

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISIDICICTION

I.A. NO. OF 2010

IN

SPECIAL LEAVE PETITION NO. 15436 OF 2009

IN THE MATTER OF

AN APPLICATION FOR IMPLEADMENT

IN THE MATTER OF

Suresh Kumar Koushal & Anr. ...Petitioners

Versus

Naz Foundation, & Ors. ...Respondents

AND IN THE MATTER OF:

1. Minna Saran, aged 62 years,
Residing at E 301
Krishna Apra Residency,
Sector 61, Noida
2. Col. (Retd) Rajeshwar Saran,
aged 76 years,
Residing at E 301,
Krishna Apra Residency,
Sector 61, Noida
3. Suresh Shripan Hemmady,
age 72 years,
Residing at C-7, Anantashram,
Proctor Road,
Mumbai 400 007
4. Shaila Suresh Hemmady, age 69 years,
Residing at C-7, Anantashram,
Proctor Road,
Mumbai 400 007

5. Shakuntala Vijaykumar Khire,
aged 70 years,
Residing at E18/12, Sarita Nagri,
Phase II, Pune- Sinhagad Road,
Pune 411030
6. Chitra Palekar, age 62 years
Residing at A 501,
Vintage Pearl, 29th Road
Bandra (West)
Mumbai 400050
7. Vijayam P.S. aged 58 years
residing XVI/170,
Manayath House, Mammiyur,
Guruvayoor 680101,
Thrissur District,
Kerala.
8. Munithayamma,
Aged about 50 years,
residing at No. 34, 'B' Street,
Gopalapura,
Magadi Road,
Bangalore 560023.
9. A. Flavie, aged 52 years
No. 12, Singaramma Compound,
Near Old Madras Soap Factory,
D.J. Halli,
Bangalore 5600045.
10. Mrs. Shobha Doshi,
Aged about 58 years
R/o 302, C wing, Anant Regency,
46 M M Road, Opp. Mulund
Telephone Exchange
Mulund (West),
Mumbai 400080
11. Padma V. aged 50 years,
Residing at 4, Veerasami Road
Kuirnji Nagar, Perungudi
Chennai 600096
12. Dr. K. S. Vasudevan, age 64 years,
Residing at H76/S5, Mullai Apartments,
Tiruvallur Nahar, Tiruvanmiyur,
Chennai – 600 041

13. Janaki Vasudevan, age 61 years,
Residing at H76/S5, Mullai Apartments,
Tiruvallur Nahar, Tiruvanmiyur,
Chennai – 600 041
 14. Mrs. Ava Chakrabarty aged 63yrs,
75, Jawpur Road,
Kolkata – 74.
 15. Mrs. Vijayalakshmi Ray Chaudhuri
aged 75yrs,
Mr. Das' Nursing Home &
Diagnostic Centre Pvt Ltd,
New Town, Diamond Harbour,
24 Parganas,
West Bengal – 743331
 16. Pramathanath Ray Chaudhuri
Mr. Das' Nursing Home &
Diagnostic Centre Pvt Ltd,
New Town, Diamond Harbour,
24 Parganas,
West Bengal – 743331
 17. Mrs. Mamata Jana aged 50yrs,
Residing at 424, G. T. Road,
Kolkata
 18. Mrs. Bina Guha Thakurta (58),
7C, Tiljala Place,
Kolkata-700017
 19. Mrs. Keya Ghosh (57),
11, Jatin Bagchi Road,
Kolkata-700029
-Applicants

TO

THE HON'BLE THE CHIEF JUSTICE AND HIS COMPANION

JUSTICES OF THE HON'BLE SUPREME COURT

HUMBLE PETITION OF THE APPLICANTS ABOVENAMED

MOST RESPECTFULLY SHEWETH:

1. The Applicants abovenamed file the present application

seeking the permission of this Hon'ble Court to be impleaded in the aforementioned Special Leave Petition No. 15436/2009. The abovementioned special leave petition impugns the decision of the Hon'ble High Court of Delhi in WP(C) 7455/2001 which declared Section 377 of the Indian Penal Code, 1860 as unconstitutional and violative of Articles 14, 15 and 21 of the Constitution of India insofar as it criminalized consensual, homosexual sexual activity between adults in private.

2. All the abovenamed Applicants are parents of lesbian, gay, bisexual and transgender (LGBT) person from different walks of life and regions of India. The Applicants therefore, unlike the Petitioners in this special leave petition, have a direct and immediate stake in the outcome of these proceedings. Hence the Applicants abovenamed are necessary and proper parties to this petition and seek the leave of this Hon'ble Court to be impleaded as Respondents in this SLP.
3. Applicant No.1 is a business woman. Applicant No. 2 retired, after a service of 27 years, as a colonel in the Indian Army in 1981.
4. Applicants Nos. 1 and 2 are the parents of (deceased) Nishit Saran, who was a film maker and gay rights activist based in Delhi. Nishit Saran had directed and produced a path breaking documentary called "A Summer in my Veins". This

documentary is about Nishit Saran's disclosure of his homosexuality to Applicant No. 1. The documentary shows the social isolation, stigma and pain that LGBT persons face in the process of growing up. It also shows the high level of societal ignorance and prejudice about homosexuality which initially constrained Applicant No.1 in her ability to understand her son's homosexuality. Finally, it shows the triumph of a parent's love for her child to transcend the barriers of social prejudice against LGBT persons fostered and perpetuated by Section 377 of the Indian Penal Code.

5. After the untimely and tragic death of Nishit Saran in a road accident, Applicants Nos. 1 and 2 set up the Nishit Saran Foundation in April 2006. The said Foundation is a registered charitable trust (registration no 104 dated 20th March 2006). Nishit Saran was a successful film maker, writer as well as a very courageous gay rights activist. Therefore dispelling the myths about homosexuality and promoting a more empathetic and humane approach to LGBT persons is a philosophy which runs through the different programmes of the Foundation. The objectives and different activities undertaken by the Foundation are as follows:

A. OBJECTIVES OF NISHIT SARAN FOUNDATION

- I. To promote a social understanding of homosexuality as a natural variant of human sexuality and therefore to promote an understanding of gay, lesbian, bisexual and

transgender people.

- II. To encourage parents to accept their children's homosexuality as a natural part of who they are.
- III. To participate in public debates, TV discussions, film festivals and other media to promote a deeper understanding of homosexuality as a part of human nature and hence the need for society to be more inclusive and accept LGBT persons as part of humanity.
- IV. To encourage and support young filmmakers who are of similar zeal and talent to Nishit Saran, but are bereft of the funds to achieve their goals.
- V. To encourage proficiency in the English language to enable bridging the language divide in India.

B. RECENT ACTIVITIES OF NISHIT SARAN FOUNDATION

1. September 12th 2007 at the Jesus and Mary College

As part of the curriculum the department of psychology of Jesus and Mary College organized the screening of the movie 'Summer In My Veins' under the banner 'Recollections Of A Filmmaker'. This was followed by an interactive session between the teachers and the students with the Applicant No. 1.

2. July 7th 2007 'NDTV Hindi'

The applicant was interviewed by NDTV Hindi for the 'Salaam Zindagi' show. The show was part of an initiative to talk to family members of LGBT persons and gauge the kind of support and bias that is prevalent. This show was broadcast on 22nd of September 2007.

3. March 7th to 10th 2007 Film Festival organised by CREA

In a film festival titled 'Films of Desire: sexuality and the cinematic imagination' at Neemrana Fort which saw screenings of feature films, short films, documentaries, animation, music videos and experimental films that engage with ideas of sexuality in South and south-east Asia. 'Summer In My Veins' by Nishit Saran was also screened. Applicant No. 1 was invited as a panelist in a Question And Answer session after the movie. Applicant No. 1's responses were well- received and encouraged her to be more proactive in supporting those parents caught in between the meshes of their societal conditioning and love for their children who are gay.

4. September 6th 2006 NDTV 24x7 Show, titled "Is it time to decriminalize homosexuality?"

In this special edition of 'We The People' a talk show hosted by Barkha Dutt on NDTV the debate was as to whether India was ready to accept homosexuality as legal and do away with the draconian Section 377 of the Indian penal code. Applicant No. 1 was one among five panelists, which included former Attorney General, Shri Soli Sorabjee.

5. August 27th, 2006 Screening at India Habitat Center

The Youth Parliament and the Nishit Saran Foundation screened 'Summer In My Veins', followed by a discussion on homosexuality.

6. Applicant No. 3 and 4 are parents of a gay man called Nikhil Aziz Hemmady. Applicant No. 3 is an engineer by education and currently serves on the Board of Directors of India's first cooperative bank. Applicant No. 4 is a house wife and active member of her community's women's association (mahila samaj). Their son, Nikhil Aziz holds a Doctorate in International Studies and formerly taught at an American University. The Applicants submit that their son has had a normal and healthy upbringing in a loving and caring environment. He went to a co-educational school like most his friends. As a youngster he has had both male and female friends, and has interests and successes quite alike and similar to most children. Thus his homosexuality is something intrinsic and natural.
7. Applicants Nos. 3 and 4 submit that for a long period of his life Nikhil Aziz concealed his homosexuality. It was only in 1998, that Nikhil Aziz told them that he was gay. He waited for many years to tell them despite the deep suffering of not being able to be honest to his family, because he wanted to ensure that his being gay would not have an impact on his sister's marriage, since there is widespread social stigma concerning homosexuality. Applicants Nos. 3 and 4 submit that they were initially shocked by the news. At the same time they both expressed their support for their son and also their pride in his decision to tell them and the larger family

about himself and not live a lie. They further submit that their son's life would have been even more fulfilling had he not had to live a secret for so many years because of the fear of stigma.

8. Applicant No. 5 is a retired teacher and lives in the city of Pune. Applicant submits that she has two children, and her elder son, Bindumadhav Vijaykumar Khire, a Computer Science Engineer, now 42 years old is gay. The Applicant submits that under family and peer pressure and largely due the social stigma attached to homosexuality, much against his will, the Applicant No.5's son married a woman. The Applicant submits that if her son had the strength and the social and legal support to accept his homosexuality at an earlier stage, he would not have taken the decision to marry. The Applicant submits that as a result of the deep social stigma, fostered by Section 377, her son has had to go through a prolonged period of isolation and difficulty. His marriage remained unhappy and finally he found the courage to confront and understand his homosexuality. The Applicant submits that after a prolonged difficult period in his life, her son got divorced and began a new life as a self confident gay man who now works for the rights of Lesbian, Gay, Bisexual and Transgender (Hereinafter referred to as LGBT) persons in Pune.

9. Applicant No. 6 is a film maker from Mumbai and an award winning theatre actor and script-writer/director. Her daughter Shalmalee Palekar a Ph. D holder in post colonial literature and currently a University Professor, is a lesbian. The Applicant submits that her understanding of homosexuality has been aided by her daughter's attempts at giving her reading material, books and meeting other LGBT people. The Applicant submits that her experience as a mother of a lesbian woman has been a very isolating experience as social stigma prevented any discussion. The Applicant submits that easy accessibility of literature on the topic of homosexuality especially directed towards parents of LGBT people is necessary but not freely available. The Applicant No. 6 submits that she has benefited enormously from reading an anthology of writing by mothers of lesbian women, whose experience mirrored the Applicant's and gave her the strength and the support that is lacking in our society. The Applicant submits that the criminality associated with homosexuality makes it impossible to have open discussions on the issue, which further contributes to the isolation of the Applicant No 6 in her role as a parent.
10. Applicant No. 7 is retired as a Senior Accounts Officer with the General Post Office in Bengaluru, where she worked for thirty years. The Applicant submits that her son Nithin Manyath, a lecturer in Communication Studies, is gay.

Though the Applicant was initially taken aback, she came to the realisation that being gay was not that uncommon in India. The Applicant No. 7 submits that her knowledge and awareness of homosexuality was further aided by her work with an organisation called Sangama which works on LGBT Rights. As part of Sangama, the Applicant No. 7 was called upon to speak to parents of LGBT people to accept their children's sexual orientation as a natural part of who they were. Applicant No. 7 submits that through a number of conversations had with parents of LGBT people, she has been instrumental in ensuring that parents played a loving and nurturing role in accepting their children's sexuality.

11. Applicant No. 7 submits that her son has a wide and caring circle of friends who know that he is gay and are accepting of his sexuality. Applicant No. 7 submits that Nithin is a good teacher, loving son, caring brother and a well adjusted and productive member of Indian society. However, despite her own personal acceptance and those of the friends of her son, she fears Section 377 and the gross potential for abuse embedded in it. Applicant No. 7 submits that Section 377 is a gross intrusion into family life like an ever present Damocles sword that could rend the fabric of her family.
12. Applicant No. 8 is the mother of Veena S, who identifies as a hijra and works as a social worker. The Applicant submits that although Veena was born as a male child, she was

always interested in dressing up in women's clothes and had many other conventional feminine interests. At that stage the Applicant No. 8 did not understand Veena's different gender identity and hence Veena's specific needs. Instead, the Applicant No. 8 feared social stigma and prevented Veena from living her life the way she wished. At times, out of sheer frustration, misinformation and confusion, the Applicant No. 8 hit Veena a few times. However, Veena, was determined to live her life on her own terms. In the hijra community, Veena found acceptance by people like her, and this gave Veena the confidence that she needed both to face the social stigma and prejudice against transgender people and to access the support that Veena's own family was unable to provide. The Applicant submits that overtime, with several discussions with Veena, who the Applicant has now come to accept as her daughter, the Applicant now understands the naturalness of her transgender and hijra identity. The Applicant No.8 hopes that more parents will step out in support of transgender people. Applicant No. 9 is also a mother of a hijra identified woman called M. Suman, who works as a social worker in Bengaluru.

13. Applicant No. 10 is a home maker and a social worker living in Mumbai. Her younger son, Mr Shameet Doshi who is about 32 years old is gay. Applicant No. 11 is an academic with a doctoral degree and is presently working as a Lecturer

in the field of media studies. Her elder daughter Ponni, aged 26 years, currently pursuing a law degree, identifies as a bisexual. Applicants Nos. 12 and 13, a retired scientist and housewife in Chennai, are parents of a gay son, Anirudh Vasudevan, a bharatnatyam dancer, scholar and a PhD candidate. Applicant No. 14 is the mother of a gay son, Rajarishi Chakrabarty, a historian and academic based in Murshidabad, West Bengal. Applicants Nos. 15 and 16 are both Sanskrit scholars and their only son Anis Ray Chaudhari, a scholar himself and a social activist is gay. Applicant No. 17 is the mother of a gay son, Jagadish Rana, who works as a counsellor. Applicant No. 18 is the mother of a gay son, Dr. Tirthankar Guha Thakurta, who teaches pathology at a medical college in Kolkata. Applicant No. 19, a practising Advocate at the Calcutta High Court herself, is the mother of a gay son, Debjyoti Ghosh who works as a human rights lawyer.

14. The Applicants submit that they come from different professional, socio-cultural backgrounds and different regions of India. The Applicants also come from a range of professional backgrounds being scientists, teachers, government employees, private sector employees, lawyers, artists and home-makers. The states from which the Applicants come from traverse the diversity of India and include Maharashtra, Delhi, West Bengal, Karnataka, Tamil

Nadu and Kerala. In the diversity of their representation the Applicants represent the plurality which is an intrinsic part of Indian culture and values. The Applicants submit that they are all united by one common factor as parents of individuals who have come out to them as being lesbian, gay, bisexual or transgender/hijra. As parents of LGBT individuals, each of the Applicants has experienced the personal struggle of having to understand sexuality at odds with what Section 377 prescribes. Each of these personal struggles which the Applicants have had to go through has resulted in acceptance of their children's sexuality. But this has also made them acutely aware of the social stigma, prejudice, myths and stereotypes that surround the subject of homosexuality in Indian society. A detailed table listing the different professional qualifications and backgrounds of the different Applicants and their LGBT children is annexed hereto and marked as **Annexure A1**.

15. The Applicants submit that their own knowledge of homosexuality has emerged from the intimate context of having a son or daughter who was lesbian, gay, bisexual or transgender/hijra. The Applicants submit that since they had no initial information on homosexuality, as is common in most people who encounter homosexuals for the first time, their response mirrored the shock and horror of the conventional societal response. The Applicants submit that

reading on the subject, meeting other LGBT persons, attending meetings of support groups for parents of LGBT persons or meeting with psychiatrists and other mental health experts has convinced them that:

- a. Homosexuality is neither a disease nor a pathology which needs to be cured. It is instead a normal variant of human sexuality.
 - b. To punish homosexual behaviour as a crime is outdated, regressive and fundamentally at variance with the right to equality, the right to life, dignity, autonomy and self expression.
 - c. The role of parents whose children are lesbian, gay, bisexual or transgender is to support their children in resisting social stigma and enable them to become self confident young persons.
 - d. That gay, lesbian, bisexual or transgender persons should be entitled to enjoy the full and equal citizenship rights guaranteed to them under the Indian Constitution.
16. The Applicants submit that the Hon'ble Delhi High Court had correctly appraised the constitutionality of Section 377 IPC based both on the current history of use of the law as well as the latest medical and scientific opinion. In particular the applicants would like to bring the following observations of the Hon'ble Delhi High Court to the attention of the Hon'ble Supreme Court. That in the well-reasoned opinion of the Hon'ble Delhi High Court:

- i. There is almost unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality. In 1973, the American Psychiatric Association removed homosexuality from its Diagnostic and Statistical Manual of Mental Disorders (DSM) after reviewing evidence that homosexuality is not a mental disorder. In 1987, egodystonic homosexuality was not included in the revised third edition of the DSM after a similar review. In 1992, the World Health Organisation removed homosexuality from its list of mental illnesses in the International Classification of Diseases (ICD 10). Guidelines of the ICD 10 reads: "homosexuality in itself is no longer included as a category." Thus, homosexuality is not a disease or mental illness that needs to be, or can be, 'cured' or 'altered', it is just another expression of human sexuality. (paras 67 and 68 of the impugned judgment)
- ii. The studies conducted in different parts of world including India show that the criminalisation of same-sex conduct has a negative impact on the lives of these people. Even when the penal provisions of Section 377 are not enforced, they reduce gay men or women to "unapprehended criminals", thus entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear, a few of the more obvious consequences are harassment, blackmail, extortion and discrimination. The Hon'ble High Court relying upon the extensive

material placed on the record in the form of affidavits, authoritative reports by well known agencies and judgments, concluded that there is a widespread use of Section 377 IPC to brutalise members of the lesbian, gay, bisexual and transgender community. (para 50 of the impugned judgment) Some of the incidents illustrating the impact of criminalisation on homosexuality are noted at para 21 of the impugned judgment.

- iii. Section 377 condemns in perpetuity a sizable section of society, namely LGBT persons and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery. The Government of India estimates the number of Men who have sex with Men (MSM) at around 25 lacs. The number of lesbians and transgenders is said to be several lacs as well. This vast number of people are denied "moral full citizenship". (para 52 of the impugned judgment)
- iv. The Hon'ble High Court rightly held that the one underlying theme of the Indian Constitution is that of 'inclusiveness'. This Hon'ble High Court rightly held that the Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. In the words of the Hon'ble High Court "The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as "deviants' or

'different' are not on that score excluded or ostracised." (para 130 of the impugned judgment).

- v. That the Hon'ble Delhi High Court's judgment decriminalising consensual sexual relationships between adults in private was rooted in a concrete understanding of the harm that Section 377 inflicts on the LGBT population. The Hon'ble High Court after a thorough reading of precedent laid down by this Hon'ble Court, and after a detailed discussion of current medical and scientific opinion of homosexuality, correctly held that Section 377 IPC was unconstitutional insofar as it criminalised consensual same-sex sexual relationships between adults in private.

17. The Applicants submit that the aforesaid decision of the Hon'ble Delhi High Court has been welcomed by large sections of Indian society. However, the Applicants have been deeply distressed to note the protests which have also followed the impugned judgement. These protests emanated from self styled representatives of India's major religions and individuals with a purported concern for protecting Indian culture. These protests against the judgment sought to uniformly condemn the judgement as opposed to Indian culture, family values as well as religions as diverse as Islam, Hinduism and Christianity. The protests also sought to falsely communicate that Indian society and culture were not ready to accept a judgment which restored 'moral citizenship' to

India's LGBT citizens.

18. The protests were followed by the filing of the present Special Leave Petition alongwith similar Petitions which have been clubbed alongwith, by numerous groups and individuals who neither have *locus standi* to file these petitions, nor expertise with regard to homosexuality or Section 377 whose range of arguments can be summarized as follows:

- The legalisation of homosexuality will lead to increase of divorce cases, disrupt the institution of family and degradation of the social fabric
- The decriminalisation of homosexuality will lead to the decriminalisation of other practices such as polygamy, incest, and prostitution.
- The legalisation of homosexuality will result in unprecedented negative influence on the children and adolescents regarding unnatural or homosexual relationships.
- That Indian society by and large looks down upon homosexuality and that this justifies the continued criminalisation of homosexuality.
- The impugned decision of the Hon'ble Delhi High Court is based upon foreign values, foreign case law and is contrary to Indian values and is based upon a misreading of Indian society.
- That the decriminalisation of homosexuality will lead to the increase in child sexual abuse and paedophilia.

19. The Applicants submit that the aforesaid views represent a strong prejudice and animus towards LGBT persons. It refuses to engage with the question of homosexuality from the perspective of science and rationality. It is a regressive look both at the illustrious jurisprudence of our Courts which is modern, democratic and committed to human rights and the values of tolerance and inclusiveness which are an integral part of Indian society and culture.

20. The Applicants submit that their role as parties to the present petition are further necessitated by baseless and unfounded allegations that LGBT persons pose a threat to the structure of family that is at the heart of Indian society. The Applicants submit that this Petition along with similar SLPs clubbed together in this matter, obfuscates the issue of decriminalization by drawing hypothetical concerns about same sex marriage, and the threat to the Indian family. The Applicants submit that the present Petition fails to acknowledge that LGBT persons are indeed a part of the Indian family. The Applicants submit that in their experience, LGBT persons form an integral part of the Indian family and there is no contradiction between being an LGBT person and being a loving and caring member of the Indian family. The Applicants submit that it is important to recognise that homosexuality is a natural reality of the diverse world we live and inhabit and shunning LGBT persons through social

stigma and criminal proscriptions – will not make them disappear. However, decriminalisation of homosexuality will ensure the constitutional dream of equality and dignity for all.

21. The Applicants submit that the present SLP deserves to be dismissed *in limine* as it has no legal basis both in terms of locus and substantial merit. It is founded entirely on misinformation and motivated by a strong and irrational sense of prejudice and animus towards LGBT persons.
22. The Applicants submit that the Petitioners are not directly affected by the Delhi High Court judgement; they have failed to establish how consensual sex in private between adults, can cause them any harm or affect the healthy and fruitful function of their daily lives. They have further failed to establish in what reasonable terms legalisation of consensual sex in private curtails their own freedom and fundamental rights.
23. The Applicants submit that the Petitioner cannot attempt to step into the role of the State. The impugned judgment is exclusively concerned with the *vires* of a statute, i.e. Section 377 of the Indian Penal Code, (IPC) 1860. The burden to defend the constitutional validity of a statute is upon the State alone. Third parties cannot seek to defend the constitutional *vires* of a statute on the State's behalf as this

is the exclusive domain and duty of the State.

24. The Applicants submit that the Petitioners self positioning as experts on “Indian cultural values”, on the Indian family and as purveyors of public interest is unwarranted and misconceived. The Applicants submit that the Petitioners have failed to demonstrate genuine public interest and concern, as their motivation lies in personal prejudices alone. The prejudices of the Petitioner are apparent in their characterization of LGBT persons who are also citizens of India as “[a] mentally sick man who feels satisfied in rape, murder of (sic) other acts of such amplitude”.
25. The Applicants submit that the Petitioner’s characterisation of the Indian society as primitive and unable to accept homosexuality is baseless and incorrect. The Applicants submit that Indian tradition and history has had an attitude of tolerance and acceptance of same sex relationships and it is this history of tolerance, inclusiveness and acceptance that has helped them come to terms with the sexual orientation of their sons and daughters. The Applicants submit that both Section 377, and the ‘primitive’ characterisation of Indian society by the Petitioners, stands in contradiction to the values of tolerance and inclusiveness they find around themselves and espouse.
26. The Applicant submits that it is unclear whether the

Petitioners have even understood the scope and reasoning behind the Delhi High Court Judgement. This has become more evident from the vague and dilatory questions of law raised by them. The Applicants submit that instead of viewing the judgement of the Delhi High Court from the perspective of constitutional law and human rights, the Petitioners have deflected by raising extraneous and irrelevant concerns, citing unsubstantiated and completely unrelated consequences, of the effect of consensual homosexuality between adults in private on incest and prostitution. The Applicants submit that consensual homosexuality between adults has no relationship whatsoever with incest or for that matter prostitution. To further add to the irrelevance, absurdity and chicanery the Petitioners have raised the hypothetical and exaggerated fear of sodomy in the army, as according to them a substantial issue of law for the Hon'ble Supreme Court to entertain against the Delhi High Court's well reasoned and constitutionally sound judgement.

27. The Applicants submit that the viewpoints of those who have an intimate stake in the matter, and therefore have the *locus standi* to be impleaded in these proceedings namely the parents of LGBT individuals must be considered before this Hon'ble Court. The Applicants based upon their intimate experience of raising well adjusted young men and women

who happen to be lesbian, gay, bisexual and transgender would like to present their insights arrived at through personal experience of the impact of Section 377, the value of decriminalisation as well as on the notion of Section 377 as a threat to the Indian family and the pluralist culture of India. The Applicants submissions against the present Special Leave Petition are briefly described below.

28. The Applicants submit that Article 21 of the Constitution protects both the Right to Dignity and Privacy of an individual including LGBT persons. The Applicants submit that through a long line of decisions of the Hon'ble Supreme Court, the scope of the right to privacy under Article 21, *inter alia*, includes the right to privacy of the family. The Applicants submit that as parents, their fundamental role of providing a loving and supportive family and safeguarding it against arbitrary and unjust intrusion from the state authorities, is hindered by Section 377.
29. Section 377 makes LGBT persons vulnerable to harassment both from the police as well as wider society. The Applicants submit that as parents, the presence of 377 creates a lurking fear of arrest and reprisal from the police on account of the homosexuality of their son or daughter. From the common and everyday experience of most LGBT persons the Applicants apprehend that their sons or daughters may be victims of police harassment, extortion or blackmail. The

constant fear of violence, harassment and ridicule gives LGBT persons a lower status, both as legal citizens and in the social hierarchy, robbing them of their dignity and self respect.

30. The Applicants submit that often the level of harassment and social stigma against homosexuality is so acute that it makes it next to impossible for families of LGBT persons to cope with the different sexuality of their children, both in their youth and adulthood. This has led in numerous cases of misguided actions by parents by opting for unscientific aversion and reparative therapies, which operate on the untenable scientific notion that homosexuality is a curable disease. Further, the bias, superstition and outdated medical theories that Section 377 fosters, impedes the creation of a loving and supportive environment for LGBT persons.
31. The Applicants submit that social stigma towards parents of LGBT persons also stems from archaic and superstitious beliefs, often supported by unscientific opinions that fail to recognize homosexuality as a natural phenomenon and attribute it to bad parentage or genetic defects. The Applicants submit that criminalization of homosexuality and its active policing by the police authorities gives credence to such beliefs, bringing the families of LGBT persons into further shame and disrepute.

32. Thus, contrary to the arguments made by the Petitioner, it is Section 377 which is a threat to family values, as it directly affects the rights of the Applicants to safeguard their families from illegal and arbitrary intrusion from the state authorities. Section 377 invades the sanctity of the family, home or correspondence and allows for unlawful attacks on the honour and reputation both parents of LGBT persons as well as LGBT persons themselves.
33. The Applicants further submit that the test for the protection of the right to privacy must be based on the principle of harm and constitutional morality. The Applicants submit that private consensual intimate relationships between people of the same sex, do not upset public morality or harm the interests of others. The Applicants submit that as is evident from the present SLP and other similar Petitions clubbed together, the purported and imagined sense of harm, as argued by the Petitioners, only emerges from a deep and irrational sense of animus and prejudice. It serves no legitimate state purpose. Such prejudice, in the Applicants humblest submission does not deserve constitutional protection.
34. The Applicants submit that Section 377 by criminalising sexual act(s) associated with LGBT persons discriminates against them as a class, without a rational nexus or stated objective, making them a victim of social ostracism and

vulnerable to police abuse, extortion and blackmail.

35. Section 377 also discriminates against families of LGBT persons and targets them arbitrarily. The Applicants submit that the Hon'ble Delhi High Court has upheld the constitutional challenge to Section 377 by rightly acknowledging the prejudice and stigma, the impugned provision taints LGBT persons with. However, the Applicants submit that the said stigma and prejudice is not confined to the LGBT person alone, but envelops the family as a whole. The Applicants submit that therefore families of LGBT persons are equally affected by the continued presence of Section 377. Thus, the parents, siblings and other members of the family of a LGBT person harbour similar fears of disclosure, public ridicule and social exclusion, which stems from an erroneous and misguided understanding of homosexuality as an unnatural curable disease alien to Indian culture. Further the families of LGBT persons suffer enormous harm to their reputation due the shame and stigma associated with Section 377.
36. The Applicants submit that parents of LGBT persons need support spaces to learn about the different sexual orientation of their family members and find ways of supporting them. However, support spaces are few and far between. Applicant No. 1 through her work with the Nishit Saran Foundation and

Applicant No. 7 by assisting parents of LGBT persons during her time at Sangama, submit that there is a desperate need to reach out to parents of LGBT persons.

37. The Applicants submit that some of them have witnessed the isolation and depression, exacerbated by social stigma faced by their children in complete helplessness. The Applicants submit some of them have been fortunate to have had access to information and knowledge both about the naturalness of homosexuality and the effect of Section 377 and the reality of stigma and prejudice in the society and have sought to provide better support for their children, however, belatedly. Applicant No. 10 from her own experience submits that she has benefited enormously from the occasional support meetings of parents of LGBT persons organised by GayBombay, a support group in Mumbai. Applicant No. 10 submits that through the support meetings she has been able to relate to experiences of other parents and learned a lot.

38. The Applicants submit that not all of them have had the benefit of support meetings, however, having gone through the often lonely and isolating experience of reaching to a gay, lesbian, bisexual or transgender child, they realise more than ever the need for – easily accessibly - support spaces for parents of LGBT persons. The shadow of criminality cast by Section 377 curtails a free and frank discussion on issues

of sexuality, which is essential in a support space and vital to bring about a better understanding. Further the stigma and prejudice against homosexuality, fostered by Section 377, continues to prevent parents from being able to accessing such support spaces.

39. The Applicants submit that criminalization of consensual homosexual activity hinders the role of parents as a source of support and leads to further alienation and separation of LGBT persons from their families. This has the effect of disintegrating and destroying family bonds. Thus the threat to families comes from Section 377 itself and not its eradication.
40. The Applicants therefore pray that they should be impleaded to espouse the cause for decriminalization of homosexuality, which is *a priori* essential for full development and growth of LGBT persons in their youth and adulthood in loving families free from prejudice and social stigma.
41. The Applicants submit that the wider public interest attached to the constitutionality of Section 377 is not in dispute and has been aptly recognized by the Hon'ble Supreme Court in its order dated 4.10.2006 in Civil Appeal No. 952 of 2006 remanding the matter back to the Delhi High Court for a fresh consideration. The Hon'ble Supreme Court stated aptly stated that:

"... We think that the questions raised in the Writ Petition involve participation from the general public so as to have a view point, which varies to a great extent."

A true copy of the order dated 4.10.2006 in Civil Appeal No. 952 of 2006 passed by this Hon'ble Court is annexed herewith and marked as **Annexure A2**.

42. The Applicants strongly oppose the prayer for interim stay made by the Petitioners. The Applicants submit that the Petitioners have failed to make out a prima facie case for an interim stay of the judgement of the Delhi High Court. The Applicants submit the entire case of the Petitioner rests on the foundation of prejudice and is devoid of any legal or constitutional merit. Their challenge to the High Court judgement is based on irrational fears and superstitions and not on any sound principles of law. Thus the case of the petitioners does not merit the grant of a stay.
43. The Applicant submits that the Petitioners have failed to specify a single instance where the continued operation of the Delhi High Court judgement will cause them any harm, or adversely affect the interests of society. The fact that the Union of India has not projected any harm to the interests of society at large, means that the High Court Judgement should be given full effect.

44. The Petitioners submit that on the contrary the continued operation of the Delhi High Court judgement has provided much needed respite from constant fears of police harassment, extortion, blackmail and arrests to lakhs of LGBT persons in India. It has allowed for wider discussions on the subject of homosexuality. The Applicants submit that in the long run decriminalisation will pave the way for greater parental acceptance and restore not only the dignity of LGBT persons but also the function of love, support and understanding, central to a family. Thus the balance of convenience weighs heavily against the granting of stay.
45. It is therefore submitted that it would be in the interest of justice if the Applicants are permitted to be impleaded in the present Special Leave Petition and assist this Hon'ble Court on the questions of law raised.
46. That the Applicants are both necessary and proper parties to this petition.
47. That no prejudice will be caused to the parties if the Applicants are permitted to implead in this matter and are arrayed as respondents. On the other hand, the Applicants will suffer irreparable harm and damage if they are not arrayed as parties to this petition, as the impugned judgment decriminalising homosexuality, not only affects the rights of the children of the Applicants whose children are gay,

lesbian, bisexual or transgender, but also the parents of LGBT persons.

48. That this Application is *bona fide and* in the interest of justice.

PRAYER

In the premises it is most respectfully prayed that this Hon'ble Court may be pleased to:

- (a) Implead the Applicants abovenamed as party respondents in the present Petition;
- (b) pass such other and further orders as this Hon'ble Court may deem fit and proper.

DRAWN AND FILED

NIKHIL NAYYAR
ADVOCATE FOR THE APPLICANTS

DRAWN ON: .03.2010

FILED ON: .03.2010

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISIDICICTION

I.A. NO. OF 2010

IN

SPECIAL LEAVE PETITION NO. 15436 OF 2009

IN THE MATTER OF

Suresh Kumar Koushal & Anr. ...Petitioners

Versus

Naz Foundation, & Ors. ...Respondents

AND IN THE MATTER OF:

Minna Saran and Others

AFFIDAVIT

I, Minna Saran, wife if Raj Saran, aged 62 years, resident of E 301 Krishna Apra Residency, Sector 61, Noida, presently at New Delhi, do hereby solemnly affirm and state as under:-

1. That I am the Applicant No.1 in the above mentioned application and as such, am conversant with the facts and circumstances if the case and am competent to swear the present affidavit on behalf of all the applicants.
2. That the contents of Paras 1, 3, 4, 5, 15, 17, 19, 20 and 36 to 38 of the accompanying application for impleadment are facts true to my knowledge and those of paras 2 and 6 to 13 are based on information received and believed to be true

and correct and those of paras 14, 16, 18, 21-35 and 39 to 48 are based on legal advice received and believed to be correct and rest of application contains submissions and prayer to this Hon'ble Court.

3. That the documents filed along with application are true copies of their respective originals.

DEPONENT

Solemnly affirmed
me on this ... day of March 2010
at New Delhi

ANNEXURE A1

Applicant No.	Name of the Parent	Name of the Son/Daughter
1. & 2.	Mrs. Minna Saran, Business Woman, New Delhi/Noida. Col. (Retd) Rajeshwar Saran Founders, Nishit Saran Foundation	Nishit Saran (deceased) Graduated from Harvard Film School, film maker, artist and gay activist.
3. & 4.	Mr. Suresh Hemmady, MA (Engg), Managing Director of a public limited company, and Director of a Public Sector Bank Mrs. Shaila Hemmady, house wife and social worker, Mumbai	Nikhil Aziz, PhD in International Relations and social activist. Executive Director of Grassroots International, a non-governmental organization.
5.	Mrs. Shakuntala Vijaykumar Khire, retired teacher, Pune	Bindumadhav Khire, software engineer, currently running Samapathik Trust in Pune, for the welfare of LGBT persons.
6.	Ms. Chitra Palekar, film maker, writer and activist based in Mumbai	Ms. Shalmalee Palekar, Ph.D graduate, University Professor
7.	Vijayam P.S., retired government employee, Guruvayor, Kerala	Nithin Manyath, Lecturer, Department of Communication Studies, Mount Carmel College, Bengaluru

8.	Munithayamma, home maker, Bengaluru	Veena S., identifies as a hijra, works as a social worker in Bengaluru
9.	A. Flavie, previously worked as a supervisor with Bunny Mills, currently a home maker, Bengaluru	M. Suman, identifies as a hijra and works as a community organizer in Sangama, an organization that works on the rights of LGBT persons.
10.	Dr. Shobha Doshi, homeopathic doctor, social activist and house wife, Mumbai	Shameet Doshi, Software Engineer
11.	Padma V., Ph.D (English) Madras University; Post Doctorate, Tisch School of Arts, NYU. Currently works as a University Professor.	Ponni Arasu, M.A. (History), currently pursuing her law degree.
12. & 13.	Dr. K.S.Vasudevan, a retired Scientist Janaki Vasudevan, homemaker	Aniruddhan Vasudevan, Bharatnatyam Dancer, English Scholar (currently pursuing his PhD)
14.	Mrs. Ava Chakrabarty, graduate and home maker	Rajarshi Chakrabarty, M.A. in History and Head of the Department of History at Krishnath College, Berhampur, Murshidabad, West Bengal. Founder Secretary of Dumdum Swikriti Society, an LGBT support group, as well as

		MANAS Bangla the state wide network running MSM HIV TI across the state of West Bengal.
15. & 16.	Mrs. Vijayalakshmi Ray Chaudhuri; M.A. in Sanskrit (Siddheswar Medalist), retired after 35 years of service as a teacher in Sanskrit from a government school in Kolkatta. Mr. Pramathanath Ray Chaudhuri M.A. (Bengali and Dramatics) – retired as the Head Master of a Govt. school after a teaching career of 32 years in Kolkatta.	Anis Ray Chaudhuri, Sanskrit scholar, teacher and social activist.
17.	Mrs. Mamta Jana, housewife, Kolkatta Husband and younger son are both doctors of Ayurvedic medicine.	Jagdish Jana, counselor and social activist
18.	Mrs. Mamta Guha Thakurta, homemaker	Dr. Tirthankar Guha Thakurta teacher of Pathology, KPC Medical College, Kolkata
19.	Mrs. Keya Ghosh, Advocate, Calcutta High Court	Debjyoti Ghosh, Advocate-Consultant, Legal Aid Unit, SAATHII, Kolkata

ANNEXURE A2

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 952 OF 2006

(Arising out of SLP (C) Nos. 7217-7218 of 2005)

Naz Foundation...

...Applicant(s)

Versus

Govt. of N.C.T., Delhi & Ors...

...Respondent(s)

ORDER

Leave granted.

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 that issue, dismissed the writ petition by the impugned order observing that there is no case 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 may, however, note that the appeal is being strenuously opposed by Respondent No. 6. 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. In this view, we set aside the impugned judgement and order of the High Court and remit Writ Petition (C) No. 7455 of 2001 for its fresh decision by the High Court.

All pleas would be open to the parties. The appellant may make appropriate prayer before the High Court for expeditious decision of the matter.

The civil appeal is allowed.

No costs.

.....CJI

[Y.K. Sabharwal]

.....J.

[C.K. Thakker]

.....J.

[R.V. Raveendran]

.....J.

[Lokeshwar Singh Pantia]

TRUE COPY

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. NO. OF 2010

IN

SPECIAL LEAVE PETITION NO. 15436 OF 2009

IN THE MATTER OF

Suresh Kumar Koushal & Anr. ...Petitioners

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AN APPLICATION FOR IMPLEADMENT

PAPER BOOK

(FOR INDEX PLEASE SEE INSIDE)

ADVOCATE FOR THE APPLICANTS: NIKHIL NAYYAR

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