

**IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION
WRIT PETITION(CRL.) NO.76 OF 2016**

IN THE MATTER OF:

NAVTEJ SINGH JOHAR & ORS

.....PETITIONERS

VERSUS

UNION OF INDIA

....RESPONDENT

SHORT AFFIDAVIT ON BEHALF OF UNION OF INDIA

I, Thangkholun Haokip, s/o Shri Henkholim Haokip, aged about 52 years, having my office at Major Dhyam Chand Stadium, Ministry of Home Affairs, New Delhi, do hereby solemnly affirm and state as under:

1. I am functioning as Under Secretary in the Ministry of Home Affairs, Union of India. I respectfully submit that I am filing this Affidavit to respectfully place on record the stand of the Union of India with regard to the subject matter of the present petitions.

2. I state and submit that the present petitions are being heard upon a reference made by three Hon'ble judge bench of this Hon'ble Court for reconsideration of the law laid down in the **Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1**, by a bench of two Hon'ble judges.

3. I state and submit that the constitutional validity of section 377 came to be challenged before the Hon'ble Delhi high Court on the ground that the acts mentioned in Section 377 be not criminalised and the same deserves to be decriminalized.

The Hon'ble Delhi High Court was pleased to render its decision in **Naz Foundation Versus Government of NCT of Delhi and Ors**, reported in (2009) 111 DRJ 1 (DB) and held as under:

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

non-vaginal sex and penile non-vaginal sex involving minors. 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. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Section 377 IPC that have already attained finality.

We allow the writ petition in the above terms.”

4. I state and submit that the appeal against the said decision came to be dismissed by two judge bench of this Hon'ble Court in the above referred judgment.

5. I state and submit that in ***Navtej Singh Johar v. Union of India, (2018) 1 SCC 791***, this Hon'ble Court was pleased to refer the matter to a constitution bench to decide as to whether the law laid down in *Koushal* (supra) is correct or not. The only question, therefore, which is referred for the consideration of larger bench is the question of constitutional validity of criminalizing “*consensual acts of adults in private*” falling under Section 377 of the Indian Penal Code and no other questions fall for consideration of this Hon'ble Bench as evident from the order of reference.

6. I state and submit that so far as the constitutional validity Section 377 to the extent it applies to “*consensual acts of adults in private*” is concerned, the Union of India would leave the said question to the wisdom of this Hon'ble Court.

7. I respectfully submit that in the event this Hon'ble Court is pleased to declare Section 377 viz. “*consensual acts of adults in private*”, to be unconstitutional, no other issue/issues and/or rights are referred for consideration and adjudication and therefore, may not be gone into.

If this Hon'ble Court is pleased to decide to examine any other question other than the constitutional validity of Section 377 of the Indian Penal Code, or to construe any other right in favour of or in respect of LGBTQ, the Union of India would like to file its detailed affidavit in reply as consideration of other issues would have far

reaching and wide ramifications under various other laws and also will have consequences which are neither contemplated in the reference nor required to be answered by this Hon'ble Bench.

8. I state and submit that the reference order is dated 08.01.2018. Most of the petitions being heard by this Hon'ble Bench are filed recently in the year 2018. Considering the issues, if any, if permitted to be raised beyond the scope of the reference, the same would require a detailed counter affidavit showing legitimate state interest on various other issues. Such an exercise could obviously not be undertaken without wider consultations in the government. In the most respectful submission of the Union of India, allowing any other issue (other than constitutional validity of Section 377) to be argued and adjudicating the same without giving an opportunity to the Union of India to file a counter affidavit to the Union of India may not be in the interest of justice and would be violative of principles of natural justice.

DEPONENT

VERIFICATION:

I the above named deponent affirms that the contents of Para 1 to 4 of this affidavit are true and correct to best of my knowledge and belief and no part of it is false and nothing material has been concealed there from.

Verified at New Delhi on this the 11th day of July, 2018.

DEPONENT