

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
REVIEW PETITION (C) No. _____ of 2014

In

I.A. No. 6 of 2009

IN

CIVIL APPEAL No.10972 of 2013

IN THE MATTER OF:-

SURESH KUMAR KOUSHAL & ANR.Petitioner(s)

VERSUS

NAZ FOUNDATION & ORS.Respondent(s)

AND

IN THE MATTER OF:

Shyam BenegalIntervener/Review Petitioner
19/20A, Everest Building
2nd Floor
Tardeo Road
Mumbai 400034

WITH

I.A. No. _____ of 2014
An application for oral hearing of review petition

WITH

I.A. No. _____ of 2014
AN Application for ad-interim ex-parte stay of the judgment under review

PAPER - BOOK

(FOR INDEX KINDLY SEE INSIDE)

ADVOCATE FOR THE PETITIONER: MOHIT KUMAR SHAH

INDEX OF RECORD OF PROCEEDINGS

S.NO.	DATE OF RECORD OF PROCEEDINGS	PAGE NO.
-------	-------------------------------	----------

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.
- 11.
- 12.
- 13.
- 14.
- 15.

INDEX

S.NO.	PARTICULARS	PAGE NOS.
1.	Office report on Limitation	A
2.	Synopsis & List of Dates	B –
3.	Civil Review Petition with affidavit	
4.	Annexure P-1 A true copy of the Judgment dated 11.12.2013 passed in C.A. No.10972/2013 & analogous cases.	
5.	Annexure P-2 A true copy of the relevant portions of the Outlook magazine's annual sex surveys for the years 1996 and 2004.	
6.	Annexure P-3 A copy of press release dt. 23.2.2012, as it appeared on the website of Press Bureau of India.	
7.	Annexure P-4 A copy of affidavit of Union of India dt. 01.03.2012.	
8.	Annexure P-5 True copy of Protection of Children from Sexual Offences Act, 2012, published in the Gazette on 14.11.2012.	
9.	Annexure P-6 A true copy of the Criminal Law Amendment Act, 2013 dt. 02.04.2013.	
10.	I.A. No. _____ of 2014 An application seeking directions for hearing of the review petition in the open court	
11.	I.A. No. _____ of 2014 An application for ad-interim ex-parte stay of the judgment under review dt. 11.12.2013.	

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OFFICE REPORT ON LIMITATION

1. The petition is within time.
2. The petition is barred by time and there is delay of _____ days in filing the same against order dated _____ 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 is re-filing has been filed.

[BRANCH OFFICER]

SYNOPSIS AND LIST OF DATES

The Petitioner, Shyam Benegal, seeks the kind indulgence of this Hon'ble Court to file this application for review of its judgment and order dated 11.12.2013 by which the Special Leave Petition in which the Petitioner was permitted to intervene was determined in favour of the Respondents herein.

Vide judgment dated 11.12.2013 this Hon'ble Court was pleased to hold that Section 377 IPC does not suffer from the vice of unconstitutionality and overturned the judgment dated 03.07.2009 of the Delhi High Court ("DHC") which held that that Section 377, insofar as it criminalized consensual sexual acts of adults in private, was violative of Articles 21, 14 and 15 of the Constitution.

The petitioner seeks review of this Hon'ble Court's judgment on the following grounds:

- 1) This Hon'ble Court has failed to take into account **new and important evidence** that would have impacted its judgment, if considered. The Criminal Law Amendment Act, 2013 could not be adverted to by any of the parties and was not considered by this Hon'ble Court since it was notified after reservation of the impugned judgment. This Hon'ble Court, in its judgment, quoted and relied on unamended provisions of the IPC relating to sexual offences. Reliance on unamended provisions resulted in failure to resolve the contradictions that Section 377 poses to the amended provisions. Further, the Protection of Children from Sexual Offences Act, 2012 was not considered and it was wrongly stated that the objective of Section 377 was to protect children from sexual offences.

The judgment in *National Legal Services Authority (NALSA) v. Union of India* [WP(C) 400 of 2012] was reserved during the pendency of the impugned judgment. Since NALSA's case pertains to equal rights for transgendered people, it could potentially impact the findings in the impugned judgment.

- 2) This Hon'ble Court has **failed to consider evidence and substantive contentions urged by the Respondents**. The evidence produced and contentions urged by the Respondents but not considered by this Hon'ble Court had a direct bearing on the constitutionality of Section 377, thus resulting in grave miscarriage of justice. Completely ignoring voluminous evidence in the form of various affidavits of LGBT persons and their parents, and health organizations, this Hon'ble Court has held that the Respondents have not laid a factual foundation to support its challenge and failed to furnish particulars of incidents of discriminatory attitude exhibited by state agencies towards sexual minorities.

The impugned judgment also fails to consider substantive contentions raised by the Respondents. As regards contentions relating to infringement of fundamental rights, this Hon'ble Court has simply recorded the contentions in the judgment but failed to discuss, accept or reject the same and record any finding. The contention that Section 377 violates Article 14 has been recorded but this Hon'ble Court has completely failed to test the classification created by Section 377 against Article 14 by seeing whether it fulfills the following criteria i) Intelligible differentia between classes; ii) Legitimate objective and iii) Rational Nexus between the differentia and objective.

Similarly, despite Article 21 being central to the Respondent's contentions and DHC's findings, this Hon'ble Court has failed to consider whether Section 377 infringes Article 21 (the Right to privacy, health, dignity, autonomy and liberty); and withstands the rigour of substantive due process read into Article 21. Further, the impugned judgment has failed to engage with and demonstrate any "compelling state interest" served by Section 377, even though it has been recorded that "compelling state interest" must be shown in order to defend any legislation that curtails the Right to privacy enshrined in Article 21.

Further, the Respondent had contended that sexual orientation is covered under the term 'sex' in Article 15 and therefore any discriminatory law based on sexual orientation is unconstitutional. This submission has not been recorded or considered by this Hon'ble Court, despite the DHC's categorical finding in favour of the Respondents in this regard.

Contentions regarding Article 19 and the violation of the Freedom of Expression by operation of Section 377 have also not been adverted to in the impugned judgment.

- 3) The impugned judgment suffers from errors apparent on the face of the record, including **patent errors in law**, resulting in grave miscarriage of justice. As regards factual errors, the impugned judgment wrongly records that the Attorney General of India appeared as Amicus when in fact he had taken a categorical stand on behalf of the Union of India that it accepted the judgment of the DHC and did not want to challenge the same (the Learned AG filed an Affidavit to this extent). Further, the impugned judgment incorrectly records that Ld. ASG PP Malhotra appeared for the Ministry of

Home Affairs and his submissions opposing the DHC judgment have been positively considered therein. However, the MHA has clarified via its counsel and press release dt. 23.02.2012 that he did not have a brief in this matter.

As regards patent errors in law, this Hon'ble Court has *firstly* failed to comprehensively address arguments pertaining to infringement of Articles 14, 15, 19 and 21, and record a finding regarding the same. By doing so, it has completely failed to test the constitutionality of Section 377 (to the extent that it criminalises consensual adult sex in private) and yet has summarily concluded that it does not suffer from the vice of unconstitutionality.

Secondly, this Hon'ble Court has misapplied principles of law and failed to effectively exercise its powers of judicial review for specious reasons, in complete contravention of the case-law cited by it. In the impugned judgment, the presumption of constitutionality has erroneously been afforded to a pre-constitutional legislation like Section 377. Not only does the case-law relied on by this Hon'ble Court fail to mention the principle of constitutionality, but each of the cases is a prime example of striking down a pre-constitutional legislation, either because it was found to infringe fundamental rights or because it was a colonial statute which had since been repealed in the colonizing state. It is submitted that both these reasons applied squarely to Section 377, but were overlooked in the impugned judgment.

The Hon'ble Court also refused to review Section 377 on grounds of temporal reasonableness (changing societal conditions and perceptions with the passage of time), in clear contravention of the case-law cited by it in the

impugned judgment (*John Vallamatom v. Union of India* [(2003) 6 SCC 611]; *Anuj Garg v. Hotel Association of India and Ors.* [(2008) 3 SCC 1]).

Further, this Hon'ble Court erroneously held that the fact that the legislature had chosen not to amend Section 377 influenced its decision not to review it and strike it down. It is submitted that the powers of judicial review must be exercised wherever there is a violation of the Constitution and the constitutionality of legislation must be determined by testing it against constitutional provisions and not by adverting to the fact that the Parliament has chosen not to amend it. Specifically, the protection of a minority's fundamental rights cannot be the prerogative of the Parliament which basically represents the majority's will; but of the courts. As stated by this Hon'ble Court in *Anuj Garg v. Union of India* [(2008) 3 SCC 1] in the context of a discriminatory law that infringed Article 15, that "It is for the court to review that majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy." However, this Hon'ble Court has not applied this principle despite citing the aforementioned case.

Similarly, in utter disregard of the principles enunciated in the case-law cited in the impugned judgment (*RK Dalmia v. Justice SR Tendolkar* [AIR 1958 SC 538]), this Hon'ble Court has upheld the constitutionality of Section 377 on the ground that a "miniscule fraction" of the country's population belonged to the LGBT community and that based on the reported cases, the quantum of persons prosecuted under Section 377 were very few.

4) Public confidence in administration of justice will be shaken if the judgment is permitted to stand as the scope of Section 377 is still unclear and it is uncertain how the police will implement it. Post-facto adjudication

of criminality without certainty of the ingredients is violative of the constitution, and therefore, a review by this Hon'ble Court is definitely warranted.

5) Review of the impugned judgment is also permissible on the ground that the same is 'necessary for the sake of justice' (*Nagaraj v. Karnataka*, (1993) Supp 4 SCC 595). In this context, this Hon'ble Court must take note of the instant criminalization of a large section of responsible Indian citizens as a result of the passing of the impugned judgment. The impugned judgment must be reviewed for the "sake of justice" as after the DHC's judgment, a considerable number of LGBT persons have publicly identified themselves as such and disclosed their sexual orientation to their families, public authorities, educational institutes, work places and in other public spaces. All such persons have suddenly been rendered vulnerable to social and economic persecution, arrest and criminal prosecution.

Hence, it is prayed that the present Review Petition be allowed.

LIST OF DATES

Date	Event
2001	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.
Sept., 2004	Division Bench of the Delhi High Court dismissed the writ petition by observing that no cause of action had accrued to Naz Foundation

	and purely academic issues could not be examined by the Court.
xx.xx.2005	An SLP was filed before this Hon'ble Court
03.02.2006	This Hon'ble Court allowed the appeal and remitted the writ petition for fresh decision by the High Court.
03.07.2009	<p>The Delhi High Court 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:-</p> <p>"We declare that Section 377 IPC, insofar as 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."</p>
2009	A number of private individuals and religious organizations filed SLPs against the order of the Delhi High Court.
07.02.2011	The intervener/Petitioner herein, Shyam Benegal filed an application for intervention bearing I.A. No. 6 of 2009 in the aforementioned matter, i.e. SLP (C) 15436 of 2009. He was permitted to intervene by order of this Hon'ble Court dated 07.02.2011.
11.12.2013	This Hon'ble Court set aside the aforesaid judgment of the Delhi High Court and 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.
	Hence, the present Review Petition.

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....Intervener/Review Petitioner

AND

IN THE MATTER OF:

SURESH KUMAR KOUSHAL & ANR.

....Petitioner(s)

VERSUS

NAZ FOUNDATION & ORS.

....Respondent(s)

**REVIEW PETITION UNDER ARTILCE 137 OF THE CONSTITUTION OF
INDIA READ WITH ORDER XL RULES 1 & 2 OF THE SUPREME COURT
RULES 1966**

To

THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUDGES OF THE
SUPREME COURT OF INDIA

THE REVIEW PETITION OF THE
PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH:-

1. That the petitioner is filing the present Review Petition under Article 137 of the Constitution of India read with Order XL, Rules 1 & 2 of the Supreme Court Rules 1966 for review of the Judgment and Order dated 11.12.2013 passed by this Hon'ble Court in SLP (C) 15436 of 2009 (converted to Civil Appeal No. 10972 of 2013) by which this Hon'ble Court has set aside the judgment and Order dated 02.07.2009, rendered by the Delhi High Court in WP (C) no. 7455 of 2001. A true copy of the order dated 11.12.2013 passed by this Hon'ble Court in SLP (C) 15436 of 2009 (converted to Civil Appeal No. 10972 of 2013) is annexed herewith and marked as **ANNEXURE P-1**.

2. 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 while observing that no cause of action had accrued to Naz Foundation and purely academic issues could not be examined by the Court. The review petition filed by Naz Foundation was also dismissed by the High Court.

- (iii) 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.
- (iv) 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 at Para that:-

“We declare that Section 377 IPC, insofar it criminalizes 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.” **(emphasis supplied)**

- (v) SLP (C) 15436/2009 (converted to Civil Appeal No. 10972 of 2013) against the judgment and order of the High Court was filed by Suresh Kumar Koushal and other petitioners, who were not parties before the High Court.
 - (vi) 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. That the intervener/Petitioner herein, Shyam Benegal filed an application for intervention bearing I.A. No. 6 of 2009 in the aforementioned matter, i.e. SLP (C) 15436 of 2009. He was permitted to intervene by order of this Hon'ble Court dated 07.02.2011.

4. That it may be relevant to mention here that this Petitioner had also produced data from annual national sex surveys which established that sexual acts which were criminalized by Section 377 were in fact wholly acceptable and widely practiced by a vast portion of Indian citizens. A true copy of the relevant portions of the Outlook magazine's annual sex surveys for the years 1996 and 2004 are annexed herewith and marked as **Annexure P-2**.
5. That it is humbly submitted that there is sufficient reason to review the judgment passed by this Hon'ble Court as it contains material and apparent errors in recording facts and evidence. It is stated that the judgment of this Hon'ble Court incorrectly records that the Ld. ASG PP Malhotra appeared on behalf of the Ministry of Home Affairs. The Ld. ASG did not, in fact, have a brief in this matter, and the Ministry of Home Affairs clarified the same through its Counsel in the open Court, as well as through a press release dated 23.02.2012. A copy of the press release dated 23.02.2012, as it appeared on the website of the Press Bureau of India is annexed herewith and marked as **Annexure P-3**.
6. That it may be pointed out that the judgment passed by this Hon'ble Court incorrectly records that the Ld. Attorney General of India appeared before the Court in the capacity of an "amicus" (at paragraph 21, page 44 of the judgment). The Ld. Attorney General appeared specifically on the instructions of the Union of India and took a categorical stand that there was no error in the judgment of the Delhi High Court dated 02.07.2009 and therefore, the Union of India did not wish to challenge the same. The Ld. Attorney General filed before this Hon'ble Court an affidavit, placing on

record the stand of the Union of India. This position has been reaffirmed in the Review petition filed by the Union of India before this Hon'ble Court on 20.12.2013. A copy of the affidavit of the Union of India dated 01.03.2012 is annexed herewith as **Annexure P-4**.

7. That it is stated that the judgment of this Hon'ble Court records at para 38, page 77 of the impugned judgment that one of the objects of retaining Section 377 in the IPC has been to protect children from sexual abuse. However, it fails to take note of the fact that on 20.06.2012, a specific statute on this issue was enacted i.e The Protection of Children from Sexual Offences Act, 2012 ("POCSO"). POCSO came into force by Gazette Notification dated 14.11.2012 and nullifies the need of retaining Section 377 on the ground that it protects children from sexual abuse. POCSO in fact came into force before the date of reservation of the judgment by this Hon'ble Court and yet was not considered by it. A true copy of The Protection of Children from Sexual Offences Act, 2012, published in the Gazette on 14.11.2012 is annexed herewith and marked as **Annexure P-5**.

8. That it is humbly submitted that the Judgment under review ought to be reviewed as it fails to take into account the Criminal Law Amendment Act 2013. The Criminal Law Amendment Act, 2013 ("the Amendment") was enacted on 02.04.2013 and came into force w.e.f. 03.04.2013 vide notification in the Official Gazette well before the pronouncement of the impugned judgment. The court heard arguments and reserved judgment on 22.03.2013. Therefore, neither the court nor the parties could have heard or agitated arguments pertaining to the Amendment. A true copy of

the Criminal Law Amendment Act, 2013 dt. 02.04.2013 is annexed herewith and marked as **Annexure P-6**.

9. That the aforesaid amendment relates to sexual offences under the Indian Penal Code, 1860 and explicitly makes lack of consent a condition for attracting the offence of sexual assault. However, the impugned judgment of this Hon'ble Court has failed to take into account the Amendment and holds that age, consent and orientation are irrelevant to Section 377 and sexual offences described therein, (para 38 of the impugned judgment). Consequently, it contradicts the requirement of lack of consent to constitute sexual assault as contemplated by the Amendment. Further, it criminalises all oral and anal sexual acts; whereas the Amendment only renders those oral and anal acts which have been performed without consent as constituting criminal actions. (Section 375 (d) of the Amendment).
10. That the impugned judgment quotes and relies upon the old and unamended provisions of the Indian Penal Code, 1860 ("IPC"), in paragraph 34, page 62 in arriving at its conclusion, thereby vitiating its findings in this regard.
11. That the Petitioner seeks to prefer the present review petition under Article 137 of the Constitution of India against the judgment of this Hon'ble Court dated 11.12.2013 passed in SLP (C) 15436 of 2009 (converted to Civil Appeal No. (C) 10972 of 2013).

12. That the grounds which are independent and without prejudice to each other on which review of the said judgment dated 11.12.2013 is sought, are as follows: -

GROUND FOR REVIEW

I. PRELIMINARY GROUNDS:-

- A. For that it would be equitable and in the interest of justice that the Judgment dt. 11.12.2013, under review in this petition, is recalled and the case is heard on merits in open court in as much as otherwise grave prejudice shall be caused to the review petitioner herein.
- B. For that the judgment fails to take into account new and important evidence;
- C. For that the judgment fails to take into account voluminous evidence adduced and substantive contentions urged by the Respondents;
- D. For that the judgment suffers from errors apparent on the face of the record, including patent errors in law.
- E. For that public confidence in administration of justice will be shaken if the judgment is permitted to stand; and
- F. For that review of this judgment is 'necessary for the sake of justice.

II. New and Important Evidence

- A. For that this judgment ought to be reviewed as it fails to take into account new and important evidence.
- B. For that the Criminal Law Amendment Act, 2013 ("the Amendment") was enacted on 02.04.2013 and came into force vide notification in the Official Gazette well before the pronouncement of the impugned judgment. The court heard arguments and reserved judgment on 22.03.2013. Therefore, neither the court nor the parties could have heard or agitated arguments pertaining to the Amendment.
- C. For that the Amendment relates to sexual offences under the Indian Penal Code, 1860 and explicitly makes lack of consent a condition for attracting the offence of sexual assault. However, the impugned judgment of this Hon'ble Court fails to take into account the Amendment and holds that age, consent and orientation are irrelevant to Section 377 and sexual offences described therein, (para 38 of the impugned judgment). Consequently, it contradicts the requirement of lack of consent to constitute sexual assault as contemplated by the Amendment. Further, it criminalises all oral and anal sexual acts; whereas the Amendment only renders those oral and anal acts which have been performed without consent as constituting criminal actions. (Section 375 (d) of the Amendment).
- D. For that the impugned judgment quotes and relies upon the old and unamended provisions of the Indian Penal Code, 1860

("IPC"), in paragraph 34, page 62 in arriving at its conclusion, thereby vitiating its findings in this regard.

- E. For that the judgment of this Hon'ble Court records at para 38, page 77 of the impugned judgment that one of the objects of retaining Section 377 in the IPC has been to protect children from sexual abuse. However, it fails to take note of the fact that on 20.06.2012, a specific statute on this issue was enacted- the Protection of Children from Sexual Offences Act, 2012 ("**POCSO**"). POCSO came into force by Gazette Notification dated 14.11.2012 and nullifies the need of retaining Section 377 on the ground that it protects children from sexual abuse. POCSO in fact came into force before the date of reservation of the judgment by this Hon'ble Court and yet was not considered by it.
- F. For that the National Human Rights Commission (which is headed by a former Chief Justice of this Hon'ble Court) on 13.12.2013 issued a statement in support of the Delhi High Court's judgment dated 02.07.09, and reaffirmed the human rights of lesbian, gay, bisexual and transgender ("**LGBT**") people. It sought action from the Government of India to address the violation of these rights caused by the retention of Section 377 IPC.
- G. For that the National Legal Services Authority has filed Writ Petition (C) 400 of 2012 before this Hon'ble Court, seeking recognition of equal rights and protection for transgender

persons. Judgment has been reserved on this writ petition by order of this Hon'ble Court dated 29.11.2013.

III. ERRORS APPARENT ON THE FACE OF THE RECORD

Factual Errors

- A. For that there is sufficient reason to review the judgment of this Hon'ble Court as it contains material and apparent errors in recording facts and evidence.

- B. For that the judgment of this Hon'ble Court incorrectly records that the Ld. Attorney General of India appeared before the Court in the capacity of an "amicus" (at paragraph 21, page 44 of the judgment). The Ld. Attorney General appeared specifically on the instructions of the Union of India and took a categorical stand that there was no error in the judgment of the Delhi High Court dated 02.07.2009 and therefore, the Union of India did not wish to challenge the same. The Ld. Attorney General filed before this Hon'ble Court an affidavit, placing on record the stand of the Union of India. This position has been reaffirmed in the Review petition filed by the Union of India before this Hon'ble Court on 20.12.2013.

- C. For that the judgment of this Honorable Court incorrectly records that the Ld. ASG PP Malhotra appeared on behalf of the Ministry of Home Affairs. The Ld. ASG did not, in fact, have a brief in this matter, and the Ministry of Home Affairs clarified the same through its counsel in court, as well as through a press release dated 23.02.2012.

IV. FAILURE TO CONSIDER CONTENTIONS URGED

- A. For that there is sufficient reason to review the judgment of this Hon'ble Court as it fails to consider contentions made by the parties and recorded in the judgment. Such non-consideration of contentions amounts to a manifest error in the judgment, resulting in grave miscarriage of justice.
- B. For that this Hon'ble Court failed to consider evidence adduced to demonstrate abuse of Section 377 IPC and harassment, torture and rape of LGBT persons.
- C. For that this Hon'ble Court has erroneously recorded in paragraph 39, page 77 that "Respondent has not laid factual foundation to support its challenge." It has further recorded, erroneously, in paragraph 40, on page 78-79 that the Respondents in that case, "miserably failed to furnish particulars of incidents of discriminatory attitude exhibited by state agencies towards sexual minorities and consequential denial of human rights." This Hon'ble Court has erred in that it did not take into account that the Petitioner and other Respondents together adduced the following documents as evidence:
- i. Affidavit of XXXXX, aged 27 years, a gay person who was arrested, assaulted and harassed by the police (*Annexure R 13; Counter Affidavit of Respondent no.11, Voices against 377*)

- ii. Affidavit of Kokila, a transgender person who was assaulted, harassed by police; (Annex. R 12; Counter Affidavit of Respondent no.11, Voices against 377)
- iii. Affidavit of Madhumita, a transgender person who was assaulted, harassed and raped by the police;(Annexure R 19; Counter Affidavit of Respondent no.11, Voices against 377)
- iv. Affidavit of Gautam Bhan, describing harassment and fear faced as a gay person;(Annexure R 20; Counter Affidavit of Respondent no.11, Voices against 377)
- v. Affidavit of Ms. Vijaylakshmi Chaudhury, parent of a gay person, speaking of harassment and fear to her child; (Annexure VIII; Counter Affidavit of Respondent no.8, Minna Saran and Others)
- vi. Affidavit of Dr. Chitra Palekar, parent of a gay person, speaking of harassment and fear of his child; (Annexure VII; Counter Affidavit of Respondent no.8, Minna Saran and Others)
- vii. Affidavit of Dr. K Vasudevan, parent of a gay person, speaking of harassment and fear of his child; (Annexure XII; Counter Affidavit of Respondent no.8, Minna Saran and Others)
- viii. Affidavit of Mrs. Shobha Doshi, parent of a gay person, speaking of harassment and fear of his child; (Annexure XIII; Counter Affidavit of Respondent no.8, Minna Saran and Others)
- ix. Judgment in Jayalakshmi v. State, (2007, Madras High Court), in which compensation was granted to the family of a transgendered person who was assaulted, raped and tortured by the police and eventually committed suicide as a

consequence(Annexure R 14; Counter Affidavit of Respondent no.11, Voices against 377);

- x. Order in Desmond Hope v. State, CMA 55 of 2007(Annexure R 15; Counter Affidavit of Respondent no.11, Voices against 377)
- xi. Judgment in Madhumita v. Karnataka (Karnataka High Court)(Annexure R 18; Counter Affidavit of Respondent no.11, Voices against 377);
- xii. Copy of an FIR recorded against two women for offences under Section 377;(Annexure R 11; Counter Affidavit of Respondent no.11, Voices against 377)
- xiii. Report of Human Rights Watch titled "Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India" on harassment faced by gay persons, dated July 2002 (Annexure R 10; Counter Affidavit of Respondent no.11, Voices against 377).
- xiv. Report of the National Coalition of Sexuality Rights on arrest of gay men in Lucknow under Section 377 IPC (Annexure R 17; Counter Affidavit of Respondent no.11, Voices against 377)
- xv. Report by Human Rights Watch on arrest of gay men in Lucknow (Annexure R 16; Counter Affidavit of Respondent no.11, Voices against 377).

D. For that this Hon'ble Court has failed to record or take note of the afore said extensive evidence placed on record and has proceeded on the erroneous assumption that insufficient evidence was placed on record to substantiate claims of harassment, torture and rape under Section 377 IPC.

V. Failure to consider contentions of parties made with respect to Article 14 of the Constitution:

A. For that the Petitioner and other Respondents put forward the contention that Section 377 by itself and in its operation violates Article 14 by arbitrarily creating classes based on consensual and private sexual activity between adults & sexual orientation. The Hon'ble Court has recorded these contention but failed to consider the same, and by doing so, has committed a manifest error in the judgment, resulting in grave miscarriage of justice.

VI. Rational Nexus:

For that the Petitioner has contended in its Written Submissions before this Hon'ble Court that Section 377 IPC violates Article 14 of the Constitution. At page 90 of its written submissions, the Petitioner has contended that based on the jurisprudence of this Hon'ble Court, a classification under Article 14 must fulfil the following criteria (i) there must be intelligible differentia between individuals falling within a group and those falling outside it, and (ii) the differentia must have a reasonable nexus to the objective that the legislation seeks to achieve. The averments of the Petitioner are even recorded by this Hon'ble Court, at paragraph 20 on page 44 of the Judgment. However, the Hon'ble Court has failed to advert to or address the Petitioner's submissions regarding 'rational nexus', thereby failing to consider contentions made, and committing a manifest error.

VII. Legitimate Objective:

A. For that the Respondent No. 1, Naz Foundation, has contended that apart from a reasonable nexus, it must be demonstrated that Section 377 IPC fulfils a legitimate objective. The contentions of Naz Foundation, Res as they were in appeal, are recorded in Paragraph 19.6 at page 34 of the Judgment. This Hon'ble Court has failed to address the same, and as a consequence, has committed a manifest error, resulting in grave miscarriage of justice.

VIII. Unreasonable Classification:

A. For that the Respondent No. 11 (Voices against 377) has argued that Section 377 IPC leads to an unreasonable classification inasmuch as if it is allowed to operate in the public sphere it would result in double punishment for LGBT persons. While comparable homosexual and heterosexual acts would be subject to obscenity and nuisance provisions of the IPC, homosexual conduct would be singled out and double punished under Section 377. This is contained in paragraph 27, page 14 of the counter affidavit filed by Respondent No.11. The submission is partly recorded at paragraph 19.6, page 34 of the judgment. However this Hon'ble Court has not considered this issue and recorded a finding in the Judgment, constituting a ground for review.

B. For that the petitioner herein has contended that Section 377 is based on unreasonable classification that does not meet the test of intelligible differentia inasmuch as the term "against the

order of nature” is vague and subjective (para 8.10 of its Written Submission) and cannot form the basis of classification unless clearly defined. In furtherance of his contention, this Petitioner had also produced data from annual national sex surveys which established that sexual acts which were criminalized by Section 377 were in fact wholly acceptable and widely practiced by a vast portion of Indian citizens.

C. For that in the impugned judgment this Hon’ble Court has also held that the term “Against the order of nature” has no clear meaning and that no uniform tests can be culled out to classify acts that would be covered under “carnal intercourse against the order of nature”. However, this Hon’ble Court has failed to invalidate Section 377 on the ground that it is vague and arbitrary and relies on unreasonable classification violative of Article 14.

IX. Failure to consider contentions of parties made with respect to Article 15 of the Constitution:

For that the Petitioner herein had argued that Section 377 violates Article 15 of the Constitution. The Petitioner *firstly*, supported the finding of the High Court that the term ‘sex’ in Article 15 encompasses ‘sexual orientation’ as well, and *secondly*, argued that by operation, Article 377 targeted a class of persons defined by their sexual orientation. Non-consideration of this submission by the Petitioner is a manifest error resulting in grave miscarriage of the justice. Consequently, a review is warranted.

X. Failure to consider contentions of parties made with respect to Article 19 of the Constitution.

- A.** For that the Petitioner had submitted that Section 377 as it applies to private same-sex relations between consenting adults violates the right to freedom of expression under Article 19 of the Constitution of India. In the written submissions filed by the Petitioner these contentions were contained in Part G, in pages 78 to 87. The judgment neither adverts to nor addresses these contentions. By failing to test the constitutionality of Section 377 IPC against the fundamental rights guaranteed by Article 19 of the Constitution, and by failing to address submissions made by the Petitioner, this Hon'ble Court has committed a manifest error in law, resulting in grave miscarriage of justice not only to the Petitioners but to all people and warranting review.
- B.** For that on behalf of Respondent no.8 (Minna Saran and Others - Parents of LGBT children), it was argued that Section 377 violates Article 19(5) as it is impermissibly vague and delegates policy-making powers to the police. This contention was recorded in the judgment at paragraph 17.8., on page 29 but was not addressed at all. This Hon'ble Court by failing to address arguments put forth has committed a manifest error in law, resulting in grave miscarriage not only to the Petitioners but to all people and warranting review.

XI. Failure to consider contentions of parties made with respect to interpretation of Section 377.

A. For that Respondent 8 (IA No. 8), (Minna Saran and Others – Parents of LGBT children) have contended that “Section 377 IPC should be interpreted in the context of its placement in the IPC (under Chapter XVI “Of Offences Affecting the Human Body”) as criminalizing an act adversely affecting the human body and not a consensual and private act which is an offence against morals as dealt with in Chapter XIV. The contention that the language of Section 377 is qua harm or adverse affection to the body and not an offence against morals has been recorded at paragraph 17.6, page 28 of the Judgment. However, this Hon’ble Court has failed to address this contention and consequently, committed a manifest error resulting in grave miscarriage of justice.

XII. Failure to consider contentions of parties made with respect to Article 21 of the Constitution.

A. *Right to privacy*

For that the Petitioner submitted that Section 377, as it applies to private same-sex relations, violates the right to privacy under the Constitution. These submissions were recorded at Part E (II), paragraphs 5.20-61, pages 50-70. The Petitioner submitted that the right to privacy could only be curtailed in the face of “compelling state interest”, in accordance with the jurisprudence of this Hon’ble Court. The submissions of the

Petitioner have not been recorded in the judgment, nor addressed, constituting grounds for review. The Judgment of the Hon'ble Delhi High Court also relies on the rights of privacy of consenting adults. However, this Hon'ble Court does not consider this reasoning of the Delhi High Court, and yet overturns its judgment.

B. *Rights of dignity, liberty and autonomy.*

For that Article 21 of the Constitution protects an individual's right to autonomy, liberty, basing this submission on the jurisprudence of this Hon'ble Court. The Petitioner's written submissions contain these averments in pages 40-51 (paragraphs 5.1-5.22). The court has adverted to, but not addressed these submissions, in paragraphs 48 and 50 of the judgment. By failing to address the contentions put forth by the Petitioner, this Hon'ble Court has committed a manifest error, resulting in a grave miscarriage of justice.

C. *Right to health*

For that Respondent No. 1 (Naz Foundation) had argued that Section 377 violates the right to health, as it prevents prevention efforts and treatment for illnesses such as AIDS and HIV. These submissions were recorded at paragraphs 3(ii) at page 4, paragraph 19.5 at page 33 and were supported by the affidavits filed by the National AIDS Control Organisation and Ministry of Health, at paragraph 6, page 6-7. This Hon'ble Court has not addressed this contention at all. Failure to address this

contention despite the DHC's categorical finding that Section 377 hindered public health intervention efforts (paras 71 – 74 of the DHC's judgment) amounts to a manifest error, resulting in grave injustice and warrants review.

D. Requirement of Substantive Due Process.

For that Respondents No. 1 (Naz Foundation) had argued that Section 377 does not fulfill the just fair and reasonable criteria of substantive due process now read into Article 21 of the Constitution. This submission was recorded at paragraph 19.4., on page 33 of the Judgment. The requirement of substantive due process was reaffirmed in paragraph 45 of the judgment. However, the judgment fails to address the submission that Section 377 violates this requirement. The Hon'ble Court has failed to consider this contention and by doing so, has committed a manifest error in the judgment, resulting in grave miscarriage of justice.

XIII. Patent Errors in Law

A. For that there is sufficient reason to review the order dated 04.07.2013 as this Hon'ble Court has committed several patent errors in law, by failing to take into account established jurisprudence and misapplying clear and established case law.

B. Failure to exercise jurisdiction: 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 criminalized or not. It was not a subject matter of speculation before this Hon'ble Court. However, apart from expressing apprehension, this Hon'ble Court has failed to substantiate the issue and therefore, it has failed to exercise its jurisdiction in this case.

XIV. Criminal Law Amendments:

For that Section 376 IPC recorded in the judgment at paragraph 34, page 62 is the pre-amended provision. [Para 34, page 62] Following the Criminal Law Amendment Act, 2013 this section (a) covers all penetrative acts between heterosexual couples and (b) makes (absence of) consent a specific requirement. Consequently, a consensual act not an offence under Section 376 would still be an offence under Section 377. While consent is made a specific requirement for other sexual offences, it is not here. By failing to take into account the full import of the amended law, the Court has committed a patent error in law, warranting review.

XV. Judicial Review:

(ii) *Presumption of Constitutionality.*

- A) For that this Hon'ble Court has erroneously held that there is a presumption of constitutionality for a pre-constitutional legislation like Section 377[paragraph 28 and 31(ii), the Judgment].

B) For that this Hon'ble Court has failed to take note of its decision in *Gulabhai V. Desai v. Union of India* [AIR 1967 SC 1110] which recorded the absurdity of the suggestion that an authority should have known the limits on its powers, when those fetters were placed after the power had been exercised. Similarly, the Legislative Council that drafted the Indian Penal Code could not have been aware that the Code would have to withstand the scrutiny of the Indian Constitution nearly a century later. In this light, it is submitted that the premise of the presumption of constitutionality of a pre-constitutional legislation like S.377, that the legislature is aware of the scope of its powers, would not continue to hold.

C) For that the cases cited by this Hon'ble Court to find in favour of the presumption of constitutionality are either silent on the application of the principle to pre-constitutional legislations or contravene the position taken by this Hon'ble Court. For instance, *John Vallamatom v. Union of India* (2003) 6 SCC 611 (of which this Hon'ble Court took note at Para 27, pg. 54, while discussing the presumption of constitutionality) struck down a pre-constitutional statute without once reverting to the principle of presumption of constitutionality. One of the reasons for striking down the impugned provision was that:

“...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.”

(para 60)

Section 377 - much like the provision impugned and eventually struck down in the aforementioned case - is a colonial relic which has been repealed in the Britain but enjoys legal tutelage in India. Despite citing this case, this Hon'ble Court committed a grave error in failing to extend the same logic to S.377 and striking it down.

Another case relied on by this Hon'ble Court to extend the presumption of constitutionality to Section 377 (a pre-constitutional legislation), but which *did not* deal with a pre-constitutional legislation itself, was *RK Dalmia v. Justice SR Tendolkar* [AIR 1958 SC 538]. Therein, it was *inter alia* held:

“(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.”

- D) For that this Hon'ble Court again committed a grave error by overlooking both these principles despite having stated them. As per (e), the presumption of constitutionality can be justified through the circumstances that dominated the drafting of the provision. Building on this logic, the colonial history of Section 377 and the fact that it is merely a vestige of Judeo-Christian morality should be grounds to vitiate the presumption of constitutionality in favor of S.377.
- E) For that as per (f) if there is a failure to demonstrate reasonable classification from the provision or from the surrounding circumstances, the presumption of constitutionality cannot be extended to uphold S.377 on the basis of unknown reasons for discriminating against certain class of persons. However, this Hon'ble Court does precisely that. It simply notes at Para 42 of its judgment 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" but completely fails to test and demonstrate the reasonableness of this classification on the anvil of Article 14 and record a finding. In direct contravention to the afore-stated principle, it summarily extended the presumption of constitutionality to Section 377 on wholly undisclosed and unknown grounds.

(iii) *Judicial deference to majoritarian parliamentary processes.*

A) For that the Hon'ble Court has erroneously held that the fact that the legislature has chosen not to amend a law influences the court's decision not to strike it down [Para 32, page 61-62 of the Judgment].

B) For that this Hon'ble Court at Para 32 of the impugned judgment stated that:

"After the adoption of the IPC in 1950, around 30 amendments have been made to the statute, the most recent being in 2013 which specifically deals with sexual offences, a category to which Section 377 IPC belongs. 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."

(emphasis supplied)

It is respectfully submitted that this view is erroneous insofar as the powers of judicial review of provisions challenging the fundamental rights of a minority / miniscule fraction (as admitted by this Hon'ble Court at para 43 of its judgment) cannot be said to be guided by Parliamentary processes simply because they are represent majoritarian political will. The powers of judicial review are to be exercised by this Court wherever there is a violation of the Constitution and the constitutionality of legislation must be determined by

testing it against constitutional provisions and not simply by advertent to the fact that the Parliament has chosen not to amend the legislation.

Further, this view runs counter to the jurisprudence established by this court in *AnujGargy. Union of India* [(2008) 3 SCC 1](which was noted by this Hon'ble Court in the impugned judgment at para 13; pgs. 12 – 13), wherein it was held that:

“...combination of biological and social determinants may find expression in popular legislative mandate. It is for the court to review that majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy”. **(Para 9)**

C) For that the Respondents had specifically raised contentions regarding individual autonomy before this Hon'ble Court. Additionally, they had reasserted the validity of the DHC's findings that:

The enlarged scope of Article 21 included the right to protect individual autonomy, which encompassed sexual orientation / identities (recorded in the Hon'ble Court's judgment at para 9; pg. 8);

Personal autonomy inherent within the protected categories of Article 15 encompassed sexual orientation (recorded in this Hon'ble Court's judgment at para 13; pg. 12 – 13).

D) For that this Hon'ble Court did not reassess the aforesaid findings of the DHC and record a finding regarding the same. It is submitted that without reconsidering these findings and *delinking sexual orientation and individual autonomy*, this

Hon'ble Court could not have circumscribed its power of judicial review at the altar of majoritarian parliamentary processes, in complete contravention of the principle laid down in *Anuj Garg's* case.

(iv) *Exclusion of temporal reasonableness as a valid ground for determining constitutionality.*

A) For that this Hon'ble Court has erroneously held that the court is not empowered to strike down a law merely by virtue of the fact that perception of society has changed as regards the legitimacy of its purpose and its need. [Para 33, page 62 of the judgment]. *Per contra*, this Hon'ble Court has cited two cases, *Anuj Garg's* and *Vallamattom's* (at para 13; pgs. 12 – 13; and at para 27, pg. 54) in which this Hon'ble Court struck down pre-constitutional provisions that had outlived their founding and usefulness over time. In *Anuj Garg v. Hotel Association of India and Ors.* [(2008) 3 SCC 1], this Hon'ble Court had clearly held that:

"7. The Act is a pre-constitutional legislation. Although it is saved in terms of Article 372 of the Constitution challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India is permissible in law. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid." **(emphasis supplied)**

B) For that in *John Vallamattom and Anr. v. Union of India*[AIR 2003 SC 2902] this Hon'ble Court struck down a pre-constitutional legislation, Section 118 of the Indian Succession Act, while stating that:

"The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by passage of time...

Further that:

"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 26-1-1950, but while doing so the court is not precluded from taking in to 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"

C) For that this Hon'ble Court has not only noted these cases but expressly referred to these paragraphs which make it clear that the constitutionality of a statute can be determined with reference to changed societal perceptions & ancillary changes that speak to a provision's legitimacy of purpose or need.

D) For that the principle that law is not static and must adapt itself or be interpreted to cope with changing social perceptions has been recognized in a catena of judgments (*Satyawati Sharma v Union of India* [(2008) 5 SCC 287];

Vatticheruku Village Panchayat v. Nori Venkatarama Deekshithulu [1991 Supp (2) SCC 228]; *Deena v. Union of India* [(1983) 4 SCC 645]; *Maganlal Chgganlal (P) Ltd. v. Municipal Corporation of Greater Bombay* [(1974) 2 SCC 402]; *National Textile Workers' Union v. PR Ramakrishnan* [(1983) 1 SCC 228]). However, this Hon'ble Court has proceeded on erroneous grounds by disregarding the same as a consideration in judicial review, thereby warranting review of its judgment.

(v) Quantum of affected persons as ground for upholding constitutionality.

- A.** For that this Hon'ble Court has erroneously indicated that a numerical threshold must be met for enforcement of fundamental rights. This is not envisioned in Article 14, 15 or 21 [Para 43, page 83].
- B.** For that this Hon'ble Court has simply stated that since a "miniscule fraction of the country's population" is part of the LGBT community and less than "200 persons have been prosecuted" under S.377, it cannot not be made a sound basis for declaring S.377 ultra vires of *inter alia* Articles 14, 15 and 21.
- C.** For that the constitutionality of a provision challenged on the grounds of violation of fundamental rights cannot simply be affirmed or determined by adverting to the quantum of

affected persons, number of recorded instances of violation or abuse of the provision under challenge. S.377 must be substantively tested on the anvil of Articles 14, 15, 19 and 21, which this court has failed to do in exercise of its powers of judicial review.

D. For that this Hon'ble Court has held in the case of *RK Dalmia v. Justice SR Tendolkar* [AIR 1958 SC 538] (noted by this Hon'ble Court in the impugned judgment) 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"

The aforementioned principle has *inter alia* been followed by a bench of this Hon'ble Court in *Ashok Kumar Thakur v. Union of India* [(2008) 6 SCC 1], wherein the court held that even when it notices that "...even one individual's freedom has been curtailed, this Court is duty-bound to entertain his or her claim." However, in the impugned judgment this Hon'ble Court has failed to apply this principle to LGBT persons affected by S.377 and erroneously refused to consider the constitutionality of S.377 on the ground that affected persons form a miniscule fraction on the country's population.

(vi) Section 377

A. For that instead of clearly defining the term “against the order of nature” and laying down its scope; this Hon’ble Court has held that the term ‘Against the order of nature’ has no clear meaning and that no uniform tests can be culled out to classify acts that would be covered under “carnal intercourse against the order of nature”. Despite this this Hon’ble Court has upheld Section 377 and failed to hold that it violates the principle that the scope of a penal provision must be definite and clear.[See para 38, page 77 of the Judgment]. This principle has been reiterated by this Hon’ble Court in the context of legislation that infringes fundamental rights in *State of MP v. Baldeo Prasad* [(1961) 1 SCR 970] (which this Hon’ble Court took note of at paras 17.8, page 29 of the judgment). Therein, it held that:

“Where a statute empowers the specified authorities to take preventive action against the citizens it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as conditions precedent to the exercise of the said authority. If the statute is silent in respect of one of such conditions precedent, it undoubtedly constitutes a serious infirmity which would inevitably take it out of the provisions of Article 19 (5).”

B. For that this Hon’ble Court has erred in holding that S.377 covers consensual sexual acts between adults in private,

without advertent to evidence of serious harm and establishing the same.

- C.** For that this Hon'ble Court has erroneously extended policy-making powers to the police, by stating that whether the acts are offences or not would have to be seen in light of circumstances and facts. [See para 38, page 77 of the Judgment]

(vii) Article 14

- A.** For that this Hon'ble Court has identified the requirement that a classification under Article 14 must be tested to see that there is: i) intelligible differentia between classes ii) a legitimate objective behind legislation and iii) a rational nexus between the differentia and the objective. However, it has failed to apply the latter two tests of rational nexus and legitimate objective. [Para 42, page 82 of the Judgment].
- B.** For that this Hon'ble Court itself has stated that it is not possible to determine what acts fall under Section 377 [See para 38, page 77 of the Judgment]. In light of the fact that any intelligible differentia between classes can only be demonstrated with reference to acts criminalized and not criminalized by S.377, it cannot be said that the criterion of intelligible differentia has been met.
- C.** For that this Hon'ble Court has simply stated with regard to Article 14 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 latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification.” However, it has failed to demonstrate why the two classes should be treated differently inasmuch as both classes encompass consensual acts between adults in private.

D. For that this Hon’ble Court has completely failed to test Section 377 against the requirements of Article 14. Nevertheless, it has arbitrarily and summarily concluded that Section 377 does not violate Article 14 (para 42 at page 82 of the judgment), thus constituting grounds for review.

(viii) Article 21

A. For that this Hon’ble Court has acknowledged the right to privacy inherent in Article 21 but has erred in failing to apply the same to S.377 and record a finding on this point. In *Gobind v. State of Madhya Pradesh* [(1975) 2 SCC 148], this Hon’ble Court had held that infringement of the right to privacy requires that some compelling state interest be demonstrated. However, this Hon’ble Court has failed to demonstrate how Section 377 protects a “compelling state interest” and record a finding in this regard. [paras 46-49, pages 86-90]

B. For that this Hon'ble Court has acknowledged the Right to Dignity (relevant extracts from *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.* [(1981) 1 SCC 608] are cited in the judgment at para 50, pg. 91), but it has erred in failing to apply the same to S.377 and record a finding whether criminalization of intimate sexual conduct of individuals impairs the dignity of persons under Article 21. [Paras 50-51, page 90-91]

C. For that this Hon'ble Court has acknowledged the Right to health but not tested S. 377 against it and record a finding whether it violates the right to health of men who have sex with men. It has arbitrarily failed to take note of the submissions of the Respondents & Union of India (through NACO affidavit) that criminalization 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 for the fear of law. [Para 40, pg 78-79].

D. For that this Hon'ble Court has erred on the point of satisfying the requirement of substantive due process under Article 21 - the law is summarized but not applied [Para 46, page 85]. In light of the above, it has completely failed to test Section 377 against the requirements of Article 21 and has summarily concluded that Section 377 does not suffer from the vice of unconstitutionality (para 54 at page 97 of the judgment), thus constituting grounds for review.

XVI. For that the circumstances incorporated in the review petition are such that public confidence in administration of justice will be shaken if order is allowed to stand [*Indian Council for Enviro-Legal Action v. Union of India*, (2011) 8 SCC 161, para 196]. The scope of Section 377 being unclear, it is uncertain how the police will implement it, as post-facto adjudication of criminality without certainty of the ingredients violates the constitution.

XVII. For that following the Delhi High Court's judgment decriminalizing adult consensual sexual acts in private, including homosexual acts, a considerable number of LGBT persons had publicly identified themselves as such and disclosed their sexual orientation to their families, public authorities, educational institutes, work places and other public spaces. All such otherwise law-abiding persons have suddenly been rendered vulnerable and liable to social persecution and criminal prosecution. In this light, this judgment must be reviewed 'for the sake of justice' which has been adjudicated to be a ground of review at the Supreme Court, in *Nagarajv. Karnataka*, [(1993) Supp 4 SCC 595].

13. That it is submitted that the present petition is being filed bonafide and in the interest of justice.
14. That the petitioner has not filed any other review petition in this matter.

PRAYER

In the premise, it is most respectfully prayed that this Hon'ble Court may be pleased to:

- (i) pass an order allowing the present review petition seeking review of the Judgment and order dated 11.12.2013 passed by this Hon'ble Court in SLP (C) 15436 of 2009 [Civil Appeal No. 10972 of 2013];
- (ii) pass such other order or orders as this Hon'ble Court may deem fit and proper in the interest of justice.

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

FILED BY:

(MOHIT KUMAR SHAH)
Advocate for the Petitioner

Place: New Delhi
Filed on:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

REVIEW PETITION (C) No. _____ of 2014
In
I.A. No. 6 of 2009
IN
CIVIL APPEAL No.10972 of 2013

IN THE MATTER OF:-

SURESH KUMAR KOUSHAL & ANR.

....Petitioner(s)

VERSUS

NAZ FOUNDATION & ORS.

....Respondent(s)

AND

IN THE MATTER OF:

Shyam Benegal

....Intervener/Review Petitioner

AFFIDAVIT

I, -----, do hereby
solemnly affirm and state as under:-

1. That I am the Review Petitioner, as such am well conversant with the facts and circumstances of the case, hence am competent to swear this affidavit.
2. That I have read a copy of the accompanying List of Dates, Review Petition [paras 1-] [pages -], I.As. and having understood the contents thereof, I say that the facts stated therein are true to my knowledge and as per the records.
3. That the annexures to the Review Petition are true copies of their respective originals.
4. That the Review Petition Paper book contains total pages.

5. That the facts stated in the above affidavit are true to my knowledge and belief. No part of the same is false and nothing material has been concealed therefrom.

DEPONENT

VERIFICATION:

I, the abovenamed deponent, do hereby verify that the facts stated in the above affidavit are true to my knowledge and belief. No part of the same is false and nothing material has been concealed therefrom.

Verified at Mumbai on this the day of January, 2014.

DEPONENT

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. No. _____ of 2014

In

REVIEW PETITION (C) No. _____ of 2014

In

I.A. No. 6 of 2009

IN

CIVIL APPEAL No.10972 of 2013

IN THE MATTER OF:-

SURESH KUMAR KOUSHAL & ANR.

....Petitioner(s)

VERSUS

NAZ FOUNDATION & ORS.

....Respondent(s)

AND

IN THE MATTER OF:

Shyam Benegal

....Intervener/Review Petitioner

**AN APPLICATION SEEKING DIRECTIONS FOR HEARING OF THE
REVIEW PETITION IN THE OPEN COURT**

To
THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUDGES OF THE
SUPREME COURT OF INDIA

THE REVIEW PETITION OF THE
PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHEWETH:

1. That the petitioner has filed the accompanying Review Petition under Article 137 of the Constitution of India R/w. Order XL of Supreme Court Rules, 1966 for review of the judgment dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal No. 10972/2013 & other connected matters, by which this Hon'ble Court set aside the Judgment dated 2nd July, 2009, rendered by Delhi High Court in Writ Petition (Civil) No. 7455 of 2001.
2. That the contents of the accompanying Review Petition are not being repeated for the sake of brevity, however, the same may be read as part of the present application.

3. That it is humbly submitted that, the main grounds, in brief, on which the Petitioner is seeking review of the impugned judgment are that:

- (i) The impugned judgment fails to take into account new and important evidence and the implications of the same (Criminal law Amendment Act, 2013; Prevention of Children from Sexual Offences Act, 2012; Statement of the National Human Rights Commission in support of Delhi High Court's judgment dated 02.07.2009; Expected judgment in National Legal Services Authority v. Union of India [WP (C) 400 Of 2012] which dealt with rights of transgendered persons)
- (ii) The impugned judgment suffers from errors apparent on the face of the record, insofar as it contains errors in recording facts and evidence presented to this Hon'ble Court and proceeds to record findings on the basis of such misconstrued facts and evidence.
- (iii) The impugned judgment suffers from errors apparent on the face of the record, insofar as it fails to consider substantive contentions urged by this Petitioner and other Respondents to the SLP pertaining to infringement of fundamental rights (Articles 21, 19, 14 and 15), urged on behalf of the Respondents and fails to record a finding regarding the same. It has summarily arrived at a bald conclusion that Section 377 "does not suffer from the vice of unconstitutionality".
- (iv) The impugned judgment suffers from errors apparent on the face of the record including patent errors in law, 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.

- (v) Section 377 IPC, insofar as it criminalizes consensual sexual acts in private, is unconstitutional and falls foul of the principles of equality and liberty enshrined therein.
- (vi) The principles of presumption of constitutionality and the principle of judicial restraint have been wrongly applied in the impugned judgment to Section 377 which is a pre-constitutional legislation.
- (vii) The impugned judgment proceeds on the erroneous assumption that the constitutionality of law infringing fundamental rights of minorities should be determined with reference to the legislature's intention to amend or repeal the same. Consequently, it fails to note that the constitutionality of such legislation can only be determined by seeing whether the same violates the provisions of the Constitution.
- (viii) The impugned judgment fails to consider that law is not static, but is dynamic and changes with the perceptions of society; and erroneously excludes temporal reasonableness as a ground for determining constitutionality.
- (ix) The impugned judgment erroneously proceeds to disregard a constitutional challenge on the ground that a small number of people were likely to be affected by Section 377; in complete contravention of the principle that quantum of affected persons is irrelevant to issue of constitutionality of the impugned legislation.
- (x) 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

4. That in view of the afore-stated reasons, oral arguments are essential in the present matter in order to assist this Hon'ble Court. Further, it would be in the interest of justice that oral arguments limited to this aspect be entertained by this Hon'ble Court.
5. That the Applicant has a good prima facie case for review of the judgment dated 11.12.2013 passed in Civil Appeal No.10972 of 2013.
6. That the present Application is being made bona fide and in the interest of justice.

PRAYER

The Applicant/ Petitioner respectfully prays that this Hon'ble Court may graciously be pleased to:

- A. direct for hearing of the Review Petition in the open court;
- B. pass such other order or orders as this Hon'ble Court may deem fit and proper in the interest of justice.

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

FILED BY:

(MOHIT KUMAR SHAH)
Advocate for the Petitioner

Place: New Delhi
Filed on:

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. No. _____ of 2014

In

REVIEW PETITION (C) No. _____ of 2014

In

I.A. No. 6 of 2009

IN

CIVIL APPEAL No.10972 of 2013

IN THE MATTER OF:-

SURESH KUMAR KOUSHAL & ANR.

....Petitioner(s)

VERSUS

NAZ FOUNDATION & ORS.

....Respondent(s)

AND

IN THE MATTER OF:

Shyam Benegal

....Intervener/Review Petitioner

**AN APPLICATION FOR GRANT OF AD-INTERIM EX-PARTE STAY OF
JUDGMENT AND ORDER UNDER REVIEW DATED 11.12.2013**

To

THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUDGES OF THE
SUPREME COURT OF INDIA

THE REVIEW PETITION OF THE
PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHEWETH:

1. That the petitioner herein has filed the accompanying Review Petition under Article 137 of the Constitution of India R/w. Order XL of Supreme Court Rules, 1966 for review of judgment dt. 11.12.2013 passed by this Hon'ble Court in Civil Appeal No.10972/2013 & other connected matters, by which this Hon'ble Court set aside the Judgment dated 2nd July, 2009, rendered by the Delhi High Court in Writ Petition (Civil) No. 7455 of 2001.
2. That the contents of the accompanying Review Petition are not being repeated for the sake of brevity, however, the same may be read as part of the present application.

3. That it is humbly submitted that following the Delhi High Court's judgment decriminalizing adult consensual sexual acts in private, including homosexual acts, a considerable number of LGBT persons had publicly identified themselves as such and disclosed their sexual orientation to their families, public authorities, educational institutes, work places and other public spaces.
4. That in light of this Hon'ble Court's judgment which is presently under review, all such persons have suddenly been rendered vulnerable and liable to social persecution and criminal prosecution. It is submitted that this Hon'ble Court must take note of the instant criminalization of a large section of responsible Indian citizens who have been living in fear of harassment and prosecution since it upheld the constitutionality of Section 377 IPC to the extent that it criminalises consensual sexual acts between adults in private.
5. That in light of the impugned judgment, critical efforts and life-saving work of HIV prevention groups, including that of State agencies like NACO (which made submissions in support of the Ministry of Health and Family Welfare stand supporting DHC's judgment) will suddenly be impeded suppressed drastically. If the judgment is allowed to stand during the pendency of present review petition, it will adversely and acutely impact the lives of many Indian citizens suffering from fatal diseases like AIDS.
6. That the Petitioner has got a very good prima facie case. Since, the Petitioner is filing the instant Review Petition, it is in the interest of justice to stay the order under review dt. 11.12.2013.

7. That the present Petition is moved bonafide and in the interest of justice.

PRAYER

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

- A) grant ad-interim ex-parte stay of the Judgment and order under review dt. 11.12.2013 till the pendency of the present review petition, and/or
- B) pass such other and further order(s) that this Hon'ble Court may feel in the interests of justice and the facts and circumstances of the case.

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

FILED BY

(MOHIT KUMAR SHAH)
Advocate for the Petitioner

New Delhi
FILED ON: