

TEAM CODE: B

BEFORE THE HON'BLE HIGH COURT OF NIRDHAN

IN THE MATTERS OF:

People's Union for Liberties & Democratic Reforms and JCi ...PETITIONERS

v.

Republic of Gariba, State of Nirdhan and Maxis Bank- Second Side ... RESPONDENTS

WRIT PETITION NO. 999 of 2015

CLUBBED WITH

WRIT PETITION NO. 1021 of 2015

SUBMISSION TO THE HON'BLE HIGH COURT OF NIRDHAN

UNDER ARTICLE 226 OF THE CONSTITUTION OF GARIBA

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONERS

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LIST OF ABBREVIATIONS

AIR	All India Reporter
&	And
Art.	Article
Edn.	Edition
Ed.	Editor
JCi	Jeopardy Contracts Inc.
JGPS	Jodhpur Gaon Panchayat Samiti
Journ.	Journal
p.	Page
pp.	Pages
¶	Paragraph
PULDR	People’s Union for Liberties & Democratic Reforms
§	Section
§§	Sections
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
i.e.	that is
UNCITRAL	United Nations Commission on International Trade Law
V	Versus
Vol.	Volume

INDEX OF AUTHORITIES

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2. *Boc Properties Ltd v. Delhi Development Authority*, (1997) 1 BC 195.
3. *Centax (India) Ltd v. Vinmar Impex Inc.*, AIR 1986 SC 1924.
4. *D.S. Nakara & Others v. Union of India*, AIR 1983 SC 130.
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13. *Minoo Framroze v. UOI*, AIR 1992 Bom 375.
14. *Minoo Framroze v. UOI*, AIR 1992 Bom 375.
15. *Mohammed Gasi v. State of Madhya Pradesh and Ors.* 2000 (4) SCC 342.
16. *Namit Sharma Vs Union of India*, (2013) 1 SSC 74.
17. *National Aluminium Co. Ltd. v R.S Builders (India) P. Ltd.*, (1994) 79 com Cas 379 (Orissa).
18. *National Thermal Power Corporation Ltd v. Flowmore Pvt. Ltd.*, AIR 1996 SC 443.
19. *Rajesh D. Darbar & Others v. Narasingrao Krishnaji Kulkarni & Ors*, JT 2003 (7) SC 209.
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2. *Saluka Investments BV (The Netherlands) v. The Czech Republic*.
3. *Secretary of State for Social Security v. Tunncliffe*, [1991] 2 All ER 712.

4. *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48.
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1. Arbitration & Conciliation Act, 1996.
2. The UN Commission's Report, 1985.
3. UNCITRAL Model Law on International Commercial Arbitration.
4. Swiss Private International Law Act, 1987.
5. Supreme Court Rules, 2013.
6. RBI Guidelines.
7. The Constitution of India.

JURISDICTION

The Petitioner submits this memorandum for two petitions filed before this Honourable Court is clubbed together. The Petitioners has approached the Hon'ble High Court of Gariba under Article 226 of the Constitution of Gariba.

STATEMENT OF FACTS

1. The Republic of Gariba is a sovereign federation of states with several union territories. Nirdhan is the biggest of the States in the Republic. The territory was considered as backward till 2011, when the then Governor of Nirdhan decided to fast pace the development of roads and highways.
2. Jeopardy Contracts Inc. [JCI] entered into an agreement with Jodhpur Gaon Panchayat Samiti [JGPS] for 115 kms of road in a Scheduled area in Nirdhan. At the time of culmination of the project, certain issues cropped up regarding land acquisition, design of the bridges etc. due to which the JGPS terminated the contract.
3. JCI sent a legal notice on for invoking arbitration as per contractual clause and also asked for ‘termination payment’ for the work already done. JGPS informed that the matter was covered under the Madhyastham Adhukaran Adhinyam Act,1983 and therefore the Arbitration and Conciliation Act,1996 is not applicable. JGPS also invoked the performance bank guarantee.
4. JCI moved the High Court of Nirdhan by filing an urgent civil writ petition being WP (C) No. 99/2014. the High Court took this matter and granted “...an ad-interim ex-parte stay on invocation of bank guarantee. The writ petition was disposed of directing the parties to seek appropriate interim remedies from the Id. Arbitrators. The arbitration culminated into an award dated in favour of JCI, and inter alia held JCI entitled to the money under the performance bank guarantee.
5. JGPS immediately filed a petition under Sec. 34 of the Act of 1996, before the High Court of Nirdhan, on its original side. In response JCI challenged the constitutional validity of Sec. 34, by way of a writ petition, being WP 999/2015. The High Court of Nirdhan admitted the petition and issued notice to the Id. Attorney General.

6. In the meanwhile, the Governor of the State of Nirdhan, promulgated Ordinance which came into effect from which amended the Nirdhan Panchayati Raj Act, 1994. the ordinance laid down the qualification criteria for election as the panch or member of the state panchayati raj.
7. People's Union for Liberties & Democratic Reforms issued a public statement that the Ordinance was replete with malice in law. People's Union for Liberties & Democratic Reforms moved the High Court of Nirdhan where listing was denied the People's Union for Liberties & Democratic Reforms moved the Hon'ble Apex Court under Art. 32. However, no listing was granted till the issuance of election notification. Upon listing, the Apex Court was pleased to observe that the matter can now be heard by High Court of Nirdhan. It filed a pro-bono petition WP (C) No. 1021/2015 in the High Court of Nirdhan seeking, to challenge the vires of the Ordinance.

ISSUES PRESENTED

ISSUE 1:

**WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996
IS CONSTITUTIONALLY INVALID?**

ISSUE2:

WHETHER BANK IS OBLIGED TO RETAIN BANK GUARANTEE?

ISSUE 3:

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

ISSUE 4:

**WHETHER THE ORDINANCE PROMULGATED BY THE GOVERNOR IS ULTRA
VIRES OF PART IX AND VIOLATIVE OF VARIOUS CONSTITUTIONAL
PROVISIONS?**

SUMMARY OF ARGUMENTS

ISSUE 1: WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS CONSTITUTIONALLY INVALID?

Section 34 of The Arbitration and Conciliation Act, 1996 is constitutionally invalid as it is violative of article 14 of the Constitution and principles of natural justice.

ISSUE2:WHETHER BANK IS OBLIGED TO RETAIN BANK GUARANTEE?

It is submitted that the bank has no authority to retain the bank guarantee as they do not have any right to interfere in the dispute between the parties.

ISSUE 3: WHETHER NON-AVAILABILITY OF A NOTIFIED VACATION BENCH AND NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION IS UNCONSTITUTIONAL?

Non-availability of a notified bench and a notified procedure for non-listing when the court is not in session is unconstitutional as it is violative of principles of natural justice and article 14 of the Constitution.

ISSUE 4: WHETHER THE ORDINANCE PROMULGATED BY THE GOVERNOR IS ULTRA VIRES OF PART IX AND VIOLATIVE OF VARIOUS CONSTITUTIONAL PROVISIONS?

The ordinance promulgated is violative of Part IX of the Constitution as it violates article 14 and article 243-D of the Constitution and also violates principle of equal opportunity by marginalizing women and weaker sections of the society.

ARGUMENTS ADVANCED

ISSUE 1: SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS CONSTITUTIONALLY INVALID.

The submission is *threefold*:

- i. It amounts to introduction of ‘litigation’ in the arbitral process which is against the basic tenets of arbitration.*

Section 34 of the act leads to the violation of constitutional provisions and is against the basic tenets of arbitration. The submission is *twofold*:

- a. Party’ Autonomy*

The foundation of Arbitration law is based on party autonomy principle forms.¹ It can be defined as the *freedom of the parties to construct their contractual relationship in the way they see fit.*² It is based on choice of law by the parties in a contract.³ The parties to an arbitration agreement waive the right to bring an action in court and exclude the jurisdiction of courts by this arbitration agreement. The parties have below mentioned freedom:

- *The Law Applicable to Arbitration Agreement:* Generally the laws applicable to the substance are chosen by parties themselves which meets the specific requirements of the dispute and

¹ Edward Brunet, Richard E. Speidel, Jean R. Sternlight & Stephen J. Ware, “Arbitration Law in America: A Critical Assessment” (2006), Cambridge University Press.

² Abdulhay, S., *Corruption in International Trade and Commercial Arbitration*, (London, United Kingdom: Kluwer Law International 2004) 159.

³ DICEY, MORRIS & COLLINS, THE CONFLICT OF LAWS, VOL 2 (14TH EDN, 2010) ¶¶ 32-004.

that also governs the arbitration clause.⁴ The principle of party autonomy is recognized by Model Law⁵ and UNCITRAL Rules⁶.

- *The Law Governing the Arbitration:* The principle of party autonomy allows the parties to design arbitration process in whatever way they want. This principle of party autonomy is also endorsed by Model Law.⁷ The principle of party autonomy enables the parties to choose any place as the seat of arbitration.
- *The Place of Arbitration:* The parties are free to choose place of arbitration. In general, the parties choose a neutral place, since the place which is national for one party is foreign for another party. This freedom of the parties is accepted by UNCITRAL Rules⁸, Model Law⁹.
- *Composition of the Arbitral Tribunal:* The parties can exercise their autonomy in the appointment and organization of arbitral tribunal.¹⁰
- *Parties deciding Powers and Duties of the Arbitrators:* It is also to be noted that parties themselves decide duties and powers of the arbitrators.

In all these respect parties exercise absolute freedom therefore award of arbitrator should be considered binding on the parties as it is completely based on their own choice and same could

⁴ *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48.

⁵ Model Law, Art 28 (1).

⁶ UNCITRAL Rules, Art 35(1).

⁷ Model Law, Art 19.

⁸ UNCITRAL Rules, Art 18 (1).

⁹ Model Law, Art 20.

¹⁰ REDFERN & HUNTER, INTERNATIONAL ARBITRATION, (5th ED. 2009), ¶4.30.

not be a subject matter of challenge before a court of law. And under the ambit of Section 34 parties challenge award passed by the arbitrator not in a singular case but in almost all cases.¹¹

This failure of arbitration was further emphasized by the High Court at Calcutta which stated:

*the law of arbitration is a cripple, which walks permanently on the crutches of legal precedents. It is no exaggeration to say that almost every controversial arbitration of any importance always waits for a second bout of legal fight in the public courts proving the truth of the old cynical statement that only fools go to arbitration because they pay two sets of costs: one before the arbitrators, and the other before the courts where they came home to roost.*¹²

Further the Bombay High Court in *Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai*,¹³ observed that admission of a section 34 petition virtually paralyzes the process for the winning party award.

b. *Kompetenz-Kompetenz*

Article 16 of the UNCITRAL Model Law of International Commercial Arbitration¹⁴ which has been legislatively enacted in Section 16 of the Arbitration & Conciliation Act, 1996 embodies the kompetenz- kompetenz rule which expressly gives the Arbitral Tribunal the power to rule on its own jurisdiction and including on the validity of the arbitration agreement.¹⁵

¹¹ *AFCON Infra. Ltd. v. The Board of Trustees of the Port of Mumbai*, 2014(1) BomCR794.

¹² *Saha & Co. v. Ishaar Singh*, AIR 1956 Cal 321 at 341.

¹³ 2014 (1) Arb LR 512 (Bom).

¹⁴ UNCITRAL Model Law on International Commercial Arbitration.

¹⁵ § 16 OF Arbitration & Conciliation Act, 1996.

Therefore it is humbly submitted that Section 34 of the Act is against the basic tenets of arbitration and is also violative of Article 14 of the Constitution in a way that doctrine of legitimate expectation and promissory estoppel enriched under said Article has been violated.¹⁶

ii. *The pendency of Sec. 34 petitions is huge and the delay thereon amounts to expropriation, in as much as it takes away the fruits of the award which leads to violation of country's bilateral and multilateral commitments under various conventions and investment treaties.*

It is humbly submitted that Republic of Gariba has entered into a bilateral trade agreement with various countries that include Australia, Japan, Africa, Finland, US, Singapore, Sri Lanka etc. and has ratified various International conventions out of which some has been give status of Most Favored Nation.¹⁷ Pendency under Section 34 of the Act is huge and undue delay amounts to expropriation of property leads to breach of these bilateral trade agreement and conventions, the argument is *twofold*—

i. Doctrine of legitimate expectation

Legitimate expectations presuppose that an agreement or a promise generates a certain level of expectations, known as legitimate expectations.¹⁸ The *doctrine* has been recognized as a part of the *fair and equitable* treatment standard provided under various investment treaties.¹⁹

Fair and equitable treatment requirement in international law requires the host State to provide for investments treatment that does not affect the legitimate expectations which the investor had

¹⁶ *Food Corporation of India v. Kamdhenu Cattle Field Industries*, AIR 1993 SC 1601.

¹⁷ Available at <http://www.commerce.nic.in/trade/international_ta.asp?id=2&trade=i>

¹⁸ Christoph Schreuer and Ursula Kriebaum in Jacques Werner *et al* eds., 2009 at p. 273.

¹⁹ *Sempra Energy International v Argentine Republic*, CSID No. ARB/02/16, ¶298.

at the time of making the investment. Further as Republic of Gariba has ratified New York Convention,²⁰ Article III and V of it, in the light of its object and purpose, presupposes strong presumption in favor of enforcement of arbitral awards and its provisions are binding as a matter of international law.²¹

Under the New York Convention, an arbitral award must be recognized as binding and enforced by a Contracting State, subject only to limited exceptions. Henceforth, investing companies has legitimate expectation that, if any arbitration arose, Republic of Gariba would abide by its treaty obligations pursuant to the New York Convention²² and would afford justice to companies by allowing it to enforce the Award, in its courts, in a fair and reasonably timely manner. Consequently, it denied it for the same.

ii. *Minimum standard of treatment*

There is little doubt that Republic of Gariba and State of Nirdhan needs Foreign Direct Investments for its development as it is backward state till 2011. The classical way in which the international investment law dealt with this was that the countries providing FDI would require the countries to follow a minimum standard of treatment. When many countries in the world accepted globalization, the *minimum standard of treatment* began to be spelled out in the form of BITs and Free Trade Agreements.²³ It has been observed by tribunal in *Saluka Investments BV (The Netherlands) v. The Czech Republic*²⁴ that:

²⁰ Recognition and Enforcement of Foreign Arbitral Awards 1958.

²¹The New York Convention, Ratified by India in 1960.

²² *Supra* 20.

²³ *White Industries Australia Limited v. The Republic of India*, Award of 30th Nov' 2011.

²⁴ *Saluka Investments BV (The Netherlands) v. The Czech Republic*.

*...the customary minimum standard is in any case binding upon a State and provides a minimum guarantee to foreign investors, even where the State follows a policy that is in principle opposed to foreign investment; in that context, the minimum standard of “fair and equitable treatment” may in fact provide no more than the “minimal” protection...*²⁵

iii. Expropriation leading to Denial of justice

It is submitted that Republic of Gariba’s Courts usually fail to try matters falling under section 34 owing to its extended judiciary and pendency of innumerable cases in the court to delay in enforcement of the award in a timely manner thereby causing denial of fair and equitable treatment and the undue delays by the courts constitute an expropriation which in turn leads to denial of justice.²⁶

Therefore, it is humbly submitted that Court delays under Section 34 of the Act has deprived JCI the benefit of the Award which is violation of bilateral trade agreement and conventions. Further it also leads to violation of Constitutional provisions under Art. 14 of the Constitution as doctrine of legitimate expectation is covered under it which is very much applicable in the instant case. Moreover, State is not able to fulfill its obligations under Art. 39 A and 51 of the Constitution.

iii. Admission of the petition under section 34 renders an award inexecutable and also takes away the rights of the party against whom the enforcement of the arbitral award is stayed.

According to the principle of natural justice, every person should be given a fair chance of presenting their case by virtue of *audi altrem partem* and this section is violating this principle because it is not giving the JCI a fair chance to present its case.

²⁵ *Ibid.*

²⁶ *Lowen Group Inc v United States of America*, 7 ICSID Rep 421).

It is violative of article 14 as it takes away the JCI's right to present their case. No proper adjudication would amount to violation of article 14. It has been suggested in 246th Law Report²⁷ that an amendment needs to be brought to effect to avoid grant of automatic stay on the arbitral award. Also in *Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd.*,²⁸ the court observed:

"....we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs."

It is considered that noncompliance with the rules of natural justice amounts to arbitrariness violating Art. 14.²⁹ Hence, this Section should be held to be unconstitutional.

ISSUE 2: BANK IS OBLIGED TO RELEASE BANK GUARANTEE.

A performance guarantee is wherein a bank agrees that its customer shall duly perform and fulfill the obligations and conditions that may arise from the contract and if the party makes a default in the fulfillment of the same, it will make the payment as agreed in the guarantee.³⁰

Bank guarantee is a separate³¹, independent, underlying³² and distinct³³ contract. It has been laid down and stressed by the courts that the banks should not interfere with the bank guarantee and

²⁷ Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996, August, 2014, Government of India.

²⁸ (2004) 1 SCC 540.

²⁹ *Minoo Framroze v. UOI*, AIR 1992 Bom 375.

³⁰ DUTTA'S, BANKING LAW (PRINCIPLES PRACTICE AND PROCEDURE), VOL.1, (ED. 2010), p.736.

³¹ *Boc Properties Ltd v. Delhi Development Authority*, (1997) 1 BC 195.

should not be concerned with the dispute between the parties.³⁴ The Supreme Court has laid down certain guidelines in respect of encashment of bank guarantee³⁵: i) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee, ii) Bank Guarantee is an independent and a separate contract, any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees and iii) Fraud of an egregious nature and an irretrievable injury should be the only points to be considered.

In *U.P Cooperative Federation Ltd v. Singh Consultants and Engineers P. Ltd.*,³⁶ Mukherji, J. observed:

"...An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is the well settled principle of the law in England. This is also a well settled principle of law in India...."

Also, the nature of the bank guarantee can only be determined by scanning the document of the guarantee.³⁷

In the instant case, the arbitral award has been passed in the favour of JCI but Maxis bank has refused to release the bank guarantee. From the above stated arguments it can be concluded that

³² *Centax (India) Ltd v. Vinmar Impex Inc.*, AIR 1986 SC 1924.

³³ *Supra* 30.

³⁴ *National Thermal Power Corporation Ltd v. Flowmore Pvt. Ltd.*, AIR 1996 SC 443.

³⁵ *Himadri Chemicals Ind. Ltd v. Coal Tar Refining Company*, (2007) 139 Comp. Cas. 706 (SC)

³⁶ (1988) 1 SCC 174, ¶21

³⁷ *National Aluminium Co. Ltd. v R.S Builders (India) P. Ltd.*, (1994) 79 com Cas 379 (Orissa).

Maxis bank is liable to release the bank guarantee as there is no fraud can be made out prima facie and no irretrievable injury shall be caused by releasing the bank guarantee.

ISSUE 3: NON-AVAILABILITY OF A NOTIFIED VACATION BENCH AND NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION IS UNCONSTITUTIONAL.

Order VI, Rule VI, of Supreme Court Rules, 2013 provides for sitting of vacation bench comprising of vacation judge, exercising all the powers of a judge and court in relation to specified matter.³⁸ But contrary to the rules no vacation bench was available and no clear cut procedure has been laid down for filing of the matter before the Supreme Court..

The Preamble of the Constitution categorically provides for securing justice to all the Citizens.³⁹ Further, non-availability of notified bench and specified procedure for listing of the matter when the court is not in session is violation of the fundamental principle of natural justice i.e. *Audi Alteram Partem* which is basically rule of fair hearing.⁴⁰ This fundamental principle unequivocally states that every person has a constitutional right of access to justice and present his case.⁴¹ The jurisprudence of the Supreme Court of India has repeatedly emphasized that the right to a fair trial and of access to justice is a basic fundamental and human right.⁴² Further

³⁸ Supreme Court Rules, 2013.

³⁹ Preamble of the Constitution.

⁴⁰ *Swadeshi Cotton Mills v. Union of India*, AIR 1981 SC 818.

⁴¹ *Maneka Gandhi v. UOI*, AIR 1978 SC 597; *HL Trehan v. UOI*, AIR 1989 SC 568.

⁴² *Dwarka Prasad Agarwal v. B.D. Agarwal*, (2003) 6 SCC 230, ¶33.

access to justice is also regarded as essential part of the fundamental rights under Articles 14 and 21 of the Constitution of India.⁴³

Therefore, as per this established rules minimum fair procedure should be provided to attain ends of principles of natural justice. But in the instant case it is pertinent to note that there is non-availability of vacation bench and notified procedure for listing of the matter before the honorable the Supreme Court. Thus it is humbly submitted before the Hon'ble Court that it leads to the violation of the principle of natural justice i.e. *Audi Alteram Partem* as well as of Constitutional provisions. It is considered that noncompliance with the rules of natural justice amounts arbitrariness violating Art. 14.⁴⁴

- i. *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.*

It is submitted that the maxim of equity, namely, *actus curiae neminem gravabit* an act of the Court shall prejudice no man, founded upon justice and good sense which serves a safe and certain guide for the administration of Law,⁴⁵ is very much applicable in the instant case. Therefore there can be no quarrel with the proposition that a party cannot be made to suffer on account of an act of the Court.⁴⁶

In the instant case it is pertinent to note that PULDR has moved to the Supreme Court within time and before issuance of election notification. And even after repeated reminders no listing

⁴³ *Namit Sharma Vs Union of India, (2013) 1 SSC 74, ¶83.*

⁴⁴ *Minoo Framroze v. UOI, AIR 1992 Bom 375.*

⁴⁵ *Mohammed Gasi v. State of Madhya Pradesh and Ors. 2000 (4) SCC 342.*

⁴⁶ *Rajesh D. Darbar & Others v. Narasingrao Krishnaji Kulkarni & Ors, JT 2003 (7) SC 209.*

was granted till the issuance of election notification. Therefore delay was there on the part of the Court which should not affect the merits of the case as per the settled maxim.

ISSUE 3: THE ORDINANCE PROMULGATED BY THE GOVERNOR IS ULTRA VIRES OF PART IX AND VIOLATIVE OF VARIOUS CONSTITUTIONAL PROVISIONS.

The submission is *fourfold*:

i. Preamble & Basic structure of Constitution

Right to equality enriched under Article 14 is not only a fundamental right, but it is also form and part of the Preamble and basic structure of the Constitution.⁴⁷ And the ordinance making powers cannot be exercised abrogating the principles of equality, including equality of status and opportunity.⁴⁸

Article 14 of the Constitution does not forbid reasonable classification of persons, objects and transactions by the legislature or any other law making body for the purpose of achieving specific ends. Classification to be reasonable should fulfill following two tests: i) It should be based on an *intelligible differentia*, some real and substantial distinction, which distinguishes person or thing grouped together from the class others left out of it and ii) the differentia adopted as the basis of classification must have a rational or a reasonable *nexus* with the object sought to be achieved by the statute in question.⁴⁹

⁴⁷ *Kesavananda Bharati and Ors. v. State of Kerala and Anr*, (1973) 4 SCC 225).

⁴⁸ *Krishna Kumar Mishra & anr. v. State of Bihar*, AIR 1996 Pat 112, ¶ 5.

⁴⁹ *Ibid.*

Hence the departure is permissible only if classification is made, which is based on intelligible differentia, having nexus with the object sought to be achieved.⁵⁰ In the instant case the Ordinance passed by the Governor setting minimum education qualification is violative of Article 14 and basic structure of the Constitution as the ordinance doesn't satisfy the test of reasonableness because it is excluding large number of population of Nirdhan from contesting Panch election. Further the classification denies equality to larger segment of the society which is violative of Article 14 of the Constitution.⁵¹

ii. Single Citizenship

To participate in democratic process is an inherent and basic right of an individual flowing from the Constitution itself, the same is not dependent on any of the particular Article or provisions of the Constitution, nor is dependent on any statutory grace.⁵²

Republic of Gariba has dual polity but has only single citizenship.⁵³ The Ordinance seeks to discriminate people living in States other than Nirdhan as it only recognizes those candidates contesting elections to the village Panchayat who are formally educated from a school in Nirdhan and debars those who are not formally educated from the state.

In case of *Minerva Mill Limited*,⁵⁴ It was contended that democracy in the context of Indian Constitution mean peoples' power for self-governance. The same can be made effective only when certain rights continue to remain with the people, namely, (a) right to vote; (b) right to

⁵⁰ *D.S. Nakara & Others v. Union of India*, AIR 1983 SC 130.

⁵¹ M.P. JAIN, INDIAN CONSTITUTIONAL LAW, (6TH ED. 2010).

⁵² *Krishna Kumar Mishra & anr. v. State of Bihar*, AIR 1996 Pat 112, ¶ 5.

⁵³ *Ibid.*

⁵⁴ AIR 1980 SC 1789.

choose their representatives in a free and fair manner and; (c) right to participate in the self-governance. But the same has been found to be violative by promulgating this ordinance as the State is discriminating in favor of its own citizens in matter of holding public office.⁵⁵

iii. Marginalizes women and weaker sections due to the prevailing skewed literacy standards

Article 243D envisages the reservation of seats for Panchayat elections for SC/ STs in proportion to their population. The purpose of 73rd Constitutional Amendment⁵⁶ with reservation for marginalized social groups was to empower them and deepen their participation in governance.

Moreover, Article 243D created a space for women participation and decision making at the grassroots level by providing reservation of 1/3rd of seats at two levels i.e. for office of the members and for that of chairpersons.⁵⁷

In the instant case it is pertinent to note that this ordinance would debar and exclude large population of the Republic of Gariba and the State of Nirdhan, as it was backward until the year 2011 with very less number of educated people and majority of selected representatives of Panchayati Raj institution in Nirdhan from contesting election, hence defeating the objective of Affirmative Action enshrined under the 73rd ⁵⁸and 74th Amendment⁵⁹ to the Constitution as well as the CEDAW⁶⁰ Convention to which India is a signatory. Moreover, no such qualifications or stipulation to contest elections have been set out for the people contesting for higher offices of

⁵⁵ *Krishna Kumar Mishra & ors. v. State of Bihar*, AIR 1996 Pat 112.

⁵⁶ Constitution (Seventy Third Amendment) Act, 1992.

⁵⁷ *Ibid.*

⁵⁸ CONSTITUTION (SEVENTY-THIRD AMENDMENT) ACT, 1992.

⁵⁹ Constitution (74th Amendment) Act, 1992.

⁶⁰ Convention on the Elimination of All Forms of Discrimination Against Women.

MLA and MPs. Therefore, the Ordinance passed by the Governor is ultra vires of part IX and violative of other constitutional provisions.

iv. Ordinance is not retroactive

The operation of this ordinance seeks to disqualify and debar the existing members of the Panchayati Raj Institution. The retroactive effect of legislation or the ordinance in this case can be implied from the words and the language of the legislation.⁶¹ For deciding the retrospective effect of a statute the test of fairness is put to use.⁶² In the case of *Vijay v. State of Maharashtra*,⁶³ test of fairness put to use wherein a law was enacted in the state of Maharashtra but it was disqualifying members of a Panchayat to contest elections for the post of Councilor of Zila Parishad or as a member of the Panchayat Samiti. The court held In this case that the law has a retrospective operation and was held to be applicable on the existing members of the Panchayat. While interpreting a statute or a law, language or the words are not always a deciding factor and cannot be held to be an ultimate measure for construing a piece of legislation as retrospective or prospective.⁶⁴

In the instant case the ordinance is taking away the vested right of the existing members of the Panchayat that have been acquired under the law before the promulgation of the ordinance. Hence, this ordinance has a retroactive effect as it is disqualifying the existing members of the Panchayat.

⁶¹ G.P SINGH, PRINCIPLES OF STATUTORY INTERPRETATION, (12TH ED. 2010).

⁶² *Secretary of State for Social Security v. Tunncliffe*, [1991] 2 All ER 712.

⁶³ (2006) 6 SCC 289.

⁶⁴ *Supra* 61.

PRAYER FOR RELIEF

In the light of the facts stated, issues raised, arguments advanced and authorities cited it is most humbly prayed that this Honorable Court may be pleased to adjudge and declare that—

1. *Section 34 of Arbitration & Conciliation Act, 1996 as constitutionally invalid.*
2. *the bank is liable to release the bank guarantee in favour of petitioner no. 999 of 2015.*
3. *non-availability of notified vacation bench and notified procedure for listing when the court is not in session as unconstitutional.*
4. *the ordinance as ultra vires to Part IX of the Constitution as it is violative of the constitutional provisions and has a retroactive effect.*

Any to pass any other order as it deems fit in the interest of equity, justice and good conscience.

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

Sd/-

(Counsel for the Petitioners)