IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
I.A. NO. 91147 OF 2018 IN
WRIT PETITION (Crl) No. 000076 of 2016 IN

THE MATTER OF:

Navtej Singh Johar & Ors. .. Petitioner

Versus

Union of India &Anr .. Respondents

AND IN THE MATTER OF:

Harish Iyer .. Applicant/Impleader

WRITTEN SUBMISSIONS ON BEHALF OF IMPLEADER BY MR. MAHESH JETHMALANI, SENIOR ADVOCATE

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The Impleader adopts the various submissions of all the Intervenors in support of the Petition but in addition wishes to place a brief written submission on record for the consideration of this Hon'ble Court.

1. BRIEF BACKGROUND

A. The Impleader

i. The Impleader namely Harish Iyer is a citizen of this country, a respectable columnist for various English newspapers, a self-confessed homosexual and an activist for a number of causes pertaining to the (LGBTQ) community, women, animals, survivors of child sexual abuse and has been the recipient of the Energising Bharat Award and Zindagi Live Awards for the same.

ii. The Impleader was sexually abused by a family member of his for a period of 11 years since the age of 7 and was gang-raped/sexually assaulted by a group of men at the age of 12. He shared his gut-trenching tale of sexual abuse when he appeared on Bollywood star Aamir Khan's show called "SatyamevaJayate" on Star Plus television channel, which impelled a renewed discourse on LGBTQ rights in India.

(The background of the Impleader is elaborately set out in the Impleadment Application.)

2. Section 377 of the IPC ultra vires Article 14 of the Constitution

Section 377 IPC is manifestly ultra vires Article 14 of the Constitution post the amendment of section 375 IPC by Act 13 of 2013. The judgment of this Hon'ble Court in *Suresh Kumar Kaushal v Naz Foundation* 2014 1 SCC 1 repelled the challenge to the constitutional validity of section 377 IPC based on Article 14 on the basis of its

reasons disclosed in para 60 of the judgment. Essentially the court repelled the attack on the basis of Article 14 on two premises:

a. That section 377 merely identified certain acts, which if committed would constitute an offence
b. The prohibition under the section regulated sexual conduct regardless of gender identity and orientation.

It is respectfully submitted that in view of the amendment to section 375 IPC in 2013 whereby Rape has been given an expanded definition in contrast to the narrow definition of the word prior to the 2013 amendment, Section 377 by necessary implication punishes the acts contemplated therein, where those acts are committed only in the course of same-sex carnal intercourse and bestiality. In other words, section 377 by virtue of the definition of Rape in section 375 IPC post 2013 no longer regulates sexual conduct regardless of gender identity and orientation. For this reason, the section is manifestly ultra vires Article 14 in as much as it discriminates between the LGBT community and heterosexuals.

Section 375 IPC before substitution by Act 13 of 2013 stood as under:

" *375. Rape. – A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-*

First.- Against her will.

Secondly. – Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her

or any person in whom she is interested in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband, and that is or believes herself to be lawfully married.

Fifthy.- With her consent, when, at the time of giving such consent, by reason of

unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under sixteen years of age.

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence ofrape.

Explanation.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age. Is not rape."

From the pre 2013 definition of Rape it is clear that what was punishable was non-consensual sexual intercourse by a man with a woman. Hetrosexuals could also be punished under section 377 IPC for "carnal intercourse against the order of nature", the latter phrase covering by judicial interpretation a host of carnal acts- predominantly oral and anal sex but covering within its sweep almost every carnal act that did not consist of penile-vaginal sexual intercourse. The present definition of Rape covers not just non- consensual sexual intercourse but by clauses (a) to (d) cover every non-consensual carnal act hitherto punishable under section 377 IPC. Most significantly the present section 375 IPC exempts from the definition of Rape every consensual carnal act (and not just sexual intercourse as previously) from the definition of Rape. In other words, section 375 permits hetrosexuals to engage in acts of what section 377 IPC prohibited and punished as being carnal intercourse against the order of nature. Section 376 IPC, which is the punishing section for Rape similarly as a corollary does not punish consensual "carnal intercourse against the order of nature" between hetrosexuals.

The upshot of the amendment to section 375 IPC is that section 377 IPC is denuded of the prohibition against consensual hetrosexual "carnal intercourse against the order of nature" or else it would be in patent conflict with section 375 IPC. In the event of such conflict the provisions of section 375 IPC as amended in 2013 must prevail over section 377 IPC since the amended section 375 IPC is a later provision and reflects the most recent legislative intent. As it presently stands, section 377 IPC therefore, punishes only same-sex "carnal intercourse against the order of nature" i.e. LGBTs apart from Bestiality. Regrettably therefore, the section now puts LGBT carnal activity on par with Bestiality.

3. Suresh Kumar Kaushal v Naz Foundation is Per Incurium

The 2013 amendment to section 375 IPC came into effect from 3rd February, 2013. In other words, considerably prior to the decision of this court in *Suresh Kaushal* (11th December, 2013), the amendment to section 375 was in force. The bench in Suresh Kaushal's case has not referred to the amendment to section 375 IPC and particularly its consequences on the constitutional validity of section 377, which it was examining. The amended section 375 IPC as aforestated rendered consensual "carnal intercourse against the order of nature" permissible as between a man and a woman. Section 377 IPC on the other hand continued to render punishable same sex carnal intercourse against the order of nature even if it was consensual. In this view of the matter, there is a manifest discrimination in criminal law between the treatment of hetrosexual carnal intercourse and carnal intercourse between the members of the LGBT community. The combined effect of the amended section 375 IPC and section 377 IPC is to render section 377 constitutionally vulnerable on the touchstone of Article 14. Indubitably, Section 377 IPC is liable to be struck down as being ultra vires Article 14. The bench in *Suresh Kaushal's* case by not noticing the amendment to section 375 IPC

fell into the error of holding as it did in para 60 of the Impugned Judgment:-

"*It is relevant to mention here that Section 377 IPC does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.*"

On the contrary, the amendment to section 375 IPC decriminalized consensual carnal intercourse "against the order of nature" between hetrosexuals while section 377 IPC continued to punish such carnal intercourse when engaged in by members of the LGBT community. After the 2013 Amendment to Section 375 IPC, section 377 does not merely regulate sexual conduct regardless of gender identity and orientation. It ` manifestly and unequivocally discriminates against members of the LGBT community qua the hetrosexuals community solely on the ground of sexual orientation. It is most respectfully and humbly submitted that the failure to take cognizance of the Amending Act of 2013 and its inexorable impact on the vires of section 377 IPC is a glaring omission, which has rendered the entire judgment per incuriam.

The very raison d'être of the judgment in para 60 for upholding the constitutionality of section 377 IPC, i.e. that the Section was gender and orientation neutral is a palpable error and the rationale of the judgment is accordingly totally vitiated.

4. <u>Impact of s.87 of IPC on section 377 IPC</u>

<u>Consensual carnal intercourse against the order of nature not an offence:</u>

To save it from the vice of unconstitutionality, section 377 IPC has to be read in a manner that decriminalizes carnal intercourse among consenting adults irrespective of gender and orientation. In fact,

chapter IV of the IPC deals with General Exceptions to all offences under the Indian Penal Code. Section 87 of the IPC is particularly relevant.

> " 87. *Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.*
>
> *Illustration A and Z agrees to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence*."

In a nutshell, the section prescribes that apart from offences involving death of grievous hurt, consent by a victim or a participant in the act, which constitutes an offence negates the commission of the offence irrespective of any harm that may be caused. Incorporating the principle of section 87 into section 377 IPC, carnal intercourse against the order of nature by members of the LGBT community ceases to be an offence when it is engaged in by consenting adults.

In fact, consent as a factor negating an offence pervades almost every offence under the IPC of a sexual colour. Examples are to be found apart from Rape in section 376 (B) IPC, section 354 IPC (the overt acts in which offence consists of assault or the use of criminal force both of which expressions are predicated on the absence of the

victim's consent), section 354 A under which the phrases "unwelcome overtures", "demand for sexual favours" , "showing pornography against the will of a woman" all denote an absence of consen," Section 354 B IPC (the overt act consisting of assault and criminal force), section 354 C IPC (which punishes voyeurism and consists of a man watching or capturing the image of the woman, engaging in a private act of which he is unaware and therefore without consent and particularly Explanation 2 to section 354 C which furnishes examples of how both consent and its absence negate and consummate respectively the offence under the section) and finally Section 354 D (stalking).

In other words, consent generally negates an offence and particularly in sexually coloured offences, absence of consent of the victim is invariably an ingredient of the offence. There is no rationale accordingly for making an exception in the case of section 377 IPC by not recognizing that the act contemplated by the section ceases to be an offence if engaged in by consenting adults of sexual orientation.

5. <u>Consent and Incest</u>

The learned ASG and at least one Respondent has contended that the court should guard against opening the floodgates by reading absence of consent into section 377 IPC as an ingredient of the offence. To recognize consensual behavior as negating the offence under section 377 IPC, it is said would lead to legitimizing incest if it is engaged in by consenting adults. This argument, it is submitted respectfully is untenable. Firstly, while several personal laws, particularly in the field of matrimony recognized specified degrees or prohibition for the purpose of marriage, incest in Indian law has never been an offence. If the State was so concerned about punishing incestuous sexual relationships, it would and should have enacted an appropriate penal provision to prohibit and punish the same.

The absence of any penal provision for incest renders the state's apprehension regarding incest unfounded. Nor does section 377 IPC itself contemplate punishment for incest. The provision was introduced in India in 1860 at a time when incest was not an offence in England itself. A historical analysis of the phrase "carnal intercourse against the order of nature" indicates that the phrase was coterminous with sodomy, buggery or fellatio (oral sex). Incest itself was first prescribed as an offence in England only under the Punishment of Incest Act, 1908 and the description of the offence was not as being "against order of nature" but consisted in expressly identifying the kind of blood relation who were prohibited from engaging in sexual intercourse. At present in England, incest is expressly made punishable by section 64 and 65 of the Sexual Offences Act, 2003, which read as under:

" Sex with an adult relative: penetration

*(1)A person aged 16 or over (A) **[**F1(subject to subsection (3A))**]** commits an offence if—*

(a)he intentionally penetrates another person's vagina or anus with a part of his body or anything else, or penetrates another person's mouth with his penis,

(b)the penetration is sexual,

(c)the other person (B) is aged 18 orover,

(d)A is related to B in a way mentioned in subsection (2), and

(e)A knows or could reasonably be expected to know that he is related to B in that way.

(2)The ways that A may be related to B are as parent, grandparent, child, grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece.

(3)In subsection (2)—

***[**F2(za)"parent" includes an adoptive parent;*

*(zb)"child" includes an adopted person within the meaning of Chapter 4 of Part 1 of the Adoption and Children Act 2002;***]**

(a)"uncle" means the brother of a person's parent, and "aunt" has a corresponding meaning;

(b)"nephew" means the child of a person's brother or sister, and "niece" has a corresponding meaning.

[**F3(3A)Where subsection (1) applies in a case where A is related to B as B's child by virtue of subsection (3)(zb), A does not commit an offence under this section unless A is 18 or over.]***

(4)Where in proceedings for an offence under this section it is proved that the defendant was related to the other person in any of those ways, it is to be taken that the defendant knew or could reasonably have been expected to know that he was related in that way unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know that he was.

(5)A person guilty of an offence under this section is liable—

(a)on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b)on conviction on indictment, to imprisonment for a term not exceeding 2 years.

***[**F4(6)Nothing in—*

(a)section 47 of the Adoption Act 1976 (which disapplies the status provisions in section 39 of that Act for the purposes of this section in relation to adoptions before 30 December 2005), or

(b)section 74 of the Adoption and Children Act 2002 (which disapplies the status provisions in section 67 of that Act for those purposes in relation to adoptions on or after that date),

*is to be read as preventing the application of section 39 of the Adoption Act 1976 or section 67 of the Adoption and Children Act 2002 for the purposes of subsection (3)(za) and (zb) above.***]**

65Sex with an adult relative: consenting to penetration

*(1)A person aged 16 or over (A) **[**F5(subject to subsection (3A))**]** commits an offence if—*

(a)another person (B) penetrates A's vagina or anus with a part of B's body or anything else, or penetrates A's mouth with B's penis,

(b)A consents to the penetration,

(c)the penetration is sexual,

(d)B is aged 18 or over,

(e)A is related to B in a way mentioned in subsection (2), and

(f)A knows or could reasonably be expected to know that he is related to B in that way.

(2)The ways that A may be related to B are as parent, grandparent, child, grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece.

(3)In subsection (2)—

***[**F6(za)"parent" includes an adoptive parent;*

*(zb)"child" includes an adopted person within the meaning of Chapter 4 of Part 1 of the Adoption and Children Act 2002;**]***

(a)"uncle" means the brother of a person's parent, and "aunt" has a corresponding meaning;

(b)"nephew" means the child of a person's brother or sister, and "niece" has a corresponding meaning.

[**F7(3A)Where subsection (1) applies in a case where A is related to B as B's child by virtue of subsection (3)(zb), A does not commit an offence under this section unless A is 18 or over.**]

(4)Where in proceedings for an offence under this section it is proved that the defendant was related to the other person in any of those ways, it is to be taken that the defendant knew or could reasonably have been expected to know that he was related in that way unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know that he was.

(5)A person guilty of an offence under this section is liable—

(a)on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b)on conviction on indictment, to imprisonment for a term not exceeding 2 years.

[*F8(6)Nothing in—*

(a)section 47 of the Adoption Act 1976 (which disapplies the status provisions in section 39 of that Act for the purposes of this section in relation to adoptions before 30 December 2005), or

(b)section 74 of the Adoption and Children Act 2002 (which disapplies the status provisions in section 67 of that Act for those purposes in relation to adoptions on or after that date),

is to be read as preventing the application of section 39 of the Adoption Act 1976 or section 67 of the Adoption and Children Act 2002 for the purposes of subsection (3)(za) and (zb) above.**]**

It is respectfully submitted that if the State is serious about criminalizing incest, its primary duty would be to enact appropriate legislation in that respect. The attempt to prevent decriminalization of LGBT carnal intercourse on the flawed ground that it might open the flood-gates to legitimize an activity like incest is totally misconceived and deserves to be rejected ex facie.