

Before

THE HIGH COURT OF NIRDHAN

AT

STATE OF NIRDHAN

WP 999/2015 & WP (C) No. 1021/2015

U/A 226 OF THE CONSTITUTION OF REPUBLIC OF GARIBA

JUSTICE R.K. TANKHA MEMORIAL

MOOT COURT COMPETITION, 2015

PEOPLE’S UNION FOR LIBERTIES & DEMOCRATIC REFORMS AND JCI (PETITIONERS)

v.

REPUBLIC OF GARIBA AND MAXIS BANK (RESPONDENTS)

MEMORANDUM *for* RESPONDENTS

SUBMITTED TO THE REGISTRY OF HIGH COURT OF NIRDHAN

TABLE OF CONTENTS

INDEX OF AUTHORITIES **III**

STATEMENT OF JURISDICTION **V**

STATEMENT OF FACTS **VI**

STATEMENT OF ISSUES **VII**

SUMMARY OF ARGUMENTS **VIII**

ARGUMENTS ADVANCED **1**

 ISSUE-1: WHETHER OR NOT PETITIONS UNDER SECTION 34 OF ARBITRATION AND
 CONCILIATION ACT, 1996 AMOUNTS TO ‘LITIGATION’ IN THE ARBITRAL PROCESS. 1

 [1.1] NO PARTY SHOULD BE LEFT REMEDILESS. 1

 [1.2] THERE IS MINIMUM INTERFERENCE OF COURTS. 2

 ISSUE-2: WHETHER OR NOT THE PENDENCY UNDER SECTION 34 LEADS TO EXPROPRIATION
 AND VIOLATE COUNTRY’S BILATERAL COMMITMENTS. 3

 [2.1] THE PENDENCY UNDER SECTION 34 OF THE ARBITRATION ACT, 1996 IS NOT
 LEADING TO EXPROPRIATION. 3

 [2.2] THERE IS NO VIOLATION OF COUNTRIES BILATERAL AND MULTILATERAL
 COMMITMENTS UNDER VARIOUS CONVENTIONS AND INVESTMENT TREATIES. 4

 ISSUE-3: WHETHER OR NOT FILING AN APPLICATION UNDER SECTION 34 RESULTS IN THE
 GRANT OF A JUSTIFIED AUTOMATIC STAY ON THE AWARD. 4

 [3.1] THE AUTOMATIC STAY IS JUSTIFIED..... 5

 [3.2] MAXIS BANK IS JUSTIFIED IN NOT RELEASING THE MONEY TO JCI. 5

 [3.3] GRANT OF AUTOMATIC STAY WITHOUT ADJUDICATION ON BALANCE OF
 CONVENIENCE AND IRREPARABLE INJURY IS NOT BAD-IN-LAW..... 6

ISSUE-4: WHETHER OR NOT THE ORDINANCE PASSED BY THE IS ULTRA VIRES OF THE CONSTITUTION. 7

 [4.1] THE LEGISLATIVE POWER OF THE GOVERNOR CANNOT BE CHALLENGED. 7

 [4.2] THE ORDINANCE IS NOT ULTRA VIRES PART IX OF THE CONSTITUTION. 8

 [4.3] THE ORDINANCE IS NOT VIOLATIVE OF ANY FUNDAMENTAL RIGHT OF THE CONSTITUTION. 10

ISSUE-5: WHETHER OR NOT NON-AVAILABILITY OF A NOTIFIED VACATION BENCH AND NOTIFIED PROCEDURE FOR LISTING IS UNCONSTITUTIONAL. 12

 [5.1] THERE HAS BEEN NO VIOLATION OF ARTICLE 14. 12

ISSUE-6: WHETHER OR NOT NON-GRANT OF LISTING SHOULD AFFECT THE MERITS OF THE CASE AS THE COURT WAS MOVED WELL IN TIME AND ACTUS CURAIE NEMINEM GRAVABIT. 13

PRAYER..... **X**

INDEX OF AUTHORITIES**STATUTES**

Short Title	Page
Arbitration and Conciliation Act, No. 26 of 1996	12,16,18,19
India Const., 1950	19
Rajasthan Panchayati Raj (Third Amendment) Act, (1999), No.16, Act of State Legislature, 1999 (India).	22
Representation of People's Act, No. 43 of 1951	25

JUDICIAL DECISIONS

Case Name	Citation	Page
<i>A.K. Roy v. Union of India</i>	A.I.R. 1982 S.C. 710	19
<i>Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc.</i>	(2012) 9 S.C.C. 552	11
<i>Bhatia International v. Bulk Trading S.A.</i>	2002 (4) S.C.C. 105	12
<i>Bikash Chandra Deb v. Vijaya Minerals Pvt. Ltd.</i>	2005 (1) C.H.N. 582	17
<i>Dalpat Kumar v. Prahlad Singh</i>	A.I.R. 1993 S.C. 276	16
<i>Dr. D.C. Wadhwa v. State of Bihar</i>	A.I.R. 1987 S.C. 579	18
<i>Election Commission of India v. Ashok Kumar</i>	(2000) 8 S.C.C. 216	24
<i>Fiza Developers and Inter-Trade Pvt. Ltd. v. AMCI (I) Pvt. Ltd.</i>	(2009) 17 S.C.C. 796	12
<i>Great Offshore Ltd. v. Iranian Offshore Engineering and Construction Company</i>	(2008) 14 S.C.C. 240	12
<i>Javed v. State of Haryana</i>	(2003) 8 S.C.C. 369	21

5th Justice R.K. Tankha Memorial Moot Court Competition – 2015

[Memorandum for Respondents]	[Index of Authorities]	
<i>K. Prabhakaran v. P.Jairajan</i>	A.I.R. 2002 S.C. 3393	22
<i>K. Nagaraj v. State of Andhra Pradesh</i>	A.I.R. 1985 S.C. 551	21
<i>L. Chandra Kumar v. Union of India</i>	A.I.R. 1997 S.C. 1125	14
<i>Mc Dermott International Inc. v. Burn Standard Co. Ltd.</i>	(2006) 11 S.C.C. 181	12, 13
<i>N.P. Ponnuswami v. Returning Officer, Namakkal Constituency</i>	A.I.R. 1952 S.C. 64	20
<i>National Buildings Construction Co. Ltd. v. Lloyds Insulation India Ltd.</i>	(2005) 2 S.C.C. 367	15
<i>Networth Stock Broking Ltd. v. Madhav Rao Nadella</i>	2010 (1) Bom.C.R. 175	17
<i>Pannalal Binjraj v. Union of India</i>	A.I.R. 1957 S.C. 397	24
<i>Ramdutt Ramkissen Dass v. E.D. Sassoon & Co.</i>	A.I.R. 1929 P.C. 103	24
<i>Rameshwar Prasad v. Union of India</i>	(2006) 2 S.C.C. 1	24
<i>S.K.G Sugar Ltd. v. State of Bihar</i>	A.I.R. 1974 S.C. 1533	18
<i>Shiv Ram v. State of Rajasthan</i>	A.I.R. 2000 Raj. 416	19,21
<i>State of Punjab v. Satya Pal Dang</i>	A.I.R. 1969 S.C. 917	19,22
<i>T. Venkata Reddy v. State of Andhra Pradesh</i>	A.I.R. 1985 S.C. 724	21
<i>V. Kunhabdulla and Anr v. State of Kerela</i>	A.I.R. 2000 Ker. 376	20
<i>White's Industries v. Coal India Ltd.</i>	2004 (2) Cal. L.J. 197	13,14

OTHER AUTHORITIES

Particulars	Page
BLACK'S LAW DICTIONARY 534 (9 TH ed. 2009)	12
Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA), art. 5(1)	13
RBI/2013-2014/66, DBOD.No.Dir.BC.12/13.03.00/2013-2014, dated July1, 2013	16

STATEMENT OF JURISDICTION

**THE RESPONDENT HAVE THE HONOUR TO SUBMIT BEFORE THE HON'BLE HIGH COURT OF
NIRDHAN, THE MEMORANDUM FOR THE RESPONDENT IN THE PETITION FILED BY THE
PETITIONER UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, 1950.**

**THE PRESENT MEMORANDUM SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN
THE PRESENT CASE**

STATEMENT OF FACTS

W/P 999/2015

A. State of ‘Nirdhan’ was considered as a backward state in the Republic of Gariba. In order to develop the state, Jodhpur Gaon Panchayat Samiti (JGPS) entered into an agreement with a Company Jeopardy Contracts Incorporation (JCI) on 21.9.2011 but the contract was terminated on 21.9.2013. They went under arbitration. The arbitral award was granted in favour of JCI and entitled them money under performance bank guarantee from Maxis Bank. JGPS filed petition before the High Court of Nirdhan for setting aside of the arbitral award under section 34 of the Arbitration and Conciliation Act, 1996. Upon this JCI challenged the constitutional validity of section 34 by way of writ petition WP 999/2015.

W/P 1021/2015

B. In the meanwhile, the Governor of the State of Nirdhan, on 20th December 2014, promulgated the ordinance which came into effect from 24th December 2014, amending section 19 of the Nirdhan Panchayati Raj Act, 1994. It set up minimum educational qualification as criteria for disqualifying a person in participating in the Panchayat elections. People’s Union for Liberties & Democratic Reforms moved to High Court of Nirdhan on 29th December 2014(during annual winter holidays) for listing and the listing was denied.

C. Further the People’s Union for Liberties & Democratic Reforms moved the Hon’ble Apex Court under Article 32 on 31.12.2014 through Vacation Officer. After following the notified procedure mentioned on the website the listing was granted to the petitioners. Upon listing the Apex Court was pleased to observe the matter and directed the party to the High Court of Nirdhan. The petitioners moved the Hon’ble High Court filing a pro-bono petition WP (C) No. 1021/2015 challenging the vires of the Ordinance and certain other reliefs.

STATEMENT OF ISSUES

THE FOLLOWING ISSUES ARE PRESENTED BEFORE THE AUTHORITY FOR RULING IN THE INSTANT MATTER:

ISSUE-1: WHETHER OR NOT PETITIONS UNDER SECTION 34 OF ARBITRATION AND CONCILIATION ACT, 1996 AMOUNTS TO ‘LITIGATION’ IN THE ARBITRAL PROCESS?

ISSUE-2: WHETHER OR NOT THE PENDENCY UNDER SECTION 34 LEADS TO EXPROPRIATION AND VIOLATES THE COUNTRY’S BILATERAL COMMITMENTS?

ISSUE-3: WHETHER OR NOT FILING AN APPLICATION UNDER SECTION 34 AMOUNT TO A JUSTIFIED AUTOMATIC STAY ON THE AWARD?

ISSUE-4: WHETHER OR NOT THE ORDINANCE PASSED BY THE GOVERNOR IS ULTRA VIRES OF THE CONSTITUTION?

ISSUE-5: WHETHER OR NOT NON-AVAILABILITY OF A NOTIFIED VACATION BENCH AND NOTIFIED LISTING PROCEDURE IS UNCONSTITUTIONAL?

ISSUE- 6: WHETHER OR NOT NON-GRANT OF LISTING SHOULD NOT AFFECT THE MERITS OF THE CASE AS THE COURT WAS MOVED WELL IN TIME AND ACTUS CURAIE NEMINEM GRAVABIT?

SUMMARY OF ARGUMENTS

A. THAT SECTION 34 DOES NOT AMOUNT TO INTRODUCTION OF ‘LITIGATION’

The purpose of the Arbitration Act was to minimize the interference of courts in the arbitral process and not to oust the jurisdiction of courts. Also jurisdiction of courts cannot be ousted completely unless the statute expressly indicates so.

B. THAT THE PENDENCY UNDER SECTION 34 DOES NOT LEAD TO EXPROPRIATION AND IS NOT VIOLATING THE COUNTRIES BILATERAL COMMITMENTS

Pendency under section 34 can never amount to expropriation as since the award has not been “taken”. The country is following the norms laid by the conventions and is just providing with the scope to prevent greater injustice to take place.

C. THAT FILING OF AN APPLICATION UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 AMOUNTS TO UNJUSTIFIED AUTOMATIC STAY ON THE AWARD

It is submitted that the award given by the Arbitral tribunal in favor of jeopardy Contracts Incorporation (JCI) is automatically stayed due to filing of an application under section 34 by Jodhpur Gram Panchayat Samiti (JGPS). This automatic stay is unjustified and the award given by the arbitral tribunal should be executed. Also, the balance of convenience is not maintained and the irreparable injury is caused to the party and hence it is proved to be bad-in-law.

D. THAT THE ORDINANCE PASSED BY THE GOVERNOR IS NOT ULTRA VIRES OF THE CONSTITUTION

It is submitted that the ordinance passed by the Governor of Nirdhan is ultra vires the powers of the Governor under article 213 and part IX of the Constitution. Also, it is in violation with fundamental rights and Preamble of the Constitution. The satisfaction of the Governor exceeds

the prescribed limits of the Constitution. Also, the Ordinance violates article 14 and it restricts a person from participating freely and equally in a democratic government.

E. THAT THE NON-AVAILABILITY OF A NOTIFIED VACATION BENCH AND NOTIFIED

PROCEDURE FOR LISTING IS NOT UNCONSTITUTIONAL

Non availability of notified vacation bench and notified listing procedure when court is not in session is not unconstitutional. Handbook is publication of the Supreme Court itself and hence provides for a well established procedure which is followed by the general public.

F. THAT THE NON-GRANT OF LISTING MAY AFFECT THE MERITS OF THE CASE

The petition filed by the petitioners is a new suit and cannot be considered as the continuance of the first and thus, it bare the courts interference as election process have commenced from the issuance of notification.

ARGUMENTS ADVANCED

ISSUE-1: WHETHER OR NOT PETITIONS UNDER SECTION 34 OF ARBITRATION AND CONCILIATION ACT, 1996 AMOUNTS TO ‘LITIGATION’ IN THE ARBITRAL PROCESS.

[¶1.] It is humbly submitted before the Hon’ble High Court that one of the main objectives of the 1996 Act was to reduce the supervisory role of the court in the arbitral tribunal process.¹ Section 34 of the Act provides very limited grounds for the interference of the courts. The Act of 1996 was enacted with the purpose of minimizing court interference, as the Act of 1940 failed to do so. No party should be left without remedy.[1.1] Also, there is minimum interference of courts.[1.2]

[1.1] NO PARTY SHOULD BE LEFT REMEDILESS.

[¶2.] The intent of the legislature was to deliberately allow the interference of courts by virtue of listed provisions only. In the *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc.* case it was held that the intention of the Indian Parliament in enacting the Arbitration Act, 1996 was not to leave a party remediless and the Arbitration Act, 1996 clearly states that in respect of all subject matters over which Courts of Judicature have jurisdiction, the National Courts will have residual jurisdiction in matters of challenge to the validity of an award or enforcement of an award.²

[¶3.] If section 34 does not exist, the parties will be left remediless and this will be in violation of natural justice. Further in the aforesaid mentioned case it has been held that, after

¹ Arbitration and Conciliation Act, No. 26 of 1996, Statement of Objects and Reasons.

² *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc.*, (2012) 9 S.C.C. 552, p. 13.

reconsidering its various previous decisions on the Indian Arbitration & Conciliation Act 1996 concluded that the Indian Arbitration Act should be interpreted in a manner to give effect to the intent of Indian Parliament.³

[1.2] THERE IS MINIMUM INTERFERENCE OF COURTS.

[¶4.] The Act uses the words ‘minimum interference’ and thus does not oust the interference of courts completely. Also it has been held by the Hon’ble Supreme Court that “while examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion.”⁴ It has been held in cases, like in *Bharat Aluminium* case that the purpose of the 1996 Act was “to minimize the supervisory role of Courts in the arbitral process”⁵ and in another case that there should be minimal interference by courts in matters relating to arbitration.⁶

[¶5.] Also the Supreme Court has said in absolutely clear terms that the role of courts under the Act is very limited and circumscribed and intervention of the court is envisaged only in the few circumstances set out in section 34 (2) of the Act.⁷

[¶6.] Therefore, Section 34 is not going against the purpose of the Act.

³ *Id.*, p. 15.

⁴ *Bhatia International v. Bulk Trading S.A.*, 2002 (4) S.C.C. 105, p. 4.

⁵ *Great Offshore Ltd. v. Iranian Offshore Engineering and Construction Company*, (2008) 14 S.C.C. 240, p. 12; *see also*, BLACK’S LAW DICTIONARY 534 (9TH ed. 2009).

⁶ *Fiza Developers and Inter-Trade Pvt. Ltd. v. AMCI (I) Pvt. Ltd.*, (2009) 17 S.C.C. 796, p. 5.

⁷ *Mc Dermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 S.C.C. 181, p. 5.

**ISSUE-2: WHETHER OR NOT THE PENDENCY UNDER SECTION 34 LEADS TO EXPROPRIATION
AND VIOLATES THE COUNTRY’S BILATERAL COMMITMENTS.**

[[7.] It is submitted to the Hon’ble High Court on behalf of the respondent that section 34 of Arbitration and Conciliation Act, 1996 is a self regulated and limited provision, providing for setting aside of award only in exceptional circumstances as has been provided in the section itself⁸ and therefore it cannot be said to be inconsistent with the purpose of the act. The pendency is neither leading to expropriation [2.1] nor violating country’s bilateral commitments.[2.2]

**[2.1] THE PENDENCY UNDER SECTION 34 OF THE ARBITRATION ACT, 1996 IS NOT LEADING TO
EXPROPRIATION.**

[[8.] The term ‘expropriation’ or ‘equivalent to expropriation’ means that which is for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation.⁹

[[9.] The petitioner’s contention that filing of an application under section 34 amounts to expropriation cannot stand as the bank guarantee is not yet procured by the respondent. As held by the court in *White’s Industries v. Coal India Ltd.* case, delay in providing an award cannot be said to be expropriation as no decision regarding the award is rendered, rather a status quo is maintained in lieu of the ongoing litigation.¹⁰ Similarly, in the present case, the bank guarantee is not given to either of the parties and status quo has been maintained. Therefore, pendency of petitions under section 34 cannot lead to expropriation.

⁸ *Mc Dermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 S.C.C. 181, p. 5.

⁹ Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA), art. 5(1), p. 3.

¹⁰ *White’s Industries v. Coal India Ltd.*, 2004 (2) Cal. L.J. 197, p. 120.

[2.2] THERE IS NO VIOLATION OF COUNTRIES BILATERAL AND MULTILATERAL COMMITMENTS

UNDER VARIOUS CONVENTIONS AND INVESTMENT TREATIES.

[¶10.] Section 34 cannot affect the investment treaties and conventions with other countries as it is providing some pecuniary grounds and keeps a check as to no person are left remediless. The country being a signatory of these conventions is following the norms laid down by them and is also providing with the scope to prevent greater injustice to take place. Further, the power of Supreme Court and High Court under article 32 and article 226 respectively is the part of basic structure, which cannot be curtailed.¹¹

[¶11.] As far as denial of justice is concerned the tribunal in white's case noticed it as a stringent one as there is no time frame in which certain case should be resolved.¹²

[¶12.] Therefore, section 34 is not leading to pendency. And hence, cannot amount to expropriation and violation of bilateral and multilateral commitments under various conventions and investment treaties.

ISSUE-3: WHETHER OR NOT FILING AN APPLICATION UNDER SECTION 34 RESULTS IN THE

GRANT OF AUTOMATIC STAY ON THE AWARD.

[¶13.] It is humbly submitted to the Hon'ble Court that in the present case the award given in the favour of Jeopardy Contracts Incorporation herein referred as JCI is automatically stayed due to filing of an application under section 34¹³ to set aside the award.[3.1] JCI should not be given with the performance bank guarantee[3.2] and balance of convenience and irreparable injury is not bad in law.[3.3]

¹¹ L. Chandra Kumar v. Union of India A.I.R. 1997 S.C. 1125, p. 9.

¹² White's Industries v. Coal India Ltd., 2004 (2) Cal. L.J. 197, p. 100.

¹³ Arbitration and Conciliation Act, No. 26 of 1996, § 34.

[3.1] THE AUTOMATIC STAY IS JUSTIFIED.

[¶14.] The stay on the award is justified, as laid down by the Hon'ble court in the case of *National Buildings Construction Co. Ltd. v. Lloyds Insulation India Ltd.*¹⁴ that if the petition filed under section 34 of the Arbitration and Conciliation Act, 1996 is filed within the time prescribed under section 34(3) of the Arbitration and Conciliation Act, 1996, the award is automatically stayed and cannot be executed. In the present case also the application has been filed within the time prescribed in section 34(3) of the Act¹⁵ and as the petition under section 34 is accepted the award is stayed and hence should not be executed.

[¶15.] Such grant of automatic stay is required because if the award is executed then it dissolves the purpose of the application made under section 34 where the suit can be heard again as a fresh suit.

[3.2] MAXIS BANK IS JUSTIFIED IN NOT RELEASING THE MONEY TO JCI.

[¶16.] It is humbly submitted that as per the Master Circular¹⁶ issued by the Supreme Court regarding the payment of invoked guarantee, it is mentioned in the circular as follows;

“Banks are required to ensure that the guarantees issued by them are honoured without delay and hesitation when they are invoked by the Government departments in accordance with the terms and conditions of the guarantee deed, unless there is a Court order restraining the banks.”

[¶17.] Similarly, in the present case at the first instance Jodhpur Gram Panchayat Samiti herein after referred as JGPS invoked the bank guarantee and while the bank was facilitating the encashment process there was a security breach because of which the amount remained in the

¹⁴ *National Buildings Construction Co. Ltd. v. Lloyds Insulation India Ltd.*, (2005) 2 S.C.C. 367, p. 3.

¹⁵ Arbitration and Conciliation Act, No. 26 of 1996, § 34 (3).

¹⁶ RBI/2013-2014/66, DBOD.No.Dir.BC.12/13.03.00/2013-2014, dated July1, 2013.

accounts of JCI and after this the stay on the invocation of bank guarantee was ordered by the court.

[18.] Therefore, at the first place itself JGPS was to be encashed with the bank guarantee and the transaction was processed, but because of the security breach and the court's order thereafter the Maxis Bank was restrained from transferring the amount. Hence, Maxis Bank is not entitled to pay any amount to JCI unless the decision of the court on the award challenged is given.

[3.3] GRANT OF AUTOMATIC STAY WITHOUT ADJUDICATION ON BALANCE OF CONVENIENCE

AND IRREPARABLE INJURY IS NOT PER SE BAD-IN-LAW.

[19.] It is humbly submitted that in the case of *Dalpat Kumar v. Prahlad Singh*.¹⁷, Supreme Court laid down that “*The phrases ‘prima facie case’, ‘balance of convenience’ and ‘irreparable loss’ are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by man’s ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice.*” Also the Bombay High Court observed that it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and concept of just and convenient while passing interim orders under section 9¹⁸ of the Act.¹⁹

[20.] In the present case the concept of balance of convenience is properly applied and it is not in favor of any one party, rather status quo has been maintained by the court. Both JCI and JGPS are kept on the same footing, this is because if JCI is given the money then the amount claimed by JCI is thrice the principle amount with accumulated interest which leads to unnecessary wastage of public funds as JGPS is a government institution.

¹⁷ *Dalpat Kumar v. Prahlad Singh*, A.I.R. 1993 S.C. 276, p. 3.

¹⁸ Arbitration and Conciliation Act, No. 26 of 1996, § 9.

¹⁹ *Networth Stock Broking Ltd. v. Madhav Rao Nadella*, 2010 (1) Bom. C.R. 175, p. 5.

[Memorandum *for* Respondents]

[Arguments Advanced]

[[21.] Similarly, if JCI is not given the amount it is in loss as it has to pay back the loan taken from the Amresian Development bank. Therefore, it can be clearly observed that balance of convenience is maintained. And as it is said that there must be a proper balance between the parties and the balance cannot be a one-sided affair.²⁰

[[22.] Hence, it is humbly submitted that the validity of section 34²¹ cannot be challenged on these grounds.

**ISSUE-4: WHETHER OR NOT THE ORDINANCE PASSED BY THE IS ULTRA VIRES OF THE
CONSTITUTION.**

[[23.] It is humbly submitted to the Hon'ble Court that the ordinance passed by the Governor of Nirdhan is not subject to judicial review.[4.1] Secondly, the ordinance is not ultra vires part IX of the Constitution.[4.2] The Ordinance does not violate any fundamental right guaranteed by the constitution.[4.3]

[4.1] THE LEGISLATIVE POWER OF THE GOVERNOR CANNOT BE CHALLENGED.

[[24.] The power of the Governor to issue an Ordinance is given in article 213²² where the Governor can use this power to promulgate ordinances in the emergent situations and this power is in the nature of an emergency power for taking immediate action where such action may become necessary at a time when the Legislature is not in session.²³

[4.1.1] Satisfaction of the Governor is not subject to judicial review.

[[25.] In the present case the Ordinance cannot be challenged on the grounds that no circumstances existed which rendered it necessary to promulgate the Ordinance. Governor

²⁰ Bikash Chandra Deb v. Vijaya Minerals Pvt. Ltd., 2005 (1) C.H.N. 582, p. 3.

²¹ Arbitration and Conciliation Act, No. 26 of 1996, § 34.

²² India Const. art. 213.

²³ Dr. D.C. Wadhwa v. State of Bihar, A.I.R. 1987 S.C. 579, p. 4.

generally promulgate an ordinance on the advice of Council of Ministers but the decision of the Governor in his discretion shall be final and validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.²⁴

[[26.] Sarkaria .J. said that the necessity for an immediate action and promulgating an ordinance is a matter purely based on the subjective satisfaction of the Governor.²⁵ Subjective satisfaction of the Governor means his personal satisfaction about the existence of necessity, in the given circumstances, for promulgating an ordinance and such satisfaction is conclusive.²⁶ It cannot be questioned on the ground of error of judgment or otherwise in court.²⁷

[[27.] In the present case the ordinance is not subject to judicial review because the Governor is satisfied in passing such an ordinance and he found the necessity to add such a disqualification criteria so it cannot be questioned merely on the grounds challenged by the petitioners.

[4.2] THE ORDINANCE IS NOT ULTRA VIRES PART IX OF THE CONSTITUTION.

[[28.] It is submitted to the Hon’ble Court that the Ordinance is not ultra vires part IX of the Constitution. In *A.K. Roy v. Union of India*, the Supreme Court laid down that “An ordinance issued by the President or the Governor is as much law as an Act passed by the Parliament and is, fully of legislative character and are made in the exercise of legislative power, within the contemplation of the Constitution.²⁸

²⁴ India Const. art 163, § 2.

²⁵ *S.K.G Sugar Ltd. v. State of Bihar*, A.I.R. 1974 S.C. 1533, p. 7.

²⁶ *State of Punjab v. Satya Pal Dang*, A.I.R. 1969 S.C. 917, p. 14.

²⁷ *Shiv Ram v. State of Rajasthan*, A.I.R. 2000 Raj. 416, p. 3.

²⁸ *A.K. Roy v. Union of India*, A.I.R. 1982 S.C. 710, p. 721.

[4.2.1] Under Article 243F(1)(b) and 243K(4) of Part IX the aforesaid Ordinance can be promulgated.

[[29.] The disqualification can be prescribed by any law made by the Legislature of State under article 243F(1)(b)²⁹ and as it has been cleared by clause (2) of article 213³⁰ which provides that an Ordinance promulgated under the Article shall have the same force and effect as an Act of Legislature of the State assented to by the Governor. Also, the article 243-K(4)³¹ provides that the Legislature of a State may, by law, make provision with respect to ‘all matters’ relating to, or in connection with, elections to the Panchayats.

[[30.] The phrase ‘all matters’ are not described in the Constitution and therefore, considering educational qualification as a criteria for disqualification in elections is a matter in connection with election of the Panchayats.

[4.2.2] Article 243-O of part IX bars interference by courts in electoral matters.

[[31.] The State Election Commission has supervisory powers under article 243-K³², is not concerned with the validity of the Ordinance, but any kind of objections like prayer for stay, or any interference with the election process.

[[32.] According to article 243-O³³ the courts should not interfere with the process of elections. The same principle was followed in the landmark judgment of *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*³⁴ The Kerala High Court in *V. Kunhabdulla and Anr v. State of*

²⁹ India Const. art. 243 F, § 1, cl. b.

³⁰ *Id.*

³¹ *Id.*

³² India Const. art. 243-K.

³³ *Id.*

³⁴ *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, A.I.R. 1952 S.C. 64, p. 2.

Kerela and Ors, laid down that the power of delimitation is legislative in character and refused to interfere with the elections for the local bodies on the ground that mandatory procedure for delimitation was not followed.³⁵

[[33.] Therefore, in the present case no interference of the courts should be entertained in the election process. In the present case granting a stay on the election process or raising questions against the ordinance after the election notification is issued, it is considered as interference and which should not be entertained.

[4.3] THE ORDINANCE IS NOT IN VIOLATION OF ANY FUNDAMENTAL RIGHT.

[[34.] The Ordinance so passed is does not intend to exclude but operates to include qualified persons. It is merely an election reform with the object to improve the working of Panchayati Raj Institutions. It was laid down in the judgment of *Javed v. State of Haryana*³⁶ where the court upheld the disqualification for those, who have more than two children in the State of Haryana, to contest the elections for Panchayati Raj Institutions.

[[35.] The Supreme Court did not sustain the argument that two child norm is discriminatory, and is violative of the article 14 and 21 of the Constitution. Relying upon the judgment of *K.Nagaraj v. State of Andhra Pradesh*³⁷ and also the Constitutional Bench judgment of *T. Venkata Reddy v. State of Andhra Pradesh*³⁸ for defending the powers of the Governor to promulgate an Ordinance, which cannot be challenged on the ground of non-application of mind or malafides.

³⁵ V. Kunhabdulla and Anr v. State of Kerela, A.I.R. 2000 Ker. 376, p. 7.

³⁶ Javed v. State of Haryana, (2003) 8 S.C.C. 369, p. 18.

³⁷ K.Nagaraj v. State of Andhra Pradesh, A.I.R. 1985 S.C. 551, p. 23.

³⁸ T. Venkata Reddy v. State of Andhra Pradesh, A.I.R. 1985 S.C. 724, p. 14.

[Memorandum *for* Respondents]

[Arguments Advanced]

[[36.] Further as observed in *Shiv Ram v. The State of Rajasthan*³⁹ where by bringing an amendment in section 19⁴⁰ and substituting clause (g), providing that person who has been convicted of any offence by a competent court and sentenced to imprisonment.

[[37.] The Ordinance was challenged on the same grounds that there existed no emergency which called for the Governor to promulgate the Ordinance, 1999 and the impugned amendment is hit by article 14 and 21 of the Constitution.

[[38.] The Division bench held that the satisfaction of Governor is not justiciable.⁴¹ The court held that the disqualification is not discriminatory and hence not in violation with article 14 and 21 of the Constitution.

[[39.] Similarly the same conditions should be applied in the present case. As the right to contest elections is a statutory right and not a fundamental right for which the qualification and disqualification can be prescribed by the Legislature.⁴²

[[40.] Since there was no time left in the present case and the Legislative Assembly was not in session, it was decided to advise the Governor to promulgate the Ordinance failing which the State Governance could not have prescribed the qualifications for a period of 5 years for which the elections are held.

[[41.] Therefore, the Ordinance does not violate any fundamental right of the constitution.

³⁹ *Shiv Ram v. The State of Rajasthan*, A.I.R. 2000 Raj. 416, p. 3-4.

⁴⁰ *Rajasthan Panchayati Raj (Third Amendment) Act, No.16 of 1999*, Act of State Legislature, 1999 (India).

⁴¹ *State of Punjab v. Satya Pal*, A.I.R. 1969 S.C. 903, p. 12.

⁴² *K. Prabhakaran v. P. Jairajan*, A.I.R. 2002 S.C. 3393, p. 16.

ISSUE-5: WHETHER OR NOT NON-AVAILABILITY OF A NOTIFIED VACATION BENCH AND NOTIFIED PROCEDURE FOR LISTING IS UNCONSTITUTIONAL.

[[42.] It is humbly submitted before the Hon'ble High Court that the contention raised by the petitioner of bench not being available is fallacious. The fact that the petitioner's case was listed⁴³ is a sufficient proof of having a vacation bench in the Apex Court. Moreover, since the matter was listed, it cannot be said to have denied the petitioner of access to justice. The non-availability of the vacation bench to the petitioner in the present case cannot be the only ground to challenge the constitutionality. Therefore there is no violation of article 14.[5.1]

[[43.] It is humbly submitted before the Hon'ble Court that Supreme Court Practice and Procedure handbook is the publication of the Supreme Court.⁴⁴ Hence Supreme Court is accountable for the handbook. Handbook provides a proper and definite procedure for listing of matters during the normal course as well as during the vacations.

[[44.] Also the procedure given in the handbook is followed and practiced by the Supreme Court and hence it can be treated as a 'usage' under article 13(3)⁴⁵ and hence it is law, therefore there exists a proper procedure through which the listing is been done by the Supreme Court.

[5.1]THERE HAS BEEN NO VIOLATION OF ARTICLE 14.

[[45.] Further it is humbly submitted that just bestowing the discretionary power on the administrative authority does not mean that such power will be exercised in an arbitrary manner. Hence there is no violation of Article 14.⁴⁶

⁴³ Moot Proposition, p. 4, para 19.

⁴⁴ <http://supremecourtindia.nic.in/sitemap.htm>.

⁴⁵ India Const. art 13(3).

⁴⁶ India Const. art. 14.

[Memorandum *for* Respondents]

[Arguments Advanced]

[[46.] The administrative department of the Supreme Court is one of the top authorities of the country. And it has been opined by the Hon'ble Supreme Court that if the discretion is vested in the State government or top ranking authorities, abuse of power cannot be readily inferred.⁴⁷

[[47.] It is humbly submitted before the Hon'ble Court that there is a procedure provided for the listing of matters when the court is not in session and hence there is no violation of rights.

ISSUE-6: WHETHER OR NOT NON-GRANT OF LISTING SHOULD AFFECT THE MERITS OF THE CASE AS THE COURT WAS MOVED WELL IN TIME AND ACTUS CURAIE NEMINEM GRAVABIT.

[[48.] It is submitted on the behalf of the respondent that in *Ramdutt Ramkissen Dass v. E.D. Sassoon & Co.*⁴⁸ it has been established that if a second suit is raised for the reason being the first having no jurisdiction, the second cannot be considered as the continuance of the first one even though the subject matter and the parties to the suit are identical.⁴⁹

[[49.] The suit filed with the high court will be considered as a fresh suit and thus bars the court interference.⁵⁰ Moreover, the election process begins with the issuance of notification under Representation of People's Act, 1951⁵¹ up to the declaration of result.⁵² Therefore, it is not the act of the court which is prejudicing the merits of the case.

⁴⁷ Pannalal Binjraj v. Union of India, A.I.R. 1957 S.C. 397, p. 13.

⁴⁸ Ramdutt Ramkissen Dass v. E.D. Sassoon & Co., A.I.R. 1929 P.C. 103, p. 6.

⁴⁹ *Id.*

⁵⁰ Rameshwar Prasad v. Union of India, (2006) 2 S.C.C. 1, p. 17.

⁵¹ Representation of People's Act, No. 43 of 1951.

⁵² Election Commission of India v. Ashok Kumar, (2000) 8 S.C.C. 216, p. 5.

PRAYER

It is humbly prayed before the Hon'ble Court that in light of the issues raised, arguments advanced, and authorities cited, that this Hon'ble Court may be pleased to adjudge and declare that:

1. *Dismiss the petition challenging the constitutionality of section 34 of Arbitration and Conciliation Act, 1996.*
2. *The automatic stay is not per se bad-in-law.*
3. *The Ordinance as not ultra vires part IX of the Constitution and is not in violation of the fundamental rights and the election procedure should not be interfered and should proceed further in accordance with the Ordinance passed by the Governor.*
4. *That there exists a notified vacation bench and a notified listing procedure.*

And Pass any other Order, Direction, or Relief that it may deem fit in the Best Interests of Justice, Equity and Good Conscience.

For This Act of Kindness, the Respondents Shall Duty Bound Forever Pray.

Sd/-

(Counsel for the Respondents)