

The Governor of Nirdhan was well within his constitutional powers under Article 213 of the Constitution to issuing such an ordinance. By a bare perusal of Article 243F(1)(b) of the Constitution it is clear that a disqualification can be prescribed by the legislature of the state. Under Article 213 the power of the Governor to promulgate an ordinance during recess of legislature is a legislative power[40]. Hence the Governor is well within his powers to issue such an ordinance. The Constitution Bench of Supreme Court in *T Venkata Reddy v State of Andhra Pradesh* held that the powers of the Governor to promulgate an ordinance cannot be challenged on the ground of non-application of mind or malafides.[41]

The High Court of Rajasthan in *Shiv Ram & 5 Ors v State of Rajasthan* turned down a challenge to Rajasthan Panchayati Raj (Third Amendment) Ordinance, 1999, inserting Section 19(g) and other sections as disqualification. It was held that it was a matter of the satisfaction of the Governor in such matters to issue such ordinances. He is the sole judge as to the existence of the

[40]Constitution of India 1950, art 213(2).

[41] *T Venkata Reddy v State of Andhra Pradesh* AIR 1985 SC 724 [7]-[11].

circumstances necessitating making of an ordinance[42]. In public interest the Governor advised by the Cabinet promulgated the ordinance as the Legislative Assembly was not in session and had he not issued the ordinance the qualifications could not have been prescribed for a period of 5 years for which elections were to be held.

3.2 The ordinance does not infringe Fundamental or Constitutional rights.

The Supreme Court of India has on several occasions upheld such disqualifications on the election of representatives. In the case of *Javed v State of Haryana* upheld the disqualification of people from contesting Panchayat elections prescribed by the legislature re on the rationale that it was done in national interest[43]. Similarly, it is contended that the Sarpanch or Zilla Pramukh Pradhan or other members are required to be educated before putting their signatures on cheques and relevant files for disbursement of funds allotted to the Panchayats to avoid financial irregularities. Also, under the Right to Information Act, 2005 the State Government has appointed Sarpanch for the entire Gram Panchayat to dispense information to the people under the Right to Information Act hence, given the pivotal role that these representatives carry between the authorities and rural populace it is the need of the changing times that they be formally educated to take care of all the documentation involved. More importantly, it is the need of the hour to promote education among rural masses of Nirdhan and for ensuring that those who lead should lead by example at the grass root of democracy the need for implementing such an ordinance was felt without which the implementation would have been delayed by 5 years. Given the changing times and the need for educated youth such a delay would have not been very feasible.

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[42] *Shiv Ram v The State of Rajasthan and Ors* AIR 2000 Raj 416 [9].

[43] *Javed v State of Haryana* (2003) 8 SCC 369 [25].

On the touchstone of Article 14 the ordinance fulfils the condition of object nexus[44] test put forward by the Hon'ble Supreme Court. The classification of illiterate people not representing in rural bodies is done with the object of promoting formal education in the backward state of Nirdhan[45] and hence, is done in public interest. Similarly in the case of *Javed v State of Haryana*[46] the Supreme Court upheld the disqualification of those who had more than two children on the pretext of popularising family planning programme the court held that such a decision was neither arbitrary nor was it against the Fundamental Rights given in Article 14 or 21. Similarly, the ordinance passed by the Governor of Nirdhan to promote education among the rural areas of Nirdhan.

The Supreme Court has held that right to vote or the right to contest elections is not an inherent constitutional right of citizen but, it is right that flows from the statute and such is regulated by statutory control.[47] Therefore, it is humbly submitted that the ordinance of the Governor under Article 213 is one such regulation that is regulating the elections to the Panchayati Raj Institutions of Nirdhan and all voting rights and right to contest are subject thereto.

3.3 <u>The Court cannot interfere with the provisions of the ordinance.</u>

In the case *T Venkat Reddy v State of Andhra Pradesh*[48] the power of the Governor to promulgate and ordinance cannot be challenged on the ground of non-application of the minds

[44] *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75 [58].

[45] Moot Proposition [3].

[46] *Javed v State of Haryana* (2003) 8 SCC 369 [7], [37].

[47] *K Krishna Murthy v Union of India* (2010) 7 SCC 202 [35], [78].

[48] *T Venkata Reddy v State of Andhra Pradesh* AIR 1985 SC 724 [7]-[11].

and mala fide. Further, in *Bhavesh D Parish v Union of India*[49] the Supreme Court held that unless the provision of law in manifestly unjust or glaringly unconstitutional the Courts should maintain judicial restraints. It was also held in *N P Ponnuswamy v Returning Officer Namakkal Constituency*[50] the court should not interfere with the process of elections. The Supreme Court in *S T Muthusami v K Natrajan and ors*[51] has cautioned the Courts against interference in elections such judicial restraint was also advocated by the Supreme Court. In the case of *State of U P v Pradhan Sangh Kshetra Samiti*[52] the Supreme Court refused to interfere with the elections with respect to delimitation of Constituencies by legislature being challenged. This is even more clearly emphasized by Article 243(o) of the Constitution in Part IX relating to Panchayati Raj institutions that courts are prohibited from any interference in elections once elections have been notified. Article 329 of the Constitution of India also highlights the same points. Hence, the court shall not interfere with the implementation of the ordinance since, the election process has been notified.[53]

[49] *Bhavesh D Parish v Union of India* (2000) 5 SCC 471 [30].

[50] *N P Ponnuswamy v Returning Officer Namakkal Constituency* AIR 1952 SC 64 [28].

[51] *S T Muthusami v K Natrajan and ors* AIR 1988 SC 616 [8].

[52] *State of U P v Pradhan Sangh Kshetra* Samiti (1995) Supp 2 SCC 305 [35].

[53] Moot Proposition [19].

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 constitutional.

2. The non-availability of a notified vacation bench and notified listing procedure is not unconstitutional.

3. The ordinance promulgated by the Governor be held constitutional.

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 Respondent)