

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CURATIVE PETITION NO. OF 2014

IN

REVIEW PETITION (CIVIL) NO. 219 OF 2014

IN

CIVIL APPEAL NO.10972 OF 2013

(Against the order dated 28.1.2014 in Review Petition (C) No. 219 of 2014 passed by this Hon'ble Court, filed against the order of this Hon'ble Court dated 11.12.2013 in Civil Appeal No. 10972 OF 2013: APPEALED FROM)

IN THE MATTER OF:

Minna Saran & Others  
PETITIONERS

...

Versus

Suresh Kumar Koushal & Others  
RESPONDENTS

...

(PAPER BOOK)

(FOR INDEX KINDLY SEE INSIDE)

ADVOCATE FOR THE CURATIVE PETITIONER: MR. NIKHIL  
NAYYAR

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## SYNOPSIS AND LIST OF DATES

1. The present curative petition under Article 142 of the Constitution of India arises in an exceptional case impacting Human Rights and Dignity.
  - a. The petitioners request this Court to reconsider its judgment and order dated 28.1.2014, dismissing the review petition filed by the Petitioner, seeking reconsideration of the final judgment and order dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal 10972/2013 and a connected set of civil appeals captioned *Suresh Kumar Koushal&Anr. v. Naz Foundation and Ors.*
  - b. The petitioners ('Minna Saran and Others') who are parents of LGBT persons were allowed by this Hon'ble Court to be impleaded as parties in C.A. 10972 of 2013 vide order in I.A. No. 8 of 2010.
  - c. The Petitioners filed Review Petition (Civil) 219 of 2013 which came to be dismissed by this Court on 28.01.2014.

### **Why this curative petition?**

2. It is submitted that the present curative petition is urged for the following reasons:
  - a. It is humbly submitted that the decision of this Hon'ble Court in *Koushalv. Naz Foundation* dated 11.12.2013 has resulted in grave injustice and violation of the fundamental rights of LGBT persons, it affects the public confidence in this Court to protect and defend the Constitutional rights of citizens and perpetuates an irremediable injustice. It is submitted that this is an exceptional case which warrants the exercise of

inherent powers by this Hon'ble court, for curing a grave miscarriage of justice. Millions of people across the country who are LGBT and their families have been denied their personhood and full moral citizenship of this country on the basis of their intimate and unalterable sexual orientation.

- b. The impugned judgment has led to a constitutionally impermissible situation where constitutional protection may only be claimed on the basis of the numerical strength of the community. The impugned decision goes against the protections granted to every minority community in the country by predicating and conditioning the protection granted by the Constitution on the demonstrable numbers and numerical strength of the community in question. It is submitted that such a condition is wholly without merit and unwarranted under the constitutional scheme which protects every citizen, right irrespective of social status or numbers. It is submitted that such a distinction made in the impugned decision would affect the confidence of every member of the public who would happen to belong to any minority community.
- c. The impugned judgment completely fails to consider the argument that Section 377 of the Indian Penal Code, 1860 was violative of Article 15(1) of the Constitution, although this contention was raised and noticed. This failure to give reasons violates the principles of Natural Justice and validates state discrimination against citizens on the basis of identity without any conclusion on classification or the prohibited grounds of discrimination.
- d. Section 377 of the Indian Penal Code violates the Fundamental Right to equality, non-discrimination,

privacy, life and liberty of Indians. This section suffers from infirmities which render it unconstitutional.

- e. Important questions of constitutional interpretation have been heard and decided by a Bench of 2 judges, in direct violation of the mandate of Article 145 of the Constitution.
- f. This Hon'ble Court is empowered and mandated with scrutiny of legislation and is duty bound to strike down legislation which offends the Fundamental Rights guaranteed by the Constitution. The present petition shows that this Hon'ble Court has fallen into serious error and has omitted to perform its Constitutional duty in leaving such an examination to a majoritarian Parliament, thereby failing to protect the guaranteed fundamental rights of a section of citizens. It is humbly submitted that the impugned judgment has not extended the rights guaranteed by the Constitution to LGBT citizens and has resulted in an abdication of this Hon'ble Court's constitutional role as the custodian of Fundamental Rights and liberties. This is an egregious error and goes against the grain of the constitutional structure and system of checks and balances. As such, it is humbly submitted that the present case is a fit case in which the curative powers of this Hon'ble Court ought to be exercised.
- g. The impugned decision warrants an unprecedented intrusion by the State into the intimate affairs of adult, consenting citizens which is unacceptable and not mandated. Therefore, the impugned decision also erodes the rights to privacy and dignity of all citizens in the country without any compelling state interest or reason. The impugned decision takes away one of the major protections of citizens against the powers and

arbitrary nature of legislatures and therefore, affect the confidence of the public in the Judiciary as the protector of all citizens.

- h. Section 377 has been used to perpetuate harassment, blackmail and abuse of citizens and this fact has been documented before this Hon'ble Court. Further, Section 377 is a penal provision which is impermissibly vague and therefore, its application and implementation are bound to be arbitrary and unfair. This ground has also been demonstrated before this Hon'ble Court.
- i. The impugned decision has led to the present petitioners being in a constant state of fear and helplessness about the safety of their children who have been reduced to the status of unapprehended felons because of Section 377 being given new life.
- j. It is widely and scientifically recognised that sexual orientation is a part of the identity of a person and that discrimination on the basis of sexual orientation goes to the core of the individual against whom such practices are perpetuated. It is well recognised by law that the State may not discriminate between citizens on the basis of certain grounds and that in order to differentiate between categories of people, the State must have a valid reason and justification which is considered important to its goals. However, even though sexual orientation is a closely held characteristic which is immutable and natural, and sexual acts between two homosexuals may be private and consensual, Section 377 of the Indian Penal Code discriminates against such conduct and criminalises it as being "unnatural". The provision of law effectively renders all categories of sexual

intercourse which are deemed “unnatural” as a criminal offence.

- k. The power of judicial review vested with the constitutional courts of the country is of paramount importance in protecting the rights of minorities and all citizens from the tyrannies of the legislative process. The power must be exercised to protect the rights of any citizen of the country.
- l. It is submitted that in *Rupa Ashok Hurra Vs. Ashok Hurra*, (2002) 4 SCC 388, this Hon’ble Court has held “that this Court, to prevent abuse of its process and to cure a gross miscarriage of justice, may reconsider its judgments in exercise of its inherent power”. (Para 49). It is submitted that the instances given in Para 51 of the judgment are not exhaustive, which is evident from the observations of the Court in Para 50 itself. It is submitted that in any event, the present case is one in which fundamental rights of a number of citizens are involved and the impugned judgments have large societal ramifications. As such, the present case is a fit case in which this Hon’ble Court ought to exercise its curative powers, to remedy a gross miscarriage of justice.

### ***Why Hear the Parties***

3. It is respectfully submitted that this curative petition merits a hearing in Court. The case involves Human Rights and Dignity. As set out in this synopsis and in greater detail in the main curative petition, a number of points advanced during the oral arguments and recorded in the written submissions have been entirely ignored. The effect and impact of *Koushal* is to demote honest and law abiding

members of the LGBT community to status of second class citizens in India. This amounts to an extraordinary regression in Human Rights jurisprudence and severely dents the record of this Court in protecting and expanding the liberty assured to all persons. The *Koushal* judgment is discordant in terms of global Human Rights jurisprudence and social developments across the world. It is respectfully submitted that the petitioners would like to explain the enormous adverse psychological, physical, social and health ramification of *Koushal* in the course of an oral hearing in open court.

#### **LIST OF DATES**

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

3.11.2004

High Court of Delhi passes order dismissing review petition filed against its order dismissing WP(C) 7455/2001.

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

3.2.2006

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

*“The challenge in the writ petition before the High Court was to the constitutional validity of Section 377 of the Indian Penal Code, 1860. The High Court without examining the issue, dismissed the writ petition by the impugned order observing that there is no cause of action in favour of the appellant as the petition cannot be filed to test the validity of the legislation and therefore, it cannot be entertained to examine the academic challenge to the constitutionality of the provision.*

*The learned Additional Solicitor General, if we may say so, rightly submits that the matter requires examination and is not of a nature which ought to have been dismissed on the ground afore-*

*stated...We are, however, not examining the issue on merits but are of the view that the matter does require consideration and is not of a nature which could have dismissed on the ground afore-stated. In this view, we set aside the impugned judgment and order of the High Court and remit Writ Petition(C) No. 7455 of 2001 for its fresh decision by the High Court.”*

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

2.7.2009

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

terms:

*“We declare that Section 377 IPC, insofar as it criminalises consensual sexual acts of adults in private, is violative of Article 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By ‘adult’ we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act.”*

09.07.2009 SLP(C) 15436/2009 was filed by third parties who were neither parties before the High Court nor demonstrated how they were personally aggrieved by the judgment of the High Court.

The Union of India accepted the declaration granted by the High Court and refused to appeal this judgment.

07.02.2011 This Hon’ble Court was pleased to pass orders in I.A. No.8/2010 allowing the present petitioners to act as interveners in SLP (C) 15436/2009.

13.02.2012 This Hon’ble Court began hearing final arguments in the above matter.

23.02.2012                      Learned ASG, Mr. P.P. Malhotra, purporting to appear for the Ministry of Home Affairs, reiterated the previous stand taken by that Ministry before the High Court of Delhi and submitted that this Ministry was opposed to the decriminalisation of homosexuality.

23, 28.02.2012                Learned ASG, Mr. Mohan Jain, appearing for the Ministry of Health took a contrary stand and submitted that Union of India had decided not to appeal against the impugned order of the High Court of Delhi as per decision taken on 20.07. 2009, that a Group of Ministers of the Union of India had found that there was no legal infirmity with the Order of the High Court of Delhi. He further submitted that section 377 of the Indian Penal Code hampered HIV prevention work.

28.02.2012                      This Hon'ble Court was pleased to record as follows:

*Learned Additional Solicitor General appeared and read out what he termed as the recommendations made by the*

*Group of Ministers and the decision of the Cabinet.*

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

*1.3.2012*

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

1.3.2012

& 13.3.2012

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

22.03.2012

The Learned Attorney General appeared before this Hon'ble Court on behalf of the Union of India and reiterated the stand of the Union of India that it finds no legal error in the

judgment of the High Court accepts the same. The Attorney General also filed written submissions before this Hon'ble Court stating that Union of India does not find any legal error in the judgment of the High Court and accepts the correctness of the same; that this was also clear from the fact that it has not filed any appeal against the judgment of the High Court.

- 27.03.2012 Oral hearings in the case concluded and judgment was reserved.
- 14.11.2012 The Protection of Children from Sexual Offences Act, 2012 came into force. This Act protects all persons below the age of 18 from all forms of sexual assault, rendering the key purpose of Section 377 i.e. to protect children from sexual abuse otiose.
- 03.02.2013 The Criminal Law (Amendment) Act, 2013 comes into force, amending *inter alia* s. 375 of the IPC. This amendment criminalizes all forms of forcible

penetrative sexual intercourse committed by a man on a woman. This amendment protects women from all forms of penetrative sexual assault be it defined as carnal intercourse or sexual intercourse, rendering a key objective of Section 377 otiose.

11.12.13

About 1 year and 8 months after the conclusion of oral hearings, this Hon'ble Court allowed the Civil Appeals and set aside the order of the Delhi High Court in WP (C) 7455 of 2001. It is submitted that in rendering the impugned judgment order, this Hon'ble Court failed to consider the contentions raised by the Petitioners to the effect that Section 377 was violative of Articles 15 and 21 of the Constitution. The impugned judgment also erroneously concludes that no factual foundation was placed on record and no material was produced to demonstrate that Section 377 was being used to harass and discriminate against the LGBT community, without taking into account the

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

Court.

13.1.2014

The Petitioners herein filed a ReviewPetition in RP (C) 219 of 2014, *inter alia* contending that the order of this Hon'ble Court had failed to protect the LGBT community and perpetuated the violation of fundamental rights of citizens, that important questions as to the interpretation of the Constitution had been raised but were not considered, in violation of the principles of natural justice and that the order in the civil appeals ignored material and contentions on record and suffered from errors apparent on the face of the record. Applications seeking oral hearing in open court were also moved.

28.1.2014

The Review Petitions were dismissed by this Hon'ble Court by circulation, without granting an opportunity of oral hearing to the Petitioners.

\_\_\_\_.04.2014

Hence this Curative Petition.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

REVIEW PETITION (C) NOS. 41-55 OF 2014  
IN  
CIVIL APPEAL NO.10972, 10974, 10986, 10981, 10983,  
10984, 10975,  
10973, 10985, 10976, 10980, 10982, 10977, 10978 AND  
10979 OF 2013

NAZ FOUNDATION (INDIA) TRUST ...

PETITIONER(S)

VERSUS

SURESH KUMAR KOUSHAL & ORS. ... RESPOND-  
ENT(S)

WITH

REVIEW PETITION (C)NO.197 OF 2014  
IN  
CIVIL APPEAL NO.10972 OF 2013

UNION OF INDIA ...

PETITIONER(S)

VERSUS

SURESH KUMAR KOUSHAL & ANR. ... RESPOND-  
ENT(S)

WITH

REVIEW PETITION (C)NO.198 OF 2014  
IN  
CIVIL APPEAL NO.10972 OF 2013

NIVEDITA MENON AND ORS. ...

PETITIONER(S)

VERSUS

SURESH KUMAR KOUSHAL & ANR. ... RESPOND-  
ENT(S)

WITH

REVIEW PETITION (C) NO.202 OF 2014  
IN  
CIVIL APPEAL NO.10972 OF 2013

SHYAM BENEAL ...

PETITIONER(S)

VERSUS

NAZ FOUNDATION AND ORS. ... RESPOND-  
ENT(S)

WITH

REVIEW PETITION (C)NO.211 OF 2014  
IN  
CIVIL APPEAL NO.10972 OF 2013

RATNA KAPUR AND ORS. ... PETITIONER(S)

VERSUS

SURESH KUMAR KOUSHAL AND ANR. ... RE-  
SPONDENT(S)

WITH

REVIEW PETITION (C)NO.219 OF 2014  
IN  
CIVIL APPEAL NO.10972 OF 2013

MINNA SARAN AND ORS. ... PETITIONER(S)

VERSUS

SURESH KUMAR KOUSHAL AND ORS. ... RE-  
SPONDENT(S)

WITH

REVIEW PETITION (C)NO.221 OF 2014

IN  
CIVIL APPEAL NO.10972 OF 2013

SHEKHAR SESHADRI AND ORS. ... PETI-

TIONER(S)

VERSUS

SURESH KUMAR KOUSHAL AND ORS. ... RE-  
SPONDENT(S)

WITH  
R.P.(C)NOS.222-233 OF 2014  
IN  
CIVIL APPEAL NOS.10972, 10974, 10986, 10981, 10984,  
10973, 10985, 10976, 10980, 10977, 10978 AND 10979/2013

VOICES AGAINST SECTION 377 ... PETI-  
TIONER(S)

VERSUS

SURESH KUMAR KOUSHAL AND ORS. ... RE-  
SPONDENT(S)

O R D E R

Delay condoned.

Application for Oral hearing is rejected.

We have gone through the Review Petitions and the connected papers. We see no reason to interfere with the order impugned. The Review Petitions are, accordingly, dismissed.

.....J.  
(H.L. DATTU)

.....J.  
(SUDHANSU JYOTI MUKHOPADHAYA)

NEW DELHI  
JANUARY 28, 2014

TRUE COPY

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CURATIVE PETITION NO. \_\_\_\_\_ OF 2014

IN

REVIEW PETITION (CIVIL) NO. 219 OF 2014

IN

CIVIL APPEAL NO. 10972 OF 2013

**IN THE MATTER OF:**

A CURATIVE PETITION FILED AGAINST

THE ORDER DATED 28.01.2014

IN REVIEW PETITION (C) NO. 219 OF 2014

**IN THE MATTER OF:**

1. Minna Saran,  
Aged about 66 years,  
Residing at E-301,  
Krishna Apra Residency,  
Sector 61, NOIDA.
2. Col. (Retd) Rajeshwar Saran,  
Aged about 80 years,  
Residing at E-301,  
Krishna Apra Residency,  
Sector 61, NOIDA.
3. Suresh ShripanHemmady,  
Aged about 76 years,  
Residing at C-7, Anantashram,  
Proctor Road,  
Mumbai – 400 007.
4. Shaila Suresh Hemmady,  
Aged about 73 years,  
Residing at C-7, Anantashram,  
Proctor Road,  
Mumbai – 400 007.

5. ShakuntalaVijaykumarKhire,  
Aged about 74 years,  
Residing at E18/12, SaritaNagri,  
Phase II, Pune Sinhagad Road,  
Pune 411030.
6. ChitraPalekar,  
Aged about 66 years,  
Residing at A501,  
Vintage Pearl, 29<sup>th</sup> Road,  
Bandra (West),  
Mumbai 400050.
7. Vijayam P.S.,  
Aged about 62 years,  
Residing at XVI/170,  
Manayath House, Mammiyur,  
Guruvayoor 680101,  
Thrissur District,  
Kerala.
8. Munithayamma,  
Aged about 54 years,  
Residing at No. 34, 'B' Street,  
Gopalapura,  
Magadi Road,  
Bangalore 560 023.
9. A. Flavie, aged about 56 years,  
No. 12, Singamma Compound,  
Near Old Madras Soap Factory,  
DG Halli,  
Bangalore 560 045.
10. Mrs.ShobhaDoshi,  
Aged about 62 years,  
R/o 302, C Wing, Anant Regency,  
46 MM Road, Opp. Mulund,  
Telephone Exchange,  
Mulund (West),  
Mumbai – 400080.
11. Padma V., aged about 54 years,  
Residing at 4, Veerasami Road,  
Kuirnji Nagar, Perungudi,  
Chennai – 600 096.
12. Dr. K. S. Vasudevan,  
Aged about 68 years,  
Residing at H76/S5, Mullai Apartments,

TiruvallurNahar, Tiruvanmiyur,  
Chennai – 600 041.

13. JanakiVasudevan,  
Aged about 65 years,  
Residing at H76/S5, Mullai Apartments,  
TiruvallurNahar, Tiruvanmiyur,  
Chennai – 600 041.
14. Mrs. Ava Chakrabarty,  
Aged about 67 years,  
75, Jawpur Road,  
Kolkata – 74.
15. Mrs.Vijayalakshmi Ray Chaudhuri,  
Aged about 79 years,  
Mr.Das' Nursing Home & Diagnostic Centre Pvt. Ltd.,  
New town, Diamond Harbour,  
24 Parganas,  
West Bengal – 743 331.
16. Pramathanath Ray Chaudhuri,  
Mr.Das' Nursing Home & Diagnostic Centre Pvt. Ltd.,  
New town, Diamond Harbour,  
24 Parganas,  
West Bengal – 743 331.
17. Mrs.Mamata Jana,  
Aged about 54 years,  
Residing at 424, GT Road,  
Kolkata.
18. Mrs.BinaGuhaThakurta (62),  
7C, Tiljala Place,  
Kolkata – 700017. ...  
PETITIONERS

VERSUS

1. Suresh Kumar Koushal  
S/o Shri S.D. Koushal,  
Aged about 53 years,  
C- 105, NirmanVihar,  
Delhi – 110 092,  
Delhi.

2. Dr.Mukesh Kumar Koushal  
S/o Shri S.D. Koushal,  
Aged about 53 years,  
C- 105, NirmanVihar,  
Delhi – 110 092,  
Delhi.
3. NAZ Foundation,  
A society registered under  
The Societies Registrar Act,  
D – 45, Gulmohar Park,  
New Delhi – 110 049  
Delhi
4. Government of NCT Delhi,  
through the Secretary,  
Social Welfare Delhi Secretariat ITO,  
New Delhi  
Delhi.
5. Commissioner of Police  
Police Headquarters,  
ITO, New Delhi.  
Delhi
6. Delhi State AIDS Control Society  
11, Lances Road, Timarpur,  
Delhi – 110 054

Delhi.

7. National AIDS Control Organization,  
Setup by the Union of India,  
Having its Office  
9th Floor, Chandralok Building  
Opp. Imperial Hotel,  
New Delhi  
Delhi.
8. Union of India,  
Through Secretary  
Ministry of Home,  
North Block, India Gate  
New Delhi.
9. Union of India,  
Through Secretary  
Ministry of Health Welfare,  
Having its office at  
344, NirmanBhavan,  
Maulana Azad Road,  
New Delhi.
10. Union of India,  
Through Secretary  
Ministry of Social Welfare,  
ShastriBhavan,  
New Delhi.

11. Joint Action Council Kannur,  
C-38, Anand Niketan  
New Delhi – 110021.
  
12. Voices Against 377  
A coalition of 12 organisations  
Having its address at  
11, Mathura Road,  
First Floor, Jangpura B  
New Delhi – 110013

...

RESPONDENTS

TO

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

THE HUMBLE PETITION OF THE PETITIONERS ABOVE  
NAMED

MOST RESPECTFULLY SHOWETH:

1. That by the present curative petition under Article 142 of the  
Constitution of India, the petitioners have approached this  
Hon'ble Court seeking remedy for the manifest injustices  
which have been caused to millions of Lesbian, Gay,  
Bisexual and Transgender (hereinafter LGBT) persons  
residing in India as a result of the decision of this Hon'ble  
Court dated 28.1.2014 dismissing Review Petition (C) No.

219 of 2014, and upholding the final judgment and order dated 11.12.2013 in Civil Appeal No. 10972 Of 2013.

2. The facts leading to the filing of the present curative petition are as under:

2.1. The Delhi High Court, in *Naz Foundation v. Government of the NCT of Delhi*, WP (C) 7455 of 2001, held that Section 377 of the Indian Penal Code, insofar as it criminalises consensual sexual acts of adults in private is unconstitutional and in violation of Articles 14, 15 and 21 of the Constitution. In order to save the provision from the vice of unconstitutionality, the High Court read down the provisions of Section 377 to apply only in respect of non-consensual penile non-vaginal sex, and sexual acts by adults with minors. By its judgement, the Hon'ble High Court decriminalised the lives of millions of Lesbian, Gay, Bisexual and Transgender Indian citizens.

2.2. In appeals filed by third parties against the said judgment in Civil Appeal No. 10972 of 2013 and connected matters, this Hon'ble Court, by its final judgement and order dated 11.12.2013, was pleased to reverse judgment and order of the High Court of Delhi. It was held that Section 377 of the Indian Penal Code was constitutional and that it applied to acts, irrespective of age or consent of the

parties involved. True copy of the impugned final judgment and order dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal No. 10972 of 2013 is annexed hereto as **ANNEXURE P-1 (Page Nos.        )**.

2.3. That the present petitioners, ('Minna Saran and Others') are parents of LGBT children and were interveners in Civil Appeal No. 10972 of 2013 vide I.A. No.8/2010, having been permitted to intervene in the matter by this Hon'ble Court vide its order dated 07.02.2011.

2.4. It is submitted that the petitioners moved this Hon'ble Court seeking review of the final judgment and order dated 11.12.2013 under Article 137 of the Constitution, pointing out apparent errors on the face of the record. True copy of the memorandum of Review Petition bearing Review Petition (C) No. 219/2014 dated 13.1.2014 is annexed hereto as **ANNEXURE P-2 (Page Nos.        )**.

2.5. The said review petition was rejected by this Hon'ble Court by circulation, without affording the Petitioners an opportunity of hearing in open court, vide order dated 28.01.2014.

- 2.6. It is submitted that this Hon'ble Court has held that the legal process contemplated under the Constitution envisages an extraordinary remedy which can be accessed in cases of grave injustice which may arise out of an order of this Hon'ble Court in the rarest of rare cases. It is respectfully submitted that in cases such as the present one, where a decision of this Hon'ble Court suffers from grievous errors which have the effect of depriving persons of the protection of the Fundamental Rights, this Court has not hesitated to correct such errors. Hence this curative petition.
3. In the aforesaid circumstances the Petitioner seeks to raise the following amongst other grounds in the present petition.

### **GROUND**

- A. That the present petition is clearly within the scope and ambit of the curative powers of this Hon'ble Court as spelled out in *Rupa Ashok Hurra Vs. Ashok Hurra*, (2002) 4 SCC 388, where this Hon'ble Court held "that this Court, to prevent abuse of its process and to cure a gross miscarriage of justice, may reconsider its judgments in exercise of its inherent power". (Para 49). It was held that a curative petition could be entertained by this Hon'ble Court even after dismissal of a review petition, when:

- ≡ The judgement causes perpetuation of irremediable injustice.
- ≡ The judgment would be oppressive to judicial conscience
- ≡ The judgment affects public confidence in the judiciary

It is further submitted that the instances given in para 51 of the said judgment are not exhaustive, which is evident from the observations of the Court in para 50 itself wherein it was observed that it was not possible to exhaustively enumerate the instances when a curative would lie. It is submitted that the present case is a fit case for exercise of curative powers by this Hon'ble Court.

- B. In *A.R. Antulay v. R.S. Nayak* (1988) 2 SCC 602, at para48 this Court has held:

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

In *Ramdeo Chauhan v. BaniKanta Das* (2010) 14 SCC 209, at para 50, this Court held

*50.. The assumption in the judgment under review that there can be no violation of a person's human right by a judgment of this Court is possibly not correct.*

*51. This Court in exercise of its appellate jurisdiction has to deal with many judgments of High Courts and Tribunals in which the High Courts or the Tribunals, on an erroneous perception of facts and law, have rendered decisions in breach of Human Rights of the parties and this Court corrects such errors in those judgments. The instances of this Court's judgment violating the Human Rights of the citizens may be extremely rare but it cannot be said that such a situation can never happen.*

*52. We can remind ourselves of the majority decision of the Constitution Bench of this court in Additional District Magistrate Jabalpur v. Shivakant Shukla reported in (1976) 2 SCC 521.. The majority opinion was that in view of the Presidential order dated 27.6.1975 under Article 359(1) of the Constitution, no person has the locus standi to move any writ petition under Article 226 before a High Court for Habeas Corpus or any other writ to enforce any right to personal liberty of a person detained under the then law of preventive detention { Maintenance of Internal Security Act of 1971}, on the ground that the order is illegal or mala fide or not in compliance with the Act. (See SCC paras 78 and 136 of the Report)....*

*54. There is no doubt that the majority judgment of this court in the ADM Jabalpur case (supra) violated the Fundamental Rights of a large number of people in this country.*

It is submitted that in light of the continuous, irreparable harm to the Fundamental Rights of millions of LGBT Indians and their families by section 377 of the Indian Penal Code, this Court ought to exercise its remedial powers to ensure that the continuous irremediable injustice is not perpetrated.

- c. It is respectfully submitted that the judgment of this Hon'ble Court dated 11.12.2013 which this Hon'ble Court subsequently declined to review vide order on 28.01.2014, criminalizes a significant section of the Indian

population by sanctioning them for their natural gender identity and sexual orientation, this Court should now exercise its powers, *ex debitojustitiae*, to rectify this grievous case of injustice and denial of Fundamental Rights.

- D. It is humbly submitted that there are serious and manifest errors on the face of the record which have led to grave and irremediable injustice to LGBT citizens and their families which would be oppressive to judicial conscience and would affect public confidence in the Judiciary. Therefore, the exercise of the inherent jurisdiction of this Hon'ble Court would be merited in the present case.

**GROUND'S SHOWING IRREMEDEABLE INJUSTICE:**

- E. **(A) Right to Dignity and Privacy of Petitioners has been Violated**
- (i) The present petitioners are parents of LGBT persons and had approached this Hon'ble Court for the protection of their right to enjoy peaceful and dignified family life with their children which is denied to them by Section 377 of the Indian Penal Code. The present petitioners had adduced evidence before this Hon'ble Court to show that the effect of Section 377 of the IPC was that they were living in constant fear of the safety of their children and were unable to enjoy their rights to life and liberty as a

result. Section 377 operated in a way that they were constantly under the apprehension that their children would be arrested and subjected to harassment and abuse because of their sexual orientation and gender identity.

- (ii) It is submitted that Section 377 had the effect of criminalising the lives of LGBT persons and this has led to the rights of the present petitioners being violated as they live in constant fear and apprehension of their children being harassed by the State. This violates their right to life and liberty under Article 21 of the Constitution.
- (iii) Despite sufficient personal testimonies in the form of affidavits being filed by these Petitioners before this Hon'ble Court, this has not even been adverted to or considered by this Hon'ble Court in its judgment dated 11.12.2013. These affidavits prove that section 377 has a radiating impact not just on the lives of LGBT persons, but also on their families. The law results in the fear of arrest and persecution of LGBT persons by the police. As far as the curative petitioners are concerned it results in the destruction of the right to a peaceful family life. The curative petitioners are deeply apprehensive that their children could be arrested at any point of time for being gay or lesbian. The fear which the curative petitioners feel pervades their family life and makes it impossible to

peacefully enjoy their family life. This is violative of the Fundamental Rights guaranteed under Articles 14, 15 and 21 of the Constitution and commits irremediable injustice against the petitioners.

F. **(B) Gross Injustice Necessitated by the Continuation of Section 377 which is an Impermissibly Vague Penal Provision**

- (i) It is submitted that it is a settled principle of criminal jurisprudence that penal law cannot be vague so as to confer upon an authority unfettered and unchartered discretion to apply the law. Such a law has been held by previous decisions of this Hon'ble Court to be arbitrary, violative of Article 14 and unconstitutional. This principle has been reiterated by Constitution Benches of this Hon'ble Court in *Bachan Singh v. State of Punjab*, (5 judges) (1982) 3 SCC 24 and in *Kartar Singh v. State of Punjab*, (5 judges) (1994) 3 SCC 569.
- (ii) It is submitted that this Hon'ble Court, vide the impugned judgment delivered on 11.12.2013 has stated in paragraph 38 of the decision that “... *no uniform test can be culled out to classify acts as ‘carnal intercourse against the order of nature’*. *In our opinion the acts which fall within the ambit of the section can only be determined with reference to the act itself and the circumstances in which it is executed.*” It is submitted that this proves that this

Hon'ble Court itself considered the prohibitions under Section 377 to be vague and not conferring any guidance on their application or interpretation.

- (iii) It is submitted that because of the aforementioned conclusions and the presence of binding precedent, this Hon'ble Court was required to strike down Section 377 as being impermissibly vague and therefore violating Article 14 of the Constitution and erred seriously in failing to do so. Further, the refusal to read down Section 377 on the basis of vagueness has resulted in the enforcement of a penal statute which is vague and offers unfettered discretion to law enforcement officers against LGBT citizens of this country.
- (iv) The arbitrary and capricious enforcement of this provision against LGBT persons and their families results in the perpetuation of grave and irremediable injustice.

G. **(C) Grave Miscarriage of Justice due to Errors in concluding that there exists no factual basis to establish discrimination and harassment due to Section 377**

- (i) It is respectfully submitted that the conclusion of this Hon'ble Court that there exists insufficient material on record to prove that there is discrimination and

harassment of LGBT persons on the basis of Section 377 is a grave error of fact and law, made without reference to the material placed on record, and this error has caused irremediable harm and injustice to the persons who have been and continue to be discriminated against because of Section 377.

- (ii) It is submitted that this Hon'ble Court has not considered the affidavits filed by the present petitioners detailing the harassment, discrimination, humiliation, insults and mistreatment meted out to their LGBT children, emanating directly from Section 377. It is submitted that this Hon'ble Court has itself recorded the instances of harassment as a fact in the impugned decision. At paragraph 51 of the same judgment, this Hon'ble Court observes,

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

- (iii) It is submitted that extensive materials had been placed before the High Court detailing uncontroverted facts showing that section 377 targets LGBT people. It is further

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

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

No basis existed for disturbing the factual finding of the High Court. It is further submitted that incidents of torture and abuse of sexual minorities at the hands of police and state machinery has been documented not only in the form of affidavits, FIR's but also through various judicial orders including through a judgment of the High Court of Madras, where the Hon'ble Court recognised and ordered compensatory relief in *Jayalakshmi v. State of Tamil Nadu*, (2007) 4 MLJ 849. In concluding that there was no factual foundation in support of the challenge to Section 377, this Hon'ble Court has entirely ignored the above material and evidence placed on record, thereby committing a serious error apparent on the face of the record. Although this aspect was pleaded in the Review Petition filed by the Petitioners, it this has not been considered while passing the impugned order dated 28.1.2014.

- (iv) It is submitted that even otherwise, this Hon'ble Court has previously considered forms of petitions sufficient to invoke its extraordinary powers without any materials or evidence adduced therewith where there is a question of the violation of Fundamental Rights.

Fundamental Rights of citizens. Regard may be had to the judgment of this Hon'ble Court in *Bandhua Mukti Morcha v. Union of India*, (3 judges) AIR 1984 SC 802 at paragraph 88, as also the rulings in *M.C. Mehta & Another v. Union Of India & Others*, AIR 1987 SC 1086, *S.P. Gupta v. Union of India*, (1981) Supp. SCC 87, *Peoples' Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473, where it was held that even a letter is enough to invoke the jurisdiction of a High Court under Article 226 or of this Hon'ble Court under Article 32.

- (v) It is submitted that the conclusion of this Hon'ble Court that an insufficient factual foundation had been laid for relief, has unfortunately resulted in perpetuating gross injustice in that this conclusion is contrary to both facts and law and has resulted in exposing the LGBT community of the country to harassment and abuse at the hands of law enforcement. It is humbly submitted that continuance of such harassment and torture of the LGBT population constitutes gross and irremediable injustice being caused as a result of the impugned decision of this Hon'ble Court

which should be corrected by the use of its inherent jurisdiction.

(vi) It is submitted that the decision of this Hon'ble Court in *Koushal* has led to renewed and vigorous discrimination against LGBT persons and their families because now Section 377 has been declared valid and enforceable in full, sanctioning prosecution of consensual, same-sex sexual acts in private and between adults. This is has led to the revival of the sense of persecution and injustice in the community and the violation of their rights to life and liberty and to be free from discrimination.

(vii) It is submitted that ever since the decision against which the present curative petition is preferred has been made, there have been instances of harassment and there is an increase in documented instances of discrimination, humiliation and violence perpetrated against LGBT persons which is disrupting the rights to life and liberty of the present petitioners. This discrimination and violence caused due to Section 377 being restored by this Hon'ble Supreme Court's judgment, is causing irremediable harm to the petitioners.

H. **(D) Irremediable Injustice Caused Due to Predicating Constitutional Protection on Size of Community**

- (i) It is submitted that the impugned judgment of this Hon'ble Court has predicated the extension of constitutional protection and the enjoyment of Fundamental Rights to the size of the community which demands such protection. It is submitted that such an approach is unsound in law and perpetuates irremediable injustice not only to minorities such as LGBT persons but also to other minorities which do not or cannot demonstrate numerical strength. This is also contrary to the purpose of Fundamental Rights, which protect the rights and liberties of people irrespective of their number or social or economic status. It is submitted that if a law violates the Fundamental Rights of even a single citizen without justification, it would be held unconstitutional by this Hon'ble Court as that is the duty cast upon it by Article 32 of the Constitution. By holding that a minority can in effect be placed at the tyrannical whims and fancies of the majority, it is submitted that the impugned judgment suffers from a grave error and the result is one which perpetuates and causes egregious and irremediable harm not only to LGBT person but potentially to all miniscule minorities.
- (ii) It is further submitted that section 377 has a radiating impact and moves outward from affecting LGBT persons to also affecting the family members of LGBT persons.

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

- (iii) This Hon'ble Court in its decision in *Sunil Batra (II) v. Delhi Administration*, (5 judges) AIR 1980 SC 1579 in paragraph 266, held,

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

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

I. **(E) Irremediable Harm caused to LGBT persons on the basis of their sexual orientation and gender identity**

- (i) It is submitted that this Hon'ble Court fails to appreciate that the classification created by section 377 of the Indian Penal Code though seemingly based upon acts, ends up targeting persons on the basis of their identity as LGBT persons. By holding that it is solely acts which are criminalised by Section 377, this Hon'ble Court holds that the section has no impact on the basis of gender identity or sexual orientation. It is submitted that this argument is erroneous because the direct and inevitable consequence of the law is to criminalise all forms of sexual expression available to LGBT persons. By criminalizing all forms of sexual expression which can be engaged in by LGBT persons the direct and inevitable consequence is to criminalize LGBT persons.
- (ii) LGBT persons can never engage in sexual intercourse which would be considered in conformity with the 'order of nature' as per the decision of this Hon'ble Court. Section 377 creates a classification which directly impacts sexual identity and is not limited to sexual acts alone. This Hon'ble Court has held in *Maneka Gandhi v. Union of India*, (7 judges) AIR 1978 SC 597 at paragraph 56 :

*“Article 14 is a founding faith of the Constitution. It is indeed the pillar on which rests securely the*

*foundation of our democratic republic and, therefore, it therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.”*

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

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

- (iii) It is submitted that by a perusal of judicial interpretation and application of Section 377, it becomes clear that there are several instances when the categorisation of individuals occurs not because of the alleged act which is prohibited by the provision, but by the identity of the person as it is perceived. In the case of *(Meharban) NowshirwanIrani v. Emperor*, AIR 1934 Sind 206, the High Court of Sindh observed,

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

It is clear that the usage of words by the High Court of Sindh in the case has the effect of stigmatizing LGBT persons and displays disapprobation towards LGBT people as a class. It is respectfully reiterated that the classification created by section 377, Indian Penal Code has the direct and inevitable consequence of targeting persons based upon identity as the acts criminalized form part of a closely held personal characteristic of LGBT persons and indeed an inseparable and inalienable aspect of the identity of LGBT persons. As such Section 377 targets LGBT persons as a class and is violative of Article 14 and 15.

- (iv) It is submitted that there is an inescapable operation of the provision against LGBT persons based on their sexual orientation and gender identity. A person who belongs to the LGBT community would be stigmatised and is subject to potential abuse and harassment even without having engaged in any sexual intercourse. Therefore, allowing the impugned decision to stand would serve to continue persecution and abuse of LGBT persons on the basis of who they are. This violates the Fundamental Rights

guaranteed to them and would cause irremediable injustice.

**GROUND TO SUBMIT THAT THE IMPUGNED  
JUDGMENTS ARE OPPRESSIVE TO THE JUDICIAL  
CONSCIENCE**

- J. It is submitted that the impugned judgments suffer from errors of law and fact apparent on the face of the record. The impugned judgments disregard past precedent and the nature of the role of this Hon'ble Court in safeguarding and upholding constitutional principles and Fundamental Rights.
- K. **Violation of the third Principle of Natural Justice:** The principles of Natural Justice mandate that every order of a court should be a speaking order and there is an obligation on all courts to give reasons for their conclusions. However, it is submitted that the impugned judgment dated 11.12.2013 does not give reasons for its conclusions on several important points of law, including in particular, the contentions raised regarding violation of Articles 14, 15 and 21 of the Constitution.
- L. **Error in Applying the tests under Article 14 of the Constitution**
- (i) This impugned judgment suffers from errors apparent on the face of the record in its conclusions regarding

application of Article 14. At paragraph 42 of this Court's judgment, it is held:

*“Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification.”*

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

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

It is submitted that this Court has not applied the precedent cited by it to determine whether there exists any rational basis for the classification or nexus of the classification with the objective of section 377. Neither has it considered wither the objective of criminalising consensual sexual activity between adults is a reasonable state object. It is submitted that the classification upheld by this Hon'ble Court is exactly that

which is prohibited by the judgment of *Re: Special Courts Bill*. The differentiation created by section 377 is spurious, artificial and without basis.

M. **No reasons given for rejection of the contentions with respect to violation of Article 15 of the Constitution**

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

the Delhi High Court judgment. It is submitted that this is a failure of this Hon'ble Court to provide any reason to reach its conclusion on Article 15.

N. **No reasons given for rejection of the contentions on violation of Article 21 of the Constitution**

- (i) It is humbly submitted that there is a grave error as this Hon'ble Court has not made any findings with respect to the question of whether Section 377 violates the dignity of LGBT persons. The Court rightly cites *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.*, (1981) 1 SCC 608 and recognises that the right to dignity is a part of the Right to Life and Liberty guaranteed vide Article 21 of the Constitution but does not apply this principle to the question of whether the said right is offended by section 377 of the Indian Penal Code or not. Failure to even address this crucial question, especially after it being observed by this Hon'ble Court as a question presented before it in both written and oral submissions, is an error which is oppressive to the judicial conscience.
- (ii) It is submitted that there is error apparent on the face of the record as this Hon'ble Court does not consider the submissions made by these petitioners on the grounds of Article 21 and the rights to privacy and liberty which are

contained therein. This Hon'ble Court undertakes an analysis of the component rights enshrined as part of Article 21 in paragraph 45 of its judgment and concludes the discussion in paragraph 50 but does not apply the discussion to the case at hand and makes no finding. After concluding that the right to privacy and dignity are enshrined and protected by the Article 21 of the Constitution, the impugned judgement does not discuss or consider the submissions made by these petitioners that section 377 is violative of these very rights guaranteed by the Constitution. The arguments made before this Hon'ble Court sought to establish that the continuance and enforcement of section 377 of the Indian Penal Code constitutes an infringement of the right to privacy by allowing state intervention in the most private sphere, namely, the home. As per the decision of this Hon'ble Court in *Gobind v. State of Madhya Pradesh*, (3 judges) (1975) 2 SCC 148 at paragraph 22,

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

*fundamental privacy right would be of far less significance.”*

It is submitted that this Hon'ble Court cites the aforementioned case with approval at paragraph 47 of its judgment but fails to undertake the analysis which is mandated by it in the case before it and does not even consider the argument of whether Article 21 is violated by section 377. Therefore, it is submitted that the impugned judgment shocks the judicial conscience by its failure to address the arguments of the petitioners and to give reasons for its conclusions. Such an approach shocks the judicial conscience.

o. **No reasoned order on the interpretation of Section 377**

- (i) It is humbly submitted that there is an error apparent on the face of the record as this Hon'ble Court has not even considered the argument raised on behalf of these Petitioners that section 377 of the Indian Penal Code should be interpreted in light of it being placed in Chapter XVI of the statute which deals with offences affecting the human body. Although this contention is noticed in paragraphs 17.6 and 17.7 of the judgment, there is no consideration of this contention. The Petitioners had submitted that the placement of Section 377 in Chapter XVI is in contrast to Chapter XIV of the Code, which deals with offences affecting the public health, safety,

convenience, decency and morals. It was urged that Section 377 be interpreted in a manner to only criminalise acts which harm the body without consent, and not those acts which are done with valid consent. Substantial written and oral arguments were made before this Hon'ble Court on this ground. It was argued that in light of this decision to place the provision in Chapter XVI, it would have to be interpreted as being in the nature of offences relating to sexual assault. It was also argued that chapter headings should indicate and characterise the offences listed therein. In support of arguments for this scheme of interpretation, the decision of this Hon'ble Court in the case of *RaichuramathamPrabhakar v. RawatmalDugar*, (2004) 4 SCC 766 was placed before this Court. It is submitted that in light of this argument, it becomes clear that Section 377 should be interpreted as prohibiting non-consensual sexual conduct, sexual assault, and sexual conduct when one of the parties is a minor (where consent would be irrelevant). Therefore, the decision of the High Court, insofar as it rendered section 377 of the Indian Penal Code inapplicable to private, consensual, sexual activity between adults would not suffer from any infirmity. The argument raised by the present petitioners, if considered, could have lent certainty to the interpretation of the statute, which was inherently and impermissibly

vague. It is humbly submitted that this Court has not even considered this argument or the tenability thereof thereby falling into an error apparent on the face of the record.

- (ii) It is submitted that the decision which is being challenged by the present curative petition has been subjected to extensive and serious academic criticism reflecting that it has affected the confidence of the public and breaches public interest. This is so because the decision of this Hon'ble Court withdraws constitutional protection from minorities based on constitutionally untenable factors such as numerical strength of the community. It has revived and legitimised the brutality of torture, harassment and misuse of the Section 377 of the IPC against LGBT citizens and has therefore affected the confidence of the public that the judiciary would indeed perform its constitutional duty as the custodian of the constitution and be the sentinel que vive of the constitution.

- (i) **The Decision Fails to Apply Judicial Review:** It is submitted that the constitutional courts in India are vested with powers of judicial review and are empowered to strike down legislation which is in violation of any of the rights guaranteed under Part III of the Constitution. This power has been exercised by this Hon'ble Court on several occasions previously where it has stepped in to protect the rights of Indian citizens from being violated by

legislative and executive action. The impugned judgements of this Hon'ble Court against which the present curative petition has been filed go against the established precedent of this Hon'ble Court which has inevitably expanded the meaning of the Fundamental Rights.

- (ii) This Hon'ble Court has seriously erred in recording in paragraph 33 of its judgment that it is not empowered to strike down a law merely in light of changing societal values as regards the legitimacy of its purpose and its need, without noticing judgments to the contrary cited before it. It is submitted that this Hon'ble Court, in *AnujGarg v. Hotel Association of India and Others*, (2008) 3 SCC 1 at paragraph 8:

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

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

*“It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26<sup>th</sup> January 1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when*

*enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation.”*

It is submitted that this Hon'ble Court has cited the two aforementioned decisions with approval in its judgment dated 11.12.2013. Further, in *Satyawati Sharma v. Union of India*, (2 judges) (2008) 5 SCC 287 at para 29, this Court had observed:

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

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

- (iii) It is further submitted that the observation of this Hon'ble Court that the competent legislature was free to amend Section 377 amounts to abdication of its judicial function. It is the duty of this Hon'ble Court and its mandate to exercise its power of judicial review to strike down

legislation for unconstitutionality. This duty and office cannot be abdicated on the basis of an ostensible reliance on the wisdom of the legislature to enact a statute which would not be unfair and would not violate the rights of citizens. This is the core of judicial function of this Hon'ble Court which has not been exercised by it in the present case. It is respectfully submitted that such a decision significantly erodes the faith of the public in the judiciary as the custodian and protector of its rights against hostile acts of discrimination perpetrated by legislative action.

- (iv) **The decisionrenders discrete and insular minorities vulnerable to hostile acts of discrimination:** It is submitted that in the constitutional structure of India, this Hon'ble Court and the Hon'ble High Courts serve an important role of being counter-majoritarian institutions which are meant to safeguard the rights of the minorities from hostile and discriminatory action perpetrated by majorities. The role of the superior judiciary is to ensure the fundamentalright of discrete and insular minorities do not become hostage to hostile majority expression. This becomes an important role of the judiciary as minority communities cannot hope to be represented in institutions which function on the basis of a majority vote and hence minorities are unable to directly control the policies and legislation of the elected government. Therefore,

barring the protections afforded under the Constitution, the minority does not have protections enshrined in the democratic setup. Therefore, the role of the Courts in protecting the rights from majoritarian whims and fancies is an important constitutional mandate.

- (v) It is submitted that the aforementioned observation of this Hon'ble Court that gay, lesbian, bisexual and transgendered persons constitute a "miniscule fraction" of the country is grave error as there is no requirement of a minority to be a "significant" one for it to enjoy the protection of Fundamental Rights, which are guaranteed to each and every citizen. Indeed, constitutional protections should apply with equal vigour in the case of all minorities even if the minority happens to be only one person.
- (vi) It is submitted that the gay, lesbian, bisexual and transgendered population in the country is not "miniscule" as by the admitted records in the case, the population of men who have sex with men is 25 lakhs. This number comprises only of men and if the number of lesbian, transgendered and female bisexuals were added to the same, it would constitute an even larger number of people. It is submitted that it is also likely that the figure of 25 lakhs is underreported as people do not readily identify

as belonging to a minority sexuality due to stigmatisation and discrimination.

(vii) It is submitted that the decision of this Hon'ble Court has affected and re-criminalised a proportion of the population of this country which numbers in millions. It is further submitted that this decision re-criminalises the most intimate and the core of their individuality which has been scientifically proven to be natural and unalterable. The impugned judgment unconscionably abridges the Fundamental Rights of LGBT persons and their families.

(viii) **The Decision Erodes the Right to Privacy and Dignity of all Individuals:** It is submitted that the impugned decision of this Hon'ble Court has led to the erosion and denial of the right to privacy and dignity which are enshrined in the right to life and liberty in Article 21 of the Constitution. It is submitted that the order and judgment of the High Court of Delhi which was set aside by this Hon'ble Court had recognized the freedom to engage in sexually intimate acts when they were consensual, between adults and in private. It is submitted that the decision of the Hon'ble High Court had correctly perceived the scope of liberty and individual autonomy guaranteed by the Constitution by holding that the State had no business in controlling the intimate sexual lives and expressions of LGBT persons, when there was no

demonstrable harm being caused by such actions and there was no State interest in the matter.

(ix) It is submitted that by setting aside the order of the High Court and by not addressing the arguments of the present petitioners on the scope of Article 21 and right to life and liberty, this Hon'ble Court has denied the application of Article 21 and right to privacy and dignity without any reason whatsoever being given by it. It is submitted that due to this decision, the concept that the judiciary would protect the right to privacy of all citizens and the dignity of vulnerable sections of society is cast into question. Thus, the impugned decision has shaken the edifice of Article 21 and the expansive interpretation which had been given by previous decisions of this Court to the scope and protection under that right. It is submitted that this decision exposes all citizens of India to unwarranted and unjust intrusion into their intimate affairs.

(x) It is submitted that the aforementioned grounds, as substantiated, make it clear before this Hon'ble Court that the errors of fact and law in its impugned judgment are of such a nature that the present curative petition is wholly merited and should be allowed. It is submitted that the present case falls into the category of "rarest of rare" instances of judicial error contemplated by the case of *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388, that

a relook into the case is merited and cannot be denied on the argument of finality to litigation.

- (xi) It is submitted that by the grounds set forth in the present petition, the petitioners have established that there has been an irremediable injustice caused not just to them, but to millions of people across the country who are LGBT and their families as they have been denied their personhood and full moral citizenship of this country on the basis of their intimate and unalterable sexual orientation. It is also submitted that this amounts to injustice because Section 377 has been used to perpetuate harassment, blackmail and abuse of citizens and this fact has been documented before this Hon'ble Court. Further, Section 377 is a penal provision which is impermissibly vague and therefore, its application and implementation are bound to be arbitrary and unfair. This ground has also been demonstrated before this Hon'ble Court. Furthermore, it is urged through the present petition that the impugned judgment has led to a constitutionally impermissible situation where constitutional protection may only be claimed on the basis of the numerical strength of the community. Lastly, the impugned decision has led to the present petitioners being in a constant state of fear and helplessness about the safety of their children who have been reduced to the

status of unapprehended felons because of Section 377 being revived. All these grounds conclusively set out that irremediable injustice has been caused and continues to be caused because of the impugned decision.

- (xii) It is submitted that by the grounds set forth in the present petition, it is further established that the decision which has been challenged by the present curative petition shocks the judicial conscience of this Hon'ble Court. This is set out because the impugned decision does not give reasoned orders for its findings and therefore does not provide any basis for dismissing the grounds which had been raised by the petitioners. It is submitted that failure to give reasons for its orders is the abdication of essential judicial function and shocks the conscience of this Hon'ble Court. It is submitted that the impugned decision does not consider the arguments raised before it on the grounds of Articles 14 and 21 of the Constitution by giving its reasoned order on the question of law presented. It has correctly cited binding precedent of this Hon'ble Court but arrived at erroneous conclusions from the said precedents resulting in grave and manifest injustice. It is submitted that this is a grave error of law and the impugned decision is *per incuriam*. Further, it is submitted that the impugned decision does not even consider or

passed any reasoned order on the question of Article 15(1) of the Constitution which had been raised before it. This is a failure to give reasons for its conclusions and violates the third principle of Natural Justice and validates state discrimination against citizens on the basis of identity without any conclusion on classification or the prohibited grounds of discrimination. It is also submitted that this Hon'ble Court has not addressed the arguments which had been raised before it by the petitioners on the interpretation of Section 377, thereby not passing any reasoned order on that point. It is submitted that failure to give reasoned order for its judgment must shock the judicial conscience of this Hon'ble Court.

- (xiii) It is submitted that by grounds set forth in the present petition, the petitioners have proved that the judgment which is challenged by the present curative petition is deeply inimical to public faith and belief in the Judiciary and the role of this Hon'ble Court. It is submitted that the impugned judgment of this Hon'ble Court fails to correctly appreciate the scope and nature of the duty cast upon it by the Constitution. It is submitted that this Court is empowered and mandated with scrutiny of legislation and is empowered to strike down legislation which offends the Fundamental Rights guaranteed by the Constitution. The present petition shows that this Hon'ble Court has fallen

into serious error in not upholding the verdict of the High Court of Delhi. It has not extended the rights guaranteed by the Constitution to LGBT citizens and has abdicated its constitutional role as the custodian of Fundamental Rights and liberties. This is an egregious error and goes against the grain of the constitutional structure and system of checks and balances. Further, as demonstrated in the grounds, the impugned decision is against past precedent of this Hon'ble Court itself, which has protected and expanded the scope of Fundamental Rights and routinely invalidated statutes for unconstitutionality. Further, the impugned decision goes against the protections granted to every minority community in the country by predicating and conditioning the protection granted by the Constitution on the demonstrable numbers and numerical strength of the community in question. It is submitted that such a condition is wholly without merit and unwarranted under the constitutional scheme which protects every citizen and every right irrespective of social status or numbers. It is submitted that such a distinction made in the impugned decision would shake the confidence of every member of the public who would happen to belong to any minority community. Further, the impugned decision warrants an unprecedented intrusion by the State into the intimate affairs of adult, consenting citizens which is

unacceptable and not mandated. Therefore, the impugned decision also erodes the rights to privacy and dignity of all citizens in the country without any compelling state interest or reason. The impugned decision takes away one of the major protections of citizens against the powers and arbitrary nature of legislatures and therefore, detracts seriously from the role of the Judiciary as the protector of all and every citizen.

(xiv) It is therefore submitted that this petition falls squarely within the rule of this Hon'ble Court in *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388 and a relook into the decision is wholly merited by the jurisprudence of this Hon'ble Court itself and again in *Indian Council for Enviro-Legal Action v. Union of India & Others*, (2011) 8 SCC 161. It is submitted that this Hon'ble Court's impugned decision falls within the 'rarest of rare' category that merit being re-opened and re-examined.

(xv) It is submitted that this Hon'ble Court is the protector and guarantor of the Fundamental Rights of all citizens of this country. It is respectfully submitted that by virtue of the impugned decision, millions of LGBT persons and their families have been rendered vulnerable to violence, discrimination and persecution and denuded of the protections of the Fundamental Rights. The impugned decision has already unleashed and has the potential to

unleash even more grave suffering and violation of human rights of LGBT Indians and their families. As this Hon'ble Court has the duty to uphold the rights to life, liberty, dignity and privacy of all individuals and is empowered in an extraordinary manner to fulfil this mandate, it should choose to exercise the same power in the present case.

- (xvi) It is submitted that no new grounds have been raised in the present curative petition that were not raised by the petitioners in the review petition.

**PRAYER**

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

- (a) Allow the present curative petition filed against the order dated 28.1.2014 in Review Petition (C) No. 219 of 2014;
- (b) Consequently, restore Civil Appeal No. 10972 of 2013 decided on 11.12.2013, for hearing; and
- (c) Pass any other or further order(s) as this Hon'ble Court may deem fit in the facts and circumstances of the present case and in the interest of justice and equity.

Filed By:

(NIKHIL NAYYAR)

ADVOCATE FOR THE PETITIONERS

New Delhi

Date: 02-04-2014