IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

REVIEW PETITION (CIVIL) NO. OF 2013

IN

CIVIL APPEAL NO. 10972 OF 2013

[AGAINST THE IMPUGNED JUDGMENT AND ORDER DATED 11.12.2013 PASSED BY THIS HON'BLE COURT IN CIVIL APPEAL NO. 10972 OF 2013]

IN THE MATTER OF:

UNION OF INDIA … Petitioner

versus

SURESH KUMAR KOUSHAL & ANR. … Respondents

PETITION FOR REVIEW UNDER

ARTICLE 137 OF THE CONSTITUTION OF INDIA READ WITH

ORDER XL OF THE SUPREME COURT RULES, 1966

TO,

THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS

COMPANION JUSTICES OF THE HON'BLE SUPREME COURT

The humble petition of the

Petitioners above named;

MOST RESPECTFULLY SHOWETH:

1. The Petitioners above named respectfully submit the present petition seeking Review of the judgment dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal No. 10972 of 2013 [arising out of SLP (C) No. 15436 of 2009] ("impugned judgment"), and other connected matters, by which this Hon'ble Court set aside the Judgment and Order dated 2nd July, 2009, rendered by the Delhi High Court in Writ Petition (Civil) No. 7455 of 2001.

2. That, the brief facts relevant for the present case are as follows :-

   (i) NAZ Foundation filed WP (C) 7455/2001 before the Delhi High Court praying for grant of a declaration that Section 377 IPC to the extent it is applicable to and penalises sexual acts in private between consenting adults is violative of Articles 14, 15, 19(1)(a)-(d) and 21 of the Constitution.

(ii) In September 2004, the Division Bench of the High Court dismissed the writ petition by observing that no cause of had accrued to Naz Foundation and purely academic issues could not be examined by the Court.

(iii) The review petition filed by Naz Foundation was also dismissed by the High Court.

(iv) An SLP was filed before this Hon'ble Court, which, vide its order dated 3.2.2006, allowed the appeal and remitted the writ petition for fresh decision by the High Court.

(v) The High Court, on 3.7.2009, allowed the writ petition filed by the petitioners therein and read down Section 377 of the Indian Penal Code, 1860. The Division Bench of the High Court, inter alia, concluded that "We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors."

(vi) SLPs against the judgment and order of the High Court was filed by Suresh Kumar Koushal (a citizen of India who believed he had the moral responsibility and duty in protecting cultural values of Indian

society) and others, who were not parties before the High Court. Some of them were intervenors before the High Court.

(vii) This Hon'ble Court has set aside the aforesaid judgment of the Delhi High Court and has held that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High Court is legally unsustainable.

3. The Petitioner is preferring the present Review Petition under Article 137 of the Constitution of India, seeking review of the judgment of this Hon'ble Court dated 11.12.2013 which allowed Civil Appeal No. (C) 10972 of 2013, inter alia on the following:-

GROUNDS

A. FOR THAT the impugned judgment suffers from errors apparent on the face of the record, and is contrary to well-established principles of law laid down by this Hon'ble Court enunciating the width and ambit of Fundamental Rights under Articles 14, 15 and 21 of the Constitution of India.

B. FOR THAT Section 377 IPC, insofar as it criminalizes consensual sexual acts in private, falls foul of the principles of equality and liberty enshrined in our Constitution.

C. FOR THAT this Hon'ble Court failed to consider that Section 377 which criminalizes intercourse 'against the order of nature' is a reflection of sodomy laws of the United Kingdom which were transplanted into India in 1860. They do not have any legal sanctity and in any case are unlawful in view of the Constitutional mandate of Articles 14, 15 and 21 of the Constitution.

D. FOR THAT this Hon'ble Court has held that a statute, which was justified when enacted, could, with the passage of time, become arbitrary and unreasonable.

E. FOR THAT this Hon'ble Court, in Malpe Vishwanath Acharya v. State of Maharashtra, (1998) 2 SCC 1, held as under

> "15. The aforesaid decisions clearly recognise and establish that a statute which when enacted was justified may, with the passage of time, become arbitrary and unreasonable…"

F. FOR THAT this Hon'ble Court arrived at various conclusions which are contrary to well-established canons of law as laid down by this Hon'ble Court

G. FOR THAT this Hon'ble Court failed to consider that the Union of India had taken a categorical stand that there was no legal error in the judgment of the High Court dated 2.7.2009, and, therefore, no appeal was filed by the Union of India against the said judgment.

It is submitted that an Affidavit was filed by the Union Home Secretary on 1st March, 2012 to this effect.

H. FOR THAT the written submissions filed by the Learned Attorney General for India, it was categorically submitted with regard to the position of the Union of India as under:

> "Accordingly, it is submitted that the Government of India does not find any legal error in the judgment of the High Court and accepts the correctness of the same. This is also clear from the fact that it has not filed any appeal against the judgment of the High Court."

I. FOR THAT this Hon'ble Court did not deal not with the submissions made by the Learned Attorney General, which articulated the stand of the Union of India. It is submitted that whilst in para 21 of the impugned judgment, the Learned Judges noted the submissions made by the Learned Attorney General, the same are not dealt with in the judgment.

J. FOR THAT the Petitioner had found no legal error in the High Court decision and thus had accepted the correctness of the same.

K. FOR THAT it is a settled principle of law that it is the Executive, i.e., the Government, that defends the constitutionality of statutes before this Hon'ble Court.

L. FOR THAT this Hon'ble Court could not have ignored the fact that the Union of India had made a considered decision not to challenge the High Court decision and had accepted the verdict that Section 377 was unconstitutional, in so far as it criminalised adult consensual sexual acts in private.

M. FOR THAT the SLPs ought to have been dismissed at the admissibility stage itself, on the ground that the Delhi High Court judgment dated 2nd July, 2009 was challenged mostly

by third parties, who were not party to the original writ petition in the High Court.

As submitted earlier, it is the prerogative of the State to defend the constitutionality of statutes, and not that of third parties.

N. FOR THAT if a statute is declared unconstitutional, Parliament has no further role to play to add to or endorse a judicial declaration.

O. FOR THAT while law-making is the sole responsibility of the Parliament, it is the task of this Hon'ble Court to judge the constitutional validity of laws.

P. FOR THAT non-amendment of law by the Parliament, especially a pre-Constitutional law, is not a limitation on the power of judicial review.

Q. FOR THAT it is not necessary that statutory provisions which have been found to be unconstitutional must, as a matter of rule, be removed from their parent statute. In Minerva Mills v. Union of India, (1980) 3 SCC 625, judgment, this Hon'ble Court struck down Articles 368(4) and (5), as they interfered with the ability of this Hon'ble Court to review constitutional

amendments. However, the latest text of the Constitution continues to includes Articles 368(4) and (5), even though they were declared unconstitutional long ago.

R. FOR THAT the impugned judgment suffers from glaring legal errors and seeks to invoke certain legal principles which were inapplicable in the facts of the present case.

S. FOR THAT it is the bounden duty of this Hon'ble Court, as the protector and guarantor of fundamental rights of people, to strike down any law that violates the fundamental rights.

T. FOR THAT this Hon'ble Court failed to appreciate the abovementioned principle of law when it held, in para 32 that:

> "Applying the afore-stated principles to the case in hand, we deem it proper to observe that while the High Court and this Court are empowered to review the constitutionality of Section 377 IPC and strike it down to the extent of its inconsistency with the Constitution, self restraint must be exercised and the analysis must be guided by the presumption of constitutionality"

U. FOR THAT this Hon'ble Court is duty-bound to strike down a provision in a statute that is unconstitutional or a restriction which violates a fundamental right.

V. FOR THAT this Hon'ble Court did not consider the law as laid down in Peerless General Finance and Investment Co. Ltd. v. RBI, (1992) 2 SCC 343, wherein it was held that:

> "47. ... It is the duty of the Court to be watchful to protect the constitutional rights of a citizen as against any encroachment gradually or stealthily thereon....
>
> ... But the Court is entitled to consider whether the degree and mode of the regulation is in excess of the requirement or is imposed in an arbitrary manner. The Court has to see whether the measure adopted is relevant or appropriate to the power exercised by the authority or whether it overstepped the limits of social legislation. Smaller inroads may lead to larger inroads and ultimately result in total prohibition by indirect method. If it directly transgresses or substantially and inevitably affects the fundamental right, it becomes unconstitutional, but not where the impact is only remotely possible or incidental. The Court must lift the veil of the form and appearance to discover the true

character and the nature of the legislation, and every endeavour should be made to have the efficacy of fundamental right maintained and the legislature is not invested with unbounded power. The Court has, therefore, always to guard against the gradual encroachments and strike down a restriction as soon as it reaches that magnitude of total annihilation of the right.

W. FOR THAT it is the duty of this Hon'ble Court to guard against the encroachment of a right and to strike down a restriction as soon as it threatens to annihilate a right.

X. FOR THAT it is well-settled that Judges of this Hon'ble Court act as sentinels on the quive when it comes to the preservation of rights guaranteed under the Constitution and it is their duty to uphold the principles and provisions laid down in the Constitution.

Y. FOR THAT this Hon'ble Court did not consider the law as laid down in State of Punjab v. Dalbir Singh, (2012) 3 SCC 346, where it was held as under:

"33. The Judges of this Court have taken an oath to uphold and preserve the Constitution and it is well known that this Court has to protect the Constitution as a

sentinel on the qui vive against any abridgment of its principles and precepts."

Z. FOR THAT a 3 Judge Bench of this Hon'ble Court, in Asif Hameed v. State of J & K, 1989 Supp (2) SCC 364, held that:

"19. When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action...."

AA. FOR THAT Justice Singhvi, in the case of A. Manjula Bhashini v. A.P. Women's Coop. Finance Corpn. Ltd., (2009) 8 SCC 431, held that:

"67. The distinction between legislative and judicial functions is well known. Within the scope of its legislative competence and subject to other constitutional limitations, the power of the legislature to enact laws is plenary. In exercise of that power, the legislature can enact law prospectively as well retrospectively. The adjudication of the rights of the

parties according to law enacted by the legislature is a judicial function. In the performance of that function, the court interprets and gives effect to the intent and mandate of the legislature as embodied in the statute. If the court finds that the particular statute is ultra vires the power of legislature or any provision of the Constitution, then the same can be struck down."

BB. FOR THAT there have been instances where this Hon'ble Court has not waited for the Parliament to amend the law, and has gone on to strike down the law when it has demonstrated that the law was unconstitutional.

CC. FOR THAT this Hon'ble Court, in Mithu v. State of Punjab, (1983) 2 SCC 277, did not wait for Parliament to revise the IPC, even though an amendment had been introduced in 1972 and went on to hold the provision as unconstitutional.

DD. FOR THAT the principles of presumption of constitutionality and the principle of judicial restraint were neither applicable nor relevant in the facts and circumstances of the present case.

EE. FOR THAT presumption of constitutionality has no relevance when a violation of constitutional provisions has been demonstrated.

FF. FOR THAT in the case of K.R. Lakshmanan (Dr) v. State of T.N., (1996) 2 SCC 226, a bench of 3 Learned Judges of this Hon'ble Court held that:

> 47. ... It is true that the presumption is in favour of the constitutionality of a legislative enactment and it is to be presumed that a legislature understands and appreciates the needs of its own people, but when on the face of the statute there is no classification and no attempt has been made to select an individual with reference to any differentiating attributes peculiar to that individual and not possessed by others, the presumption is of no assistance to the State...

GG. FOR THAT in the present case, the Learned Judges, without at all adverting to the arguments, submissions and compendium of materials which were placed before them to show how the provision of Section 377 ipso facto violates the provisions of Article 14, 15 and 21 of the Constitution, applied the principle of presumption of constitutionality in favour of Section 377.

HH. FOR THAT in John Vallamattom v. Union of India, (2003) 6 SCC 611, which was noticed by this Hon'ble Court in the impugned judgment, the issue was with respect to the constitutionality of Section 118 of the Indian Succession Act, a pre-Constitutional statute, which was based on the Mortmain and Charitable Uses Act, 1888 of England. In the said judgment, it was held as under:

> "60. In my opinion, there is no justification in retaining the impugned provision in the statute-book, which is arbitrary and violative of Article 14 of the Constitution, since the Mortmain statute was repealed by the Charities Act, 1960 and by that the very basis and foundation of the impugned provision has become non-existent."

It is submitted that the same logic would apply on all the fours in the present case. Section 377 could not have stood in the statute book, as the British Parliament de-criminalized homosexuality through the Sexual Offences Act in 1967. Following this, many other countries decriminalized homosexuality.

II. FOR THAT in para 32 of the impugned judgment, this Hon'ble Court observed as under:

> "The 172nd Law Commission Report specifically recommended deletion of that section and the issue has repeatedly come up for debate. However, the Legislature has chosen not to amend the law or revisit it. This shows that Parliament, which is undisputedly the representative body of the people of India has not thought it proper to delete the provision. Such a conclusion is further strengthened by the fact that despite the decision of the Union of India to not challenge in appeal the order of the Delhi High Court, the Parliament has not made any amendment in the law. While this does not make the law immune from constitutional challenge, it must nonetheless guide our understanding of character, scope, ambit and import."

It is respectfully submitted that the observations of this Hon'ble Court in this regard are completely erroneous. The superior judiciary of the country under the Constitutional Scheme has been invested with the powers of judicial review under the scheme of our Constitution. The powers of judicial

review of legislation are not “guided by Parliamentary processes”.

It is further submitted that the only guiding factor is violation of the provisions of the Constitution. It is submitted that the Hon’ble Court in arriving at its conclusions has been 'guided' by completely wrong assumptions of law.

JJ. FOR THAT whether a law is Constitutional or not is certainly not dependent upon whether the legislature has thought it fit to retain a provision in the statute or not. It depends on whether that provision in effect violates the provisions of the Constitution.

KK. FOR THAT the mere factum of retention of a provision in a statute cannot infuse life into the provision which is otherwise unconstitutional. It is submitted that the Hon’ble Court in the impugned order has unfortunately lost sight of this basic principle of judicial review. This approach is not only wrong but has never deterred judicial review. If followed, it will make judicial review effete.

LL. FOR THAT the fact that Parliament is the representative body of the people of India cannot be a factor when considering Section 377.

As observed by the Learned Judges themselves, the IPC along with Section 377 as it exists today was passed by the Legislative Council and the Governor General assented to it on 6.10.1860. It is submitted that the Council consisted of Englishmen. Therefore, it cannot be said Section 377 represented the will of Indian Parliament.

MM. FOR THAT this Hon'ble Court arrived at an erroneous conclusion in para 33 of the impugned judgment that "this Court is not empowered to strike down a law merely by virtue of its falling into disuse or the perception of the society having changed as regards the legitimacy of its purpose and its need."

NN. FOR THAT the reasoning of this Hon'ble Court flies in the face of a catena of judgments of this Hon'ble Court which have in unequivocal terms laid down that laws cannot be interpreted or adjudicated upon in vacuum and that laws must be interpreted in the light of changing social values.

OO. FOR THAT Bhagwati, J., writing for a bench of 5 Hon'ble Judges in National Textile Workers' Union v. P.R. Ramakrishnan, (1983) 1 SCC 228, observed that the law must be interpreted keeping in mind change in social

concepts and values, and the law must respond to the needs of a changing society. The relevant extract in this regard reads as under:

> "9. … We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind. It must shake off the inhibiting legacy of its colonial past and assume a dynamic role in the process of social transformation. We cannot therefore mechanically accept as valid a legal rule which found favour with the English courts in the last century when the doctrine of laissez-faire prevailed. It may be that even today in England the courts may be following the same legal rule which was laid down almost a hundred years ago, but that

> can be no reason why we in India should continue to do likewise. It is possible that this legal rule might still be finding a place in the English textbooks because no case like the present one has arisen in England in the last 30 years and the English courts might not have had any occasion to consider the acceptability of this legal rule in the present times. But whatever be the reason why this legal rule continues to remain in the English textbooks, we cannot be persuaded to adopt it in our country, merely on the ground that it has been accepted as a valid rule in England. We have to build our own jurisprudence and though we may receive light from whatever source it comes, we cannot surrender our judgment and accept as valid in our country whatever has been decided in England

PP. FOR THAT in Maganlal Chhaganlal (P) Ltd. v. Municipal Corpn. of Greater Bombay, (1974) 2 SCC 402, this Hon'ble Court reiterated its earlier stand that the law is not static and that it must adapt itself to cope with new situations. It was held as under:

> "22 ... As in life so in law things are not static. Fresh vistas and horizons may reveal themselves as a result of the impact of new ideas and developments in different fields of life. Law, if it has to satisfy human

needs and to meet the problems of life, must adapt itself to cope with new situations. Nobody is so gifted with foresight that he can divine all possible human events in advance and prescribe proper rules for each of them. There are, however, certain verities which are of the essence of the rule of law and no law can afford to do away with them. At the same time it has to be recognized that there is a continuing process of the growth of law and one can retard it only at the risk of alienating law from life itself. There should not be much hesitation to abandon an untenable position when the rule to be discarded was in its origin the product of institutions or conditions which have gained a new significance or development with the progress of years. It sometimes happens that the rule of law which grew up in remote generations may in the fullness of experience be found to serve another generation badly. The Court cannot allow itself to be tied down by and become captive of a view which in the light of the subsequent experience has been found to be patently erroneous, manifestly unreasonable or to cause hardship or to result in plain iniquity or public inconvenience. The Court has to keep the balance between the need of certainty and continuity and the desirability of growth and

development of law. It can neither by judicial pronouncements allow law to petrify into fossilised rigidity nor can it allow revolutionary iconoclasm to sweep away established principles”

QQ. FOR THAT in Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441, it was held that

“16. ... The inevitable truth is that law is not static and immutable but ever increasingly dynamic and grows with the ongoing passage of time.

17. So it falls upon the superior courts in a large measure the responsibility of exploring the ability and potential capacity of the Constitution with a proper diagnostic insight of a new legal concept and making this flexible instrument serve the needs of the people of this great nation without sacrificing its essential features and basic principles which lie at the root of Indian democracy....it is by now well settled by a line of judicial pronouncements that it is emphatically the province and essential duty of the superior courts to review or reconsider their earlier decisions, if so warranted under compelling circumstances and even to overrule any questionable decision, either fully or partly, if it had been

erroneously held and that no decision enjoys absolute immunity from judicial review or reconsideration on a fresh outlook of the constitutional or legal interpretation and in the light of the development of innovative ideas, principles and perception grown along with the passage of time. This power squarely and directly falls within the rubric of judicial review or reconsideration

RR. FOR THAT this Hon'ble Court, in Vatticherukuru Village Panchayat v. Nori Venkatarama Deekshithulu, 1991 Supp (2) SCC 228, held as under:

> "20. ... Law is not static. The purpose of law is to serve the needs of life." The law should, therefore, respond to the clarion call of social imperatives (sic and) evolve in that process functional approach as means to subserve "social promises" set out in the Preamble, Directive Principles and the Fundamental Rights of the Constitution."

SS. FOR THAT in Deena v. Union of India, (1983) 4 SCC 645, this Hon'ble Court held:

> "4 ... No one of course can question that law is a dynamic science, the social utility of which consists in its ability to keep abreast of the emerging trends in

> social and scientific advance and its willingness to readjust its postulates in order to accommodate those trends. Life is not static. The purpose of law is to serve the needs of life. Therefore law cannot be static. But, that is not to say that judgments rendered by this Court after a full debate should be reconsidered every now and then and their authority doubted or diluted. That would be doing disservice to law since certainty over a reasonably foreseeable period is the hallmark of law.

TT. FOR THAT law does not operate in a vaccum but in a social context. There has been a sea-change, not just in India, but all over the world, with respect to the law on homosexuality. It is submitted that a majority of the countries across the world have legalized homosexuality.

UU. FOR THAT even in India, Section 377 was introduced not as a reflection of existing Indian values and traditions, but rather, it was imposed upon Indian society due to the moral values of the colonizers. Indian society prior to the enactment of the IPC had a much greater tolerance towards homosexuality.

VV. FOR THAT this Hon'ble Court has failed to consider the dynamic nature of the law, particularly with respect to homosexuality.

It is submitted that the view adopted by this Hon'ble Court is contrary to the principles enshrined in the law down , i.e. that the Court cannot allow itself to be tied down by and become captive of a view which in the light of the subsequent experience has been found to be patently erroneous, manifestly unreasonable or to cause hardship or to result in plain iniquity or public inconvenience.

WW. FOR THAT like any other law, the concept of "against the order of nature" will not be static, and not the same as it was in 1860.

XX. FOR THAT this Hon'ble Court, whilst drawing a distinction between the two alleged 'classes', does not shed any light on what comes within the ambit of 'against the order of nature'. (para 38)

YY. FOR THAT this Hon'ble Court makes self-contradictory observations in paras 38 and 42 of the impugned judgment. In para 38, it is observed that "Section 377 IPC does not criminalize a particular people or identity or orientation. It

merely identifies certain acts which if committed would constitute an offence". However, the opening words of para 42 are "Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes...", thereby referring to 'particular people'.

ZZ. FOR THAT this Hon'ble Court has erred in holding that Section 377 has been used mostly in cases of non-consensual and markedly coercive situations, as evident from the case laws and expresses apprehension whether the Court would rule similarly in a case of proved of consensual intercourse between adults. (para 38). This was precisely the issue before this Hon'ble Court, i.e., whether adult consensual sexual acts should be criminalised or not. It was not a subject matter of speculation before this Hon'ble Court. This Hon'ble Court thus has failed to exercise its jurisdiction in the present case

AAA. FOR THAT a perusal of para 40 of the impugned judgment shows that the Learned Judges have completely misconstrued the argument made. It is submitted that the arguments and the submissions made were not only that the sexual minorities were being discriminated by the State or its

agency but the thrust of the argument was that the provision, as it exists, seeks to criminalize consensual sexual activity of two adults, which was against the constitutional ethos of equality and liberty. This aspect of the matter has not at all been dealt with or considered at all by this Hon'ble Court.

BBB. FOR THAT in para 42 of the judgment the learned judges summarily come to a conclusion that there was no violation of Article 14 and 15, without really analyzing the import and relevance of these two Articles.

It is submitted that lengthy arguments and submissions were made on how Section 377 offends the mandate of Article 14 and Article 15. The impugned order has dealt with Articles 14 and 15 in one para by stating that those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. It is submitted that the Learned Judges have refrained from dealing with or considering the true import of Article 14. The arguments were not merely that there was irrational classification but also that there was no nexus and further that this was arbitrary.

CCC. FOR THAT there is no reason as to why these the two classes referred to in Section 377, i.e., those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature, should be treated differently, because both classes refer to consensual acts. As stated above, this Hon'ble Court did not shed any light on what constituted carnal intercourse 'against the order of nature'.

DDD. FOR THAT criminalising consenting sex between adults in private without evidence of serious harm was arbitrary and unreasonable.

EEE. FOR THAT this Hon'ble Court has erred in holding that the classification between carnal intercourse in the ordinary course of nature and carnal intercourse against the order of nature is valid and not arbitrary (para 42), without addressing the second limb of the classification test, i.e., there has to be a rational nexus between the classification and the object of legislation. This Hon'ble Court ought not to have to upheld the said classification, in the absence of recording a finding on the rational nexus with the object of legislation.

FFF. FOR THAT this Hon'ble Court has erred in not recording a finding whether Section 377 is vague and arbitrary and thus violates Article 14, as argued by the Respondents.

GGG. FOR THAT this Hon'ble Court itself notes that no uniform tests can be culled to classify acts that would be covered under carnal intercourse against the order of nature (para 38).

HHH. FOR THAT it is well-settled that lack of uniformity in application of penal law results in uncertainty and arbitrariness and may render the law unconstitutional on the ground of vagueness.

III. FOR THAT this Hon'ble Court has completely failed to consider whether Section 377 violates Article 15, as argued by the Respondents and as held by the High Court that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15 (para 104 of the High Court judgment).

JJJ. FOR THAT this Hon'ble Court has failed to record a finding whether Section 377, which criminalises penile-non vaginal sexual acts for all, violates the right to privacy of individuals

or not, as argued by the Respondents, in light of the Court's own holding that Section 377 is applicable, irrespective of age and consent. (para 38)

KKK. FOR THAT Article 21 protects the right to privacy of all persons, including the right to form intimate and sexual relationships between consenting adults. Section 377 criminalizes penile-non-vaginal sexual acts, i.e., penile-anal and penile-oral sex, for all, including both heterosexual and homosexual persons, and thus constitutes a clear violation of the right to privacy. This Hon'ble Court has not addressed this issue at all, despite a clear finding from the High Court on the same (paras 47-48 of the High Court judgment).

LLL. FOR THAT this Hon'ble Court has failed to record a finding whether criminalisation of intimate sexual conduct of individuals impairs the dignity of persons under Article 21 or not, as argued by the Respondents.

MMM. FOR THAT Section 377, by proscribing certain sexual acts between consenting adults in private, demeans and degrades the dignity of all individuals, irrespective of their sexual orientation. In particular, Section 377 criminalises the only form of sexual expression, i.e., penile-oral or penile-anal sex, of the homosexual men and transgender/hijra persons.

This strikes at the root of the dignity and self-worth of the homosexual men and transgender/hijra persons. This Hon'ble Court has not addressed this issue at all, despite a clear finding from the High Court on the same (paras 48-52 of the High Court judgment).

NNN. FOR THAT this Hon'ble Court has failed to consider whether Section 377 violates the right to health of men who have sex with men, as argued by the Respondents and the Union of India. Criminalisation of same sex activity impedes access to health services as well as makes it difficult for the State to reach out to these populations, who remain underground due to fear of law. This hampers the effectiveness of major health interventions, including the HIV prevention programs.

OOO. FOR THAT the High Court of Delhi had come to a specific conclusion that Section 377 hindered public health intervention efforts (paras 71-74 of the High Court decision), which has been completely ignored by this Hon'ble Court.

PPP. FOR THAT in para 43 of the impugned judgment, this Hon'ble Court has erroneously come to the following conclusion:

> "While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution."

QQQ. FOR THAT this observation of this Hon'ble Court flies in the face of well-established constitutional jurisprudence which has unequivocally and categorically laid down that the extent of violation of fundamental rights is not the determinator of whether a Statute is constitutional or not but the fact of whether the Statute in fact infracts fundamental rights.

RRR. FOR THAT this Hon'ble Court did not consider the fact that a Bench of 5 Judges of this Hon'ble Court, while dealing with the Commissions of Enquiry Act in Ram Krishna Dalmia v.

Justice S.R. Tendolkar, AIR 1958 SC 538, held that a law can be held to be constitutional even if it relates to one individual. In this regard, the relevant extract reads as under:

> "11. … (a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;"

SSS. FOR THAT the abovementioned extract of the judgment in Dalmia's case was noticed by a bench of 2 Learned Judges (of which Justice Singhvi was a member) in para 17 of Satyawati Sharma v. Union of India, (2008) 5 SCC 287.

TTT. FOR THAT it is clear that the number of people affected is irrelevant when it comes to deciding an issue of constitutionality. This Hon'ble Court, when arriving at this observation, did not take into account settled law on the subject.

UUU. FOR THAT Dalmia's principle has been followed in a catena of judgments of this Hon'ble Court, the latest being the judgment in the case of Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1, where this Hon'ble Court held that:

> "530. ... If even one individual's freedom has been curtailed, this Court is duty-bound to entertain his or her claim..."

VVV. FOR THAT Hon'ble Court has completely ignored the affidavits filed by the Ministry of Health and Family Welfare in 2006 in the High Court and in 2012 in this Court that categorically stated that fear of harassment from law enforcement agencies has driven the MSM community underground and away from essential health services, resulting in risky sexual practices and increased vulnerability to HIV (para 7 of the MOHFW's affidavit named 'Concerns of Ministry of Health'). This clearly showed that the Petitioner believed that Section 377 acted as an impediment to public health interventions.

WWW. FOR THAT the present review petition is being filed to avoid grave miscarriage of justice to thousands of LGBT persons who have been aggrieved by the order dated 11.12.2013 of this Hon'ble Court and have been put at risk of prosecution and harassment, upon re-criminalization of their sexual identities.

XXX. FOR THAT following the High Court judgment that decriminalized adult consensual sexual acts in private, including homosexual acts, a considerable number of LGBT persons had become open about their sexual orientation and identity in their families, workplaces, educational institutions and public spaces, amongst others. All those people suddenly have become vulnerable to abuse and discrimination and require immediate relief

PRAYER

It is most respectfully prayed that this Hon'ble Court may be pleased to :

A) Allow the present Review Petition seeking review of the judgment dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal No. 10972 of 2013,

B) Pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER, AS IN DUTY BOUND, SHALL EVER PRAY.

(ADVOCATE FOR THE PETITIONER)

Drawn by: Devadatt Kamat

Anoopam N. Prasad

Settled by: G.E. Vahanvati, Attorney General for India

Date of Filing:

Place of Filing:

AFFIDAVIT

I, _____S/o _____, aged about _____ years, working as _____ presently at New Delhi do hereby solemnly affirm and declare as under:

1. That I am Petitioner in the above matter and as such I am fully conversant with the facts of the case and am competent to depose to this affidavit.

2. That I have read and understood the contents of paras 1 to _____ of the accompanying Review Petition and Synopsis and List of Dates at Pages to and I.A. I say that the facts stated therein are true and correct to my knowledge and belief.

3. The contents of the I.A. are true and correct and nothing false has been stated therein.

DEPONENT

VERIFICATION

I, the above named deponent do hereby verify that the contents of paras 1 to 3 of this affidavit are true and correct to be best of my knowledge and belief and nothing material has been concealed therefrom.

DEPONENT