

IN THE SUPREME COURT OF INDIA
CURATIVE PETITION (C) NO. OF 2014

IN

REVIEW PETITION (C) NOS. 221 OF 2014

ARISING OUT OF COMMON ORDER DATED 11.12.2013 PASSED IN
CIVIL APPEAL NO. 10972 OF 2013 (ARISING OUT OF SPECIAL LEAVE
PETITION (CIVIL) NO. 15436 OF 2009)

IN THE MATTER OF:

Dr. Shekhar Seshadri & Others ...Petitioners

Versus

Suresh Kumar Koushal & Others ...Respondents

WITH

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

AND

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

AND

I.A. No. of 2014 : An application for exemption from filing
certified copy of the judgment dated
28.1.2014

AND

I.A. No. of 2014 : An application for permission to file extended
synopsis and list of dates

PAPER-BOOK

(FOR INDEX KINDLY SEE INSIDE)

ADVOCATE FOR THE PETITIONERS: GAUTAM NARAYAN

INDEX

S. No.	Particulars	Page Nos.
1.	Office Report on Limitation	
2.	Synopsis and List of Dates	
3.	Certificate issued by Senior Advocate Mr. C.U.Singh as per <i>Rupa Hurra v. Ashok Hurra</i>	
4.	Curative Petition with Affidavit	
5.	Annexure P1: Copy of the final common judgment dated 11.12.2013 passed by this Hon'ble Court titled Suresh Kumar Koushal & Ors. Vs Naz Foundation & Ors. (2014) 1 SCC 1	
6.	Annexure P2: Order dated 28.1.2014 in the Review Petition (C) No.221 of 2014	
7.	Annexure P3: Order dated 2.9.2004 in W.P.(C.) No.7455 of 2001 passed by the Hon'ble Delhi High Court	
8.	Annexure P4: Order dated 3.2.2006 in Civil Appeal No.952 of 2006 arising out of SLP(C) Nos.7217-7218 of 2005 passed by the Hon'ble Supreme Court of India	
9.	IA No. ___ of 2014: An application Seeking oral hearing in open court	
10.	IA No. ___ of 2014: An application for stay	
11.	IA No. ___ of 2014: An application for exemption from filing certified copy of the judgment dated 28.1.2014	
12.	IA No. ___ of 2014: An application for permission to file extended synopsis and list of dates	

IN THE SUPREME COURT OF INDIA
CURATIVE PETITION (C) NO. OF 2014

IN THE MATTER OF:

Dr. Shekhar Seshadri & Others ...Petitioners

Versus

Suresh Kumar Koushal & Others ...Respondents

OFFICE REPORT ON LIMITATION

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

[BRANCH OFFICER]

NEW DELHI

FILED ON:

Synopsis and List of Dates

The present Curative Petition is being filed against order dated 28.1.2014 dismissing Review Petition No. 221 of 2014 filed by the Petitioners seeking review of final judgement and order of this Hon'ble Court dated 11.12.2013 in Civil Appeal No. 10972 of 2013 and other connected appeals. By the impugned judgement and order in Civil Appeal and Review, this Hon'ble Court was pleased to set aside the judgment of the Delhi High Court in *Naz Foundation v. Government of the NCT of Delhi*, WP (C) 7455 of 2001, which had held section 377 of the Indian Penal Code, insofar as it criminalised consensual sexual acts of adults in private, to be unconstitutional and in violation of Articles 14, 15 and 21 of the Constitution. In order to save the provision from the vice of unconstitutionality, the High Court had read down section 377 to apply only to non-consensual, penile, non-vaginal sex, and sexual acts by adults with minors. This Hon'ble Court, by the impugned judgment, set aside the judgment of the High Court and held that Section 377 of the Indian Penal Code was constitutional and that it applied to acts, irrespective of age or consent of the parties involved.

Annexure P1 to this petition is a true typed copy of the order of this Hon'ble Court dated 28.1.2014 dismissing Review Petition No. 221 of 2014 and **Annexure P 2** is copy of judgement and order of this Hon'ble Court dated 11.12.2013 in Civil Appeal No. 10972 of 2013, *Suresh Kumar Koushal And Another vs Naz Foundation And Others*, (2014) 1 SCC 1.

The Petitioners herein are 13 senior psychiatrists, psychologists, counsellors and mental health professionals – including a Professor of Psychiatry at the National Institute of Mental Health and Neurosciences,

Bangalore; a fellow of the Indian Psychiatric Society who is also head of the psychiatry department of Sitaram Bhatia Institute of Science and Research; a Member of the International Advisory Board, International Journal of Social Psychiatry; an editor of the influential Lancet Series on Global Health; and a Lecturer in psychiatry, Maharashtra Institute of Mental Health – who applied to be impleaded before this honourable Court, but were allowed to intervene in the special leave petitions.

It is submitted that the Petitioners were heard through their Counsel and detailed written submissions along with authoritative scientific literature from reputed academic peer-reviewed journals supporting the declaration of the Hon'ble Delhi High Court were also filed on their behalf. However, it is respectfully submitted that the impugned judgment does not mention, refer to, or deal with the submissions of the review petitioners. It is most respectfully submitted that failure to consider the contentions of the review petitioners is a violation of the principles of natural justice and a patent error of law that has resulted in a serious miscarriage of justice. {See Indian charge chrome vs. Union of India (2005) 4 SCC 67 @ Pr. 13 & 16}

The Petitioners' uncontroverted contentions regarding expert opinion from the field of mental health in respect of the Lesbian, Gay, Bisexual and Transgender ('LGBT', for short) community were as under:

- a) homosexuality was not a mental disorder but a normal and natural variant of human sexuality, even the International Classification of Diseases (ICD-10) of the World Health Organisation (WHO) and The Diagnostic and Statistical Manual (DSM IV) of the American Psychiatric Association (APA), the globally accepted standards for classification of mental health, no

longer considered non-peno-vaginal sex between consenting as mental disorders or illness.

- b) homosexuals had no choice in their attraction to persons of the same sex;
- c) the criminalization of LGBT persons adversely affected their mental health.

It is relevant to note that the Petitioners' contentions were also urged by the original Writ Petitioner i.e. Naz Foundation India before the Hon'ble High Court of Delhi. It is further relevant to note that this petition was earlier rejected by the Hon'ble High Court of Delhi on the ground of lack of cause of action. However, this Hon'ble Court vide order dated 03.02.2006 in SLP (C) Nos. 7217-7218/2005 remitted the matter for consideration to the Hon'ble High Court.

It is further submitted that the issue as to whether factual foundation had been laid for the challenge to the constitutionality of section 377 was not raised or contended after this Hon'ble Court's order dated 03.02.2006. It is further pertinent to mention that none of the respondents contended the said issue i.e. "lack of cause of action" or "absence of factual foundation for the challenge to section 377" before the Hon'ble High Court, after this Hon'ble Court's order dated 03.02.2006.

It is further relevant to note that even before this Hon'ble Court, none of the special leave petitions raised the issue of "lack of factual foundation" as a ground of challenge. It is therefore submitted that the issue of 'lack of factual foundation' attained finality vide order dated 03.02.2006. It was only during oral submissions that Senior Advocate appearing for the appellant in Civil Appeal arising out of SLP (C) No.

24334/2009 – Delhi Commission for Protection of Child Rights contended that the writ petition before the High Court did not contain foundational facts necessary for pronouncing on the constitutionality of section 377. None of the parties therefore, had fair opportunity to meet the contention. This was clearly an attempt at re-litigating an issue and an abuse of process of this Hon'ble Court. (See K.K. Modi vs K.N. Modi, AIR 1988 SC 1297 and Subhash Chandra and Another v. Delhi Subordinate Services Selection Board and Others (2009) 15 SCC 458)

It is respectfully submitted that the finding of 'lack of factual foundation' has been occasioned as a result of abuse of process of this Hon'ble Court and has resulted in gross miscarriage of justice.

Annexure P 3 to this petition is a true typed copy of order dated 02.09.2004 in WP (C) No. 7455/2001 passed by the Hon'ble High Court at New Delhi and **Annexure P 4** to this petition is a true typed copy of Order dated 3.2.2006 of this Hon'ble Court in SLP (C) Nos. 7217-7218/2005.

The finding of lack of factual foundation is also erroneous in fact since the record reveals that the petition before the High Court laid detailed factual foundation establishing the direct and inevitable effect of section 377 on the health and well-being of Lesbian, Gay, Bisexual and Transgender persons ('LGBT', for short) and their families. The record also reveals that Respondent No. 8 before the High Court, a coalition of organizations representing child rights, women's rights, human rights, health concerns as well as the rights of same sex desiring people, 'Voices against 377', had also laid detailed factual foundation that medically, scientifically and legally established direct

and inevitable harmful effects of section 377 on LGBT persons and their fundamental rights at paragraph 8.1.1 of its counter affidavit.

After the matter was remitted by this Hon'ble Court, the Hon'ble High Court in its judgment considered the consensus of expert opinion from the field of mental health in paragraphs 67-70, and returned a finding that evidence before it revealed that section 377 as it stood, violated the Fundamental Rights of LGBT persons.

It is most respectfully submitted in arriving at the conclusion stating that "Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes",

the impugned judgment is in patent error of law since there is no intelligible differentia, i.e.,— no 'real and substantial difference', no 'yardstick or measure', 'no policy or principle' for guidance to distinguish 'carnal intercourse in the ordinary course' from 'carnal intercourse against the order of nature'. The judgement itself, after reviewing reported judgements on section 377, recorded at para 38 that not only was it not possible to list acts which were covered by section 377, but no test could be laid down to differentiate "carnal intercourse against the order of nature". Section 377 therefore, from the impugned judgements' review of reported judgements that applied section 377, failed the first test of Article 14, i.e., there was no intelligible differentia to distinguish 'carnal intercourse in the ordinary course' from 'carnal intercourse against the order of nature'. Failure to apply the test of intelligible differentia has resulted in gross miscarriage of justice. (See *Chiranjit Lal Chowdhury v. The Union of India and Others*, [1950] S.C.R.

869, page 913 and 932, *State of West Bengal v. Anwar Ali Sarkar* , [1952] SCR 294, page 315)

It is also respectfully submitted that the impugned judgement is also in manifest error of law resulting in gross miscarriage of justice since the test of whether there was a rational nexus of the classification of acts punished by section 377 with what the section sought to achieve was not applied. Indeed there has never been clear consensus about what section 377 sought to achieve. The judgement itself notes deliberate obviation of all discussion around the section at the time of its legislation (at para 37), and also notes, (at para 38), the complete lack of judicial consensus of the acts which fall within section 377.

It is also submitted that the impugned judgement is also in patent error of law in finding that only 200 prosecutions over 150 years cannot be made a sound basis for testing the vires of section 377. In so doing, the impugned judgement introduces a numerical requirement for the protections of Chapter III of the constitution, whereas it is long settled that Fundamental Rights of miniscule minorities, even minorities of one, are entitled to full protection. This patent error of law has resulted in gross miscarriage of justice since this Hon'ble Court's testing of the constitutionality of section 377 has been coloured by the erroneous view that laws that target small minorities are immune to constitutional challenge.

Further the impugned judgements relying on reported orders to come to a view regarding the number of persons affected by section 377 is also a patent error of law in as much as most prosecutions do not reach the appellate stage, and not all appellate judgements are reported. The number of reported judgments offers no reliable

indication of even the numbers of persons prosecuted since FIRs may be registered, intrusive investigations conducted into private affairs, searches carried out, bail applications granted or refused, cases tried and persons convicted without finding any reflection in the docket of the appellate courts.

It is further submitted that the impugned is also in patent error of law that has resulted in gross miscarriage of justice in raising a presumption of constitutionality while testing the constitutionality of section 377. In *Gulabbhai Vallabbhai Desai & Others v. Union of India*, AIR 1967 SC 1110, at 1117 this Hon'ble Court held that it could not be presumed that the law making body knew of the limits to its authority while enacting a law, if the limits were only introduced later in time. Section 377 therefore could not have been presumed to be constitutional since at the time of its enactment, the legislating authority had no knowledge of fundamental rights or other Constitutional limitations on its power. Patent error of law in raising the presumption of constitutionality resulted in gross miscarriage of justice particularly because this Hon'ble Court failed to consider that the burden of proving the constitutionality of section 377 lay upon the state as laid down by this Hon'ble Court in *Anuj Garg & Another v. Hotel Association of India & Others* (2008) 3 SCC 1 at para 20

It is also submitted that the impugned judgement is in patent error of law that has resulted in gross miscarriage of justice in misconstruing the ratio of its judgement in *A.K. Roy* to hold that the 'vagaries of language' saved section 377 from the challenge of vagueness. In *A.K. Roy*, this Hon'ble Court made a distinction between

- a) expressions which were difficult to define since they comprehended "an infinite variety of situations"
- b) and expressions which did not comprehend such an infinite variety of situations(See *A. K. Roy, Etc vs Union Of India And Anr*, 1982 SCR (2) 272, page 323)

In the light of the fact that section 377 describes an offence against the human body and requires penetration to constitute the offence, 'carnal intercourse against the other order of nature' cannot comprehend an "infinite variety of situations" and it should be possible to 'enumerate' the acts of penetration which constitute the offence. Absent such enumeration, the clause will be capable of wanton abuse as was held in *A.k. Roy*, where the phrase "maintenance of supplies and services essential to the community" was held to be not only "vague and uncertain" but "capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21." This court in *A.K. Roy* cautioned that courts must strive to give even expressions which by their very nature were difficult to define, a narrower construction than the literal words suggested, limiting their application to as few situations as possible.

The impugned judgement is also in patent error resulting in gross miscarriage of justice in its application of the 'object and form' test of *A.K. Gopalan's* case, discarded by this Hon'ble Court in favor of the 'intended and real effect' or the 'direct and inevitable effect' test of *Maneka Gandhi* in examining whether section 377 unduly burdened a

class.(See Maneka Gandhi vs Union Of India, 1978 SCR (2) 621, State of Maharashtra & Anr. Versus Indian Hotel & Restaurants Assn. & Ors., CIVIL APPEAL NO.2705 OF 2006, decided on July 16, 2013)

The conclusion that section 377 merely identifies certain acts as offences and does not criminalize LGBT people is also a patent error of law that has resulted in miscarriage of justice since, by penalising the only form of sexual intercourse available to LGBT persons – i.e., non-peno vaginal - section 377 entirely denies sexual intercourse to the class of LGBT persons. Further, none of the 200 prosecutions dealt with in reported judgements (referred to at para 43 of the judgement), involved prosecutions of sexual intercourse involving consenting heterosexual adults. In its 'effect and operation' therefore, section 377 unduly burdens the class of LGBT. The judgement of the Delhi High Court clarified and declared that there was no rationale for this uneven application of the law and henceforth, consent would remove all consensual non-peno-vaginal sexual intercourse from the ambit of section 377 altogether, whether practiced by LGBT persons or heterosexuals. (See Khandige Sham Bhat And Others vs The Agricultural Income Tax officer, 1963 AIR 591, 1963 SCR (3) 809)

It is further submitted that the judgement's failure to even attempt at identifying a compelling state interest requisite to justify the denial of the rights to privacy and dignity - guaranteed by article 21 of the Constitution - by the criminalization of consensual acts in private is also a patent error of law that has resulted in gross miscarriage of justice.

The Judgement impugned is also in error for having referred to some of the contentions urged by parties regarding the direct and

legislature or the executive. In view of the above, we feel that an academic challenge to the constitutionality of a legislative provision cannot be entertained.

Hence, the petition dismissed.”

3.11.2004

The Hon'ble High Court of Delhi vide its order dated 3.11.2004 dismissed the review petition filed against its order dismissing WP(C) 7455/2001

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

3.3.2006

This Hon'ble Court allowed the appeal and remanded the writ petition for fresh 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.

22.11.2006

The Voices Against 377 was impleaded as Respondent No. 8 before the Hon'ble High Court of Delhi

2.7.2009

The Hon'ble High Court of Delhi 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

This Hon'ble Court vide its order dated 9.7.2009 issued notice on a special leave petitions by parties who who were neither parties before the High Court, nor personally aggrieved by the judgment of the High Court.

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

07.02.2011

This Hon'ble Court disposed off the impleadment application IA No. 9 of 2010 of the present review petitioner and granted leave to the petitioner to act as intervenors in the proceedings of the batch of the special leave petitions.

13.02.2012

This Hon'ble Court begins hearing final arguments in this matter.

23.2.2012

This Hon'ble Court records that the learned Additional Solicitor General made submissions on behalf of the Union of India. The learned additional solicitor argued that the Union of India was opposed to the declaration granted by the High Court. As soon as the said Additional Solicitor General concluded his submissions, another Additional Solicitor

General stated that the Union of India had not filed an appeal and had not yet taken a stand in this case.

28.2.2012

The Additional Solicitor General appears on behalf of the Union of India and submitted the recommendations of the Group of Ministers and the decision of the Cabinet. The recommendations of the Group of Ministers and the decision of the Cabinet was that the Delhi High Court's declaration was correct in law and ought not to be appealed by the Union of India. This Hon'ble Court was pleased to record that the

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

An affidavit was filed on behalf of the Union of India by the Home Secretary which negated

the earlier submissions made by the earlier Additional Solicitor General. 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.

21.3.2012 The present Review Petitioners appeared addressed this Hon'ble Court and concluded the arguments. Furthermore, the learned Attorney General appeared before this 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.

22.03.2012 The learned Attorney General again appeared before this Court and reiterated that the Union of India finds no error in the High Court's declaration and accepts the same. He 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. This is also clear from the fact that it has not filed any appeal against the judgment of the High Court.

27.03.2012 The oral hearings in this case were conclude and judgment is reserved.

- 19.06.2013 The Protection of Children from Sexual Offences Act is enacted and assented to by the President. This statute criminalizes all forms of sexual assault committed on any person under the age of 18.
- 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 non consensual penetrative acts committed by a man on a woman.
- 11.12.13 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.

16.1.2014	Review Petition (C) No.221 filed by Petitioners.
28.1.2014	Review petitions dismissed.
2.4.2014	Hence this Curative Petition.

IN THE SUPREME COURT OF INDIA

CURATIVE PETITION (C) NO.

OF 2014

IN

REVIEW PETITION (C) NOS. 221 OF 2014

ARISING OUT OF COMMON ORDER DATED 11.12.2013 PASSED IN
CIVIL APPEAL NO. 10972 OF 2013 (ARISING OUT OF SPECIAL LEAVE
PETITION (CIVIL) NO. 15436 OF 2009)

IN THE MATTER OF:

1. Dr. Shekhar Seshadri
Son of P. Seshadri
Residing at E-304,
Adarsh Palace, 47th Cross,
5th Block, Jayanagar,
Bangalore 560004
2. Dr. Alok Sarin
Son of B.K. Sarin
Residing at A 52/1, SFS Flats,
Saket, New Delhi 110017
3. Dr. Soumitra Ramesh Pathare
Aged about 45 years
Son of Ramesh Pathare
Residing at Plot 134 Sector 27A
Pradhikaran, Nigdi
Pune 411044
4. Dr. Vikram Patel
Sangath Centre,
841/1 Alto Porvorim,
Goa 403521
5. Dr. Devendra Shirole
Son of Keshav Shirole

432, Shukrawar Peth
Shivaji Road
Pune – 411 002

6. Arvind Mukund Panchanadikar
Son of Mr. Mukund Panchanadikar
41 Shantala Manisha Society,
Karve Nagar, Pune-52
7. Dr. Bhooshan Dattatraya Shukla
Son of Dattatraya Shukla
B-804, Padmavilas Apartments
Survey no. 131/1,
Pashan - Baner Link Road
Pune - 411021
8. Dr. Kaustubh Ashok Joag
Son of Ashok Joag
Residing at C 6 , Flat No 5,
Sarita Nagari Phase 2,
Sinhagad Road,
Pune 411030
9. Dr. Raman Shivkumar Khosla
Son of Shivkumar Khosla
Residing at 805
DSK Vasant Vaibhav Apts,
Lakaki Road, Model Colony,
Pune 411016
10. Dr. Subir Kumar Hajra Chaudhuri
Son of Dilip Hajra Chaudhuri
Residing at 39 B, Creek Row,
Kolkata 700014

11. Dr. Debashish Chatterjee
Son of Amalesh Chatterjee
Residing at 199 Block A,
Bangur Avenue,
Kolkata 700055

12. Sarbani Das Roy
Daughter of Upal Chatterjee
Residing at 193A/2,
Picnic Garden Road,
Flat 8; Kolkata 7000039

13. Jolly Laha
Daughter of Madhusudan Laha
Residing at 20B,
Deshapriya Park Road,
Kolkata 700026

...Petitioners

Versus

1. Suresh Kumar Koushal
S/o Shri S.D. Koushal,
C-105, Nirman Vihar,
Delhi- 110092
Delhi

2. Dr. Mukesh Kumar Koshal
S/o Shri S.D. Koushal
C-105, Nirman Vihar,
Delhi – 110 092

3. Naz Foundation,
A Trust registered under the
Indian Trust Act,
Having its registered office at
A-86, East of Kailash
New Delhi- 110065

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
B.S. Ambedkar Hospital
Dharamshala Block
Rohini, Sector 6
Delhi
7. National AIDS Control Organization,
Set up 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 Family Welfare,
Having its office at
344, Nirman Bhavan,

Maulana Azad Road,
New Delhi

10. Union of India,
Through Secretary
Ministry of Social Welfare
Shashtri Bhavan,
New Delhi
11. Joint Action Council Kannur
C-38, Anand Niketan
New Delhi-110 021
12. Voices Against Section 377
A coalition of 12 organisations
Having its address at
11, Mathura Road,
First Floor, Jangpura B
New Delhi – 110013

...Respondents

A Petition under Article 142 of the Constitution of India

To:

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

The humble application of the applicant abovenamed

MOST RESPECTFULLY SHOWETH:

1. That the accompanying Curative Petition has been filed under Article 142 of the Constitution of India for setting aside 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 2.7.2009 rendered by the Delhi High Court in Writ Petition (Civil)

No. 7455 of 2001 on the grounds of abuse of process of court and gross miscarriage of justice. The present Petitioners/Applicants had also filed a review petition, Review Petition (C) No.221 of 2014, which was dismissed by circulation vide order dated 28.01.2014 of this Hon'ble Court. Copy of the judgment dated 11.12.2013, titled Suresh Kumar Koushal & Ors. Vs Naz Foundation & Ors. (2014) 1 SCC 1 is annexed to this petition as **Annexure P1**. Copy of the true copy of the order dated 28.01.2014 of this Hon'ble Court in dismissing the Review Petition (C) no. 221 of 2014 is annexed to this petition as **Annexure P2**.

2. That the **Annexure P3** to this petition is a true typed copy of the Order dated 2.9.2004 dismissing W.P.(C.) No.7455 of 2001 passed by the Hon'ble Delhi High Court and **Annexure P 4** is copy of Order dated 3.2.2006 in Civil Appeal No.952 of 2006 arising out of SLP(C) Nos.7217-7218 of 2005 passed by the Hon'ble Supreme Court of India remitting the WP (C) No. 7455 of 2001 for consideration to the Hon'ble High Court.
3. The present Petitioners are seeking to invoke the curative jurisdiction of this Court on the following grounds:

GROUND:

- A. Because the impugned judgement has been occasioned by an abuse of process of this Hon'ble Court and also because the impugned judgement has resulted in gross miscarriage of justice.
- B. Because the impugned judgement does not mention, refer to, or deal with the submissions of the review petitioners despite the fact that Counsel for the review petitioners was heard on 22

March 2012 and Petitioners filed detailed written submissions along with authoritative scientific literature from reputed academic peer-reviewed journals supporting the declaration of the Hon'ble Delhi High Court. Petitioners are 13 senior psychiatrists, psychologists, counsellors and mental health professionals – including a Professor of Psychiatry at the National Institute of Mental Health and Neurosciences, Bangalore; a fellow of the Indian Psychiatric Society who is also head of the psychiatry department of Sitaram Bhatia Institute of Science and Research; a Member of the International Advisory Board, International Journal of Social Psychiatry; an editor of the influential Lancet Series on Global Health; and a Lecturer in psychiatry, Maharashtra Institute of Mental Health – who applied to be impleaded before this Hon'ble Court, but were allowed to intervene, in special leave petitions that challenged the Delhi High Court Judgement that decriminalised sex between consenting adults. The petitioners had contended – and their contentions had not been controverted – that the consensus of expert opinion from the field of mental health was that –

- a. Homosexuality was not a mental disorder but a normal and natural variant of human sexuality. The International Classification of Diseases (ICD-10) of the World Health Organisation (WHO) and The Diagnostic and Statistical Manual (DSM IV) of the American Psychiatric Association (APA), the globally accepted standards for classification of mental health, no longer considered non-peno-vaginal sex between consenting adults, mental disorders or illness

- b. Homosexuality was innate and immutable; persons did not choose to become homosexual; the criminalization of homosexuality was therefore akin to criminalizing persons on the basis of their skin colour, the colour of their eyes, their race, or ethnic origin.
- c. the criminalization of Lesbian, Gay, Bisexual and Transgender ('LGBT', for short) persons caused them mental stress and anxiety and adversely affected their mental health
- d. Homosexuality cannot 'spread' from one person to another; the fear that homosexuality may spread due to the impugned judgment of the Hon'ble Delhi High Court was therefore unscientific and irrational.
- e. Sexual activity between two men, did not, *per se*, lead to the spread of HIV/AIDS. Unprotected sex, between men and men, and men and women spread HIV/AIDS.
- f. Section 377 created a climate for discrimination, harassment and abuse of LGBT persons as it conveyed the message that LGBT persons were criminals, not entitled to the dignity of other citizens.
- g. Section 377 of the IPC encouraged hatred and prejudice in society as it conveyed the message that people who were different were not to be tolerated.

Failure to consider the contentions of the review petitioners, the only party before this Hon'ble Court with professional expertise in the medical and mental health issues of LGBT persons, is a patent error of law that undermines its soundness and that has

resulted in a serious miscarriage of justice. {See Indian Charge Chrome vs. Union of India (2005) 4 SCC 67 @ Pr. 13 & 16}

- C. Because the impugned judgement is also in patent error of law in finding that only 200 prosecutions over 150 years cannot be made a sound basis for testing the vires of section 377. In so doing, the impugned judgement introduces a numerical requirement for the protections of Chapter III of the constitution, whereas it is long settled that Fundamental Rights of miniscule minorities, even minorities of one, are entitled to full protection. This patent error of law has resulted in gross miscarriage of justice since this Hon'ble Court's testing of the constitutionality of section 377 has been coloured by the erroneous view that laws that target small minorities are immune to constitutional challenge.
- E. Because the impugned judgement's finding of 'lack of factual foundation' is contrary to the decision of a four judge bench of this Hon'ble Court at an earlier stage of the proceedings. Contentions taken by the present petitioners had been taken before the Delhi High Court by Naz Foundation India, the petitioners in those proceedings, at paragraphs 40 and 41 of their petition. That petition had once been rejected by the Delhi High Court for lack of cause of action. This Hon'ble Court, vide order dated 03.02.2006 in SLP (C) Nos. 7217-7218/2005 (of a bench of four judges of this Court) had reversed that judgement and remitted the matter for consideration to the Delhi High Court finding –

“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 been dismissed on the ground afore-stated.”

With the passing of this order, the contention that factual foundation had not been laid for the challenge to the constitutionality of section 377 had already been rejected by this Hon'ble Court vide order dated 03.02.2006 in SLP (C) Nos. 7217-7218/2005. None of the respondents contended lack of cause of action or absence of factual foundation for the challenge to section 377 before the High Court, after this Hon'ble Court's judgement of 03.02.2006. Before this Hon'ble Court in the proceedings that led to the judgement impugned as well, none of the petitions urged lack of factual foundation as a ground of challenge. The issue of 'lack of factual foundation' having attained finality vide orders of this Hon'ble Court dated 03.02.2006 was no longer in issue before the High Court or before this Hon'ble Court. It was only during oral submissions that Senior Advocate appearing for the appellant in Civil Appeal arising out of SLP(C) No.24334/2009 – Delhi Commission for Protection of Child Rights contended that the writ petition before the High Court did not contain foundational facts necessary for pronouncing on the constitutionality of section 377. None of the parties therefore, had fair opportunity to meet the contention. This was clearly an attempt at re-litigating an issue and an abuse of process of this Hon'ble Court. {See K.K. Modi vs K.N. Modi, AIR 1988 SC 1297 and Subhash Chandra and Another v. Delhi

Subordinate Services Selection Board and Others (2009) 15 SCC 458}

- E. Because the impugned judgement's finding of 'lack of factual foundation' for the challenge to the constitutionality of section 377 is also gross miscarriage of justice since it was reached without noticing that the petition before the High Court laid detailed factual foundation establishing the direct and inevitable effect of section 377 on the health and well-being of Lesbian, Gay, Bisexual and Transgender persons ('LGBT', for short) and their families. The record also reveals that respondent number 8 before the High Court, a coalition of organizations representing child rights, women's rights, human rights, health concerns as well as the rights of same sex desiring people, 'Voices against 377', had also laid detailed factual foundation that medically, scientifically and legally established direct and inevitable harmful effects of section 377 on LGBT persons and their fundamental rights at paragraph 8.1.1 of its counter affidavit. After the matter was remitted, the judgement of the Delhi High Court considered the consensus of expert opinion from the field of mental health in paragraphs 67-70, and returned a finding that evidence before it revealed that section 377 as it stood, violated the Fundamental Rights of LGBT persons.

Article 14

- F. Because the impugned judgement's conclusion 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" is a manifest error of law resulting in

gross miscarriage of justice, having been passed without considering whether there was a rational differentia between the two classes, which is the first part of the test laid down by this Hon'ble Court in *State of West Bengal v. Anwar Ali Sarkar*, [1952] SCR 294, page 315. The impugned judgement itself, after reviewing reported judgements of cases involving prosecutions for violation of section 377, recorded at para 38 that not only was it not possible to list acts which were covered by section 377, but no test could be laid down to differentiate "carnal intercourse against the order of nature". Section 377 therefore, from the impugned judgements' review of reported judgements that applied section 377, failed the first test of Article 14, i.e., there was no intelligible differentia; no 'real and substantial difference'; no 'yardstick or measure'; 'no policy or principle' for guidance to distinguish 'carnal intercourse in the ordinary course' from 'carnal intercourse against the order of nature'. Failing to apply the test of intelligible differentia has caused a manifest error of law resulting in gross miscarriage of justice. {See *Chiranjit Lal Chowdhury v. The Union of India and Others*, [1950] S.C.R. 869, page 913 and 932, *State of West Bengal v. Anwar Ali Sarkar* , [1952] SCR 294, page 315}

- G. Because the impugned judgement is also in manifest error of law resulting in gross miscarriage of justice since the test of whether there was a rational nexus of the classification of acts punished by section 377 with the object sought to achieved by section 377 was not applied. This was the second part of the Article 14 test which section 377 failed. This is particularly important since there

has never been consensus about what the object sought to be achieved by section 377 is. The judgement itself notes deliberate obviation of all discussion around the section at the time of its legislation (at para 37), and also notes, (at para 38), the complete lack of judicial consensus of the acts which fall within section 377.

- H. Because the impugned judgement is also in manifest error of law resulting in gross miscarriage of justice in its failure to even consider that the Union of India, in refusing to appeal the judgment of the Hon'ble High Court, had offered no reasonable objective for the criminalisation of consensual sexual activity between adults. As a party before this Hon'ble Court as well, the Union of India had refused to justify the criminalisation of consensual sexual activity and had clearly accepted the proposition that the criminalisation of consensual sexual activity had no reasonable objective and was clearly violative of Article 14.
- J. Because the impugned judgement is also in patent error of law resulting in in gross miscarriage of justice in misconstruing the ratio of its judgement in A.K. Roy to hold that the 'vagaries of language' saved section 377 from the challenge of vagueness. In A.K. Roy, this Hon'ble Court made a distinction between
- a.i. expressions which were difficult to define since they comprehended "an infinite variety of situations"
 - a.ii. and expressions which did not comprehend such an infinite variety of situations

In the light of the fact that section 377 describes an offence against the human body and requires penetration to constitute the offence, 'carnal intercourse against the order of nature' cannot comprehend an "infinite variety of situations" and it should be possible to 'enumerate' the acts of penetration which constitute the offence. Absent such enumeration, the clause will be capable of wanton abuse as was held in *A.K. Roy*, where the phrase "maintenance of supplies and services essential to the community" was held to be not only "vague and uncertain" but "capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community." In such a situation, this Court held in *A.K. Roy* that "To allow the personal liberty of the people to be taken away by the application of that clause would be flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21." This Hon'ble Court further cautioned in *A.K. Roy* that courts must strive to give even expressions which by their very nature were difficult to define, a narrower construction than the literal words suggested, limiting their application to as few situations as possible. {See *A. K. Roy, Etc vs Union Of India And Anr*, 1982 SCR (2) 272, page 323}

- k. Because the impugned judgement is also in patent error of law resulting in gross miscarriage of justice in as much this Hon'ble Court did not examine the effect of consent in sexual relationships between adults of same or different sexes. As has been urged by the intervenor/petitioner herein through scientific material, same sex behaviour is harmless and just as natural as

opposite sex behaviour and there arises no need for State intervention in this matrix. In fact, the Union of India has not preferred an appeal of the impugned order of the Delhi High Court which is reflective of its stand that there is no compelling state interest in preventing consensual same sex behaviour. Further, this Hon'ble Court in paragraph 38 considers previous instances in which the court has had to determine the applicability of section 377, and has also acknowledged that these were instances of coercion and not consent. Despite this, this Hon'ble Court proceeds to conclude that consent is immaterial. This Hon'ble Court erred in not considering that in cases of consensual sexual relationship between adults in private, there are no victims – children, men or women. In so far as reading down of the provision to exclude consensual same sex activities between two adults is concerned, Section 377 IPC even after reading down would apply to coercive and non-consensual sexual activities as it was applied before.

- L. Because allowing section 377 to stand on the statute books will also be gross miscarriage of justice after the enactment of the Protection of Children from Sexual Offences Act, 2012 and the Criminal Law (Amendment) Act, 2013, both of which were enacted after the conclusion of oral hearings. Both statutes are new and important evidence which could not be placed for consideration of this Hon'ble Court. Two justifications offered by the Union of India before the High Court for the retention of s. 377 were –

- a. The protection of children from child sexual abuse

- b. The protection of women from penile, non-vaginal sexual assault.

Both objectives have been comprehensively dealt with and taken care of by the 'Protection of Children from Sexual Offences Act, 2012' and the 'Criminal Law (Amendment) Act, 2013'. There is even less reason therefore to retain section 377 on the statute book. Further, the Criminal Law Amendment Act by making absence of consent the gravamen of the offences legislated is in keeping with the reasoning of the judgement of the Delhi High Court that was successfully challenged before this Hon'ble Court.

Presumption of Constitutionality

- M. Because this Hon'ble Court also committed a patent error of law that has resulted in gross miscarriage of justice in raising a presumption of constitutionality while testing the constitutionality of section 377. In *Gulabbhai Vallabbhai Desai & Others v. Union of India*, AIR 1967 SC 1110, at 1117 this Hon'ble Court held that it could not be presumed that the law making body knew of the limits to its authority while enacting a law, if the limits were only introduced later in time. Section 377 therefore could not have been presumed to be constitutional since at the time of its enactment, the legislating authority had no knowledge of fundamental rights or other Constitutional limitations on its power.

- I. Because the patent error of law in raising the presumption of constitutionality resulted in gross miscarriage of justice particularly because this Hon'ble Court failed to consider that the burden of proving the constitutionality of section 377 lay upon

the state as laid down by this Hon'ble Court in Anuj Garg & Another v. Hotel Association of India & Others (2008) 3 SCC 1 at para 20:

“When the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, inter alia, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefore would be on the State.”

- N. Because the impugned judgement is also in patent error of law resulting in miscarriage of justice in carrying the presumption of constitutionality to assume that there must be some undisclosed and unknown reasons for the punitive provisions of section 377 since there was no indication on the face of the law, or in circumstances surrounding the enactment of section 377, of the basis for hostile treatment of persons or proscribed acts. In Ram Krishna Dalmia's case, this Hon'ble Court had held 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. The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.”

- O. Because the impugned judgement, in extending the presumption of constitutionality to a pre-constitutional law such as section 377 is in patent error of law resulting in gross miscarriage of justice since no such presumption is available to pre-constitutional legislations. A fundamental basis for the presumption of constitutionality of laws – that the enacting legislature is a representative body of the people, accountable to them, aware of their needs, acting in their best interest and within the confines of the Constitution - does not obtain in the case of pre-constitutional laws generally, and certainly not for section 377. The Legislative Council which enacted section 377 consisted of 12 unelected Englishmen, who did not represent the people, were not accountable to them or aware of their needs, and did not act in their best interests or within the confines of the constitution, since they were acting before the constitution.
- P. Because the impugned judgement, is in patent error of law resulting in gross miscarriage of justice carrying the presumption of constitutionality of section 377 to the extent of assuming an

"undisclosed intention or reason" for the classification of acts into "carnal intercourse against the order of nature" and "carnal intercourse within the order of nature". In so doing, the protection of Article 14 has been rendered "a mere rope of sand, in no manner restraining state action." The error in applying the presumption of unconstitutionality is compounded by the fact that "good faith and knowledge of existing conditions" on the part of the body that legislated the Indian Penal Code cannot be presumed, since the Legislative Council consisted of 12 unelected Englishmen. {See *State of West Bengal v. Anwar Ali Sarkar* , [1952] SCR 294, page 316}

Article 15

Q. Because the impugned judgement is in patent in not considering the arguments, or reaching a finding with respect to Article 15(1). The High Court had read sexual orientation and gender identity into 'sex' in Article 15(1). Arguments to this effect were also made before this Hon'ble Court but were not even dealt with. As a result now, not only private employers but state agencies can discriminate between people on the basis of sexual orientation, a gross miscarriage of justice.

Error in Applying the Object and Form Test Instead of the Intended and Real Effect Test

R. Because the impugned judgement is in patent error of law resulting in gross miscarriage of justice in applying the 'object and form' test of '*A.K. Gopalan*', discarded by this Hon'ble Court in favor of the 'intended and real effect' or the 'direct and inevitable effect' test of '*Maneka Gandhi*' to examine whether

section 377 unduly burdened a class. {See Maneka Gandhi vs Union Of India, 1978 SCR (2) 621, State of Maharashtra & Anr. Versus Indian Hotel & Restaurants Assn. & Ors., CIVIL APPEAL NO.2705 OF 2006, decided on July 16, 2013}

- S. Because the impugned judgement is in patent error of law resulting in gross miscarriage of justice in concluding that section 377 merely identifies certain acts as offences and does not criminalize LGBT persons since, by punishing the only form of sexual intercourse available to LGBT persons – i.e., non-peno vaginal - section 377 entirely denies sexual intercourse to the class of LGBT persons. Further, none of the 200 prosecutions dealt with in reported judgements (referred to at para 43 of the judgement), involved prosecutions of sexual intercourse involving consenting heterosexual adults. In its 'effect and operation' therefore, section 377 unduly burdens the class of LGBT. The judgement of the Delhi High Court clarified and declared that there was no rationale for this uneven application of the law and henceforth, consent would remove all consensual non-peno-vaginal sexual intercourse from the ambit of section 377 altogether, whether practiced by LGBT or heterosexuals.
- T. Because the impugned judgement is also in patent error of law resulting in gross miscarriage of justice in coming to the conclusion that section 377 did not target people, identity or orientation but only identified "acts which if committed would constitute an offence" without considering the contentions of the petitioners that the acts in question, and the identity or orientation of LGBT persons were so deeply connected that

criminalizing the acts amounted to criminalizing identities. The Petitioners had contended that:

- a. It was established medical fact that a person's sexual orientation comprised four components:
 - a.i. Sexual Attraction
 - a.ii. The labeling of this attraction as reflecting a particular sexual orientation i.e. self identification.
 - a.iii. Disclosure of attraction and self identification to others,
and
 - a.iv. Sexual behaviour
- b. The first component, sexual attraction was at the core of sexual orientation.
- c. Homosexuality referred to sexual behaviour, desires, attractions and relationships among people of the same sex, as well as to the cultures, identities and communities associated with them.
- d. Both homosexual and heterosexual behavior and attraction were common across species and were normal and natural aspects of human sexuality.
- e. Medical and psychiatric opinion was near unanimous that homosexuality was not a disease or disorder and was just another expression of human sexuality.

It is submitted that this Hon'ble Court erred in failing to consider the above before arriving at a finding that section 377 IPC did not criminalise an identity or an orientation resulting in a gross miscarriage of justice.

- U. Because the impugned judgement is also in patent error of law resulting in gross miscarriage of justice in as much it does even consider scientific or medical evidence reflecting the mental and psychological harm caused LGBT persons as a direct and inevitable effect of Section 377 IPC:
 - a. LGBT persons across the world faced extensive prejudice, discrimination and violence because of their sexual orientation. A recent study of the mental health needs of LGB persons in India showed that they faced a sense of isolation, confusion and difficulty in reconciling rigid images of hetero-normative and gender appropriate behaviour that were a part of their social world and their internal processes and feelings. This study showed that invisibility, silence and a lack of language to express desire was a major issue that Lesbian, Gay and Bisexual youth faced in India and the stigmatization of gay lesbian and bisexual persons posed a risk to their mental well-being.
 - b. Criminalization had adverse consequences for the right to health of those who practiced same-sex conduct through the creation of the societal perception that they were "abnormal" and criminals. Anti sodomy statutes fostered a climate of intolerance in which LGBT persons felt compelled to conceal or lie about their sexual orientation to avoid personal rejection. This compulsion to remain "in the closet" reinforced anti-gay prejudices.
 - c. Section 377 of the Indian Penal Code by criminalizing expressions of intimacy among LGBT persons adversely

affected their mental health and was a violation of the right to live with dignity protected under Art 21 of the Constitution.

{See Report of the United Nations Commissioner on Human Rights titled "Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity", 17th November, 2011 in compilation (Vo.2) of Respondent 11 (Voices Against 377) compilation, pp 75-79

Ketki Ranade, "Process of Sexual Identity Development for Young People with Same-Sex Desires: Experiences of Exclusion", Psychological Foundations – The Journal (2008). Issue 1, Vol. X, pp. 1-15.

American Psychological Association, American Psychiatric Association et al, Brief as Amicus Curae in Lawrence v. Texas 539 U.S. 558 (2003), pp. 28-30}

- v. Because the impugned judgement is also in patent error of law resulting in gross miscarriage of justice in as much it does not even consider that the American Psychiatric Association ('APA', for short) had, in 1973, removed homosexuality from the list of mental disorders on the basis of rigorous scientific scrutiny. The APA reasoned that behavior constituted psychiatric disorder if it regularly caused subjective distress or was regularly associated with generalized impairment in social effectiveness or functioning. It was the considered opinion of the APA, that homosexuality *per*

se, did not meet the requirements of a psychiatric disorder. Gradually a scientific consensus had built that homosexuals or bisexual orientation, *per se*, was not a mental disorder and therefore not “against the order of nature” until both the International Classification of Diseases (ICD- 10) of the World Health Organisation (WHO), and the Diagnostic and Statistics Manual IV (DSM IV) of the American Psychiatrist Association, followed by mental health fraternity worldwide, acknowledged that homosexuality was not a mental disorder. The impugned judgement’s failure to consider conclusive medical opinion while holding certain sexual activities between consenting adults as ‘criminal’, is palpably arbitrary and irrational and has resulted in gross miscarriage of justice.

Article 21

w. Because the impugned judgement is in patent error of law in its failure to consider whether section 377 violates the right to life, liberty, privacy and dignity of LGBT persons. From paragraph 45 to 50, the impugned judgement sets-out some salient precedents on the right to life, liberty, privacy and dignity. In paragraph 51 however, the impugned judgement reduces the challenge to section 377 on grounds of violation of Article 21 to harassment, blackmail and torture as a result of abuse of section 377, and does not at any point address the petitioners’ substantive challenge on the grounds that section 377 violates the right to life, privacy and dignity and privacy of LGBT persons. Failure to test section 377 against Article 21 rights of life, liberty, privacy and dignity has resulted in a gross miscarriage of justice.

- x. Because the impugned judgement is in patent error of law in its failure to consider that by virtue of the existence of Section 377 IPC a normal variant of human sexuality is perceived and treated as abnormal and punishable by law. Petitioners' had produced evidence that the larger climate of intolerance fostered by a law that encroaches on the individual rights of LGBT persons caused severe mental distress and loss of self-esteem and Section 377 of the IPC created immense pressure on homosexuals which severely affected their ability lead normal lives. This Hon'ble Court erred in not considering that the criminalization of homosexuality by Section 377 contributed to social isolation of homosexuals and lead to harassment. The presence of section 377 results in homosexuals being forced to live a dual life, causing anguish and leading to a range of mental health problems. Failure to consider the contentions of the curative petitioners, the only party before this Hon'ble Court with professional expertise in the medical and mental health issues of LGBT persons, is a material error, manifest on the face of the judgement that undermines its soundness and that has resulted in a serious miscarriage of justice.
- y. Because the impugned judgement is in patent error of law in its failure to consider Petitioners' contentions that Section 377, through the social attitude it fostered and also directly, impacted the mental health and well being of LGBT persons and thereby violated their right to live with dignity. This Hon'ble Court did not consider the petitioner's contention that in their experience as mental health professionals they have repeatedly come across

instances of LGBT persons who suffer mental health issues ranging from depression, low self esteem to suicidal tendencies. It is respectfully submitted that the origin of such grave mental health issues faced by LGBT persons is the stigma, social isolation and discrimination fostered by Section 377 of the IPC. Section 377 of the IPC causes mental stress and anxiety in LGBT persons as it forced LGBT persons to hide their sexuality. It also encourages discrimination, harassment and abuse of LGBT persons by conveying the message that LGBT persons are criminals and hence to be accorded less dignity than other citizens. Failure to consider the contentions of the review petitioners, is a patent error of law that undermines its soundness and that has resulted in a serious miscarriage of justice.

- z. Because the impugned judgement is in patent error of law in its failure to examine whether the State has a compelling interest to violate the right to privacy of LGBT people, where such sexual activity involves adults, and harms no one. The impugned judgement cites *Gobind v. State of Madhya Pradesh* (1975) 2 SCC 148, at para 47 –

“There can be no doubt that privacy-dignity claims deserve to be examined with care and only denied when an important countervailing interest is shown to be superior. If the Court does find 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 that right.”

While considering whether section 377 violated the right to privacy and dignity of LGBT persons in India, this Court had to address two issues.

a.i. Whether there was a violation of the liberty, privacy and dignity of LGBT persons?

a.ii. Was there a paramount state interest that would justify the gross invasion of liberty, privacy and dignity?

It is respectfully submitted that this Hon’ble Court has not considered whether there was a violation of the right to liberty, privacy and dignity and has merely dismissed demonstrated violations of privacy and dignity as misuse, (at para 51). The Court does not consider that on a plain reading, section 377 allows the police to enter even the private sanctum of the home and ask searching questions about the most intimate parts of a person’s life. Failure to consider the contentions of the review petitioners is a patent error of law that undermines its soundness and that has resulted in a serious miscarriage of justice.

AA. Because the Judgement impugned is also in patent error of law for having referred to some of the contentions urged by parties regarding the direct and inevitable impact of section 377 on the Right to Health of LGBT persons, but not having considered or dealt with it as a ground of challenge to its constitutionality. Failure to consider impact on the Right to Health has resulted in gross miscarriage of justice.

AB. Because Judgement impugned is also in patent error of law for not considered the impact that re-criminalising the LGBT community would have on the efforts to control the spread of HIV/AIDS. The stand of the National Aids Control Organisation and the Union of India through the Ministry of Health and Family Welfare, even in the High Court, was in favour of reading down section 377 in so far as it applied to sexual practices of consenting adults in private. Persons engaged in same sex behaviour belong to a High Risk Group with respect to contracting HIV/AIDS as they are forced to hide their sexual practices hence making it difficult to gain access to health facilities and preventive measures. In the case of VHAP v. Union of India, the Supreme Court has considered the importance of treating HIV/AIDS and directed state governments to consider policies to combat it. Renewed fear of law enforcement agencies following the decision of this Hon'ble Court will drive same sex practices further underground thereby thwarting efforts of public health officials to reach out to the LGBT community. Protecting and promoting the rights of the LGBT community is crucial in ensuring safe sex practices for them, and consequently in the control of spread of HIV/AIDS which is a larger public health concern and failure to consider this aspect of the Right to Life has resulted in gross miscarriage of justice.

AC. Because Judgement impugned is also in patent error of law for not considering that that section 377 of the IPC violated the right to privacy and dignity embodied in Article 21 of the Constitution. The right to privacy as embodied in Article 21 interpreted by the

Hon'ble Supreme Court includes right to form intimate attachments with those of one's choice, provided that it is done consensually and without harm. The formation of intimate ties include consensual sexual relationships with other adult human beings is a sensitive, key aspect of human existence and is at the core of what is meant by the right to privacy. Personal intimacy is so core an aspect of the right to privacy that neither the state nor society has a role in dictating or controlling those choices. Further the right to privacy and respect for intimate choices of a human being is integrally linked to the notion of autonomy which enables persons to attain fulfillment, grow in self-esteem and build relationships of one's choice. The failure to consider that section 377, by criminalizing expression of same sex adult consensual relationships denies LGBT persons the very opportunity to form intimate attachments, to grow and flourish as members of the human family and thereby violates the right to live with dignity and the right to privacy of LGBT persons has resulted in a gross miscarriage of justice.

AD. Because Judgement impugned is also in patent error of law for not considering the petitioners' contention that homosexuals have no choice in their attraction to persons of the same sex. This Hon'ble Court did not consider that the petitioners had placed on record recent studies that showed that homosexuals generally have little or no choice in their attraction to members of the same sex. This Hon'ble Court erred in not considering that an individual's sexual orientation is mostly determined by hereditary and pre-natal factors. It is submitted that homosexuality is not a

manifestation of a choice that can be prevented by the presence of criminal law. The impugned judgement's failure to consider that section 377 by targeting LGBT persons whose sexual orientation is immutable, natural and innate, is prima facie arbitrary and a violation of Article 14 and 21 of the Constitution has resulted in a gross miscarriage of justice.

AE. Because the Judgement impugned is also in patent error of law resulting in gross miscarriage of justice in its failure to even attempt at identifying a compelling state interest requisite to justify the denial of the rights to privacy and dignity - guaranteed by article 21 of the Constitution - by the criminalization of consensual acts in private.

AF. Because the Judgement impugned is also in patent error of law in its conclusion regarding the possibility of abuse of section 377. While it is a well established legal principle that the possibility of abuse is not ordinarily sufficient to strike down a law, failure to consider that uncertainty in the law and the infringement of a guaranteed freedom, coupled with the probability of misuse should result in the court striking down the provision has resulted in gross miscarriage of justice. This principle was clearly enunciated in paragraph 47 in the case of *Abbas v. Union of India* as follows:

“Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless

sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases”.

The impugned judgement itself states, at paragraph 38 that it is unclear as to which acts are covered under the terms of section 377, leaving society in a “boundless sea of uncertainty”. In failing to consider that the vagueness of Section 377 conferred unfettered discretion on police officials and other agents of the state, as evident from the voluminous material Respondent no. 1 and Respondent no.11 placed on record and from the harassment, blackmail and torture of LGBT persons that this Court very briefly mentions at para 51 the impugned judgement is in patent error of law resulting in gross miscarriage of justice.

AG. Because the Judgement impugned is also in patent error of law in its failure to consider the petitioners’ contentions regarding the effect of section 377 on the dignity of persons who belong to the LGBT community. Dignity is an intrinsic part of Article 21 as held in various decisions of this Hon’ble Court. Dignity is related to autonomy and self-realisation. Denial of sexual expression violates the dignity of homosexual individuals. In the decision under review, this Hon’ble Court considers the arguments with

respect to dignity but does not apply them to the case in question. Given that persons of the LGBT community have to face several affronts to their dignity in a society that is still averse to such identities, legal sanction against them further compromises their constitutional right to dignity and failure of this Hon'ble Court to consider petitioners' contentions in this regard has resulted in gross miscarriage of justice.

AH. Because the Judgement impugned is also in patent error of law in as much this Hon'ble Court did not consider that Section 377 IPC in its operation creates an association of criminality towards LGBT persons. It is most respectfully submitted that because of the existence of the section 377 many LGBT persons face consequences including blackmail and sexual abuse as well as consequences such as stigma and discrimination. Failure of this Hon'ble Court to consider that Section 377 in its operation as well as its over broad classification which includes consensual sexual acts between adults violates the mandate of equality in Article 14 has resulted in gross miscarriage of justice.

AI. Because the Judgement impugned is also in patent error of law in criminalizing consensual same sex acts without considering that homosexuality is not a disease or a mental illness that needs to be, or can be, 'cured' or 'altered', but is a natural variant of human sexuality. It is most respectfully submitted that to criminalise what is a characteristic of some human beings over which they have no control is much like criminalizing left handed people for being left handed. The failure of this Court to take into consideration that criminalization of a natural but also inborn

characteristic of LGBT persons lacks any clear rationale, is prima facie arbitrary and a violation of Article 14 has resulted in gross miscarriage of justice.

AJ. Because the Judgement impugned is also in patent error of law in its conclusion that in the "last more than 150 years less than 200 persons have been prosecuted (as per the reported orders)". Most prosecutions do not reach the appellate stage, and not all appellate judgements are reported. The judgement is therefore clearly in error in assuming that the number of reported judgments offers any indication of the numbers of persons prosecuted, without even taking into consideration that, FIRs may be registered, intrusive investigations conducted into private affairs, searches carried out, bail applications granted or refused, cases tried and persons convicted without finding any reflection in the docket of the appellate courts. This patent error of law in understanding the many lawful intrusions into the private sphere that section 377 makes possible has resulted in gross miscarriage of justice.

AK. Because the Judgement impugned is also in patent error of law as this Court has failed to consider that the harassment, torture, rape, extortion, and blackmail of LGBT persons is a direct and inevitable consequence of Section 377. This Court brushes off the documented instances the fundamental rights violations of LGBT persons at para 51 by stating:

"Respondent No. 1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those

belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section.”

It is submitted that such “misuse” of the section is a direct and inevitable consequence of the provision and failure to consider its impact has resulted in gross miscarriage of justice.

Article 19

AL. Because the Judgement impugned is also in patent error of law as this Hon’ble Court has denied the LGBT community the right to free speech and expression. Articles 14, 19 and 21 are a composite charter, since the right to equality, the right to expression and the right to life are inextricably linked. The right of individuals to express themselves, including their sexual identities, is core to the human experience. To deny the right to express one’s sexuality, apart from violating the dignity and equal protection of individuals, is a violation of Article 19. The fear arising from section 377 creates a chilling effect on speech regarding the sexuality of members of the LGBT community thereby forcing on them a culture of silence. Further, none of the prohibitive grounds to deny the right under Article 19 having been made out, the patent error of law has resulted in gross miscarriage of justice.

AM. Because the Judgement impugned is also in patent error of law resulting in miscarriage of justice in upholding the constitutionality of Section 377 of the Indian Penal Code and

vindicating the stand of the parties who have filed SLP against the High Court judgment that homosexual relationship between two consenting male adults in their private sphere is “unnatural” and “against the order of the nature” and akin to perversion. It is most respectfully submitted that this view is irrational, arbitrary and unscientific. It is submitted that ‘homosexuality’ is innate and immutable characteristic of a human being and hence the criminalization of homosexuality would be like criminalizing persons on the basis of their skin colour, the colour of their eyes or their race, or ethnic origin.

Error of Law in Misconstruing the Stand of the Union of India

AN. Because the impugned judgement is also in patent error of law resulting in gross miscarriage of justice in completely misunderstanding the stand of the Union of India, a necessary and proper party to these proceedings.

- a. On 23.02.2012 the Learned Additional Solicitor General appeared on behalf of the Ministry of Home Affairs and argued that the Ministry was opposed to the Writ Petition. However, after he finished his arguments, another Learned Additional Solicitor General, submitted that he was instructed by the Attorney-General to state that the Union of India had not yet taken any stand on the matter.
- b. On 28.02.2012 Mr. Mohan Jain submitted the recommendations of the Group of Ministers and the decision of the Cabinet with regard to this case and this Hon’ble Court was pleased to record that –

“Learned Additional Solicitor General appeared and read out what he termed as the recommendations made by the Group of Ministers and the 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. Thereafter, an affidavit dated 1.3.2012 was filed on behalf of the Union of India by the Home Secretary which negated the earlier submissions made by the learned Additional Solicitor General on behalf the Ministry of Home Affairs. 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.

- c. On 22.03.2012 and 23.03.2012 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 found no legal error in the judgment of the High Court and accepted the same. The learned Attorney General also filed written submissions before this Hon’ble Court stating that the Union of India:

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

- AO. Because the impugned judgement is also in patent error of law in misconstruing the submissions of the Attorney General as being the submissions of Amicus Curiae, when in fact they were made in his constitutional capacity as Chief Legal Advisor and lawyer of the government of India - a relationship akin to that between lawyer and client - whose submissions were upon instructions from the Union executive. This patent error of law has resulted in gross miscarriage of justice since the judgement does not even deal with the submissions of the Attorney General, let alone consider them as the view of the Union of India. { *See B.P. Singhal v. Union of India*, 2010 (5) SCALE 134}
- AP. 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.
- AQ. It is submitted that new grounds have been raised in the Curative Petition that have not already been raised in the Review Petition. The said review petition was dismissed by circulation vide judgment dated 28.1.2014.
- AR. The present petitioner submits that no other curative petition has been filed by the present petitioner against the order and decision of this Hon'ble Court on 11.12. 2013 in Civil Appeal No. 10972 of 2013 and connected matters and the review petition dismissed by this Hon'ble Court on 28.01.2014 vide order in Review Petition Nos. 41-55 Of 2014.

PRAYER

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

- (a) Allow the present curative petition and set aside final common judgment and order of this Hon'ble Court dated 11.12.2013 in Civil Appeal No. 10972, confirmed by order dated 28/01/2014 in Review Petition (Civil) No. 221 of 2014;
- (b) 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.

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

DRAWN BY:

Rajat Kumar and

Sahana Manjesh, Advocate

FILED BY

GAUTAM NARAYAN

(ADVOCATE FOR THE PETITIONERS)

DRAWN ON: 31/3/2014

FILED ON: 2/4/2014

IN THE SUPREME COURT OF INDIA

IA No. ____

IN

CURATIVE PETITION (C) NO. _____ OF 2014

IN THE MATTER OF:

AN APPLICATION FOR ORAL HEARING

IN THE MATTER OF:

Dr. Shekhar Seshadri & Others ...Petitioners

Versus

Suresh Kumar Koushal & Others ...Respondents

To:

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

The humble application of the applicant abovenamed

MOST RESPECTFULLY SHOWETH:

4. That the accompanying Curative Petition has been filed under Article 142 of the Constitution of India for setting aside 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 2.7.2009 rendered by the Delhi High Court in Writ Petition (Civil) No. 7455 of 2001 on the grounds of abuse of process of court and gross miscarriage of justice.
5. That the present Petitioners/Applicants had also filed a review petition, Review Petition (C) No.221 of 2014, which was dismissed by this Hon'ble Court vide order dated 28.1.2014.

6. That the contents of the accompanying Curative Petition are not being repeated for the sake of brevity, however, the same may be read as part of the present application.
7. It is submitted that the Court has fundamentally erred in appreciating the law regarding Articles 14, 15 and 21 of the Constitution. More specifically, it is submitted that the expert contentions and scientific material placed before this Court by the Petitioners/Applicants herein, who are a group of reputed mental health practitioners, have not been considered before re-criminalizing the LGBT community, in a judgment that does not provide adequate reasons for the conclusions finally arrived at. These contentions and submissions were made to inform this Court of the lack of scientific basis in treating homosexuality as a crime. *Au contraire*, modern science has established that homosexuality is not unnatural or against the order of nature but is in fact innate, immutable and core to a person's identity.
8. It was also submitted before this Hon'ble Court that treating homosexual individuals as criminals has an adverse affect on their mental well-being as they are forced to live in an environment of fear and intolerance, for no fault of their own. The control over the sexuality of LGBT persons, and therefore their identity, is inimical to their mental health. These contentions, arising out of the experience of the Applicants/Petitioners during their professional lives, have not been considered by this Court.
9. While the judgment of the High Court had enabled a life of dignity by securing a nurturing environment to the LGBT community, the effect of the judgment of this Hon'ble Court will

be to recreate the fear and intolerance which will disallow the community a life of dignity and mental well-being.

10. That the present Curative Petition is being filed to prevent the further violations of the fundamental rights of LGBT persons, upon rigorous consideration of material and submissions placed before this Hon'ble Court. Since the materials and submissions of the Petitioners/Applicants were not considered in the final judgment rendered on 11.12.2013, as confirmed vide the order dated 28.1.2014, permission is sought to assist this Hon'ble Court in appreciating the scientific evidence that are on record which may be done in open court through oral arguments.
11. That the requirements for a curative petition under *Rupa Hurra v. Ashok Hurra* – that of abuse of process of the court and gross miscarriage of justice – have been satisfied. The Petitioners/Applicants have a good *prima facie* case for the reconsideration of the judgment dated 11.12.2013 in Civil Appeal No. 10972 of 2013, as confirmed in Review Petition (C) 221 of 2014 vide order dated 28.1.2014.
12. It is submitted that new grounds have been raised in the Curative Petition that have not already been raised in the Review Petition, which was dismissed by circulation vide judgment dated 28.1.2014.
13. That the present Application is being made *bona fide* and in the interest of justice.

PRAYER

The Applicants/ Petitioners respectfully pray that this Hon'ble Court may graciously be pleased to:

- i. Direct that the above Curative Petition be listed in open court for hearing of oral arguments prior to disposing off the accompanying Curative Petition; and
- ii. Pass such further or other orders as this Hon'ble Court may deem fit and proper.

DRAWN BY:

Rajat Kumar and
Sahana Manjesh, Advocate

FILED BY

GAUTAM NARAYAN
(ADVOCATE FOR THE PETITIONERS)

DRAWN ON: 31/3/2014

FILED ON: 2/4/2014

IN THE SUPREME COURT OF INDIA

IA No. ____

IN

CURATIVE PETITION (C) NO. _____ OF 2014

IN THE MATTER OF:

AN APPLICATION FOR STAY

IN THE MATTER OF:

Dr. Shekhar Seshadri & Others ...Petitioners

Versus

Suresh Kumar Koushal & Others ...Respondents

To:

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

The humble application of the applicant abovenamed

MOST RESPECTFULLY SHOWETH :

1. That the accompanying Curative Petition has been filed under Article 142 of the Constitution of India for setting aside 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 2.7.2009, rendered by the Delhi High Court in Writ Petition (Civil) No. 7455 of 2001 on the grounds of abuse of process of court and gross miscarriage of justice.

2. That the present petitioners had also filed a review petition, Review Petition (C) No. 221 of 2014, which was dismissed by this Hon'ble Court vide order dated 28.1.2014.
3. That the contents of the accompanying Curative Petition are not being repeated for the sake of brevity, however, the same may be read as part of the present application.
4. It is submitted that the Court has fundamentally erred in appreciating the law regarding Articles 14, 15 and 21 of the Constitution. More specifically, it is submitted that the expert contentions and scientific material placed before this Court by the Petitioners/Applicants herein, who are a group of reputed mental health practitioners, have not been considered before re-criminalizing the LGBT community, in a judgment that does not provide adequate reasons for the conclusions finally arrived at. These contentions and submissions were made to inform this Court of the lack of scientific basis in treating homosexuality as a crime. *Au contraire*, modern science has established that homosexuality is not unnatural or against the order of nature but is in fact innate, immutable and core to a person's identity.
5. It was also submitted before this Hon'ble Court that treating homosexual individuals as criminals has an adverse affect on their mental well-being as they are forced to live in an environment of fear and intolerance, for no fault of their own. The control over the sexuality of LGBT persons, and therefore their identity, is inimical to their mental health. These contentions, arising out of the experience of the Applicants/Petitioners during their professional lives, have not been considered by this Court.

6. While the judgment of the High Court had enabled a life of dignity by securing a nurturing environment to the LGBT community, the effect of the judgment of this Hon'ble Court will be to recreate the fear and intolerance which will disallow the community a life of dignity and mental well-being.
7. That the present Curative Petitioners have established a good prima facie case on merits. The balance of convenience tilts overwhelmingly in favour of the petitioners and against the respondents. No prejudice would be caused to the respondents if the interim reliefs as prayed for are granted. The Respondents/Appellants are neither beneficiaries of the judgment under review, nor are any of their rights effected in any way by the judgment under review. On the other hand grave prejudice would be caused to the LGBT community and their families, including the Petitioners herein, if the reliefs as prayed for are not granted. That it is in the interests of justice that the judgment dated 11.12.2013 rendered by this Court in C.A. 10972 of 2013 and other connected matters, as confirmed in Review Petition (C) No.221 of 2014 vide order dated 28.1.2014, are stayed by this Court.
14. The requirements for a curative petition under *Rupa Hurra v. Ashok Hurra* – that of abuse of process of the court and gross miscarriage of justice – have been satisfied. The Applicant has a good prima facie case for the reconsideration of the judgment dated 11.12.2013 in Civil Appeal No. 10972 of 2013, as confirmed in Review Petition (C) No.221 of 2014 vide order dated 28.1.2014.

15. It is submitted that new grounds have been raised in the Curative Petition that have not already been raised in the Review Petition, which was dismissed by circulation vide judgment dated 28.1.2014.
16. That this application is *bona fide* and in the interests of justice.

PRAYER

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

- a) Stay the common judgment and final order dated 11.12.2013 passed by this court in C.A. No. 10972 of 2013, and as confirmed by order dated 28.1.2014 in Review Petition (C) No. 221 of 2014.
- b) and pass any further orders as this Hon'ble Court may deem fit and proper in the interests of justice

DRAWN BY:

Rajat Kumar and

Sahana Manjesh, Advocate

FILED BY

GAUTAM NARAYAN

(ADVOCATE FOR THE PETITIONERS)

DRAWN ON: 31/03/2014

FILED ON: 02/04/2014

IN THE SUPREME COURT OF INDIA

IA No. ____

IN

CURATIVE PETITION (C) NO. _____ OF 2014

IN THE MATTER OF:

**AN APPLICATION FOR EXEMPTION FROM FILING CERTIFIED
COPY OF JUDGMENT DATED 28.1.2014**

IN THE MATTER OF:

Dr. Shekhar Seshadri & Others ...Petitioners

Versus

Suresh Kumar Koushal & Others ...Respondents

To:

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

The humble application of the applicant abovenamed

MOST RESPECTFULLY SHOWETH :

1. That the accompanying Review Petition has been filed under Article 142 of the Constitution of India for setting aside 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 2.7.2009, rendered by the Delhi High Court in Writ Petition (Civil) No. 7455 of 2001 on the grounds of abuse of process of court and gross miscarriage of justice.

2. That the present petitioners had also filed a review petition, Review Petition (C) No. 221 of 2014, which was dismissed by this Hon'ble Court vide order dated 28.1.2014.
3. That the contents of the accompanying Curative Petition are not being repeated for the sake of brevity, however, the same may be read as part of the present application.
4. That the present Petitioners/Applicants have approached this Court under Article 142 of the Constitution to address abuse of process of court and gross miscarriage of justice.
5. That the present Petitioners/Applicants have furnished an uncertified copy of the order dated 28.1.14 and undertake to file a certified copy of the same as and when called upon to do so.
6. That the Petitioners/Applicants have not furnished a certified copy of the order since the matter is of some urgency and they have not had the time to procure a certified copy. Additionally, this Hon'ble Court was shut for a short period of time in the duration between the review being dismissed and the current curative petition being filed.
7. That grave and irreparable harm and injury will be caused to the Petitioners/Applicant if not allowed to rely upon the uncertified copy of the judgment dated 28.1.14 during the course of the hearing of this curative petition.
8. That no prejudice will be caused to the Respondents if the Petitioners/Applicants are allowed to rely on the uncertified copy of the judgment dated 28.1.14.
9. The requirements for a curative petition under *Rupa Hurra v. Ashok Hurra* – that of abuse of process of the court and gross miscarriage of justice – have been satisfied. The Applicant has a

good prima facie case for the reconsideration of the judgment dated 11.12.2013 in Civil Appeal No. 10972 of 2013, as confirmed in Review Petition (C) No.221 of 2014 vide order dated 28.1.2014.

10. It is submitted that new grounds have been raised in the Curative Petition that have not already been raised in the Review Petition, which was dismissed by circulation vide judgment dated 28.1.2014.
11. That this application is *bona fide* and in the interest of justice.

PRAYER

It is therefore most respectfully prayed that this Court be pleased to:

- a) Exempt the Petitioners/Applicants from filing a certified copy of the judgment in Review Petition (C) No. 221 of 2014.
- b) And pass any other orders that this Hon'ble Court may deem fit and proper in the interests of justice.

DRAWN BY:

Rajat Kumar and

Sahana Manjesh, Advocate

FILED BY

GAUTAM NARAYAN

(ADVOCATE FOR THE PETITIONERS)

DRAWN ON: 31/03/2014

FILED ON: 02/04/2014

IN THE SUPREME COURT OF INDIA

IA No. ____

IN

CURATIVE PETITION (C) NO. _____ OF 2014

IN THE MATTER OF:

**AN APPLICATION FOR PERMISSION TO FILE EXTENDED
SYNOPSIS AND LIST OF DATES**

IN THE MATTER OF:

Dr. Shekhar Seshadri & Others ...Petitioners

Versus

Suresh Kumar Koushal & Others ...Respondents

To:

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

The humble application of the applicant abovenamed

MOST RESPECTFULLY SHOWETH :

1. That the accompanying Review Petition has been filed under Article 142 of the Constitution of India for setting aside 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 2.7.2009, rendered by the Delhi High Court in Writ Petition (Civil) No. 7455 of 2001 on the grounds of abuse of process of the court and gross miscarriage of justice.

2. That the present Petitioners/Applicants had also filed a review petition, Review Petition (C) No. 221 of 2014, which was dismissed by this Hon'ble Court vide order dated 28.1.2014.
3. That the contents of the accompanying Curative Petition are not being repeated for the sake of brevity, however, the same may be read as part of the present application.
4. That the matter that dates back from the year 2001 and involves complex legal and factual arguments and hence the Applicant craves leave to file an extended synopsis and list of dates beyond the 10 pages limit prescribed by the rules of this Hon'ble Court.
5. That the Petitioners/Applicants will face irreparable harm if they are not allowed to file this extended list of dates and synopsis as the Petitioners/Applicants will not be able to present the full essential facts and circumstances of the matter before this Hon'ble Court. On the other hand, no harm or prejudice will be caused to the Respondents if the Petitioners/Applicants are allowed to file an Extended Synopsis and List of Dates.
6. The requirements for a curative petition under *Rupa Hurra v. Ashok Hurra* – that of abuse of process of the court and gross miscarriage of justice – have been satisfied. The Applicant has a good prima facie case for the reconsideration of the judgment dated 11.12.2013 in Civil Appeal No. 10972 of 2013, as confirmed in Review Petition (C) No.221 of 2014 vide order dated 28.1.2014.
7. It is submitted that new grounds have been raised in the Curative Petition that have not already been raised in the Review Petition,

which was dismissed by circulation vide judgment dated 28.1.2014.

8. That this application is *bona fide* and in the interests of justice.

PRAYER

It is therefore most respectfully prayed that this Court be pleased to:

- a) Allow the Petitioner/Applicant mentioned above to file an Extended Synopsis and List of Dates.
- b) And pass any other orders that this Hon'ble Court may deem fit and proper in the interests of justice.

DRAWN BY:

Rajat Kumar and

Sahana Manjesh, Advocate

FILED BY

GAUTAM NARAYAN

(ADVOCATE FOR THE PETITIONERS)

DRAWN ON: 31/03/2014

FILED ON: 02/04/2014