TEAM CODE: G

Before

THE HIGH COURT OF NIRDHAN

W.P. No. 999/2015

and

W.P. No. 1021/2015

WRIT JURISDICTION U/ A. 226 OF
THE CONSTITUTION OF INDIA

JCi **.....Petitioner**

v.

Republic of Gariba and Maxis Bank **.....Respondent**

AND

People's Union for Liberties & Democratic Reforms **.....Petitioner**

v.

Republic of Gariba and State Election Commission **.....Respondent**

MEMORANDUM ON BEHALF OF THE RESPONDENTS

5TH JUSTICE R.K. TANKHA MEMORIAL MOOT COURT COMPETITION, 2015

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STATEMENT OF JURISDICTION

The defendants Republic Of Gariba and Maxis Bank has been summoned by the High Court of Nirdhan and the court has the jurisdiction to hear the matter by the provisions laid down under Article 226 of the Constitution.

STATEMENT OF FACTS

1. The Republic of Gariba is a sovereign federation of states with several union territories. Nirdhan,was considered as backward till 2011,The Governor of Nirdhan decided to develop roads and highways for the benefit of rural populace. Power was delegated to all the Panchayat Samitis for the same.
2. Jeopardy Contracts Inc. ["**JCi**"] entered into an agreement with Jodhpur Gaon Panchayat Samiti ["**JGPS**"] which was terminated by JGPS on which an award was culminated into,on 21.1.2015 in favour of Jci. JGPS immediately filed a petition under Sec. 34 of the Act of 1996, before the High Court of Nirdhan, on its original side on 25.1.2015.
3. Meanwhile on 24.1.2015,JCi wrote to Maxis Bank asking for money .On 27.1.2015,Maxis Bank informed until the final outcome of Sec. 34, it is not obliged to pay anything to JCi. It also highlighted its difficulty to Jci regarding the strict compliance mandated by the Apex Court as well as the Reserve Bank with bank guarantee norms. JCi challenged the constitutional validity of Sec. 34, by way of a writ petition, being WP 999/2015.
4. On 20th December 2014,The Governor promulgated an Ordinance which came into effect from 24th of December 2014, which amended the Nirdhan Panchayati Raj Act, 1994. People's Union for Liberties & Democratic Reforms moved to the High Court of Nirdhan during winter vacations on 29th of December 2014 for an urgent listing and hearing.The PPS to the Hon'ble Chief Justice informed the listing has been denied.
5. Further they moved to the Hon'ble Apex Court under Art. 32 on 31.12.2014 through the "Vacation Officer". No listing was granted till the issuance of election notification. The apex court sent them back to the High Court. They filed a pro-bono petition WP (C) No. 1021/2015 in the High Court of Nirdhan challenging the constitutionality of the ordinance.

STATEMENT OF ISSUES

W.P. No. 999/2015

I. **Whether the present Writ Petition filed by the petitioner is maintainable.?**

II. **Whether section 34 of The Arbitration And Conciliation Act of 1996 is unconstitutional ?**

W.P. No. 1021/2015

I. **Whether Non-availability of a vacation bench during any holidays is unconstitutional?**

II. **Whether the ordinance is in violation of Fundamental Rights and is Ultra Vires of Part IX of the Constitution ?**

III. **Whether the ordinance is in violation of the basic structure of the Constitution like the preamble, single citizenship , free and equal participation and also Constitutional Rights?**

SUMMARY OF ARGUMENTS

Writ Petition No. WP 999/2015:

I. The present Writ Petition filed by the petitioner is not maintainable.

The writ petition is not maintainable as it is barred by doctrine of stare decesis. The Hon'ble Supreme Court has held that there is no question of the Arbitration and Conciliation Act, 1996(hereinafter referred to as the 'Act') being unconstitutional or in any way offending the basic structure of our constitution.

II. Section 34 of arbitration and concilliation act of 1996 is Constitutional

Firstly there is always a presumption in favour of constitutionality and the burden lies heavily on the person who challenges the Act secondly it is valid as it is passed within its powers thirdly it is not against the basic tenet of arbitration and delay caused by section 34 is not amounting to expropriation.

Writ Petition No. 1021/2015

I. Non-availability of a vacation bench during any holidays is unconstitutional.

The decision herein, cannot be questioned as the power exercised here is a Discretionary Power. It's a Judicial Discretion and hence, the Republic of Gariba is not liable to answer for the actions of the Judiciary.

II. The ordinance is in violation of Fundamental Rights and is Ultra Vires of Part IX of the Constitution

The law is not in violation of any Fundamental Rights and is not ultra vires of Part IX of the Constitution of India. The law is reasonable and not arbitrary and is promulgated for the larger

good of the people. Part IX of the Constitution envisages rural development and hence is in consonance of the ordiance.

III. The ordinance is in violation of the basic structure of the Constitution like the preamble, single citizenship , free and equal participation and also Constitutional Rights

The ordinance is not in violation of the basic structure of the Constitution like the preamble, single citizenship , free and equal participation and also Constitutional Rights. The preamble is the non executionary part of the Constitution and the aim of the ordinance being good governance , it is not in violation of any of the above mentioned principles.

ARGUMENTS ADVANCED

Writ Petition No. 99/2015

I. THE PRESENT WRIT PETITION FILED BY THE PETITIONER IS NOT MAINTAINABLE.

The writ petition is not maintainable as it is barred by doctrine of *stare decesis*.

The Hon'ble Supreme Court has held that there is no question of the Arbitration and Conciliation Act, 1996(hereinafter referred to as the 'Act') being unconstitutional or in any way offending the basic structure of our constitution.[1] The Delhi high court[2] has ruled that the Act is a product of conceptual thinking and of much debate and consultation. Features have been incorporated which are intended to perfect the legislative scheme. An award can now be set aside if it is in conflict with "the public policy in India", thus further held that section 34 is constitutionally valid. It is further stated that the impugned act has been passed in confirmity with the model law. Hence following the principle of stare decisis writ petition is not maintainable.

II. THAT THE SECTION 34 OF ARBITRATION AND CONCILIATION ACT OF 1996 IS CONSTITUTIONAL

There is always a presumption in favour of constitutionality and the burden lies heavily on the person who challenges the Act.**[A]** it is further valid as it is passed within its powers. It is not against the basic tenet of arbitration.**[B]** delay caused by section 34 is not amounting to expropriation.**[D]**

A. PRESUMPTION IN FAVOUR OF CONSTITUTIONALITY AND INTRA VIRES THE CONSTITITION.

There is presumption in favour of constitutionality of statutes. The law courts can declare the legislative enactment to be an invalid piece of legislation only in the event of gross violation of

[1] *Babar Ali* v. *UOI*, (2000) 2 SCC 178.
[2] *TPI* v. *Union of India*, 2001 (3) RAJ 70 (Del).

constitutional sanctions. Arbitration is subject matter included in list III.[3] It was in the domain of parliament to pass the Act.

B. IT DOES NOT AMOUNT TO INTRODUCTION OF 'LITIGATION' IN THE ARBITRAL PROCESS WHICH IS AGAINST THE BASIC TENETS OF ARBITRATION.

Basic tenets of arbitration is discretion of the parties to choose arbitration, as a method of resolution of disputes.[i] Section 34 which gives certain jurisdictional grounds to the aggrieved party to challenge the award involves an expedient procedure.[ii]

i. Basic tenets of arbitration is discretion of the parties.

Basic tenets of Arbitration is a private dispute resolution mechanism agreed upon by the parties, contained in the arbitration agreement.[4]A consensual arbitration is the result of agreement between the parties.[5]. It is always in the discretion of the parties, whether or not, to choose arbitration, as a method of resolution of disputes.[6] Appointment of arbitrator against the will of one of the parties is almost rarity; and in fact, it runs contrary to the very spirit of arbitration.[7] Arbitration Act[8] is an attempt to introduce and enforce some sort of disciplined expediency to alternative disputes resolution.[9] An arbitrator derived his authority from this confidence and any step calculating to reduce it was against the spirit of arbitration.[10] The Act intends to promote and strengthen arbitration, as a mechanism for resolution of disputes.[11]

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[3] The Constitution of India,1950, Seventh schedule, List III, no. 13.
[4] *P.Manohar Reddy* v. *Magrashtra Krishna,* AIR 2009 SC 1776.
[5] *P.M.A Shukkoor* v. *Muthoot Vehicle And Asset Finance Ltd.*, 2011 (2) RAJ 121 (ker).
[6] *M/s Uma Engineering Co.* v. *The superintending Engineer Irrigation & CAD*, LNIND 2008 AP 1004.
[7] *id*.
[8] The Arbitration And Conciliation Act, 1996.
[9] *M/S. R.R. Constructions Co.* v. *Union Of India & Others*, LNIND 2009 AP 754.
[10] *Satya Narayan Agarwall* v. *Baidyanath Mandal,* AIR 1972 PAT 29.
[11] *A. Ramakrishna* v. *Union of India (UOI), rep. by Chief Engineer (SZ.II)* 2004 (5) ALD 762; *Central Public Works Department and Ors*, 2005 (1) ARB LR 1(AP).

ii. Section 34 of arbitration act involves expedient procedure.

The Supreme Court has observed[12] that an arbitratior is a Judge appointed by the parties and as such an award passed by him is not to be lightly interfered, even if erroneous in the opinion of the court it cannot be interfered with. It has also been held that courts should not substitute it's own view in the place of the arbitrator[13] and the scope for setting aside has been reduced to large extent.[14] Applications under Section 34 of the Act are summary proceedings framing of issues is also not sine qua non[15] court should approach an award with a desire to support it rather than to destroy it[16] It is clear that issues need not be framed in applications under Section 34 of the Act. Constitutional validity of a statute that is considered, should be construed according to the Directive Principles of State Policy as a rule of Interpretation.[17]The above principles laid down by the Supreme Court indicate that courts under Section 34 are acting in supervisory jurisdiction to minimize the supervisory role of courts in the arbitral process. [18] The procedure followed by courts under section 34 ensures that there is fast disposal of cases. Thus there can be no delay which can be attributed to section 34.

C. THE PENDENCY OF SEC. 34 PETITIONS IS HUGE DOES NOT AMOUNT TO EXPROPRIATION, AND THUS NOT VIOLATING OF COUNTRY'S BILATERAL AND MULTILATERAL COMMITMENTS UNDER VARIOUS CONVENTIONS AND INVESTMENT TREATIES;

Delay due to section 34 is not amounting to expropriation[i] It is not amounting expropriation by laws in India and thereby violating article 300-A.[ii] Grant of an automatic stay, without adjudication on prima-facie case, balance of convenience and irreparable injury is *per se* bad in law.[iii]

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[12] *Indu. Engg* v. *DDA*, (2001)5 SCC 691.
[13] *Smita Contractors Ltd* v. *Euro Alloys Ltd.*, (2001)7 SCC 728.
[14] *Municipal Corporation of Greater Mumbai* v. *Prestress Products (India)*, (2003) 4 RAJ 363.
[15] *Fiza Developers and Inter-Trade P. Ltd.* v.*AMCI (I) Pvt. Ltd. and Anr.* (2009)17 SCC 796.
[16] *Maharashtra SEB* v. *Sterilite Industries (India) Ltd.*, (2001)8 SCC 482.
[17] *Atam Prakash* v.*State of Haryana and Ors*, (1986)2 SCC 249.
[18] Statement of Objects and Reasons as given in The Arbitration and Conciliation Bill, 1995.

i. Whether delay due to section 34 is amounting to expropriation

Indirect expropriation involves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure but Direct expropriation involves in the sense an outright taking of private property. The single most important development in state practice has become the issue of indirect expropriation. "In case of an indirect expropriation, sometimes referred to as a 'regulatory taking,' host States invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or cancelling investors' legal title to their assets or diminishing their control over them."[19]

The arbitral tribunal in *Telenor* v. *Hungary* pointed out that the determinative factors for establishing an expropriation were the intensity and duration of the economic deprivation suffered by the investor.[20] An indirect expropriation must be equivalent in its effects to a direct expropriation. The impact of the measure or degree of interference must be such as to render the property rights useless, i.e. to deprive the owner of the benefit and economic use of the investment. On 27.1.2015, Maxis Bank informed that admission of Petition under Sec. 34 amounts to a stay on the award, and therefore until the final outcome of Sec. 34, it is not obliged to pay anything to Jci.[21]It can be observed that the duration and the intensity do not qualify it to be an expropriation.

Interference with investor's expectations :-*The Waste Management* v. *Mexico* tribunal put it, "*it is not the function of the international law of expropriation to eliminate the normal commercial risks of a foreign investor*". [22] Nature, purpose and character of the measure:- The nature of the measure refers to whether it is a bona fide regulatory act. The purpose focuses on whether the

[19] *Suez et al.* v. *Argentina*,(Award) Decision on Liability, 30 July 2010, ¶ 121.
[20] *Telenor* v. *Hungary*, Award, 13 September 2006, ¶ 70.
[21] Moot proposition, ¶12.
[22] *Waste Management* v. *Mexico*, Final Award, 30 April 2004, ¶ 159.

measure genuinely pursues a legitimate public-policy objective and includes features such as non-discrimination, due process and proportionality. Asserting the State's right to regulate in the public interest :-The police powers doctrine in its contemporary meaning refers that certain acts of States are not subject to compensation under the international law of expropriation. [23]Treaty practice distinguishing non-compensable Regulatory measures from indirect expropriations:-The nature, purpose and character of a measure play a decisive role in distinguishing between an indirect expropriation and a regulatory act that is not subject to compensation. Further there is always a presumption of validity of a regulatory measure.[24] Indicators of the expropriatory nature of a regulatory measure:-The regulatory role of States in the modern economy is vital for management of economic activities, for providing an equitable and stable framework within which markets can develop in a competitive manner and for protecting the public interest certain areas. State measures, prima facie are a lawful exercise of powers of governments[25] Regulatory functions are a matter of sovereign right of the host State and there could be no right in international law to compensation or diplomatic protection in respect of such interference." [26]

Regulatory measures not amounting to expropriations

Recent treaties have included specific clarifications to regulate and distinguish between an expropriatory measure and a normal (and thus non-compensable) regulatory act of State.[27]In *Methanex* v. *USA*, the tribunal acknowledged that "As a matter of general international law, a nondiscriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is not deemed

[23] Ian Brownlie, *Principle Of Public International Law* 252 (8th ed. Oxford University Press 2008)

[24] Dolzer & Schreuer, *Principles of International Investment Law* 95 (2d ed., Oxford University Press 2008).

[25] *Supra* Note 23, Brownlie.

[26] M. Sornarajah, *The International Law on Foreign Investment* 357 (2d ed., Cambridge University Press 2010).

[27] Colombia-India Bilateral Investment Treaty (2009).

expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."[28]Section 34[29]which is a regulatory measure of the state passed in the interest of public which is non-discriminatiory, does not satisfy the essential ingredients of indirect expropration and thereby not violating any BIT.

i. Whether it is amounting expropriation according to laws in India and thereby violating article 300-A

a. Law of expropriation in Republic of Gariba

The process of exercising the power of eminent domain is commonly referred to as 'condemnation' or 'expropriation'.[30] Article 300A gets attracted to an acquisition or taking possession of private property, by necessary implication for public purpose, in accordance with the law made by the Parliament or a State legislature, a rule or a statutory order having force of law. Prima facie, State would be the judge to decide whether a purpose is a public purpose. By necessary implication the obligation of the state, to pay compensation for property acquired or indemnification of property deprived under Article 300A or other public purpose is obviated[31]on the ground of inadequacy or illusory nature of the compensation.[32]

ii. Whether a statute can be held unconstitutional if it violates Article 300-A.

The concept of eminent domain applies when a person is deprived of his property postulates that the purpose must be primarily public and not of private interest which has to be decided by the legislature, It should be made known. Thus it is a condition precedent, for invoking Article 300A. The requirement of public purpose is invariably the rule for depriving a person of his

[28] *Methanex* V. *USA, Final Award*, 3 August 2005, Part IV, Chapter D, ¶ 7.
[29] The Arbitration And Conciliation Act, 1996.
[30] *Jilubhai Nanabhai Kachhar* v. *State Of Gujarat And Anr* , AIR 1995 SC 142.
[31] *id*.
[32] *Smt. Elizebath Samuel Aaron And Ors.*v. *State Of Kerala And Ors.*, AIR 1991 Ker 162.

property, violation of which is amenable to judicial review.[33] The constitutional obligation to pay compensation to a person who is deprived of his property primarily depends upon the terms of the statute and the legislative policy. Thus it is constitutional.

a. Grant of an automatic stay, without adjudication on prima-facie case, balance of convenience and irreparable injury is per se bad in law.

The arbitration culminated into an award dated 21.1.2015 in favour of JCi, and inter alia held JCi entitled to the money under the performance bank guarantee.[34] On 27.1.2015, Maxis Bank informed that admission of Petition under Sec. 34 amounts to a stay on the award, and therefore until the final outcome of Sec. 34, it is not obliged to pay anything to JCi.[35] It is pertinent to note that as per the Supreme Court rulings if the petition under section 34 amounts to stay on the award automatically.[36]

Writ petition No. 1021/2015

I. NON-AVAILABILITY OF A VACATION BENCH DURING ANY HOLIDAYS FALLS UNDER THE POWER OF THE COURT.

A. NON-AVAILABILITY OF A NOTIFIED PROCEDURE FOR LISTING WHEN THE COURT IS NOT IN SESSION IS UNCONSTITUTIONAL.

The decision herein, cannot be questioned as the power exercised here is a Discretionary Power. Now, the discretionary power can be dealt in two ways: 1) It is a Judicial Decision/ Discretion and State being an executive body is not in any scenario answerable for the decisions and discretions of the Judiciary. The discretion was solely of the Chief Justice of the High Court.. Hence, the Republic Of Gariba stands immune from answering or giving any reason whatsoever for the actions of the Judiciary.

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[33] *id*.
[34] Moot proposition, ¶ 4.
[35] Moot proposition, ¶12.
[36] *Fiza Developers and Inter-Trade P. Ltd.* v. *AMCI (I) Pvt. Ltd. And Anr*. (2009)17 SCC 796.

2) Alternatively, If at all the discretion is considered to be Administrative, It is subjected to limited Judicial Review. The administration of the High Court including the allocation of cases to puisne judges is with the Chief Justice.[37] It was also held that parties need not be heard and have no say in the matter. This in no sense is arbitrary or abuse of power as it is contended in *H.C. Puttuswamy* v. *Hon'ble Chief Justice* [38]that there is an imperative need for total and absolute administrative independence of the High Court and for this complete control should be vested in the Chief Justice. Going by the principles of Administrative Law, any discretion gets with it, a presumption of being reasonable. Like there is a presumption of constitutionality of a law/enactment, herein also, the discretion is presumed to be reasonable and the Burden to prove it as unconstitutional lies on the party claiming the same[39]. The grounds of Judicial Review of legislative acts are much more restricted than those of judicial review of administration action.[40]Now, the Administrative Discretion here should not be questioned going by another principle that the court would not interfere with or probe into the merits of the exercise of discretion by an authority. They would not go into the question whether the opinion formed by the concerned authority is right or wrong. The court does not substitute its own views for that of the concerned authority[41]. Judicial policy of non-intervention with the exercise of administrative discretion on merits, can be further illustrated in the case of *Arora* v. *State of U.P*[42].

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[37] *Rajiv Ranjan Singh 'Lalan'* v. *Union Of India* (2005) 11 SCC 312: (2005) 5 Scale 297.
[38] *H.C. Puttuswamy* v. *Hon'ble Chief Justice*, AIR 1991 SC 295, 298: 1991 Supp (2) SCC 421.
[39]Justice Bhagabati Prosad Banerjee & Bhaskar Prosad Banerjee, *Judicial Control Of Administrative Action* (2d ed. LexisNexis 2012).
[40] B.C. Sharma; *The Law Of Ultra Vires* 147 (1st ed., Jain Book Depot 2004).
[41] *Pratap Singh* v. *State of Punjab*, AIR 1964 SC 72,83; *State of Bombay* v. *K.P. Krishnan*, AIR 1960 SC 1223; *Ram Manohar Lohia* v. *State of Bihar*, AIR 1966 SC 740.
[42]*Arora* v. *State of U.P,* AIR 1964 SC 1230.

II. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS NOT IN VIOLATION OF THE FUNDAMENTAL RIGHTS AND IS ULTRA VIRES OF PART IX OF THE CONSTITUTION OF INDIA.

Preliminarily a law cannot be invalidated on the ground that in making the law, the law making body did not apply its mind or was promoted by some improper motive.[43]in considering the effects of an impugned law , the court has to distinguish between its ' direct and inevitable consequences.[44]

A. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS NOT INVIOLATION OF ART. 14

The principle of equality of law as per the Article 14 is that there should be equality of treatment under equal circumstances. It means " *that equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike*".[45] It must therefore , necessarily have the power of making laws to attain to particular objects and , for that purpose of distinguishing , selecting and classifying persons and things upon which its laws are to operate.

i. Is the classification reasonable?

The State has promulgated the ordinance with a certain objectives in mind which includes the obligation of the state to promote and develop education as under Art. 21A [46], remove social backwardness by improving the standard of the local self government by placing capable and informed people in the Village Panchayat and finally to attain the objectives as laid down in the Directive Principles of State Policy in the Constitution of India. For the accomplishment of these policies state has divided the rural population into educated and not educated. This particular inference is from the fact that 5th standard marks the attainment of basic primary education.

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[43] *Nagaraj* v. *State Of A.P*, 1985 SC 551 ; *Rehman* v. *State Of Jammu And Kashmir*, AIR 1960 SC 1.
[44] *Express Newspapers* v. *Union Of India* (1959) SCR 12 (134-5).
[45] *Gauri Shankar* v. *Union of India,* AIR 1995 SC 55.
[46] *State Of UP* v. *Bhupendra Nath Tripathi* ,(2010) 13 SCC 203.

Classification to be reasonable should fulfill the tests of intelligible differentia (some real and substantial) and must have a reasonable nexus to the objective sought by the legislature. [47]The state has achieved intelligible differentia as there is a clear demarcation between those who are educated and those who are not. The classification here is well defined and distinguishable and provides for an incentive of promoting good and wise governance. Education is one of the chief objectives. The legislature is allowed to make a valid classification where the statute itself may indicate the persons or things to whom its provisions are intended to apply.[48] The Supreme Court held[49] "*Educational qualifications have been recognized by this Court as a safe criterion for determining the validity of classification*" Attention is also focused on some Supreme Court Cases wherein classification on the basis of educational qualifications was upheld. [50] Therefore, mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause.[51]. The Parliament and every State Legislature has power to make laws with respect to any of the matter which falls within its field of legislation under Article 246 read with Seventh Schedule of the Constitution. The Panch or Sarpanch are role models for the people of the village and they look up to them. To escalate the education and the governance standards we have to start from the grass root level and thus making such a provision for current and prospective members of the Panchayat will result in a positive influence on the villagers who will observe and learn from their very own elected

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[47] *Javed* v. *State Of Haryana*, (2003) 8 SCC 369; *State of Haryana* v. *Jai Singh*, (2003) 9 SCC 114, *Laxmi Khandsari* v. *State of Uttar Pradesh*, AIR 1981 SC 873;*The State Of Jammu And Kashmir* v. *Shri Triloki Nath Khosa And Ors*. AIR 1974 SC 1 ; *Budhan Choudhry And Ors*. v. *State Of Bihar*, AIR 1955 SC 191.

[48] *Ramkrishna Dalmia* v. *Tendolkar*, AIR 1958 SC 538.

[49] *The State Of Jammu & Kashmir* v. *Shri Triloki Nath Khosa And Ors.* , AIR 1974 SC 1.

[50] *State of Mysore And Anr.* v. *P. Narasing Rao,* AIR 1968 SC 349 ; *Ganga Ram* v. *Union Of India,* (1970) 3 SCR 481;*The Union Of India* v. *Dr. (Mrs.) S.B. Kohli,* (1973) 3 SCR 117 *; T.R. Kothandaraman And Ors.* v. *Tamil Nadu Water Supply & Drainage BD And Ors.,* (1994) 6 SCC 282*; Javed* v. *State Of Haryana,* (2003) 8 SCC 369.

[51] *Jaila Singh* v. *State Of Rajasthan,* AIR 1975 SC 1436.

representatives. Thus the aforementioned provisions are nor arbitrary and discriminatory. Hence Article 14 is held to be valid as both the tests mentioned are satisfied.[52]

ii. Does the law marginalize women?

The law does not specifically marginalize women or is arbitrary as anybody and everybody falling in the category of not educated shall barred from contesting elections. Therefore men who are not 5th standard pass are also prevented from contesting for the post of Panch. Bearing in mind the objective behind the policy that is to promote good governance; this law shall be beneficial for the entire population including women.

B. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS NOT IN VIOLATION OF ARTICLE 21 OF THE CONSTITUTION OF INDIA

It is contested by the petitioner that the Ordinance violates Right to live with Human Dignity and Right to Development. Our contention here is that the law has been passed keeping in mind the larger good of the people and also to ensure that a qualified person becomes the leader of the local self government with a forecast that such will improve the social conditions. There cannot be a presumption that being Panch is the only manner in which one can retain their dignity as well as expand oneself politically . The law in no way abridges the human dignity of any citizen rather it encourages the cardinal concept of social and educational progress.

C. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS NOT ULTRA VIRES OF PART L*X OF THE CONSTITUTION OF INDIA.*

The 73rd amendment which gave Village Panchayats a constitutional base was passed in pursuance of the Directive Principle contained in Art. 40 and it is designed to establish strong, effective and democratic local administration which may lead to rapid implementation or rural development programmes.[53]So long as village panchayats are organised to achieve the above

[52] *Kangshari* v. *State Of W. B,* AIR 1960 SC 457.
[53] M.P.Jain, *Indian Constitutional Law*,1844 (6th ed., LexisNexis 2010).

mentioned objectives, the requirements of Art.40 will be complied with both in their spirit and in letter.[54]Clause (b) of Article 243G provides that Gram Panchayats may be entrusted the powers to implement the schemes for economic development and social justice including those in relation to matters listed in the Eleventh Schedule.[55] Law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein In pursuance of these factors and also bearing in mind the powers of the State Legislature bestowed under Arts. 246 and 243-K (4) this ordinance is intra vires of the part IX of the constitution.

III. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS NOT IN VIOLATION OF CONSTITUTIONAL RIGHTS AS WELL AS THE PREAMBLE, SINGLE CITIZENSHIP AND FREE AND FAIR PARTICIPATION IN DEMOCRATIC GOVERNMENT.

A. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS NOT IN VIOLATION OF ANY CONSTITUTIONAL RIGHTS

Replicating the words of the Honourable Judges in a Supreme Court case[56]

> *"The points which emerge from this decision may be stated as follows :-(1) The right to vote or stand as a candidate for election is not a civil right but is acreature of statute or special law and must be subject to the limitations imposed byit. (2) Strictly speaking, it is the sole right of the Legislature to examine and determineall matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal and entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."*

Another Supreme Court Judgement[57] reiterated -

> *"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither ar fundamental right nor a Common Law Right. It is pure and simple, a*

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[54] *State of Uttar Pradesh* v. *Pradhan Sangh Kshettra Samiti,* AIR 1995 SC 1512.
[55] *Javed* v. *State of Haryana,* AIR 2003 SC 3057.
[56] *N.P. Ponnuswami* v. *Returning Officer, Namakkal Constituency And Ors.,* AIR 1952 SC 64.
[57] *Jyoti Basu And Ors.* v. *Debi Ghosal And Ors ,* AIR 1982 SC 983 ; *P. Nalla Thampy Thera* v. *B.L Shankar,* AIR 1984 SC 135.

> *statutory right. So is the right to be elected. Statutory creations they are, and therefore, subject to statutory limitation."*

Hence, Right to Contest elections is neither a fundamental nor a Constitutional right, the question of its contravention cannot be raised. Assuming this particular process of contesting elections for Village Panchayat does derive its power from the Constitution, there also lays the power in the hands of the state to pass any reasonable legislation regarding disqualifications as depicted in Art. 243F (1) (b) and 243K(4).

B. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS NOT IN VIOLATION OF THE PREAMBLE

The Supreme Court has clarified the status of the preamble to the constitution in several cases. The Preamble is neither a part of the of the Constitution nor it is a source of any substantive power of the Government. Nor can any prohibitions and limitations be implied on the government from the Preamble. [58]The principles in the Preamble involving the concept of equality is regarded not as a static, but a dynamic concept. Those who are unequal, in fact, cannot be treated by identical standards. That may amount to equality in law or formal equality but it would certainly not be real or substantive equality. It is necessary to take into account *de facto* inequalities which exist in society and to remove which affirmative action needs to be taken.[59]

C. THAT THE SECTION 19 OF THE NIRDHAN PANCHAYATI RAJ ACT, 1994 IS NOT IN VIOLATION TO FREE AND EQUAL PARTICIPATION IN DEMOCRATIC GOVERNMENT.

Bringing to attention an excerpt from the Supreme Court Judgement[60] *Smt. Indira Nehru Gandhi* v. *Shri Raj Narain and Anr*.

> *"Cooley has observed that courts are not at liberty to declare statutes void because they appear to the minds of the judges to violate fundamental principles of republican government. The principles of democratic republican government*

[58] *Supra* Note 53, M.P Jain, 1718.
[59] *id.* 1718 (6th Edition LexisNexis 2010).
[60] *Smt. Indira Nehru Gandhi* v. *Shri Raj Narain And Anr*., AIR 1975 SC 2299.

> *are not a set of inflexible rules; and unless they are specifically incorporated in the Constitution, no law can be declared bad merely because the Court thinks that it is opposed to some implication drawn from the concept."*

The respondent asserts that the content of the ordinance so promulgated is to be considered in juxtaposition with the changing and progressive time and it is created to bring about an enhancement in the democratic structure of the local self government and the classifications so put forth are reasonable as proven in the previous issues.

PRAYER

Wherefore, In the light of facts stated, issues raised, arguments advanced and authorities cited, It is humbly prayed before the Hon'ble court to

1. Dismiss both the writ petitions. or

2. Pass any order in the interest of Justice, equity and Good Conscience.

Date:

Place:

Counsel(s) for the Respondents