

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
REVIEW PETITION (C) No. _____ of 2014
IN
CIVIL APPEAL NO. 10972 OF 2013

[Against the final judgment and order dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal No. 10972 of 2013]

IN THE MATTER OF:-

NIVEDITA MENON & ORS. ...PETITIONERS

VERSUS

SURESH KUMAR KOUSHAL & ANR. ...RESPONDENTS

W I T H

I.A. No. _____ of 2014
Application for exemption from filing certified copy of impugned judgment

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

I.A. No. _____ of 2014
Application for stay

I.A. No. _____ of 2014
Application for Directions

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ADVOCATE FOR THE PETITIONER:

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Application for oral hearing of review petition
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Application for stay
8. **I.A. No. _____ of 2014**
Application for Directions

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
REVIEW PETITION (C) No. _____ of 2014
in
Civil Appeal No. 10972 of 2013

IN THE MATTER OF:-

NIVEDITA MENON & ORS. ... Petitioner

versus

SURESH KUMAR KOUSHAL & ANR. ... Respondents

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]

NEW DELHI

SYNOPSIS AND LIST OF DATES

The Petitioners are seeking review of Judgment dated 11.12.2013 by which the Special Leave Petition in which the Petitioners were permitted to intervene was determined in favour of the Respondents herein.

It is respectfully submitted that the impugned Judgment passed by a Division Bench comprising of Hon'ble Mr. Justice G.S. Singhvi and Hon'ble Mr. Justice S.J. Mukhopadhaya suffers from errors apparent on the face of the record, fails to take into account new and important evidence, does not consider the submissions advanced by the Petitioner and other intervenors and is contrary to well-established principles of law laid down by this Hon'ble Court.

The Petitioners are well respected, highly qualified Indian academics who intervened in these proceedings because they believed that S. 377 IPC oppresses the freedom of LGBT persons and that mere lack of consensus cannot be a ground for taking away the rights of any person. The Petitioners' arguments before this Hon'ble Court on secularism, general exceptions under S. 87 IPC and desuetude were not considered or recorded by this Hon'ble Court. These contentions strike at the very root of S. 377 IPC and this Hon'ble Court has committed a manifest error, resulting in grave miscarriage of justice due to this non-consideration. Further, the contentions of other intervenors such as mental health professionals and legal academics were not considered or recorded by the Hon'ble Court.

This Hon'ble Court has not taken into account the 2013 Criminal Law Amendments which are new and important evidence. This Court's interpretation of Section 377 IPC, i.e. that Section 377 IPC speaks of acts irrespective of the age, consent, gender or sexual orientation of persons involved, has created an anomalous situation as, after the 2013 Amendment, the same act may fall under both S. 375 and S. 377 of the IPC. The 2013 Amendment has also introduced a definition of

'consent' in sexual offence law for the first time. The finding of this Hon'ble Court that S. 377 IPC will apply irrespective of age and consent is contrary to this understanding of sexual assault law. This Hon'ble Court has also not considered the Protection of Children from Sexual Offences Act, 2012.

This Hon'ble Court has committed a factual error by misrepresenting the stand of the Union of India. While the Union of India through the Ld. AG accepted the judgment of the High Court, this Hon'ble Court erroneously stated that the Ld. AG argued the case as amicus. Further, the Ld. ASG, P.P Malhotra did not represent the views of the Ministry of Home Affairs, as has been recorded, and in fact did not have a brief in the matter. This factual error is a ground for review.

There are also patent errors of law in the statement of law, and interpretation of earlier judgments passed by this Hon'ble Court. These errors of law are a sufficient ground for review.

Firstly, this matter involves a substantial question of law as to the interpretation of the Constitution of India and should have been referred to a 5 judge bench.

Secondly, this Hon'ble Court has wrongly applied the law when interpreting Article 14 of the Constitution. Article 14 permits class legislation only if there is an intelligible differentia between the classes, a rational nexus with the objective of the legislation, and the objective itself is constitutionally valid. However, this Hon'ble Court has held that people who commit and do not commit the prohibited acts under S. 377

IPC constitute different classes, but has returned no finding on rational nexus and constitutionally valid objective.

Thirdly, this Hon'ble Court has absolutely disregarded the submissions made on Article 15 of the Constitution and the finding of the High Court that 'sexual orientation' is a ground analogous to 'sex' in Article 15 has not even been considered.

Fourthly, this Hon'ble Court has acknowledged the 'right to privacy', the 'right to dignity' and the 'right to health' under Article 21 but has not returned specific findings on whether S. 377 violates these rights under Article 21. This Hon'ble Court even holds that 'substantive due process' is required to be satisfied while judging the constitutionality of a provision which purports to restrict the rights under Article 21 of the Constitution but does not give any reasons as to how 'substantive due process has been followed in this case.

Fifthly, this Hon'ble Court has incorrectly held that there is a presumption of constitutionality for pre-constitutional legislation but has relied on case-law which holds that there is no such presumption for pre-constitutional legislation. Rather, the cases which have been cited by this Hon'ble Court hold that the past history and circumstances in which provisions were framed must be taken into account while deciding constitutionality and that societal change is a ground for holding a provision unconstitutional. These principles actually help this Hon'ble Court in declaring S. 377 IPC unconstitutional but it has held the exact opposite without any reasons.

Sixthly, this Hon'ble Court has found the Legislature's retention of a particular provision in the Statute relevant to deciding the constitutionality of S. 377 IPC. This is an incorrect understanding of the power of judicial review and contrary to the law laid down by this Hon'ble Court. This Hon'ble Court has decided not to wait for Parliament to amend the law in other cases including a Constitution Bench of this Court in *Mithu v. State of Punjab*, (1983) 2 SCC 277. The impugned Judgment is also per incurium *Mithu*.

Seventhly, this Hon'ble Court has also egregiously stated that it need not intervene because only 200 persons have been prosecuted under this law. The requirement that a minimum number of persons must be affected before this Court will intervene is contrary to this Hon'ble Court's public interest jurisprudence. This Hon'ble Court has held that even if one individual's liberty is curtailed, then a provision can be held unconstitutional. In fact, when the High Court initially dismissed the petition filed by Naz Foundation as being merely academic, this Hon'ble Court remanded the matter back to the High Court on the ground that constitutional issues could not be decided in such a manner.

Finally, this judgment deserves to be set aside on review for the sake of justice. A number of LGBT individuals have been put at risk of prosecution and harassment because they have been re-criminalized by the impugned judgment. All those individuals suddenly have become vulnerable to abuse and discrimination and require immediate relief.

LIST OF DATES

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.

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

2005 An SLP was filed before this Hon'ble Court

3.2.2006 This Hon'ble Court allowed the appeal and remitted the writ petition for fresh decision by the High Court.

3.7.2009 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 "We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors."

07.02.2011 A large number of individuals and organizations filed SLPs against the order of the Delhi High Court. This Petitioners were permitted to intervene by order of this Hon'ble Court.

11.12.2013 This Hon'ble Court 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.
Hence, the present Review Petition

01.2014

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
REVIEW PETITION (CIVIL) NO. OF 2013
IN
CIVIL APPEAL NO. 10972 OF 2013

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

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... PETITIONER

VERSUS

SURESH KUMAR KOUSHAL & ANR.

... RESPONDENTS

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

The humble petition of the
Petitioners above named;

MOST RESPECTFULLY SHOWETH:

1. The Petitioners are seeking Review of the Judgment dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal No. 10972 of 2013 [arising out of SLP (C) No. 15436 of 2009], and other connected matters ("impugned judgment"), by which this Hon'ble Court has set aside the Judgment and Order dated 02.07.2009 passed by the Delhi High Court in Writ Petition (Civil) No. 7455 of 2001.
2. The brief facts relevant for the present case are as follows :-
 - (i) Naz Foundation filed WP (C) No. 7455/2001 before the Delhi High Court praying for grant of a declaration that Section 377 IPC to the extent it is applicable to and penalises sexual acts in private between consenting adults is violative of Articles 14, 15, 19(1)(a)-(d) and 21 of the Constitution.

- (ii) In September 2004, the Division Bench of the High Court dismissed the Writ Petition by observing that no cause of action had accrued to Naz Foundation and purely academic issues could not be examined by the Court.
- (iii) The review petition filed by Naz Foundation was also dismissed by the High Court.
- (iv) An SLP was filed before this Hon'ble Court, which, vide its order dated 03.02.2006, allowed the appeal and remitted the writ petition for fresh decision by the High Court.
- (v) The High Court, on 03.07.2009, allowed the Writ Petition filed by the Petitioners therein and read down Section 377 of the Indian Penal Code, 1860. The Division Bench of the High Court, *inter alia*, concluded that

“...Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.”
- (vi) SLPs against the judgment and order of the High Court were filed by *inter alia* Suresh Kumar Koushal (a citizen of India who believed he had the moral responsibility and duty in protecting cultural values of Indian society) and others, who were not parties before the High Court.
- (vii) Vide impugned Judgment dated 11.12.2013 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.

- (viii) The Petitioners are well respected, highly qualified Indian academics who appeared in the aforementioned matter, i.e. SLP (C) No. 15436 of 2009 as intervenors, and were permitted to intervene by order of this Hon'ble Court dated 07.02.2011.
- (ix) The Petitioners have preferred the present review petition under Article 137 of the Constitution of India, seeking review of judgment dated 11.12.2013 passed in SLP (C) 15436 of 2009 (converted to Civil Appeal No. (C) 10972 of 2013). Further, the Petitioners state that no other petition seeking review has been filed by them against the judgment dated 11.12.2013.

G R O U N D S

- A. For that review of the judgment of this Hon'ble Court is sought on the following grounds:
 - (i) the judgment fails to take into account new and important evidence;
 - (ii) the judgment suffers from errors apparent on the face of the record, including patent errors in law,
 - (iii) review of this judgment is necessary for the sake of justice.

NEW AND IMPORTANT EVIDENCE

B. For that judgment dated 11.12.2013 ought to be reviewed as it fails to take into account the following new and important evidence:

- (i) This Hon'ble Court has stated that S. 377 IPC does not violate the principle that the scope of a penal provision must be definite and clear. [Para 38, Page 77 of impugned judgment]. However, the Hon'ble Court has failed to consider the effect of the Criminal Law Amendment Act, 2013, which came into force on 02.04.2013. While the impugned judgment mentions the 2013 Amendments, the judgment quotes the old, unamended Section 375 and 376 IPC [Para 34, Page 62].
- (ii) The 2013 amendment of Section 375 IPC broadens the definition of 'rape' to include penetration other than penile-vaginal penetration. However, this Hon'ble Court has held that Section 377 IPC applies to all acts of oral and anal sex irrespective of the age, consent, gender or sexual orientation of the parties. Consequently, the same act against a woman may fall under both Section 375 and 377 IPC. This creates confusion in the interpretation of criminal statutes which is to be avoided.
- (iii) Section 375 IPC applies to acts which are done without consent. The Criminal Law Amendment Act has also inserted a definition of "consent" for the first time in the statute. However this Hon'ble Court has held that Section 377 IPC applies irrespective of age and consent of the parties (in Para

38, Page 77). The Court has failed to take into account the changes in law, which is new and important evidence and thus warrants a review. A true copy of the Criminal Law Amendment Act, 2013 is enclosed as **Annexure A**.

FAILURE TO CONSIDER CONTENTIONS URGED

- C. For that this Hon'ble Court has failed to consider contentions made by the parties although the same are recorded in the judgment. This Hon'ble Court in *Indian Charge Chrome v. Union of India*, [(2005) 4 SCC 67] has held that failure to consider a contention urged before the Court it is a manifest error resulting in grave miscarriage of justice.
- D. For that the Petitioners are highly qualified academics who contended that modern democracies have a duty to respect the choices of others and that mere lack of consensus cannot be a ground for taking away the rights of LGBT persons. The Petitioners stated that just as religious leaders are entitled to their opinions, they themselves believe that S. 377 IPC legitimizes an atmosphere that is a complete contradiction to the spirit of openness and acceptance of difference that marks a constitutional democracy.
- E. For that the Petitioners submitted that secularism is a part of the basic structure of the Constitution and a criminal provision which reflects 19th Century Judeo-Christian Victorian morality without any secular purpose befitting Independent India cannot be

permitted to exist. However, this Hon'ble Court has failed to advert to or even address the Petitioner's submissions.

- F. The Petitioners contended that Section 377 IPC must be considered in the context of general exceptions which are engrafted into each provision of the IPC and that consensual acts are exempt from the rigours of Section 377 IPC by virtue of Section 87 IPC. Section 87 IPC states that:

“Act not intended and not known to be likely to cause death or grievous hurt, done by consent.-- Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.”

- G. For that the Petitioners also argued that the doctrine of desuetude or 'dead letter law' would apply as no prosecutions had been done under Section 377 IPC for consensual acts for over 80 years.
- H. For that these contentions strike at the very root of Section 377 and this Hon'ble Court in not considering these contentions has

committed a manifest error, resulting in grave miscarriage of justice.

I. For that this Hon'ble Court has failed to consider the submissions made by other intervenors:

(i) In IA No. 9, Shekar Seshadri and Ors., who are highly qualified mental health professionals, submitted that in their professional lives they had interacted with a number of LGBT persons and that the High Court's judgment had removed a major source of stigma and discrimination. The mental health professionals contented that homosexuality is not a disease and is a normal variant of sexuality. The names of these intervenors have been mentioned in the impugned judgment but their submissions are neither considered, nor recorded.

(ii) The intervenors in IA No. 13 of 2010 (Prof. Ratna Kapur and Ors.) were legal academics. The legal academics contented that that a "compelling state interest" was needed to frame the law, and that the historical background of the law showed that by enacting Section 377 IPC the British imposed their cultural values on the native population. These submissions were neither considered, nor recorded by this Hon'ble Court and this Hon'ble Court in doing so has committed a manifest error, resulting in grave miscarriage of justice.

ERRORS APPARENT ON THE FACE OF THE RECORD

FACTUAL ERRORS

J. 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 in the aforementioned judgment:

- a. This Hon'ble Court did not taken cognizance of the fact that the Ld. Attorney General of India took a categorical stand that the Union of India has fully accepted the judgment of the High Court. The Attorney General submitted that there was no legal error in the judgment of the High Court dated 2nd July, 2009, and, therefore, no appeal was filed by the Union of India against the said judgment.

- b. Instead, this Hon'ble Court stated (para 21, page 44 of the impugned judgment) that the Ld. Attorney General argued the case as 'amicus'. That was not the case in the present case and in any event the Ld. Attorney General has a right to pre-audience (before all other Advocates) before the Court under the Advocates Act It is also incorrectly stated (para 22, page 45) that the Mr. PP Malhotra, ASG, appeared for the Ministry of Home Affairs. Sh. Mohan Jain, Ld. ASG clarified that Sh. PP Malhotra had not been instructed by the MHA in this regard. The Ld. Attorney General filed an affidavit dt. 01.03.2012 before this Hon'ble Court placing on record the stand of the Union of India. A press release was also issued to this effect on 23.2.2012 being Annexure B.

PATENT ERRORS IN LAW

- K. For that this Hon'ble Court failed to take into account established jurisprudence and misapplied clear and established case law which is sufficient ground to review the impugned Judgment.
- L. For that this Hon'ble Court should have referred this matter to a five judge bench as Article 145(3) of the Constitution of India states, "The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five". It is submitted that the constitutionality of S. 377 is a matter which involves a substantial question of law as to the interpretation of this Constitution and the Hon'ble Court has ignored this aspect completely.
- M. For that in Para 42 of the judgment the learned judges summarily come to a conclusion that there was no violation of Article 14 and 15 of the Constitution.

"Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution."

- N. For that Article 14 of the Constitution permits class legislation only if there is an intelligible differentia between the classes, a rational nexus with the objective of the legislation, and the objective itself is constitutionally valid. The Hon'ble Court in the impugned judgment has concluded 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 has stated nothing about the rational nexus that this classification seeks to achieve. This Hon'ble Court also did not shed any light on what constituted carnal intercourse 'against the order of nature'.
- O. 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] and hence there is no intelligible differentia the Acts criminalized and not criminalized by S.377 IPC.
- P. For that the High Court had found that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15 of the Constitution (para 104 of the High Court judgment). This Hon'ble Court has not dealt with that submission at all.
- Q. For that the Respondents had submitted that Section 377 IPC violates Article 21 of the Constitution by violating the right to privacy. A statute can only infringe the right to privacy if some compelling state interest is demonstrated. [*Gobind v. State of Madhya Pradesh*, 1975 (2) SCC 148; paras 46-49, pages 86-90].

- R. For that this Hon'ble Court has recognized that Article 21 of the Constitution encompasses the right to dignity. Section 377 IPC by criminalizing consensual sexual acts in private causes fear and shame in both same and opposite sex couples that engage in such conduct. Since such sexual conduct may be intrinsically connected to the ways that many citizens define an intimate part of themselves, it instills grave fear and leads of a sense of shame in them. This Hon'ble Court failed to apply this test to S. 377 IPC and record a finding whether criminalization of intimate consensual sexual conduct of individuals in private impairs the dignity of persons under Article 21. [Paras 50-51, page 90-91].
- S. For that this Hon'ble Court has acknowledged the Right to health but not tested S. 377 IPC against it or to consider whether it violates the right to health of men who have sex with men. It has failed to take note of the submissions of the Respondents and the Union of India (through NACO) 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, page 78-79].
- T. For that this Hon'ble Court has summarized the law on the requirement of substantive due process under Article 21 [Para 46, page 85] but fails to address the submission that Section 377 IPC violates this requirement.
- U. For that this Hon'ble Court has erroneously held that there is a presumption of constitutionality for a pre-constitutional legislation

like S. 377 IPC [paragraph 28 and 31(ii) of the impugned judgment].

V. For that the three cases cited by this Hon'ble Court to buttress its stand are either silent on pre-constitutional legislation or contravene the stand taken by this Hon'ble Court.

W. For that *RK Dalmia v. Justice SR Tendolkar* [AIR 1958 SC 538] cited by the Court does not pertain to a pre-constitutional legislation. It also enumerates several dicta on the nature of the presumption of constitutionality, the last two of which are that –

“(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.”

As per (e), the presumption can be justified through the circumstances that dominated the drafting of the provision. The provision has a colonial history and is a vestige of Judeo-Christian morality; so, a presumption cannot be justified.

X. For that in *John Vallamattom v. Union of India*, (2003) 6 SCC 611, this Court dealt with the constitutionality of Section 118 of the Indian Succession Act, a pre-Constitutional statute, which was based on the Mortmain and Charitable Uses Act, 1888 of

England. In the said judgment, the following passage has been approvingly cited as under:

“Article 372 of the Constitution of India per force does not make a pre-constitution statutory provision to be constitutional. It merely makes a provision for the applicability and enforceability of pre-constitution laws subject of course to the provisions of the Constitution and until they are altered, repealed or amended by a competent legislature or other competent authorities.” (emphasis supplied)

It is submitted that the said passage does not create a presumption of constitutionality in case of pre-constitutional laws.

Rather, it holds that pre-constitution laws are applicable and enforceable subject to the provisions of the constitution. In *John Vallamottam* the Court struck down Section 118 of the Succession Act as unconstitutional based on the reason that similar contemporaneous provision had been deleted in England.

It attached no presumption of constitutionality to that provision.

This court has held:

“It may be true that the Indian Parliament is not bound to take note of and amend its statutory enactments keeping in view the amendments made in England. But there cannot be any doubt whatsoever that while interpreting a restrictive statute, one may consider not only the past history of the concerned legislation but the manner in which the same has been dealt with by the legislature of its origin.”

Y. For that in *Anuj Garg v Union of India*, 2008 (3) SCC 1, this Hon'ble Court struck down a ban enacted in 1914 on female bartenders and held that the provision was unconstitutional. This Hon'ble Court has cited (in para 27):

“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.”

Z. For that this passage does not state in any way that pre-constitutional legislations are presumed to be constitutional. The cited passage just holds that a valid piece of legislation can be held as invalid with changes in the domestic and international arena.

AA. For that the judgments cited by this Hon'ble court themselves have held that temporal reasonableness is a ground to strike down a statute, and changing societal conditions must be taken into account. However this Hon'ble Court has held to the contrary that: (Para 33, Page 62):

“It is, therefore, apposite to say that unless a clear constitutional violation is proved, this Court is not empowered to strike down a law merely by virtue of its falling into disuse or the perception of the society having changed as regards the legitimacy of its purpose and its need.”

AB. For that in Para 32 of the impugned Judgment, the Learned Judges observed that

“Self restraint must be exercised and the analysis must be guided by the presumption of constitutionality..... 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”

AC. For that the impugned Judgment is contrary to, and *per incurium*, *Mithu v. State of Punjab*, [(1983) 2 SCC 277] wherein a Constitution Bench of this Hon'ble Court did not wait for Parliament to revise the IPC, even though an amendment had been introduced in 1972. In *Mithu* this Hon'ble Court went on to hold the provision unconstitutional. Justice Bhagwati even stated that “Section 303 was destined to die in Court”.

AD. For that *Mithu* has been followed in *State of Punjab v Dalbir Singh*, [(2012) 3 SCC 346] which held that a provision of the Arms Act which provided for mandatory sentencing was unconstitutional:

“30. Learned Addl. Solicitor General submitted that in the light of the aforesaid pronouncement by this Court in *Mithu v. State of Punjab*, (1983) 2 SCC 277, the government is examining the question of making suitable amendments as indicated above to Section 27(3) of the Act.

31. This Court, however, is not inclined to defer its decision. The Court, however, cannot refuse to examine the provision in view of a very fair stand taken by learned ASG.

32. The Judges of this Court have taken an oath to uphold and preserve the Constitution and it is well known that this Court has to protect the Constitution as a sentinel on the qui vive against any abridgement of its principles and percepts.”

AE. For that courts cannot be guided in exercise of the power of judicial review of Statutes by the fact that the Legislature has retained a particular provision in the Statute.

AF. For that this Hon'ble Court's judgment is in contravention of a Constitution Bench of this Court in *Mithu v. State of Punjab* and is *per incuriam* which is fit ground for review.

AG. For that the Legislature has not always removed statutory or even constitutional provisions from their parent statute even after this Hon'ble Court has held them to be unconstitutional. In *Minerva Mills v. Union of India*, [(1980) 3 SCC 625], this Hon'ble Court struck down Articles 368(4) and (5) of the Constitution, as they limited the power of this Hon'ble Court to review constitutional amendments. However, the latest text of the Constitution continues to include Articles 368(4) and (5), even though they were declared unconstitutional long ago.

AH. For that this Hon'ble Court has held

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

AI. For that the right to approach a constitutional court under Article 32 or 226 of the Constitution of India against infringement of fundamental rights is not circumscribed by the number of that the number of people affected by a statute. Rather, it has been held by this Hon'ble Court in *RK Dalmia v. Justice SR Tendolkar* [AIR 1958 SC 538], (cited in the impugned judgment) that:

“11. ... (a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not

applicable to others, that single individual may be treated as a class by himself;”

AJ. For that this principle has been followed by this Hon'ble Court in a catena of judgments, most recently in *Ashoka Kumar Thakur v. Union of India*, [(2008) 6 SCC 1], wherein this Hon'ble Court held that:

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

AK. For that the number of people affected is irrelevant when it comes to deciding an issue of constitutionality.

AL. For that the present review petition is being filed to avoid grave miscarriage of justice to thousands of LGBT persons whose sexual identities have been re-criminalized by the Judgment dated 11.12.2013 passed by this Hon'ble Court and have now been put at risk of prosecution and harassment. This Hon'ble Court must take note of the criminalization of a large section of Indian citizens.

AM. For that this Hon'ble Court has held in *Nagaraj v. State of Karnataka*, [(1993) Supp 4 SC 595] that a judgment must be reviewed 'for the sake of justice'.

PRAYER

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

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

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

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

(ADVOCATE FOR THE PETITIONER)

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A No. _____ OF 2014

IN

REVIEW PETITION (CIVIL) NO. _____ OF 2014

IN

CIVIL APPEAL NO. 10972 OF 2013

IN THE MATTER OF:

NIVEDITA MENON & ORS. ... Petitioner

Versus

SURESH KUMAR KOUSHAL & ANR. ... Respondents

APPLICATION FOR EXEMPTION FROM FILING CERTIFIED COPY
OF JUDGMENT

To

Hon'ble the Chief Justice of India
and His Companion Justices of
the Supreme Court of India

The humble application of the
Petitioner above named.

MOST RESPECTFULLY SHOWETH:-

1. The Petitioner above named respectfully submits this Review Petition under Article 137 of the Constitution against the Judgment and Order dated 12.11.2013 passed by this Hon'ble Court in Civil Appeal No. 10972 of 2013, dismissing the Civil Appeal.

2. This application is made bonafide and in the interests of justice.

PRAYER

It is therefore most respectfully prayed that, in the interests of justice, this Hon'ble Court may be graciously pleased to:

- a. Exempt the Petitioner from filing certified copy of impugned judgment and
- b. Pass any other or further orders as may deem fit and proper in the circumstances of the case.

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

(ADVOCATE FOR THE PETITIONER)

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. NO. _____ OF 2014

IN

REVIEW PETITION (CIVIL) NO. _____ OF 2014

IN

CIVIL APPEAL NO. 10972 OF 2013

IN THE MATTER OF:

NIVEDITA MENON & ORS. ... Petitioner

Versus

SURESH KUMAR KOUSHAL & ANR. ... Respondents

APPLICATION FOR DIRECTIONS

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 accompanying Review Petition has been filed under Article 137 of the Constitution of India read with Order XL of the Supreme Court Rules, 1966 for review of the judgment dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal No. 10972 of 2013, and other connected matters, by which this Hon'ble Court set aside the Judgment and Order dated 2nd July, 2009, passed 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 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 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, work places and other public spaces.
5. That the impugned judgment suffers from errors apparent on the face of the record, fails to take into account new and important evidence, does not consider the submissions advanced by the Petitioner and other intervenors and is contrary to well-established principles of law laid down by this Hon'ble Court.
6. That 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.
7. That the Applicant has a good prima facie case for review of the judgment dated 11.12.2013 in Civil Appeal No. 10972 of 2013.
8. 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 that oral arguments be heard prior to disposing of the accompanying Review Petition; and
- B. Pass such further or other orders as this Hon'ble Court may deem fit and proper.

ADVOCATES FOR THE
APPLICANT / PETITIONER

FILED ON: _____.01.2014

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. NO. _____ OF 2014

IN

REVIEW PETITION (CIVIL) NO. _____ OF 2014

IN

CIVIL APPEAL NO. 10972 OF 2013

IN THE MATTER OF:

NIVEDITA MENON & ORS. ... Petitioner

Versus

SURESH KUMAR KOUSHAL & ANR. ... Respondents

APPLICATION FOR STAY

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 accompanying Review Petition has been filed under Article 137 of the Constitution of India read with Order XL of the Supreme Court Rules, 1966 for review of the judgment dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal No. 10972 of 2013, and other connected matters, by which this Hon'ble Court set aside the Judgment and Order dated 2nd July,

2009, passed 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 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 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, work places and other public spaces.
5. That if the judgment is allowed to stand during the pendency of the present review petition, the 'right to health' of many persons will be affected as critical efforts and life-saving work of HIV prevention groups will be impeded.

PRAYER

It is therefore most respectfully prayed that, in the interests of justice, this Hon'ble Court may be graciously pleased to:

- A. grant ad-interim ex-parte stay of the Judgment and order under review till passing of appropriate order(s) in the present review petition, and

B. Pass such further or other orders as this Hon'ble Court may
deem fit and proper.

ADVOCATES FOR THE
APPLICANT / PETITIONER

FILED ON: _____.01.2014