

5TH NLIU- JUSTICE R.K. TANKHA MEMORIAL NATIONAL MOOT COURT COMPETITION 2015



**BEFORE THE
HON'BLE HIGH COURT OF NIRDHAN**

**Writ Petition No.: 999/2015
&
Writ Petition (Civil) No.: 1021/2015**

Under Article 226 of the Constitution of Gariba

JCi & People's Union for Liberties & Democratic Reforms

Petitioners

v.

Republic of Gariba & Ors.

Respondents

SUBMISSION BEFORE THE HON'BLE HIGH COURT OF NIRDHAN

-MEMORIAL ON BEHALF OF THE PETITIONER-

INDEX OF AUTHORITIES

CASES

- A. K. Roy v. Union of India, (1982) AIR 710 (SC)
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- Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., [1947] 2 All ER 680
- Bandhua Mukthi Morcha v. Union of India, (1984) 2 SCR 67
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- Competition Commission of India v. Steel Authority of India Ltd., (2010) 10 SCC 744
- D.C. Wadhwa v. State of Bihar, (1987) 1 SCC 378
- Delhi Development Authority v. Bhardwaj Brothers, (2014) 3 ARBLR 333 (Delhi)
- Fertilizer Corporation Kamgar Union v. Union of India, (1981) SCR 2 52
- Fight for Human Rights v. Union of India & Anr., W.P. (C) No. 8201/2014
- H.M.T. Ltd. v. Labour Court, Ernakulam and Ors., (1994) 2 SCC 38
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- Isaac Isanga Musumba & Ors. v. State of Maharashtra & Ors., (2013) 7 SCALE 569
- Chairman, Railway Board and Ors. v. Mrs. Chandrima Das and Ors., (2000) AIR 988 (SC)
- Jamal Uddin Ahmed v. Abu Saleh Najmuddin, (2003) 2 SCR 473
- Jilubhai Nanbhai Khachar v. State of Gujarat, (1995) Supp 1 SCC 596
- Keshavananda Bharati v. State of Kerala, (1973) AIR 1461 (SC)
- M. J. Shivani v. State of Karnataka, (1995) 5 SCC 289
- Assistant Commissioner, Commercial Tax Department, works Contract and Leasing, Kota v. Shukla & Brothers, (2010) 4 SCC 785
- Maneka Gandhi v. Union of India, (1978) AIR 597
- Mekaster Trading Corporation v. Union of India & Ors., (2003) 71 DRJ 376
- Mithu v. State of Punjab (1983) AIR 473 (SC)
- Morgan Stanley Mutual Funds Pvt. Ltd. v. Kartick Das, (1994) Com Cas 318
- National Aluminium Co. Ltd. v. M/s. Pressteel Fabrications Pvt. Ltd. and Anr., (2003) 10 SCALE 1062

Nawabkhan Abbaskhan v. State of Gujarat, (1974) 3 SCR 427
Om Kumar v. Union of India, (2001) 2 SCC 386, 409
R Gandhi, President Madras Bar Association v. Union of India, (2010) 6 UJ 2945 (SC)
R. K. Dalmia v. Tendulkar (1959) SCR 279
R. N. Jadi & Bros. & Ors. v. Subhashchandra, (2007) 8 SCR 241
Rajasthan State Road Transport Corporation v. Bal Mukund Bairwa, (2009) 4 SCC 299
Rameshwar Prasad v. Union of India, (2006) 2 SCC 1
Siemens Engg. & Mfg. Co. of India Ltd. v. Union of India, (1976) AIR 1785 (SC)
Special Courts Bill (in re:), (1979) 2 SCR 476
Starrett Housing Corp. v. Islamic Republic of Iran, Iran-U.S.C.T.R. Trib., S. 122 (154) (1983)
State of Bihar v. Bal Mukund Sah, (2000) 4 SCC 640
State of U. P. v. Harish Chandra & Co. (1999) 1 SCC 63
Union Carbide Corporation etc. etc. v. Union of India etc. etc., (1991) 2 SCALE 675
Union of India v. Dinesh Engineering Corporation, (2001) 8 SCC 491
Union of India v. J.N. Sinha, (1971) 1 SCR 791

BOOKS AND COMMENTARIES

Black's Law Dic., (8th ed. 2004)
C.K.THAKKAR, ADMINISTRATIVE LAW, Eastern Book Co. (2) ed., 2012
CAMPBELL McLACHLAN QC, LAURENCE SHORE, MATTHEW WEINIGER,
INTERNATIONAL INVESTMENT ARBITRATION, Oxford University Press, 2010
DR. C.D. JHA'S, JUDICIAL REVIEW OF LEGISLATIVE ACTS, Lexis Nexis (2) ed., 2009
DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, Vol. 8, Lexis
Nexis (8) ed., 2011
DURGA DAS BASU, SHORTER CONSTITUTION OF INDIA, Wadhwa and Company (13)
2003
G.P.SINGH, PRINCIPLES OF STATUTORY INTERPRETATION, Lexis Nexis (12) ed., 2010
HERBERT BROOM, BROOM'S LEGAL MAXIMS, (11) ed., 2011
JUSTICE R.S. BACHAWAT'S, LAW OF ARBITRATION & CONCILIATION, Vol. 1 & 2,
Lexis Nexis (5) ed., 2012
KATIYA YANNACA-SMALL, ARBITRATION UNDER INTERNATIONAL INVESTMENT
AGREEMENTS, Oxford University Press, 2010

M. P. JAIN & S. N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, , Lexis Nexis (6) ed., 2013

M. P. JAIN, INDIAN CONSTITUTIONAL LAW, Lexis Nexis, (6) ed., 2010

M.L.TANNAN, TANNAN'S BANKING LAW AND PRACTICE IN INDIA, Lexis Nexis (21) ed., 2009

NARENDRA CHAPALGAONKAR, LAW OF ELECTIONS, A.I.R. Publication (1) ed., 1997

P. C.MARKAMDA, LAW RELATING TO ARBITRATION AND CONCILIATION- COMMENTARY ON THE ARBITRATION AND CONCILIATION ACT, 1996, Lexis Nexis (7) ed., 2009

PREM CHATURVEDI, LAW OF WRITS & OTHER CONSTITUTIONAL REMEDIES, Vol. II, Bharat Law Publications (3) ed., 2011

STATUTES AND RULES

Arbitration and Conciliation Act, 1996, No. 26/1996, Acts of Parliament

Civil Procedure Code, 1908, No. 5/1908, Acts of Parliament

Companies Act, 2013, No. 18/2013, Acts of Parliament

Companies (Incorporation) Rules, 2014, No. 182/2014, Acts of Parliament

Delhi High Court (Public Interest Litigation) Rules, 2010, No. 451/Rules/DHC, notification issued by Delhi High Court, available at http://delhihighcourt.nic.in/PIL_RULES.pdf

Order granted by Rajasthan High Court dated 15th January 2015, regarding constitutionality of Rajasthan Panchayati Raj (Second Amendment) Ordinance, 2014

Report No. 246, Amendments to the Arbitration and Conciliation Act 1996, Law Commission Report of India, August 2014

State Responsibility, Articles 4-11 International Law Commission

OTHER SOURCES

Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations Publication, UNCTAD/DIAE/IA/2011/7, 2012

[http://delhihighcourt.nic.in/writereaddata/upload/RTI/RTIFile_L7WWFZXR.PDF_\(official website of the Delhi High Court\)](http://delhihighcourt.nic.in/writereaddata/upload/RTI/RTIFile_L7WWFZXR.PDF_(official%20website%20of%20the%20Delhi%20High%20Court))

http://finmin.nic.in/bipa/bipa_index.asp Official Website of Ministry of Finance, Government of India (last accessed on 5.2.2015)

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STATEMENT OF JURISDICTION

Part A

The Petitioner hereby submits this memorandum for W. P. 999/2015 before the Hon'ble High Court of Nirdhan invoking the jurisdiction of this Hon'ble Court under Article 226 of the Constitution of Gariba.

Part B

The Petitioner hereby submits this memorandum for W. P. (C) 1021/2015 before the Hon'ble High Court of Nirdhan invoking the jurisdiction of this Hon'ble Court under Article 226 of the Constitution of Gariba.

COUNSEL FOR THE PETITIONER

STATEMENT OF FACTS

Sr. No.	Date / Time	Event
1	21-09-2011	JCi enters into agreement with JGPS for construction of 115km of road
2	21-09-2013	JGPS terminates the contract
3	11-12-2014	JCi sends legal notice invoking arbitral clause
4	12-12-2014	JGPS counsel informs that matter is covered under Madhyastham Adhikaran Adhiniyam, 1983, and not Arbitration and Conciliation Act, 1996
		JGPS invokes the performance bank guarantee
5	13-12-2014	JCi moves the High Court of Nirdhan for stay of invocation of performance bank guarantee with WP (C) No. 99/2014
6	15-12-2014	
	10:00 AM	Branch Manager encashes the performance bank guarantee
	10:01 AM	Cyber security breach at Maxis Bank. Thus, amount under the performance bank guarantee still remains with JCi
	10:30 AM	High Court of Nirdhan grants ad-interim <i>ex parte</i> stay against invocation of performance bank guarantee
	11:00 AM	Copies of this order served on JGPS and Maxis Bank
7		WP (C) No. 99/2014 confirmed, disposed of, directing parties to

		arbitration
8	20-12-2014	Ordinance promulgated by Governor of Nirdhan
9	24-12-2014	Ordinance comes into effect
10	29-12-2014	People's Union for Liberties and Democratic Reforms (PUDR) moves High Court of Nirdhan
11	31-12-2014	PUDR moves Apex Court
12	03-01-2015	Election notification issued
13		Apex Court directs parties to High Court
14		PUDR files pro-bono petition W.P. (C) No. 1021/2015 at the High Court of Nirdhan
15		High Court of Nirdhan admits petition
16	21-01-2015	Arbitral award in favour of JCi, entitling it to money under the performance bank guarantee
17	24-01-2015	JCi asks Maxis Bank for the money under the bank guarantee
18	25-01-2015	Section 34 petition filed by JGPS before the High Court of Nirdhan
19	27-01-2015	Maxis Bank refuses any payment
20		JCi challenges the constitutional validity of Section 34-W.P. 999/2015
21		W.P. 999/2015 and W.P. 1021/2015 directed to be listed together

STATEMENT OF ISSUES

PART-A

(Writ Petition No.: 999/2015)

A.1 WHETHER PETITION IS MAINTAINABLE BEFORE THIS HON'BLE COURT

**A.2 WHETHER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT,
1996 IS UNCONSTITUTIONAL**

PART-B

(Writ Petition (Civil) No.: 1021/2015)

**B.1 WHETHER THE PUBLIC INTEREST LITIGATION PETITION IS
MAINTAINABLE**

B.2 WHETHER THE IMPUGNED ORDINANCE IS UNCONSTITUTIONAL

**B.3 WHETHER THE NON-AVAILABILITY OF NOTIFIED VACATION BENCH AND
LISTING PROCEDURE DURING HOLIDAYS VIOLATES ARTICLES 14 AND 21 OF
THE CONSTITUTION**

SUMMARY OF ARGUMENTS

PART- A

SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS UNCONSTITUTIONAL

Section-34 of the Arbitration and Conciliation Act, 1996 is arbitrary and infringes upon Arts. 14 and 21 of the Constitution. Further the procedure laid out in the above section in consonance with section-36 results in delay, thereby violating Art. 51 (c), and resulting in expropriation infringing upon Art.300-A. Therefore, it is humbly pleaded that the section is unconstitutional and be struck down.

PART-B

THE IMPUGNED ORDINANCE, IS UNCONSTITUTIONAL

The impugned Ordinance is violating the basic tenets of the Constitution as it violates Art. 14 under Part III and is *ultra vires* Part IX. There is no rational nexus between the basis of classification and the object of the statute. The criteria of formal education are not required to discharge the functions of the Panchayati Raj Institutions. And hence, the impugned Ordinance is unconstitutional.

THE NON-AVAILABILITY OF NOTIFIED VACATION BENCH AND LISTING PROCEDURE DURING HOLIDAYS VIOLATES ARTICLES 14 AND 21 OF THE CONSTITUTION

The denial of listing by the administrative wing of the High Court of Nirdhan without reasons, for the listing and hearing of an urgent issue is arbitrary under Art.14 and violates the Fundamental right to be heard under Art. 21.

ARGUMENTS ADVANCED

PART-A W.P. (C) No. 999/2015

A.1. THIS PETITION IS MAINTAINABLE BEFORE THIS HON'BLE COURT

It is humbly submitted that the Petitioner has the *locus standi* to approach this Hon'ble Court for violation of fundamental rights.

'*Locus Standi*' in Latin refers to a 'place of standing' and it is defined as the right to bring an action or to be heard in a given forum.¹ In the instant case, the contract between JGPS and JCi ("the Petitioner") was terminated abruptly by the former on 21st September 2013. Further, the former invoked the performance bank guarantee on 12th December 2013. On reference of the dispute to arbitration, an award dated 21st January 2015 was granted in favour of the Petitioner, entitling them to the performance bank guarantee. JGPS immediately filed a petition under Section 34 of the Act which resulted in an automatic stay of the award.²

This petition is an attempt to strike down an unconstitutional provision which denies the right of the Petitioner to be heard before his position is varied unfavourably. The arbitral award is stayed automatically without looking into the balance of convenience and irreparable injury³ of such stay. This Hon'ble Court can and must strike down such unconstitutionality under Article 226. Thus, the Petitioner has the *locus standi* to approach this Hon'ble Court for violation of

¹ Black's Law Dic., p. 952 (8th edn. 2004)

² Factsheet pp. 1, 2 ¶¶ 4,6,10, 11

³ Morgan Stanley Mutual Funds Pvt. Ltd. v. Kartick Das, (1994) Com Cas 318, ¶ 19

fundamental rights. It is conceded that the Petitioner is a foreign entity;⁴ however, rights under Articles 14 and 21⁵ are afforded to even foreigners.

A.2. SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS UNCONSTITUTIONAL

It is humbly submitted before this Hon'ble Bench that the provisions of Section 34 when read with Section 36 of the Arbitration and Conciliation Act, 1996 ("the Act") is violative of Articles 14, 21 and Article 51 (c) of the Constitution of Gariba ("the Constitution"). Constitutionality of legislation is challenged on grounds of lack of legislative competence⁶ or violation of any of fundamental rights guaranteed by Constitution.⁷

A.2.1. Article 14 of the Constitution is violated

Section 34 when read in consonance with Section 36 of the Act leaves no area for the judiciary to apply its mind and exert judicial wisdom. This in turn violates Article 14 by making the law arbitrary.⁸ Further by virtue of this abovementioned provision, the Legislature has transgressed upon the powers of the judiciary⁹.

A.2.1.1. The provisions of the impugned Section are arbitrary

⁴ Rule 8 (2)(b)(vi), Companies (Incorporation) Rules, 2014, No. 182/2014, Acts of Parliament; Section 4 (1)(a), Companies Act, 2013, No. 18/2013, Acts of Parliament

⁵ Isaac Isanga Musumba & Ors. v. State of Maharashtra & Ors., (2013) 7 SCALE 569 ¶ 5; Chairman, Railway Board and Ors. v. Mrs. Chandrima Das and Ors., (2000) AIR 988 ¶ 29 (SC)

⁶ In Re Special Reference No. 1 of 2012 (2012) 9 SCALE 310 ¶ 103

⁷ INDIA CONST. Art. 13, Cl. 2

⁸ Mithu v. State of Punjab (1983) AIR 473 ¶ 36 (SC)

⁹ State of Bihar v. Bal Mukund Sah, (2000) 4 SCC 640 ¶ 32

Arbitrary action is described as one that is irrational and not based on sound reason, or as one that is unreasonable,¹⁰ and not based on sound reason, or that is unreasonable, uncanalised and unguided.¹¹ Any decision taken without considering the relevant facts, can only be termed as an arbitrary decision and violative of the mandate of Article 14 of the Constitution¹². The impugned Sections curtail the most essential function of the Judges, to exercise their judicial wisdom, by setting out misguided grounds, which are purely technical to admit a petition under Section 34. It is submitted that even though arbitrariness is not found *ex facie*, the same can be gathered on wholesome reading of the statute and rules, regulations, orders or notifications issued thereunder.¹³

A.2.1.2. Doctrine of Separation of Powers and Independence of Judiciary is violated

Staying of an arbitral award is a judicial function¹⁴ and is to be granted by the judiciary taking into consideration the balance of convenience to the parties upon adjudication on prima facie case and ensure that there is no irreparable injury¹⁵ and therefore cannot be dictated by the Act. By virtue of this Section, the judiciary is constrained in applying its mind, and is forced to ignore even crucial financial aspects¹⁶ thereby admitting petition solely on grounds determined by the Legislature. This transgression of Legislature into the powers of the Judiciary is overriding the Doctrine of Separation of Powers, part of the basic structure.¹⁷ Admission of a petition under

¹⁰ Om Kumar v. Union of India, (2001) 2 SCC 386, 409 ¶ 59

¹¹ *Id.*

¹² Union of India v. Dinesh Engineering Corporation, (2001) 8 SCC 491 ¶ 12

¹³ M. J. Shivani v. State of Karnataka, (1995) 5 SCC 289 ¶ 19

¹⁴ Order XXI, Rule 29, Civil Procedure Code, 1908, No. 5/1908, Acts of Parliament

¹⁵ Morgan Stanley Mutual Fund v. Karthick Das, (1994) Com Cas 318 ¶ 19

¹⁶ Factsheet, p.3 ¶ 13

¹⁷ Keshavananda Bharati v. State of Kerala, (1973) AIR 1461 ¶ 302 (SC)

Section 34 restricts the judiciary from exercising the mandates for stay of proceedings.¹⁸ It bars judicial discretion thereby adversely affecting the constitutional provisions of principles of rule of law, independence of the judiciary and separation of powers¹⁹

A.2.2 Article 21 of the Constitution is violated

A.2.2.1. Right to be heard

“Right to be heard” is one among the principles of natural justice-*audi alteram partem*.²⁰ It has three essentials to be complied with.²¹ Firstly, a person against whom an order is passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the authority concerned must provide a fair procedure. Thirdly, the authority concerned must apply its mind and dispose of the matter by a speaking order.²² Further, non compliance with the rules of natural justice amounts to arbitrariness violating Art. 14.²³

Setting aside an award implies that it is avoided and the matter becomes open for decision again.²⁴ Courts can neither settle the dispute nor interfere with the merits of the award.²⁵

¹⁸ National Aluminium Co. Ltd. v. M/s. Pressteel Fabrications Pvt. Ltd. and Anr., (2003) 10 SCALE 1062 ¶ 11

¹⁹ R Gandhi, President Madras Bar Association v. Union of India, (2010) 6 UJ 2945 ¶ 41, (SC)

²⁰ Maneka Gandhi v. Union of India, (1978) AIR 597 ¶ 58

²¹ M. P. Jain & S. N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW, 307, Lexis Nexis (6) ed., 2013; Assistant Commissioner, Commercial Tax Department, works Contract and Leasing, Kota v. Shukla & Brothers, (2010) 4 SCC 785 ¶ 10

²² Competition Commission of India v. Steel Authority of India Ltd., (2010) 10 SCC 744 ¶ 24

²³ Rajasthan State Road Transport Corporation v. Bal Mukund Bairwa, (2009) 4 SCC 299, ¶ 22

²⁴ State of U. P. v. Harish Chandra & Co. (1999) 1 SCC 63 ¶ 10

²⁵ Delhi Development Authority v. Bhardwaj Brothers, (2014) 3 ARBLR 333 ¶ 11 (Delhi)

Petitions filed under Section 34 read with Section 36, tie the hands of the Judiciary to apply its mind, since the Section envisages an automatic stay.²⁶

This automatic stay without adherence to principles of the right to be heard, results in irreparable injury and is *per se* bad in law and as a result the Petitioner in the instant case is in detriment.²⁷ Additionally, this defeats the object of the Act, thereby protracting the litigation process and it is fair to conclude that the procedure and object of the enactment are not in harmony with each other. This is a clear violation of Articles 14 and 21²⁸ as it is introduction of litigation in arbitral process which is against the basic tenets of arbitration.

A.2.2.2. Time not stipulated for disposal of petitions under Section 34

Instances of cases of arbitration pending for over sixteen years²⁹, and the unending litigation that ensues as a result of applications under Section 34 defeat the object of the Act not only failing to give speedy remedy for commercial transactions but also amounting 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 treaties³⁰. On the one hand, Republic of Gariba promises foreign investors alternate dispute resolution while inviting investments, but on the other, legislates provisions that set aside and prolong for undefined time, cases despite arbitral award being granted.³¹

²⁶ National Aluminum Co. Ltd v. M/S. Pressteel & Fabrications, *id.*

²⁷ Factsheet, p. 3 ¶ 13

²⁸ R. K. Dalmia v. Tendulkar (1959) SCR 279 ¶ 24

²⁹ National Aluminum Co. Ltd vs M/S. Pressteel& Fabrications, *supra* at 18 ¶ 10

³⁰ Factsheet, p. 3 ¶ 14

³¹ Report No. 246, Amendments to the Arbitration and Conciliation Act 1996, Law Commission Report of India, August 2014, ¶ 1-7

The Section, being one for setting aside the award, does not stipulate for a timeline within which the petition must be disposed of thereby making it fall under the nature of any other civil petition. This unjust classification is clearly violative of Article 14.

A.2.3. Article 51(c) of the Constitution is infringed

Alternative dispute resolution systems, such as arbitration, is a pre-requisite to attract and sustain foreign investment, since post 1991, foreign investors require stable business environment based on a predictable and efficient system of resolution of disputes.³² However, Section 34 read with Section 36 frustrates this object, thereby violating essentials of international obligations under Article 51 (c). Republic of Gariba is a party to over 72 Bilateral Investment Treaties³³

It is admitted that there must be essential support from the judiciary for arbitration, but, admission of a petition under Section 34 paralyzes the process for the winning party/award creditor.³⁴ It, as in the instant case, permanently destroys the economic value of investment, depriving owner of its ability to manage his property in meaningful way and thus resulting in an indirect expropriation.³⁵

A.2.3.1 Expropriation violates Article 300 A

The range of measures giving rise to expropriation claims include formal transfer of ownership, outright seizures, intervention of government appointed managers, concessions and permit

³² *Id.* at ¶ 7

³³ http://finmin.nic.in/bipa/bipa_index.asp Official Website of Ministry of Finance, Government of India (last accessed on 5th February, 2015)

³⁴ *Afcons Infrastructure Limited v. the Board of Trustees, Port of Mumbai*, (2014) 1 ARBLR 512 ¶ 20 (Bom)

³⁵ EXPROPRIATION, UNCTAD Series on Issues in International Investment Agreements II, United Nations Publication, UNCTAD/DIAE/IA/2011/7, 2012

breaches, and prejudice suffered in domestic courts.³⁶ Section 34 grants three months to file an application to set aside the arbitral award³⁷ along with incessant delay in the disposal of the petition. This coupled with the automatic stay results in expropriation, where the Petitioner is unable to enjoy the fruits of the award.

The total or near total deprivation of an investment but without a formal transfer of title or outright seizure is an indirect expropriation.³⁸ This in turn violates the principles of international law³⁹ and obligations. There can be no deprivation of property without any sanction of law⁴⁰ and property includes both in its legal and corporeal sense.⁴¹ Article 300-A of the Constitution is thus violated. The provision which deprives the right to property itself is violative of Part III rights and as a cascading effect, Section 34 is infringing upon Petitioner's right to property also.

³⁶ *Id.* at p.14

³⁷ Section 34, Cl. 4, Arbitration and Conciliation Act, 1996, Act No. 26/1996, Acts of Parliament

³⁸ *Starrett Housing Corp. v. Islamic Republic of Iran*, Iran-U.S.C.T.R. Trib., S. 122 (154) (1983)

³⁹ State Responsibility, Articles 4-11 International Law Commission

⁴⁰ *Jilubhai Nanbhai Khachar v. State of Gujarat*, (1995) Supp 1 SCC 596 ¶ 48

⁴¹ *Id.* ¶ 42

PART-B W.P. (C) No. 1021/2015**B.1. THE PRESENT PUBLIC INTEREST LITIGATION IS MAINTAINABLE**

Conventionally, petitions and applications were admitted before any Court only if it was instituted by the aggrieved. Restrictive rules of standing are antithesis to a healthy system of administrative action.⁴² Rule of law must win and *Locus standi* must be liberalized to meet the challenges of the times.⁴³ This Public Interest Litigation (PIL) is in conformity, inasmuch as it was possible, with the Delhi High Court (Public Interest Litigation) Rules, 2010.⁴⁴

The Petitioner is a forum named People's Union for Liberties & Democratic Reforms. This petition is not for any personal gains but to espouse a public cause⁴⁵ of the political situation in the state of Nirdhan, as well as the arbitrary denial of listing to any aggrieved. It concerns the entire state and not just the Petitioner. It benefits persons whose right to stand for elections are violated by the impugned Ordinance, by the prescription of unlawful disqualifications as well as for any aggrieved person who would have been denied listing at this Hon'ble Court. Persons in a state with as skewed a literacy rate as Nirdhan⁴⁶ cannot be expected to approach this Hon'ble Court and conduct the case themselves. A PIL may be filed in cases where persons are disadvantaged due to any reason and are unable to approach the Courts themselves.⁴⁷

⁴² Fertilizer Corporation Kamgar Union v. Union of India, (1981) SCR 2 52 ¶ 42

⁴³ *Id.* at ¶ 38

⁴⁴ Delhi High Court (Public Interest Litigation) Rules, 2010, No. 451/Rules/DHC, notification issued by Delhi High Court, available at http://delhihighcourt.nic.in/PIL_RULES.pdf (last accessed on 5th January, 2015)

⁴⁵ Union Carbide Corporation etc. etc. v. Union of India etc. etc., (1991) 2 SCALE 675 ¶ 21

⁴⁶ Factsheet, p.4 ¶ 20

⁴⁷ Bandhua Mukthi Morcha v. Union of India, (1984) 2 SCR 67 ¶ 19

There have been no laches in the institution of this writ petition. The Petitioners had moved this Hon'ble Court, at the first instance on 29th December 2014. This is a mere four days after the Ordinance came into effect. However, this particular writ petition is being heard only after the election notification was already issued,⁴⁸ on which this Ordinance has a direct bearing. Delay caused by the courts in this instant case, must not be allowed to affect the merits of the case is brought to life in *Actus curiae neminem gravabit*. No party should suffer on account of the delay in the decision by the court.⁴⁹ The maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law.⁵⁰ It is best illustrated by the rule of *nunc-pro-tunc*. If, owing to the delay in what the court should have done earlier but did later and a party suffers owing to events occurring in the interregnum, the Court has the power to remedy it.⁵¹ In the instant case, where the Petitioner has approached all the appropriate authorities at all the right stages, then such petition must not be allowed to be thrown on the grounds of laches. Thus it is humbly submitted that this PIL is maintainable.

B.2. THE IMPUGNED ORDINANCE PROMULGATED IS UNCONSTITUTIONAL

It is submitted that the impugned ordinance which provides educational criteria to contest local elections is unconstitutional.

B.2.1. The Ordinance is violative of Article 14

The Panchayati Raj institutions are intended for inclusive governance at the grassroots levels⁵² to all persons including those who do not have formal education, as entailed in Article 40. This

⁴⁸ Factsheet, p.4 ¶ 19

⁴⁹ H.M.T. Ltd. v. Labour Court, Ernakulam and Ors., (1994) 2 SCC 38 ¶ 1

⁵⁰ HERBERT BROOM, BROOM'S LEGAL MAXIMS, 74, (11) ed., 2011

⁵¹ A.R. Antulay v. R.S. Nayak, (1988) Supp. SCR 1 ¶ 136

⁵² Bhanumati & Ors. v. State of Uttar Pradesh, (2010) 12 SCC 1 ¶¶ 12, 19

purpose is defeated by the impugned Ordinance. The state of Nirdhan was considered backward till 2011,⁵³ and hence the impugned Ordinance seeks to eliminate a majority of the rural population from contesting in the elections for Panchayati Raj Institutions.

B.2.1.1. There is no rational nexus between classification and object sought to be achieved

There must be a nexus between the basis of classification and the object of the statute.⁵⁴ Any law which disqualifies a large section of rural population on the ground of non-attaining the educational qualifications, is *prima facie*, arbitrary, irrational and unreasonable.⁵⁵ It is negation of the very purpose of enacting the Constitution, described in the Preamble.⁵⁶ It is violative of Article 14.

It is not necessary for a Sarpanch, or a member of a Zila Parishad, to be formally educated to represent the people. They are assisted by persons with minimum qualification to advise them for proper discharge of their duties and functions. Persons above 21 years of age in rural areas with no opportunity of formal education in the absence of schools, may not be disqualified to take part for representation in the Panchayati Raj Institutions⁵⁷ and is a violation of the right to equality.⁵⁸ Such a law is retroactive, by virtue of the fact that it is now impossible, to comply with it. *Lex non cogit ad impossibilia*.⁵⁹ Law does not compel man to do what he possibly cannot perform.⁶⁰

⁵³ Factsheet, p.1 ¶ 3

⁵⁴ *Special Courts Bill (in re:)*, (1979) 2 SCR 476 ¶ 123

⁵⁵ *Id.* at ¶ 33

⁵⁶ Order granted by Rajasthan High Court dated 15th January 2015, regarding constitutionality of Rajasthan Panchayati Raj (Second Amendment) Ordinance, 2014 ¶ 32

⁵⁷ *Id.* at ¶ 34

⁵⁸ *Id.* at ¶ 30

⁵⁹ *R. N. Jadi & Bros. & Ors. v. Subhashchandra*, (2007) 8 SCR 241 ¶ 17

⁶⁰ *Supra* at 50, p. 177

Further, formal education is not the only criteria for awareness about matters of everyday concern.⁶¹ Literacy may be acquired through adult literacy classes as opposed to modes envisaged in the Ordinance.

Further, no educational qualifications are prescribed to contest the elections of the Legislative Assembly or Parliament. This classification further violates Article 14 where MPs and MLAs essentially perform the same functions as a Sarpanch.

B.2.1.2. Promulgation of this Ordinance amounts to colourable exercise of powers

The Ordinance has been promulgated on the eve of the elections. There was no urgency for the promulgation, without extensive debate, immediately preceding elections which, was commonly known to be held in January 2015. *Quando aliquid prohibetur ex directo, prohibetur et per obliquum*. What is prohibited indirectly is also prohibited indirectly. An ordinance cannot make provision which the State Legislature is not competent to enact.⁶² This is an exercise of colourable legislation and amounts to legislative fraud.⁶³

B.2.2. The Ordinance is violative of Part IX

An ordinance has the force and effect of law, and the power to promulgate an ordinance is a legislative power, that temporarily vests in the executive.⁶⁴ Distinction between the a law of the Parliament and an Ordinance lies in the fact that, the former being a body of elected persons, is transparent and subject to the criticism inside and outside the House, while the latter being an executive decision, is neither transparent, nor subject to any discussion at any forum.⁶⁵

⁶¹ Factsheet, p. 2 ¶ 9

⁶² INDIA CONST. Art. 213, Cl. 3

⁶³ Ashok Kumar v. Union of India, (1991) AIR 1972 ¶ 6 (SC)

⁶⁴ INDIA CONST. Art. 213, Cl. 2 and Art. 367, Cl. 2

⁶⁵ M. P. JAIN, INDIAN CONSTITUTIONAL LAW, 184 LEXIS NEXIS, 6th ed., 2010

The power to promulgate an Ordinance is to be used in extraordinary situation⁶⁶ by the Governor and it cannot be allowed to be perverted to serve political ends.⁶⁷ The subjective satisfaction of a constitutional authority including the Governor, is not exempt from judicial review.⁶⁸ The omitting of Article 213 (4)⁶⁹ has opened the door for challenging the validity of an Ordinance on the ground that it was vitiated by *mala fides*.⁷⁰

The Panchayati Raj Institution fosters democratic principles of governance at the grassroots level. Disqualification for membership on the basis of educational qualification bears no object to the actual reason behind under Art. 243-F, such as protecting the character, integrity or morality of the posts which are to be contested.

Not less than one-third of the total reserved seats are to be reserved for women,⁷¹ which has been extended to 50% by many states. This Ordinance will result in a Panchayat where many reserved seats for women will be left vacant, as their literacy rates are lesser than that of men especially in rural areas, where the general literacy rates are alarmingly low.

B.2.3. There have been reasonable disqualifications. This Ordinance is not.

There have been prior enactments regarding disqualifications to the Panchayat. In *Javed v. State of Haryana*,⁷² or an Ordinance which introduced the criteria as of home sanitation for contesting elections,⁷³ the objects sought to be achieved, are respectively, popularizing the family welfare,

⁶⁶ INDIA CONST. Art. 213, Cl. 1

⁶⁷ D.C. Wadhwa v. State of Bihar, (1987) 1 SCC 378 ¶ 6

⁶⁸ Rameshwar Prasad v. Union of India, (2006) 2 SCC 1 ¶ 101

⁶⁹ INDIA CONST., amended by The Constitution (44th Amendment) Act, 1978

⁷⁰ A. K. Roy v. Union of India, (1982) AIR 710 ¶ 27 (SC)

⁷¹ INDIA CONST. Art. 243-D, Cl. (3)

⁷² (2003) AIR 3057 ¶ 4 (SC)

⁷³ Rajasthan Panchayati Raj (Amendment) Ordinance, 2014, No. 2/2014, Acts of Governor

and family planning programme, and public health and sanitation. Such classification does not suffer from any arbitrariness, and it is based on legislative wisdom. These matters are policy decisions, which are not open to judicial scrutiny.⁷⁴ In contrast, the impugned Ordinance makes literacy a pre-requisite to contest local elections, despite the fact that it bears no relevance to one's ability to perform the duties of electoral office. This is *ultra vires* Part IX of the Constitution.

Thus, the impugned ordinance, is wholly illegal, arbitrary and violative of Arts. 14, and 40 and *dehors* Part IX of the Constitution.

B.3. NON AVAILABILITY OF NOTIFIED VACATION BENCH AND LISTING PROCEDURE DURING HOLIDAYS VIOLATES ARTICLES 14 AND 21.

The Petitioners were not afforded the chance to be heard in court despite the urgency and necessity of adjudicating upon an unconstitutional Ordinance. The Petitioners' inherent right to be heard was blatantly violated by the Respondents.

B.3.1. Administrative side of High Court is subject to judicial review

High Courts discharge administrative and ministerial functions through the Registry and officers thereunder. They are empowered with authority to do things for and or behalf of the Court so as to aid judges in discharge of their judicial functioning.⁷⁵ This Hon'ble High Court functions with the support of its Registry, which includes various Administrative Branches/Sections.⁷⁶ Thus orders of the Registry are liable to be challenged if they suffer from unconstitutionality.

B.3.2. Denial of listing without reasons is arbitrary

⁷⁴ Fight for Human Rights v. Union of India & Anr., W.P. (C) No. 8201/2014 ¶ 9

⁷⁵ Jamal Uddin Ahmed v. Abu Saleh Najmuddin, (2003) 2 SCR 473 ¶ 14

⁷⁶ http://delhihighcourt.nic.in/writereaddata/upload/RTI/RTIFile_L7WWFZXR.PDF (official website of the Delhi High Court, last accessed on 28th January, 2015)

The Ordinance was promulgated on 20th December 2014, and shortly thereafter, the election notification was due to be issued on 3rd January 2015. Due to the paucity of time, the Petitioners were forced to move this Hon'ble Court during the annual winter holidays for an urgent listing and hearing. This Ordinance has direct bearing on the impending elections, and the Petitioners sought to challenge the vires of the same.

Listing of the case was denied without assigning any reason. A reasoned order is an essential requirement for the delivery of justice.⁷⁷ An order must be delivered with reasons, and the order so delivered must speak for itself. It is one of the fundamental principles of administrative law and natural justice. Moreover, judicial review is permitted over the process by which administrative decisions are arrived at.⁷⁸

In the case of *M/s. Woolcombers of India Ltd. v. Woolcombers Workers Union & Anr.*,⁷⁹ the reasons for necessity of a speaking order were succinctly laid down:

- (a) To prevent unconscious arbitrariness in reaching conclusions, to ensure application of mind, to reduce possibility of casualness, and to minimise whims and caprice.⁸⁰
- (b) Justice should not only be done but should also appear to be done

In *Delhi Transport Corporation v DTC Mazdoor Sabha*,⁸¹ it was observed that the *audi alteram partem* rule enforced the equality clause in Article 14, and that it is applicable to both quasi-judicial bodies as well as administrative orders. Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. Their aim is to secure justice or to

⁷⁷ *Siemens Engg. & Mfg. Co. of India Ltd. v. Union of India*, (1976) AIR 1785 (SC) ¶ 6

⁷⁸ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1947) 2 All ER 680

⁷⁹ (1973) AIR 2758 ¶ 5 (SC)

⁸⁰ *Mekaster Trading Corporation v. Union of India & Ors.*, (2003) 71 DRJ 376 ¶ 24

⁸¹ (1990) 1 Supp. SCR 142 ¶ 11

prevent miscarriage of justice.⁸² Article 14 codifies these principles of natural justice in the Constitution, and the passing of an administrative order without affording the affected persons a chance to be heard, is replete with violation of the principles of natural justice.⁸³ An order which infringes a fundamental freedom passed in violation of the *audi alteram partem* rule is a nullity.⁸⁴

Thus it is humbly submitted that denial of a notified vacation bench and procedure when the court is not in session is unconstitutional.

⁸² Union of India v. J.N. Sinha, (1971) 1 SCR 791 ¶ 8

⁸³ Maneka Gandhi v. Union of India, (1978) 2 SCR 621 ¶ 227

⁸⁴ Nawabkhan Abbaskhan v. State of Gujarat, (1974) 3 SCR 427 ¶ 14

PRAYER

Wherefore, in the light of facts of the case, issues raised, arguments advanced and authorities cited, it is the humble prayer of the Petitioner that this Hon'ble Court may be pleased to declare and adjudge that:

PART-A: W.P. No. 999/ 2015

- Section 34 of Arbitration and Conciliation Act, 1996 violates fundamental rights as well as other constitutional rights.

PART-B: W.P. (C) No. 1021/ 2015

- The Ordinance is unconstitutional with immediate effect.

And pass any other order in favour of the petitioners that it may deem fit in the ends of justice, equity, and good conscience. All of which is respectfully submitted.

Place:

S/d _____

Date:

(Counsel for Petitioners)