IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

(ORDER XL, RULE 1)

REVIEW PETITION (CIVIL) No. of 2014

(Against the Order dated 11.12.2013 in Civil Appeal No. 10972 of 2013 (arising out of Special Leave Petition (Civil) No. 15436 of 2009) passed by this Hon'ble Court: SOUGHT TO BE REVIEWED)

IN THE MATTER OF:

Minna Saran & Others … PETITIONERS

Versus

Suresh Kumar Koushal & Others … RESPONDENTS

WITH

I.A. No. of 2014 : An application seeking oral hearing in open court

AND

I.A. No. of 2014 : An application for stay

PAPER-BOOK

(FOR INDEX KINDLY SEE INSIDE)

ADVOCATE FOR THE PETITIONER: NIKHIL NAYYAR

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IN THE SUPREME COURT OF INDIA

CIVIL /~~CRIMINAL~~ APPELLATE JURISDICTION

REVIEW PETITION (CIVIL) NO. _____ OF 2014

IN THE MATTER OF:

Minna Saran & Others … PETITIONERS

Versus

Suresh Kumar Koushal & Others … RESPONDENTS

OFFICE REPORT ON LIMITATION

1. The Petition is/are within limitation.

2. The Petition is barred by time and there is a delay of """"____ days in filing the present review petition against the order dated 11.12.2013 in Special Leave Petition (C) No. 15436 of 2009 a and petition for condonation of """"_____ days' delay has been filed.

3. There is delay of ____ days in re-filing the petition and petition for condonation of ____ days' delay in re-filing has been filed.

[BRANCH OFFICER]

NEW DELHI

FILED ON:

SYNOPSIS

The present review Petitioners seek review of the judgment and final order of this Hon'ble Court dated 11.12.2013 in C.A. 10972 of 2013 (arising out of SLP(C) 15436/2009) whereby this Hon'ble Court was pleased to set aside the judgment of the Delhi High Court in *Naz Foundation* v. *Government of the NCT of Delhi,* WP (C) 7455 of 2001, holding Section 377 of the Indian Penal Code, insofar as it criminalises consensual sexual acts of adults in private to be unconstitutional and in violation of Articles 14, 15 and 21 of the Constitution. In order to save the provision from the vice of unconstitutionality, the High Court had read down the provisions of Section 377 to apply only in respect of non-consensual penile non-vaginal sex, and sexual acts by adults with minors. This Hon'ble Court, by the impugned judgment, set aside the judgment of the High Court and held that Section 377 of the Indian Penal Code was constitutional and that it applied to acts, irrespective of age or consent of the parties involved. The present Petitioners, who are parents of LGBT children, were interveners in the SLP (C) No. 15436 of 2009 vide order dated 07.02.2011 of this Court in I.A. No. 8 of 2010. It is submitted that Review Petition No. 41-55/2014 filed by the Naz Foundation also seeks review of the judgment impugned herein.

It is submitted that the impugned judgment and order dated 11.12.2013 passed by this Hon'ble Court suffers from errors apparent on the face of the record and warrants review, for the following reasons (amongst others urged in greater detail in the grounds to this Review Petition):

1. The impugned judgment completely fails to consider the argument that Section 377 of the Indian Penal Code, 1860 was violative of Article 15 of the Constitution.

   - The High Court, in its judgment, after specifically interpreting Article 15 of the Constitution, concluded that Section 377 was violative of that provision.

   - Contentions supporting this finding were urged before this Hon'ble Court and are noticed *inter alia* in paragraph 19.9 of the impugned order.

   - However, the impugned judgment does not thereafter advert to or consider this fundamental contention.

2. The Petitioners had further contended that Section 377 violated the right to life and liberty guaranteed under Article 21 since it infringed on dignity, privacy and liberty of LGBT persons.

   - This Hon'ble Court recognises that the right to dignity is a part of the Right to Life and Liberty guaranteed vide Article 21 of the Constitution. This Hon'ble Court undertakes an analysis of the component rights enshrined as part of Article 21 in paragraph 45 of its judgment and concludes the discussion in paragraph 50. However, thereafter, the impugned judgment does not proceed to apply this analysis to Section 377 and to even examine

whether the said section violates Article 21. Failure to even address this crucial question, especially after it being observed by this Hon'ble Court as a question presented before it in both written and oral submissions, is an error apparent on the face of the record.

- The present Petitioners intervened in their position as parents of LGBT persons who have suffered because of the stigmatisation of their children as criminals on the basis of their sexual orientation or gender identity. The present Petitioners have adduced their personal narratives before this Hon'ble Court demonstrating the unconstitutional discrimination and affront to dignity and privacy that their families have faced due to section 377. These aspects have not been considered at all.

3. In not applying the precedents cited before it as regards the tests under Article 14 of the Constitution to the facts at hand, the impugned judgement suffers from an error apparent on the face of the record

- In paragraph 42 of the impugned judgment, this Hon'ble Court has held that those who indulge in carnal intercourse "in the ordinary course" and "against the order of nature" constitute different classes.

- It is submitted that this Court has not applied the precedents cited before it to determine whether

there exists any rational basis for the classification or nexus of the classification with the objective of section 377. Neither has it considered wither the objective of criminalising consensual sexual activity between adults is a reasonable state object. In failing to apply the precedents and law cited before it to the facts at hand, the impugned judgment suffers from an error apparent on the face of the record.

4. The impugned judgment suffers from an error apparent on the face of the record inasmuch as, after noticing the arguments of the present Petitioners on the interpretation of Section 377, it fails to consider or record any view on these submissions

≅ It is submitted that the impugned judgment has not even considered the argument raised on behalf of these Petitioners that section 377 of the Indian Penal Code should be interpreted in light of it being placed in Chapter XVI of the statute which deals with offences affecting the human body. It was argued that in light of this decision to place the provision in Chapter XVI, it would have to be interpreted as being in the nature of offences relating to sexual assault i.e. acts done without consent. Although this contention is noticed in paragraphs 17.6 and 17.7 of the judgment, there is no consideration of this contention.

5. It is submitted that the impugned judgment suffers from a serious error apparent on the face of the record in its understanding on the role of Fundamental Rights as a guarantee to all persons regardless of how miniscule the group may be.

≅ In paragraph 43 of the impugned judgment, this Hon'ble Court has held that only a "miniscule fraction" of the country's population constitute lesbians, gays, bisexuals or transgenders, and that their prosecutions cannot be made a basis for challenge to the validity of Section 377. It is submitted that this understanding is entirely contrary to all settled notions of Constitutional Law. It is humbly submitted that the very purpose of the constitutional guarantee of fundamental rights is to ensure that all persons are guaranteed these basic human rights, irrespective of their numbers. By holding that a minority be effectively placed at the tyrannical whims and fancies of the majority, it is submitted that the impugned judgment suffers from a very serious error apparent on the face of the record, warranting review.

6. It is submitted that this Hon'ble Court must exercise its power to review its judgments, in cases where an abridgement of Fundamental Rights is made out

≅ As a result of the impugned order, a significant

minority of this country have been stripped of their Fundamental Rights to equality, privacy, dignity and life. This minority does not enjoy a political constituency or mass resources at its command to counter the systemic discrimination and inequality that it faces. Therefore, its only recourse is to approach this Hon'ble Court with the prayer that this Court act as protector of constitutional rights and liberties of Indian citizens and extend the protection of the Constitution to these citizens of India. On this ground also the impugned order warrants review.

7. It is submitted that in omitting to consider the material and evidence placed on record and in instead concluding that there was no factual foundation for the High court's judgment, the impugned judgment suffers from an error apparent on the face of the record.

- Paragraph 40 of the impugned judgment notes that there are insufficient factual grounds for "a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment either by State or its agencies or the society."

- It is submitted that this Hon'ble Court has not considered the affidavits filed by the present petitioners detailing the harassment, discrimination, insults and mistreatment meted out to their LGBT children who are full citizens of this country and which is a direct result of section 377. The

impugned judgment also fails to notice the extensive materials that had been placed before the High Court detailing uncontroverted facts showing that section 377 targets LGBT people, which facts are noticed in paragraphs 21 and 74 of the High Court judgment.

For all the above reasons, as well as on the basis of the grounds set out hereunder, the Petitioners pray that this Hon'ble Court be pleased to review the impugned order.

LIST OF DATES

2001	The Writ Petitioner Naz Foundation files WP (C) 7455/2001 before the High Court of Delhi with the prayer that Section 377 be declared as unconstitutional and violative of Articles 14, 15, 19(1)(a) and 19(1)(d) and 21 of the Constitution insofar as it criminalises consensual sexual activity between adults conducted in private.
2.9.2004	The writ petition is dismissed by a Division Bench of the High Court of Delhi.
3.11.2004	High Court of Delhi passes order dismissing review petition filed against

its order dismissing WP(C) 7455/2001.

Thereafter the Writ Petitioner Naz Foundation files SLP(C) Nos. 7217-7218/2005 against the orders dated 02.09.2004 and 3.11.2004 before this Hon'ble Court.

3.2.2006 This Hon'ble Court allowed the appeal and remanded the writ petition for fresh consideration and decision by the High Court in the following terms:

> *"The challenge in the writ petition before the High Court was to the constitutional validity of Section 377 of the Indian Penal Code, 1860. The High Court without examining the issue, dismissed the writ petition by the impugned order observing that there is no cause of action in favour of the appellant as the petition cannot be filed to test the validity of the legislation and therefore, it cannot be entertained to examine the academic challenge to the constitutionality of the provision.*
>
> *The learned Additional Solicitor General, if we may say so, rightly submits that the matter requires examination and is not of a nature which ought to have been dismissed on the ground afore-stated…We are, however, not examining the issue on merits but are of the view that the matter*

does require consideration and is not of a nature which could have dismissed on the ground afore-stated. In this view, we set aside the impugned judgment and order of the High Court and remit Writ Petition(C) No. 7455 of 2001 for its fresh decision by the High Court."

This Hon'ble Court therefore directed the High Court to entertain the petition on merits, and to consider whether it would be constitutionally permissible to invoke Section 377 against adults who were having consensual sex in private. In view of the aforementioned order of this Hon'ble Court, any objections as to facutal foundation, locus standi of the writ petitioner and the circumstances in which the petition came to be filed were no longer open for argument as these objections stood conclusively determined, in view of this Hon'ble Court's order.

2.7.2009 The High Court rendered its decision and gave its declaration in the following terms:

"We declare that Section 377 IPC, insofar as it criminalises consensual sexual acts of adults in private, is violative of Article 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. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act."

09.07.2009	SLP(C) 15436/2009 was filed by third parties who were neither parties before the High Court nor demonstrated how they were personally aggrieved by the judgment of the High Court. The Union of India accepted the declaration granted by the High Court and refused to appeal this judgment.
07.02.2011	This Hon'ble Court was pleased to pass orders in I.A. No.8/2010 allowing the present petitioners to act as interveners in SLP (C) 15436/2009.
13.02.2012	This Hon'ble Court began hearing final arguments in the above matter.

23.02.2012	Learned ASG, Mr. P.P. Malhotra, purporting to appear for the Ministry of Home Affairs, reiterated the previous stand taken by that Ministry before the High Court of Delhi and submitted that this Ministry was opposed to the decriminalisation of homosexuality.
23, 28.02.2012	Learned ASG, Mr. Mohan Jain, appearing for the Ministry of Health took a contrary stand and submitted that Union of India had decided not to appeal against the impugned order of the High Court of Delhi as per decision taken on 20.07. 2009, that a Group of Ministers of the Union of India had found that there was no legal infirmity with the Order of the High Court of Delhi. He further submitted that section 377 of the Indian Penal Code hampered HIV prevention work.
28.02.2012	This Hon'ble Court was pleased to record as follows: *Learned Additional Solicitor General appeared and read out what he termed as the*

recommendations made by the Group of Ministers and the decision of the Cabinet.

By the same order, the Union of India was directed to file an affidavit of the concerned Secretary incorporating therein the recommendations made by the Group of Ministers and the decision taken by the Cabinet.

1.3.2012 Affidavit was filed on behalf of the Union of India by the Home Secretary. In this affidavit, filed by the Home Secretary, it was stated that there was no legal error in the impugned judgment by the High Court.

1.3.2012

& 13.3.2012 Mr. Fali S. Nariman, Senior Counsel representing the present review petitioners, made his oral submissions before this Hon'ble Court.

22.03.2012 The Learned Attorney General appeared before this Hon'ble Court on behalf of

	the Union of India and reiterated the stand of the Union of India that it finds no legal error in the judgment of the High Court accepts the same. The Attorney General also filed written submissions before this Hon'ble Court stating that Union of India does not find any legal error in the judgment of the High Court and accepts the correctness of the same; that this was also clear from the fact that it has not filed any appeal against the judgment of the High Court.
27.03.2012	Oral hearings in the case concluded and judgment was reserved.
14.11.2012	The Protection of Children from Sexual Offences Act, 2012 came into force. This Act protects all persons below the age of 18 from all forms of sexual assault, rendering the key purpose of Section 377 i.e. to protect children from sexual abuse otiose.

03.02.2013	The Criminal Law (Amendment) Act, 2013 comes into force, amending *inter alia* s. 375 of the IPC. This amendment criminalizes all forms of forcible penetrative sexual intercourse committed by a man on a woman. This amendment protects women from all forms of penetrative sexual assault be it defined as carnal intercourse or sexual intercourse, rendering a key objective of Section 377 otiose.
11.12.13	About 1 year and 8 months after the conclusion of oral hearings, this Hon'ble Court allowed the Civil Appeals and set aside the order of the Delhi High Court in WP (C) 7455 of 2001. It is submitted that in rendering the impugned judgment order, this Hon'ble Court failed to consider the contentions raised by the Petitioners to the effect that Section 377 was violative of Articles 15 and 21 of the Constitution. The impugned judgment also erroneously concludes that no factual foundation was placed on record and no material was produced to

demonstrate that Section 377 was being used to harass and discriminate against the LGBT community, without taking into account the affidavits, documents and orders placed on record by the various parties, in this context, before the High Court as well as this Hon'ble Court. Further, the impugned judgment erroneously holds that the LGBT community was only a "miniscule fraction" and that their possible persecution could not be a basis for holding that the provision was unconstitutional. It is humbly submitted that this conclusion is entirely contrary to fundamental principles of Constitutional Law which mandate that the human rights of even the smallest minorities be protected against a tyrannical majority. It is submitted that the impugned judgment, which permits an abridgement of the Petitioner's fundamental rights on an erroneous reading of the law, without taking into consideration the contentions of the

Petitioners as well as the material placed on record, suffers from errors apparent on the face of the record, mandating review by this Hon'ble Court.

13.1.2014 Hence, this Review Petition.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

REVIEW PETITION (CIVIL) No. of 2014

IN THE MATTER OF:

A PETITION UNDER ORDER XL, RULE 1 OF THE SUPREME COURT RULES, 1966 FOR REVIEW OF THE ORDER OF THIS HON'BLE COURT DATED 11.12.2013 PASSED IN CIVIL APPEAL NO. 10972 OF 2013 (ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NO. 15436 OF 2009)

IN THE MATTER OF:

1. Minna Saran,
   Aged about 66 years,
   Residing at E-301,
   Krishna Apra Residency,
   Sector 61, NOIDA.

2. Col. (Retd) Rajeshwar Saran,
   Aged about 80 years,
   Residing at E-301,
   Krishna Apra Residency,
   Sector 61, NOIDA.

3. Suresh Shripan Hemmady,
   Aged about 76 years,
   Residing at C-7, Anantashram,
   Proctor Road,
   Mumbai – 400 007.

4. Shaila Suresh Hemmady,
   Aged about 73 years,
   Residing at C-7, Anantashram,
   Proctor Road,
   Mumbai – 400 007.

5. Shakuntala Vijaykumar Khire,
   Aged about 74 years,
   Residing at E18/12, Sarita Nagri,
   Phase II, Pune Sinhagad Road,
   Pune 411030.

6. Chitra Palekar,
Aged about 66 years,
Residing at A501,
Vintage Pearl, 29th Road,
Bandra (West),
Mumbai 400050.

7. Vijayam P.S.,
Aged about 62 years,
Residing at XVI/170,
Manayath House, Mammiyur,
Guruvayoor 680101,
Thrissur District,
Kerala.

8. Munithayamma,
Aged about 54 years,
Residing at No. 34, 'B' Street,
Gopalapura,
Magadi Road,
Bangalore 560 023.

9. A. Flavie, aged about 56 years,
No. 12, Singaramma Compound,
Near Old Madras Soap Factory,
DG Halli,
Bangalore 560 045.

10. Mrs. Shobha Doshi,
Aged about 62 years,
R/o 302, C Wing, Anant Regency,
46 MM Road, Opp. Mulund,
Telephone Exchange,
Mulund (West),
Mumbai – 400080.

11. Padma V., aged about 54 years,
Residing at 4, Veerasami Road,
Kuirnji Nagar, Perungudi,
Chennai – 600 096.

12. Dr. K. S. Vasudevan,
Aged about 68 years,
Residing at H76/S5, Mullai Apartments,
Tiruvallur Nahar, Tiruvanmiyur,
Chennai – 600 041.

13. Janaki Vasudevan,

Aged about 65 years,
Residing at H76/S5, Mullai Apartments,
Tiruvallur Nahar, Tiruvanmiyur,
Chennai – 600 041.

14. Mrs. Ava Chakrabarty,
Aged about 67 years,
75, Jawpur Road,
Kolkata – 74.

15. Mrs. Vijayalakshmi Ray Chaudhuri,
Aged about 79 years,
Mr. Das' Nursing Home & Diagnostic Centre Pvt. Ltd.,
New town, Diamond Harbour,
24 Parganas,
West Bengal – 743 331.

16. Pramathanath Ray Chaudhuri,
Mr. Das' Nursing Home & Diagnostic Centre Pvt. Ltd.,
New town, Diamond Harbour,
24 Parganas,
West Bengal – 743 331.

17. Mrs. Mamata Jana,
Aged about 54 years,
Residing at 424, GT Road,
Kolkata.

18. Mrs. Bina Guha Thakurta (62),
7C, Tiljala Place,
Kolkata – 700017. …
PETITIONERS

VERSUS

1. Suresh Kumar Koushal

S/o Shri S.D. Koushal,

Aged about 53 years,

C- 105, Nirman Vihar,

Delhi – 110 092,

Delhi.

2. Dr. Mukesh Kumar Koushal

S/o Shri S.D. Koushal,

Aged about 53 years,

C- 105, Nirman Vihar,

Delhi – 110 092,

Delhi.

3. NAZ Foundation,

A society registered under

The Societies Regisrar Act,

D – 45, Gulmohar Park,

New Delhi – 110 049

Delhi

4. Government of NCT Delhi,

through the Secretary,

Social Welfare Delhi Secretariat ITO,

New Delhi

Delhi.

5. Commissioner of Police

Police Headquaters,

ITO, New Delhi.

Delhi

6. Delhi Sate AIDS Control Society

11, Lancess Road, Timarpur,

Delhi – 110 054

Delhi.

7. National AIDS Control Organization,
Setup by the Union of India,
Having its Office
9th Floor, Chandralok Building
Opp. Imperial Hotel,
New Delhi
Delhi.

8. Union of India,
Through Secretary
Ministry of Home,
North Block, India Gate
New Delhi.

9. Union of India,
Through Secretary
Ministry of Health Welfare,
Having its office at
344, Nirman Bhavan,
Maulana Azad Road,
New Delhi.

10. Union of India,
Through Secretary
Ministry of Social Welfare,
Shastri Bhavan,
New Delhi.

11. Joint Action Council Kannur,
C-38, Anand Niketan
New Delhi – 110021.

12. Voices Against 377
A coalition of 12 organisations
Having its address at
11, Mathura Road,
First Floor, Jangpura B
New Delhi – 110013 …RESPONDENTS

TO

THE HON'BLE THE 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. That the present petitioners are filing the present review petition seeking a review of the final judgment and order of this Hon'ble Court dated 11.12.2013 in Civil Appeal No. 10972 of 2013 and other connected appeals. The present petitioners are interveners in Civil Appeal No. 10972 of 2013 arising out of SLP (Civil) No. 15436 of 2009 vide I.A. No.8/2010, having been permitted to intervene in the

matter by this Hon'ble Court vide its order dated 07.02.2011.

2. The aforementioned civil appeals had been filed by various persons against the Judgment and final order dated 02.07.2009 passed by the High Court of Delhi in WP(C) 7455/2001. By its judgment, the Hon'ble High Court of Delhi had declared section 377 of the Indian Penal Code, 1860 unconstitutional insofar as it criminalised private, consensual sexual activity between adults and in doing so, de-criminalised millions of LGBT citizens of India. By order dated 11.12.2013, this Hon'ble Court has reversed the order of the High Court without taking into account the pleadings and materials placed on record by the Petitioners. A certified copy of this Hon'ble Court's order dated 11.12.2013 in Civil Appeal No. 10972 of 2013 and other connected matters, allowing the said appeals, is annexed herewith as **ANNEXURE P-1 (Page Nos.)**.

3. The Petitioners have not filed any other petition seeking review of the judgment and final order dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal No. 10972 of 2013.

4. **GROUNDS**:

A. It is humbly submitted that there are errors apparent on the face of the record as this Hon'ble Court has failed to consider the facts before it and has misapprehended and misapplied the law laid down by this Hon'ble Court in several cases.

Error in Recording Position of the Government of India

B. Because it is submitted that there is an error apparent on the face of the record as this Hon'ble Court has erred in recording the stand of the Union of India. At paragraph 21 of this Hon'ble Court's judgment, it is recorded that the learned Attorney General appeared before this Hon'ble Court to argue as an *amicus.* At para 22 of this Hon'ble Court's judgment, it is recorded that the learned Additional Solicitor General, Mr. P.P. Malhotra, appeared on behalf of the Ministry of Home Affairs on 23.02.2012 and submitted that the said Ministry opposed the decriminalisation of homosexuality and hence the final Judgment and Order of the Delhi High Court. It is submitted that however, thereafter, another learned ASG, Mr. Mohan Jain submitted before this Court that the Union of India, at that point, had not yet taken a stand. Thereafter, Mr. Mohan Jain submitted the recommendations of the Group of Ministers and the decision of the Cabinet with regard to

this case. The fact of ASG Mr. Mohan Jain making submissions before this Hon'ble Court is recorded at paragraph 23 of the decision. It is submitted that by order dated 28.02.2012, this Hon'ble Court was pleased to record that

> *learned Additional Solicitor General appeared and read out what he termed as the recommendations made by the Group of Ministers and the decisions of the Cabinet.*

By the same order, the Union of India was directed to

> *file an affidavit of the concerned Secretary incorporating therein the recommendations made by the Group of Ministers and the decision taken by the Cabinet.*

Thereafter, vide an affidavit dated 01.03.2012 filed before this Hon'ble Court, the Union of India by the Home Secretary recorded that there was no legal error in the judgment of the Delhi High Court. This affidavit, therefore, negatived the earlier submissions purported to be made on behalf of the Ministry of Home Affairs. Thereafter, the learned Attorney General appeared before this Hon'ble Court on behalf of the Union of India and reiterated the stand of the Union of India that it finds no legal error in the judgment of the High Court and accepts the same. The Attorney General also filed written submissions before this Hon'ble Court stating that the Union 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.

It is submitted that in view of the above, this Hon'ble Court has fallen into error in appreciating the stand of the Government of India in the present case. It is respectfully submitted that due to the same, this Court has not appreciated the fact that Government of India had made a conscious, deliberative and reasoned decision not to appeal against the judgment of the High Court of Delhi. This stand was clarified through the learned Attorney General's submissions and the affidavit filed on behalf of the Ministry of Home Affairs, Government of India. The same should be considered the sole stand of the Government of India. Only the written and oral submissions of the learned Attorney General should have been considered by this Hon'ble Court and any other submissions to the contrary, purported to be advanced on behalf of the Union, should have been disregarded. Use of the latter arguments in arriving at its decision is clearly erroneous.

C. Because it is submitted that there is an error apparent on the face of the record that this Hon'ble Court has failed to recognise that the stance of the Government of India had changed from the one it had made before the High Court of Delhi. Whereas the Government of India had defended

the constitutionality of section 377 of the Indian Penal Code at the High Court, it made a conscious decision of not appealing the Order of the High Court and submitted before this Hon'ble Court that it found no legal infirmity in the said Order. It is submitted that if there is a change in the stance of the Government of India, this Hon'ble Court has recognised the same and has proceeded with the modified submissions as the submissions by the Government. This was observed by this Hon'ble Court in *T.M.A. Pai Foundation and Others v. State of Karnataka and Others,* JT (2002) 9 SC 486

> *"Before proceeding further, it will not be out of place to mention here that there is a perceptible shift in the stand of the Union of India as could be discerned from the written submission filed by the then learned Attorney-General on behalf of the Union of India when these cases were heard earlier by another Bench and the contentions now urged by the learned Solicitor General appearing for the Union of India."*

Error in failing to consider material and evidence placed on record

D. Because it is submitted that there is error apparent on the face of the record in this Hon'ble Court's recording at paragraph 40 that there are insufficient factual grounds for "a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment either by State or its agencies or the society." It is submitted that this Hon'ble

Court has not considered the affidavits filed by the present petitioners detailing the harassment, discrimination, insults and mistreatment meted out to their LGBT children, a direct result of section 377. This section legitimises social misconceptions and ridicule which they face on a daily basis from society and making them criminals in the eyes of the law. It is submitted that the presence of section 377 gives legal backing to harassment and inferiority based on an immutable identity of individuals. This harassment and inferior status is a denial of their rights granted under the Constitution and also their human rights.

E. It is submitted that extensive materials had been placed before the High Court detailing uncontroverted facts showing that section 377 targets LGBT people. Inter alia, it was recorded in paragraph 21 of the High Court judgment:

> *"To illustrate the magnitude and range of exploitation and harsh and cruel treatment experienced as a direct consequence of Section 377 IPC,* ***respondent No. 8 has placed on record material in the form of affidavits, FIRs, judgments and orders with objectively documented instances of exploitation, violence, rape and torture suffered by LGBT persons****. The particulars of the incidents are drawn from different parts of the country. In an instance referred to as "Lucknow incident - 2002" in the report titled*

> *'Epidemic of Abuse : Police Harassment of HIV/AIDS Outreach Workers in India' published by Human Rights Watch, the police during investigation of a complaint under Section 377 IPC picked up some information about a local NGO (Bharosa Trust) working in the area of HIV/AIDS prevention and sexual health amongst MSMs raided its office, seized safe sex advocacy and information material and arrested four health care workers. Even in absence of any prima facie proof linking them to the reported crime under Section 377 IPC, a prosecution was launched against the said health care workers on charges that included Section 292 IPC treating the educational literature as obscene material. The health workers remained in custody for 47 days only because Section 377 IPC is a non-bailable offence."* (emphasis supplied)

It is further submitted that the High Court of Delhi had made a finding of fact in the impugned proceedings where it had stated in paragraph 74:

> ***"A number of documents, affidavits and authoritative reports of independent agencies and even judgments of various courts have been brought on record to demonstrate the widespread abuse of Section 377 IPC for brutalising MSM and gay community persons, some of them of very recent vintage."***

It is further submitted that incidents of torture and abuse of sexual minorities at the hands of police and state machinery has been documented by the Judiciary itself with the High Court of Madras recognising and ordering compensatory relief in *Jayalakshmi v. State of Tamil Nadu,* (2007) 4 MLJ 849. In concluding that there was no

factual foundation in support of the challenge to Section 377, this Hon'ble Court has entirely ignored the above material and evidence placed on record, thereby committing a serious error apparent on the face of the record.

F. Because it is submitted that there is an error apparent on the face of the record as this Hon'ble Court has reappraised the evidence on record before the High Court. . The observation of this Hon'ble Court that there is no factual basis to the petition amounts to re-appraising the evidence of harassment and discrimination, without even adverting to the material that was in fact placed on record, which is impermissible. It is further submitted that in fact, even this Hon'ble Court recognises the potential of section 377 to be misused for harassment and abuse when it observes in paragraph 51 of its judgment:

> *"Respondent No. 1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere* ***fact that the section is misused by police authorities and others*** *is not a reflection of the vires of the section."* (Emphasis supplied)

G. It is submitted that this Hon'ble Court has laid out well established law that in the exercise of its powers vide

Article 136 of the Constitution, it will not interfere with the findings of fact of the High Court unless the same has acted perversely or improperly. This Hon'ble Court stated in *State of Uttar Pradesh v. Babul Nath,* (2 judges) (1994) 6 SCC 29 at paragraph 5,

> *"At the very outset we may mention that in an appeal under Article 136 of the Constitution this Court does not normally reappraise the evidence by itself and go into the question of credibility of the witnesses and the assessment of the evidence by the High Court is accepted by the Supreme Court as final unless, of course, the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."*

It is submitted that the findings of fact made by the High Court of Delhi were not erroneous and did not merit a re-appreciation by this Court according to law laid down by this Hon'ble Court. It is therefore humbly submitted that findings of fact made by this Hon'ble Court in paragraphs 39 and 40 are erroneous factually as well as on law and as such, merit review.

Failure to consider arguments advanced as regards violation of Article 15 of the Constitution

H. It is humbly submitted that insofar as the impugned judgment does not even consider the argument regarding

violation of Article 15(1) of the Constitution, it suffers from an error apparent on the face of the record. It is submitted that this Hon'ble Court observed in paragraph 42 of the judgment that *"High Court was not right in declaring section 377 IPC ultra vires Articles 14 and 15 of the Constitution."* It is submitted that this Court has not based the aforementioned conclusion on an analysis of Article 15(1) which is shown in this Court's judgment. Contentions regarding violation of Article 15 were urged both before the High Court and this Hon'ble Court. The decision of the High Court of Delhi was based in part on consideration on Article 15(1) in paragraphs 99 to 104. The contentions urged in this regard before this Hon'ble Court are also briefly summarised in paragraphs 19.19 of the judgment. In the circumstances, given the decision of the High Court on this question, this Court committed a serious error in not even considering the same grounds prior to setting aside the Delhi High Court judgment.

Failure to consider arguments advanced as regards violation of Article 21 of the Constitution

I. Because it is humbly submitted that there is an error apparent on the face of the record as this Hon'ble Court has not made any findings with respect to the question of

whether Section 377 violates the dignity of LGBT persons. The Court rightly cites *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.,* (1981) I SCC 608 and recognises that the right to dignity is a part of the Right to Life and Liberty guaranteed vide Article 21 of the Constitution but does not apply this principle to the question of whether the said right is offended by section 377 of the Indian Penal Code or not. Failure to even address this crucial question, especially after it being observed by this Hon'ble Court as a question presented before it in both written and oral submissions, is an error apparent on the face of the record.

J. Because there is error apparent on the face of the record as this Hon'ble Court does not consider the submissions made by these petitioners on the grounds of Article 21 and the rights to privacy and liberty which are contained therein. This Hon'ble Court undertakes an analysis of the component rights enshrined as part of Article 21 in paragraph 45 of its judgment and concludes the discussion in paragraph 50 but does not apply the discussion to the case at hand and makes no finding. This Court rightly finds that it is established that the right to privacy and dignity are enshrined and protected by the Article 21 of the Constitution. However, there is no discussion on the submissions and arguments made by

these petitioners that section 377 is violative of these very rights guaranteed by the Constitution. The arguments made before this Hon'ble Court sought to establish that the continuance and enforcement of section 377 of the Indian Penal Code constitutes an infringement of the right to privacy by allowing state intervention in the most private sphere, namely, the home. As per the decision of this Hon'ble Court in *Gobind v. State of Madhya Pradesh,* (3 judges) (1975) 2 SCC 148 at paragraph 22,

> *"There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible state interest, the characterization of the claimed rights as a fundamental privacy right would be of far less significance."*

It is submitted that this Hon'ble Court cites the aforementioned case with approval at paragraph 47 of its judgment but fails to undertake the analysis which is mandated by it in the case before it. It is humbly submitted that the Court does not even consider the argument of whether Article 21 is violated by section 377. Therefore, it is submitted that the impugned judgment

suffers from an error apparent on the face of the record, mandating review.

Failure to consider arguments by present Petitioners on the interpretation of Section 377

K. Because it is humbly submitted that there is an error apparent on the face of the record as this Hon'ble Court has not even considered the argument raised on behalf of these Petitioners that section 377 of the Indian Penal Code should be interpreted in light of it being placed in Chapter XVI of the statute which deals with offences affecting the human body. Although this contention is noticed in paragraphs 17.6 and 17.7 of the judgment, there is no consideration of this contention. The Petitioners had submitted that the placement of Section 377 in Chapter XVI is in contrast to Chapter XIV of the Code, which deals with offences affecting the public health, safety, convenience, decency and morals. It was urged that Section 377 be interpreted in a manner to only criminalise acts which harm the body without consent, and not those acts which are done with valid consent. Substantial written and oral arguments were made before this Hon'ble Court on this ground. It was argued that in light of this decision to place the provision in Chapter XVI,

it would have to be interpreted as being in the nature of offences relating to sexual assault. It was also argued that chapter headings should indicate and characterise the offences listed therein. In support of arguments for this scheme of interpretation, the decision of this Hon'ble Court in the case of *Raichuramatham Prabhakar v. Rawatmal Dugar,* (2004) 4 SCC 766 was placed before this Court. It is submitted that in light of this argument, it becomes clear that Section 377 should be interpreted as prohibiting non-consensual sexual conduct, sexual assault, and sexual conduct when one of the parties is a minor (where consent would be irrelevant). Therefore, the decision of the High Court, insofar as it rendered section 377 of the Indian Penal Code inapplicable to private, consensual, sexual activity between adults would not suffer from any infirmity. The argument raised by the present petitioners, if considered, could have lent certainty to the interpretation of the statute, which was inherently and impermissibly vague. It is humbly submitted that this Court has not even considered this argument or the tenability thereof thereby falling into an error apparent on the face of the record.

Error in Extending Presumption of Constitutionality

L. Because it is humbly submitted that there is an error apparent on the face of the record in this Court's holding in paragraph 28 of the judgment stating that pre-constitutional laws are manifestations of the will of the people of India through the Parliament and are presumed to be constitutional just as post-constitutional laws would be. It is submitted that Article 372 of the Constitution of India merely states that the laws in force prior to the coming into force of the Constitution of India shall continue to be in force. This provision is made subject to other Articles in the Constitution, including Article 13, which expressly stipulates that pre-Constitution laws shall, insofar as they are inconsistent with Part III of the Constitution, be void. In the circumstances, it is humbly submitted that it could not by any stretch be concluded that pre-Constitutional laws are presumed to be Constitutional. The said proposition that pre-constitutional legislation must also be presumed to be constitutional is not found in Article 372 or any judicial pronouncement. This Hon'ble Court, in its judgment in *Gulabhai Vallabhai Desai & Others v. Union of India,* (5 judges) AIR 1967 SC 1110 at paragraph 23 states that the law making authority cannot be presumed to be cognizant of limits on its powers while legislating if such limits have been introduced after the enactment of the law in question. In

the present case, it is submitted that the legislative authority in 1860 could not have been cognizant of the limitations placed upon the exercise of such power by the Constitution. In such a situation, Article 372 cannot extend the presumption of constitutionality of the pre-constitution statute. It is further submitted that this Hon'ble Court has held in *Anuj Garg & Others v. Hotel Association of India & Others,* (2 judges) AIR 2008 SC 663 at paragraph 20:

> *"When the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, inter alia, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15,* ***the burden therefore would be on the State.*** *While considering validity of a legislation of this nature, the court was to take notice of the other provisions of the Constitution including those contained in Part IV A of the Constitution."* (Emphasis supplied)

In light of the aforementioned precedent which was placed on record before this Hon'ble Court in the course of the hearing, it is respectfully submitted that this Hon'ble Court erred on the face of the record in concluding that there was a presumption of constitutionality to pre-constitutional legislation.

Error in appreciating the factual evidence on record

M. Because it is humbly submitted that there is an error apparent on the face of the record in this Hon'ble Court's treatment of the credentials of one of the Respondents in the impugned Civil Appeal as a ground for dismissing the challenge to the constitutionality of section 377. This Hon'ble Court observed at paragraph 40 of the impugned judgment that:

> *"The writ petition filed by respondent No. 1 was singularly laconic inasmuch as except giving brief detail of the work being done by it for HIV prevention targeting MSM community, it miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic human rights to them."* (Emphasis supplied)

It is firstly submitted that sufficient material had been placed on record in the course of the hearings, in the form of affidavits, and documents including court orders, to demonstrate discrimination and harassment, as well as denial of basic human rights to members of the MSM community. However, it is submitted that this has not at all been considered. It is submitted that even otherwise, this Hon'ble Court has previously considered forms of petitions sufficient to invoke its extraordinary powers without any materials or evidence adduced therewith. It is humbly submitted that this Hon'ble Court erred in observing that the writ petition filed before the High Court was lacking in evidence, as the other pleadings filed

along with the petition have also to be considered by it. It is further submitted that this Hon'ble Court in *Bandhua Mukti Morcha v. Union of India,* (3 judges) AIR 1984 SC 802 at paragraph 88, held as follows:

> *"Experience shows that in many cases it may not be possible for the party concerned to file a regular writ petition in conformity with procedure laid down in the Rules of this Court. It further appears that this Court for quite some years now has in many cases proceeded to act on the basis of the letters addressed to it. A long standing practice of the Court in the matter of procedure also acquires sanctity. It may also be pointed out that in various cases the Court has refused to take any notice of letters or other kind of communications addressed to Court and in many cases also the court on being moved by a letter has directed a formal writ petition to be filed before it has decided to proceed further in the matter."*

It has been held several times by this Court in *M.C. Mehta & Another v. Union Of India & Others,* AIR 1987 SC 1086, *S.P. Gupta v. Union of India,* (1981) Supp. SCC 87, *Peoples' Union for Democratic Rights v. Union of India,* AIR 1982 SC 1473, that even a letter is enough to invoke the jurisdiction of a High Court under Article 226 or of this Hon'ble Court under Article 32.

Error in Appreciating Scope and Nature of Judicial Review

N. Because it is submitted that there is an error apparent on the face of the record as this Hon'ble Court has erred in recording in paragraph 33 of its judgment that it is not

empowered to strike down a law merely in light of changing societal values as regards the legitimacy of its purpose and its need, without noticing judgments to the contrary cited before it. It is submitted that this Hon'ble Court, in *Anuj Garg v. Hotel Association of India and Others,* (2008) 3 SCC 1 at paragraph 8:

> *"Changed social psyche and expectations are important factors to be considered in the upkeep of law. Decision on relevance will be more often a function of time we are operating in. Primacy to such transformation in constitutional rights analysis would not be out of place."*

Further, this Hon'ble Court, in its judgment in *John Vallamattom v. Union of India,* (3 judges) AIR 2003 SC 2902, held in paragraph 33:

> *"It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26th January 1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation."*

It is submitted that this Hon'ble Court has cited the two aforementioned decisions with approval in its judgment dated 11.12.2013. Further, Justice Singhvi while delivering the opinion of this Hon'ble Court in *Satyawati*

Sharma v. Union of India, (2 judges) (2008) 5 SCC 287 at para 29 had observed:

> "*It is trite to say that legislation which may be quite reasonable and rational at the time of enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equality and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it found that the rationale of classification has become non-existent."*

However, this Hon'ble Court has made the observation in paragraph 33 of its present judgment that it is not empowered to strike down a law merely by virtue of the perception of the society having changed as regards the legitimacy of its purpose or need. It is submitted that such a conclusion, which is contrary to the aforementioned judgments, is an error on the face of the record.

O. Because it is submitted that there is error apparent on the face of the record in paragraphs 30 and 31 of the judgment inasmuch as this Hon'ble Court after correctly appreciating the nature of "reading down" of a statute to cure it of unconstitutionality, did not consider application of the same to Section 377 or assign any reason for not applying it to Section 377. The contentions of the parties and the validity of the reasoning of the High Court on this issue are not considered or analysed in the judgment and no reasons are given in support of this Hon'ble Court's

conclusions on this issue. This Hon'ble Court declares that the purpose of reading down or reading into a provision is to make it effective, workable and ensure that the objective of the Act are attainable. This Hon'ble Court states that in engaging in the practice of reading down, the Court cannot change the essence of the law and create a new law which in its opinion is more desirable. This Hon'ble Court has cited its previous decisions and precedents to reach its conclusion but has not applied the precedents it cites to the present case. It is respectfully submitted that the decision of the High Court of Delhi had not changed the essence of the law and has not created a new law. It is submitted that the order of the High Court of Delhi was a valid exercise of reading down a criminal statute. The order and the judgment of the High Court held that sexual acts between adults, in private and based on consent would not be covered under section 377, thereby severed the application of the law.

P. Because there is error apparent on the face of the record in the observation made by this Hon'ble Court in paragraph 31(iii) of the judgment where the doctrine of severability is discussed and it is stated:

> *"This doctrine should be applied keeping in mind the scheme and purpose of the law and the*

> *intention of the Legislature and should be avoided where the two portions are inextricably mixed with one another."* (Emphasis supplied)

It is respectfully submitted that such a position is based on an erroneous reading of the decision of this Hon'ble Court in *R.M.D. Chamarbaugwalla v. Union of India,* (5 judges) AIR 1957 SC 628 at paragraph 26 where this Court was pleased to observe:

> *"If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable."*

It is further submitted that this Hon'ble Court also stated in paragraph 16 of its decision in *R.M.D. Chamarbaugwalla:*

> *"It is the true nature of the subject-matter of the legislation that is the determining factor, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it."*

It is respectfully submitted that the principle of law developed by *R.M.D. Chamarbaugwalla* is the principle of severability of enforcement of a provision against a class. This principle was also cited in *Kedar Nath Singh v. State of Bihar* 1962 Supp (2) SCR 769. The ruling in Chamarbuagwala's case was also applied recently to criminal statutes by this Court in *Indra Dass v. State of Assam*. [2011] 4 S.C.R. 289. Application of the principle of

severability of enforcement does not alter the essence of the law or tamper with the text of the law, but merely states that the provision will not apply against a class or group. It is humbly submitted that in not applying the principle of severability of enforcement in the present case, and in misreading the previous judgments of this Hon'ble Court on this question, the impugned order suffers from errors apparent on the face of the record.

Error in Appreciating the Nature and Effects of Section 377

Q. Because there is error apparent on the face of the record that this Hon'ble Court has not considered the reported cases of application of section 377 of the Indian Penal Code where there is no element of coercion and both the parties are adults. At paragraph 38 of its decision, this Court observes,

> *"All the aforementioned cases refer to non consensual and markedly coercive situations and the keenness of the court in bringing justice to the victims who were either women or children cannot be discounted while analyzing the manner in which the section has been interpreted. We are apprehensive of whether the Court would rule similarly in a case of proved consensual intercourse between adults."* (Emphasis supplied)

It is respectfully submitted that there exist examples where section 377 of the Indian Penal Code has been applicable where there has been consent involved and this Hon'ble Court has not considered the same. E.g. in

(Meharban) Nowshirwan Irani v. Emperor, AIR 1934 Sind 206, the High Court of Sindh had applied section 377 to a situation where the prosecution could not prove any coercion. Ultimately, though the High Court set aside the conviction of the appellant on the grounds of insufficient evidence of whether the prohibited act or attempt thereof had actually occurred, it did not find any problem with the applicability of the provision itself. Further, even though there was no conclusive evidence present in the particular case, the Court considered it fit to observe

> *"Coming to the evidence of the young man Ratansi, …. The doctor who has examined him is of the opinion that the lad must have been used frequently for unnatural carnal intercourse. If he was in the house of the accused behind locked doors, I have not the smallest hesitation in believing that he had gone there voluntarily. Had there been the slightest resistance on his part, there would have been noticed some symptoms, such as torn clothes, or scratches, or some kind of injuries on his anus."*

It is submitted that this Hon'ble Court has not considered this case as proof of the fact that section 377 remains applicable and has been utilised against consensual, private, same-sex acts between adults. It is further submitted that the Petitioners herein had in any event argued that irrespective of actual prosecutions of offences under Section 377, there is a larger body of cases of persecution carried out under the rubric of Section 377. Thus there are cases of blackmail, torture and abuse

which do not even result in an FIR, cases which result in an FIR but do not go much further as well as cases which result in decisions of the sessions court. It is this entire history of persecution which had been placed before the Hon'ble Court through affidavits, judgments and FIR's which is the basis for the factual claim of the use of Section 377 against consenting adults. However, these submissions and the material placed in this regard have not been considered and it is humbly submitted that as a result, the impugned order suffers from an error apparent on the face of the record.

Error in understanding the Role of Fundamental Rights as a guarantee to all persons regardless of how miniscule the group may be

R. It is submitted there is a grave error apparent on the face of the record inasmuch as this Hon'ble Court has relied on the number or small size of people constituting the minority while determining whether the same would be entitled to the fundamental rights. At paragraph 43 of this Court's judgment, it is held as follows:

> *"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 the last more than 150 years less than 200 persons have been prosecuted (as per 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."*

It is submitted that if a law violates the Fundamental Rights of even a single citizen without justification, it would be held unconstitutional by this Hon'ble Court as that is the duty cast upon it by Article 32 of the Constitution. It does not matter and is irrelevant that the minority targeted by the impugned law may be a small or weak minority. The duty of this Hon'ble Court is to protect and uphold the Fundamental Rights of each and every citizen of India and the size of the minority should not be of any account in the determination of whether it would be entitled to the protection of Fundamental Rights. It is humbly submitted that the above observations run contrary to the great legacy and the judgments of this Hon'ble Court wherein, this Court has acted as the protector of the weakest of minorities and the smallest of numbers of people. By holding that a minority be effectively placed at the tyrannical whims and fancies of the majority, it is submitted that the impugned judgment suffers from an error apparent on the face of the record.

S. It is further submitted that section 377 has a radiating impact and moves outward from affecting LGBT persons to also affecting the family members of LGBT persons. The families of LGBT persons also experience the

apprehension, fear and vulnerability which disturbs the right to peaceful enjoyment of family life and indeed the right to life with dignity itself. Constantly apprehending that their children could be arrested under Section 377, the law disturbs the right to life of a wider range of people beyond the 'so called' minority of LGBT persons. The present Petitioners are all parents and family members of LGBT persons and their affidavits, setting out their apprehensions and fears have not at all been considered while passing the impugned judgment.

T. This Hon'ble Court in its decision in *Sunil Batra (II) v. Delhi Administration,* (5 judges) AIR 1980 SC 1579 in paragraph 266, held,

> *"…we cannot be oblivious to the fact that the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14."*

It is further submitted that the reliance placed by this Hon'ble Court on recording only the number of reported cases under section 377 of the Indian Penal Code to gauge the extent of application and abuse caused thereby is erroneous as it does not take into account the number of FIRs or prosecutions which could have been instituted under the section but which do not reach the level of High Court or above.

Error in Applying the tests under Article 14 of the Constitution

U. Because it is submitted that there is an error apparent on the face of the record as this Hon'ble Court has erred in the application of Article 14. At paragraph 42 of this Court's judgment, it is held:

> *"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 latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification."*

This Court has erred in appreciating the applicable precedents which it has itself cited. This Hon'ble Court's decision in *Re: Special Courts Bill,* (7 judges) (1979) 2 SCR 476 held, *inter alia:*

> *"The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act."*

It is submitted that this Court has not applied the precedent cited by it to determine whether there exists any rational basis for the classification or nexus of the classification with the objective of section 377. Neither

has it considered wither the objective of criminalising consensual sexual activity between adults is a reasonable state object. It is submitted that the classification upheld by this Hon'ble Court is exactly that which is prohibited by the judgment of *Re: Special Courts Bill* and in simply citing the judgment and failing to apply it to the facts at hand, the impugned judgment suffers from an error apparent on the face of the record. Furthermore, the differentiation created by section 377 is spurious, artificial and without basis. This Hon'ble Court has failed to consider how or in any manner section 377 has any rational nexus to the object underlying the the Indian Penal Code. It is submitted that this does not satisfy the test for reasonable and constitutional classification as laid down by this Court in *Re: Special Courts Bill.*

V. It is submitted that there is an error apparent on the face of the record as this Hon'ble Court has failed to appreciate that the sexual acts criminalised by Section 377 are the only ways in which LGBT people can express sexual intimacy with one another. This Hon'ble Court has identified the acts which are committed by LGBT persons as their sole form of sexual expression and upheld the criminality of the same, thereby criminalising the sole means that LGBT people have of expressing and building intimate attachments.

W. Because there is error on the face of the record as this court fails to appreciate that the classification created by section 377, Indian Penal Code is based on identity and not acts and is violative of Article 14 of the Constitution. This Court holds that the section creates a classification based on certain sexual acts. It holds that section 377 does not classify on the basis of gender or orientation but on the basis of the acts regulated by the section 377. It is submitted that this argument is erroneous because the direct and inevitable consequence of the law is to criminalise all forms of sexual expression LGBT persons. LGBT persons can never engage in ‘carnal intercourse’ which would be considered in conformity with the 'order of nature'. Section 377 creates a classification based on identity and not acts. This Hon’ble Court has held in *Maneka Gandhi* v. *Union of India*, (7 judges) AIR 1978 SC 597 at paragraph 56 :

> *“Article 14 is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic and, therefore, it therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.”*

This Hon'ble Court held in *Bachan Singh v. State of Punjab,* (5 judges) (1982) 3 SCC *24* in paragraph 240:

> *"It can, therefore, now be taken to be well-settled that if a law is arbitrary or irrational, it would fall foul of Article 14 and would be liable to be struck down as invalid. Now a law may contravene Article 14 because it enacts provisions which are arbitrary; as for example, they make discriminatory classification which is not founded on intelligible differentia having rational relation to the object sought to be achieved by the law or they arbitrarily select persons or things for discriminatory treatment."*

In the aforementioned case of *(Meharban) Nowshirwan Irani v. Emperor,* AIR 1934 Sind 206, the High Court of Sindh observed,

> "*Coming to the evidence of the young man Ratansi, I must say that he appears to be a despicable specimen of humanity. On his own admission he is addicted to the vice of a catamite. …."* (Emphasis supplied)

It is clear that the usage of words by the High Court of Sindh in the case has the effect of stigmatising and displays disapprobation towards LGBT people and not merely towards any particular act. It is respectfully reiterated that the classification created by section 377, Indian Penal Code is based on identity and not sexual acts and is as such violative of Article 14 of the Constitution. It targets LGBT persons as a class and creates no classification. Further, even if the classification created by section 377 is held to be only based on acts

and not identities, and thus non-arbitrary, it would fall short of fulfilling the test under Article 14, as there exists no reasonable nexus to the objectives of the Act.

Error in Applying the Principle of Unconstitutionality due to Vagueness

x. Because there is error apparent on the face of the record inasmuch as this Hon'ble Court has not properly considered or applied the principle of vagueness as rendering a penal statute unconstitutional. This Hon'ble Court notices the contentions raised by the Petitioners in this regard and acknowledges that it is a fundamental principle of criminal law that vagueness of a law would render it unconstitutional. This is observed by the Court in paragraph 44 of the judgment. This Hon'ble Court held in *Bachan Singh v. State of Punjab,* (5 judges) (1982) 3 SCC *24 in paragraph 240,*

> *"But there is also another category of cases where without enactment of specific provisions which are arbitrary, a law may still offend Article 14 because it confers discretion on an authority to select persons or things for application of the law without laying down any policy or principle to guide the exercise of such discretion. Where such unguided and unstructured discretion is conferred on an authority, the law would be violative of Article 14 because it would enable the authority to exercise such discretion arbitrarily and thus discriminate without reason. Unfettered and uncharted discretion conferred on any authority, even if it be the judiciary, throws the door open for arbitrariness, for after all a judge does not cease to be a human being subject*

> *to human limitations when he puts on the judicial robe and the nature of the judicial process being what it is, it cannot be entirely free from judicial subjectivism."*

It is submitted that the impugned section 377 of the Indian Penal Code is vague and indeterminate since this Hon'ble Court also observes in paragraph 38 that,

> *"… no uniform test can be culled out to classify acts as 'carnal intercourse against the order of nature'. In our opinion the acts which fall within the ambit of the section can only be determined with reference to the act itself and the circumstances in which it is executed."*

It is respectfully submitted that if this Hon'ble Court had engaged in analysis of section 377 in light of the precedent laid out in *Bachan Singh* it would have come to the conclusion that the provision delegates unfettered discretion to the police and law enforcement officials to prosecute and criminalise sexual conduct. The same has led to a great amount to abuse, blackmail and harassment of LGBT persons in this country as has been noted by this Hon'ble Court in paragraph 51 of the judgment. Therefore, it is violative of Article 14 of the Constitution. It is further submitted that this Hon'ble Court has held in *Kartar Singh v. State of Punjab,* (5 judges) (1994) 3 SCC 569:

> *"It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasised that laws should give the person of*

> *ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked."*

It is submitted that section 377 of the Indian Penal Code imposes such vague and indeterminate standards of behaviour which are noted by this Hon'ble Court itself, that it should be held unconstitutional for violating Article 14 of the Constitution. It is further submitted that section 377 violates the basic principles of criminal jurisprudence as have been noted by this Hon'ble Court in several previous cases. While these contentions have been noticed and the propositions of law acknowledged, it is submitted that the impugned judgment fails to apply these propositions to Section 377 and in failing to consider or assign reasons for its conclusions in this behalf, the impugned order suffers from errors apparent on the face of the record.

Y. It is submitted that there is error apparent on the face of the record in that this Court has upheld the constitutionality of the impugned section 377 of the Indian

Penal Code even after noting that the section provides no guidance to interpretation and implementation and suffers from vagueness. It is submitted that this Hon'ble Court has consistently held that there must be safeguards in the interpretation and implementation of penal statutes which has not been followed in the present case. This Hon'ble Court has held in *Tolaram Relumal v. State of Bombay,* (5 judges*)* AIR 1954 SC 496,

> *"If two possible and reasonable constructions can be put upon a penal provision, the court must lean towards the construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the court to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature."*

It is submitted that in light of the impermissibly vague and indeterminate language of section 377 of the Indian Penal Code, its implementation is bound to lead to situations of uncertainty and misuse. In such a situation, this Hon'ble Court is in error when it notes at paragraph 51,

> *"Respondent No. 1 attacked section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section."*

It is submitted that because the section is impermissibly vague and suffers from archaic phraseology, its

implementation is necessarily connected to misuse and abuse by authorities and cannot be separated therefrom. Therefore, as a result, the section as it stands today must be declared unconstitutional.

Z. It is submitted that there is error apparent on the face of the record in that this Court has not considered that there is no clear legislative intention or objective in the application of section 377 of the Indian Penal Code. In light of the fact that the section is vague and unclear, it could have been salvaged by application and interpretation in light of legislative intention. However, as noted by this Hon'ble Court in paragraph 37 of the judgment, the law was deliberately not discussed during enactment. The closest one gets to the legislative intent is the comment by Lord Macaulay on an earlier draft of what was to become Section 377 of the IPC. Lord Macaulay in reference to the earlier offence said that

> *'clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said'.*

It is submitted that the lack of discussion during the passing of the law, has created an ambiguity which dogs its application. Further, it is submitted that in paragraph 44 of the judgment, this Court quotes its former decision

in the case of *K.A. Abbas v. Union of India,* (5 judges) (1970) 2 SCC 780 stating:

> *"The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases."* (Emphasis supplied)

It is respectfully submitted that proper application of this precedent by this Court would have inevitably led to the conclusion that vagueness and lack of clarity of section 377 cannot be cured because of a total lack of evidence of legislative intent and therefore, it must be held to be violative of Article 14.

Error of Law on the Applicability and Usage of Foreign Decisions

AA. Because there is error apparent on the face of the record as this Hon'ble Court has held that judgments from foreign jurisdictions *"cannot be applied blindfolded for*

deciding the constitutionality of the law enacted by the Indian legislature." This Court relies on its decision in *Jagmohan Singh v. State of Uttar Pradesh,* (5 judges) (1973) 1 SCC 20. It is submitted that this case was noted by another decision of this Hon'ble Court in *Sunil Batra v. Delhi Administration,* (5 judges) AIR 1980 SC 1579 at paragraph 266,

> *"Now, we do not have in our Constitution any provision like the VIIIth Amendment of the U.S. Constitution forbidding the State from imposing cruel and unusual punishment as was pointed out by a Constitution Bench of this Court in Jagmohan Singh v. State of U.P. 1973 CriLJ 370 But we cannot be oblivious to the fact that the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14."*

It is therefore submitted that the use of foreign decisions to throw light on the position or principles of law is not barred by the decision of this Court in *Jagmohan.* It is further submitted that the use of the precedent to indicate that the use of foreign jurisprudence is disallowed is an erroneous position of law as this Hon'ble Court continues to cite decisions from other countries. It is further submitted that this Hon'ble Court has misapplied the *ratio* of its previous judgment in *Jagmohan.* It is submitted that the ruling in that case dealt particularly with the use of empirical data collected in foreign jurisdictions and the problem of applying the same to India. The same is

expressly noted by this Hon'ble Court at paragraph 15 of its decision in *Jagmohan* that the nature of materials being borrowed from the United States of America was statistical and therefore, could not be applied in India where "social conditions" and the "general intellectual level" were different. It is therefore submitted that this Hon'ble Court's decision in *Jagmohan* applies only as a bar against the use of foreign statistical and empirical studies and not against the use of any legal development in other jurisdictions. It is submitted that this Hon'ble Court in *Jagmohan,* after making the aforestated observation at paragraph 15 goes on to consider the development of the law with regard to mandatory death sentences in, *inter alia,* the United Kingdom (at paragraph 21). It is therefore submitted that this Hon'ble Court has fallen into serious error in holding that the decision of *Jagmohan* acts as a bar to the use of foreign law in India.

Failure to Notice Legislative Changes

AB. Because there is an error apparent on the face of the record as this Court has erred in failing to notice legislative changes in the country which have further deprived Section 377 of any use other than to target LGBT people. Since the enactment of the Protection of

Children from Sexual Offences Act, 2012, in effect since 14th November, 2012 and the Criminal Law (Amendment) Act, 2013, in effect from 3rd February, 2013, all forms of sexual assault, which include persons below the age of 18 and forms of sexual assault other than penile-vaginal forms are also covered by the law and punished wherever necessary. In light of these legislative developments, the argument that section 377 of the Indian Penal Code prohibits certain forms of sexual assault previously not covered has no merit. It is respectfully submitted that this Court has not taken legislative changes into account in reaching its decision. The judgment does not mention the Protection of Children from Sexual Offences Act, 2012 and the extract of sections 375 and 376 in paragraph 34 of the judgment are as they stood prior to the Criminal Law (Amendment) Act, 2013. It is submitted that failure to take account of legislative changes which are inextricably linked to the purpose of Section 377 constitutes error on the face of the record especially as the changes in the law have now rendered Section 377 otiose.

Error in Admitting Appeal from Decision of the High Court

AC. It is submitted that there is error apparent on the face of the record as this Hon'ble Court has erred in not

considering whether its jurisdiction under Article 136 has been properly invoked. The appellants in Civil Appeal No. 10972 of 2013 do not plead a single specific instance demonstrating how they were affected by the judgment of the Delhi High Court. They do not even demonstrate what legal interests were affected by the Delhi High Court judgment, nor do they show what rights conferred on them vide section 377, Indian Penal Code were abridged or taken away by the order of the Delhi High Court. The appellants, by their own admission, are not intended beneficiaries, or members of any affected class of persons identified by the judgment. Their legal rights are in no way directly or remotely affected by the decriminalising of adult, consensual sexual activity conducted in private. The appellants could not demonstrate or prove *locus standi* to challenge the order of the Delhi High Court. The order of the Delhi High Court had the effect of decriminalising and consequently, de-stigmatising the existence of millions of citizens of India who are lesbian, gay, bisexual and transgendered. It is submitted that the order of this Hon'ble Court has effectively re-criminalised the same population, comprising of millions of Indians. Given the nature of the case and action, this Hon'ble Court should have insisted

on a strict compliance with the requirement of *locus standi.*

AD. Because there is error apparent on the face of the record as this Court has allowed the present Respondents to take on the garb of a sovereign and defend the law as if they were the Union of India. It is submitted that the burden of defending the validity and constitutionality of statutes was upon the Union of India and the State Government. By not appealing the Delhi High Court judgment, and by its aforementioned submissions through the learned Attorney General, the Union of India has accepted the judgment and order of the High Court. In such a case, third parties have no *locus* to challenge the judgment of the High Court on a finding of constitutionality of a penal statute, which the Union of India has decided not to defend. It is further submitted that the appellants were not parties before the High Court during the pendency of proceedings there. In light of the entire consideration, it is submitted that *locus standi* for the appellants was completely lacking and Article 136 jurisdiction could not be properly invoked by them.

AE. Because there is an error apparent on the face of the record in that this Hon'ble Court did not notice that the

Union of India had accepted the order of the High Court of Delhi and had chosen not to appeal against that decision. It is submitted that the effect of this decision taken by the Government would be that the Union of India considers that no compelling state interest or no societal harm ensues from the reading down of section 377 as per the High Court's order. Therefore, the criminalisation of same-sex sexual activity between two consenting adults in private has no reasonable objective in the eyes of the Government. No third party can defend a criminal statute once the State chooses not to.

Errors due to Delay in Delivery of Verdict

AF. Because there is error apparent on the face of the record both of law and of fact that have been made by this Hon'ble Court in the impugned decision. This Hon'ble Court, in *Anil Rai v. State of Bihar,* (2 judges), AIR 2001 SC 3173, held that if judgments were kept pending after hearing for long periods of time, it was likely that the judges themselves may lose sight of the details of facts and niceties of legal points advanced. In the present case, the impugned judgment was pronounced more than 20 months after arguments were heard and judgment was reserved. It is respectfully submitted that in these circumstances, and in view of the fact that several

arguments advanced and material placed on record have not been considered, the impugned order suffers from errors apparent on the face of the record, warranting review by this Hon'ble Court.

Failure to Consider the Personal Testimonies of the Present Petitioners

AG. Because there is an error apparent on the face of the record that this Hon'ble Court has not even considered the numerous affidavits conveying personal testimonies of the present petitioners before it. It is submitted that these petitioners and the affidavits filed with the pleadings before this Hon'ble Court amount to compelling testimony on the various debilitative aspects of section 377 of the Indian Penal Code. These affidavits prove that section 377 has a radiating impact not just on the lives of LGBT persons, but also on their families. The law results in apprehension of misuse and legal prosecution. As far as the review petitioners are concerned it results in the destruction of the right to a peaceful family life. The review petitioners are deeply apprehensive that their children could be arrested at any point of time for being gay or lesbian. The fear which the review petitioners feel pervades their family life and makes it impossible to peacefully enjoy their family life. This is violative of the

Fundamental Rights guaranteed under Articles 14, 15 and 21 of the Constitution. It is submitted that if this Hon'ble Court had considered the affidavits filed by the present petitioners as part of their pleadings, it would have been able to appreciate that the continuance of section 377 as it stands today is violative of the right to live with dignity under the Constitution.

Power to review in the event of abridgement of Fundamental Rights

AH. It is respectfully submitted that the powers of review of this Hon'ble Court extend to granting relief in case of the abridgment of Fundamental Rights. It was held by this Hon'ble Court in *A.R. Antulay v. R.S. Nayak,* (7 judges) AIR 1988 SC 1531 at paragraph 47,

> *"We are of the opinion that this Court is not powerless to correct its error which has the effect of depriving a citizen of his fundamental rights and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. Powers of review can be exercised in a petition filed under Article 136 or Article 32 or under any other provision of the Constitution if the Court is satisfied that its directions have resulted in the deprivation of the fundamental rights of a citizen or any legal right of the petitioner."*

Because of the order of this Hon'ble Court dated 11.12.2013, a significant minority of this country have been stripped of their Fundamental Rights to equality, privacy, dignity and life. This minority does not enjoy a political constituency or mass resources at its command to counter the systemic discrimination and inequality that it faces. Therefore, its only recourse is to approach this Hon'ble Court with the prayer that this Court be the ultimate protector of constitutional rights and liberties of Indian citizens and extend the protection of the Constitution to these citizens of India.

AI. Because as an immediate result of the decision of this Hon'ble Court on 11.12.2013, the present review petitioners have come to be extremely fearful and stressful of the security of their LGBT children. It is submitted that the present review petitioners have every reason to believe that the abuse and harassment perpetuated by section 377 of the Indian Penal Code prior to the decision of the High Court on 02.07.2009 will now return with full force. The present petitioners are living in a constant state of emotional stress and helplessness over the security and well-being of their LGBT children. It is submitted that the decision of this Hon'ble Court has led to the belief that LGBT persons across India are unsafe and can be arrested by the police on baseless suspicions

because of their identity. This has wrecked havoc in the lives of families of LGBT persons.

AJ. Because this Hon'ble Court is empowered with extraordinary powers vide Article 142 of the Constitution of India to "pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it" and therefore, this Hon'ble Court is fully competent to stop any injustice or denial of rights of any citizen of India which is being committed anywhere in the country. This Hon'ble Court has exercised this power to ensure the dignity and equality of Indians on several past occasions. In light of all the aforementioned grounds highlighting the continuous, irreparable harm to the Fundamental Rights of millions of Indians being done by section 377 of the Indian Penal Code, this Court should exercise its authority to bring the about a cessation in this violation of rights, pending further directions that it may make.

PRAYER

It is, therefore, respectfully prayed that this Hon'ble Court may be pleased to:-

(a) Allow this review petition, review the final order dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal 10972/2013 and consequently restore the said Civil Appeals for hearing; and

(b) And pass such other or further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interest of justice.

FILED BY

DRAWN BY:
ARVIND NARRAIN, ADVOCATE

NIKHIL NAYYAR
(ADVOCATE FOR THE PETITIONERS)

DRAWN ON: 5/1/2014

FILED ON: 13/1/2014