IN THE SUPREME COURT OF INDIA

TRANSFER CASE NO. 151 OF 2013

IN THE MATTER OF:

S. RAJU …PETITIONER

VERSUS

STATE OF TAMIL NADU …RESPONDENT

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONER FILED BY MR. ARVIND P. DATAR, SENIOR ADVOCATE

MOST RESPECTFULLY SHOWETH:

1. These submissions are confined to the impact of the U.S. Constitution and decisions of U.S. Supreme Court in deciding whether: -

   a. A combined reading of the observations in *M.P. Sharma v. Satish Chandra* 1954 SCR 1077 and in *Kharak Singh v. State of U.P.* AIR 1963 SC 1295 can lead to the conclusion that no fundamental right to privacy exists in our Constitution?

   b. Whether the observations in *M.P. Sharma* and in *Kharak Singh* (majority view) on the right to privacy require to be overruled?

2. The M.P. Sharma case was decided in 1954 and the *ratio decidendi*of the case was confined to the question whether search warrants, issued pursuant to an Inspection Report under Section 138 of the Indian Companies Act, 1913, for searches to be carried out at

34 places simultaneously, were violative of the fundamental rights of the petitioners under Article 20(3) and 19(1)(f). The petitioners were certain companies, their senior officials and shareholders.

3. In para 2, this Hon'bleCourt rejected the plea regarding Article 19(1)(f) and the "only substantial question" related to Article 20(3). The plea urged before this Hon'ble Court, was :

> *"The argument urged before us is that a search to obtain documents, for investigation into an offence is a compulsory procuring of incriminatory evidence from the accused himself and is, therefore, hit by Article 20(3) as unconstitutional and illegal."*

4. Thus, the question whether the right to privacy is or is not a fundamental right never came up for consideration before the Court.

5. The following observation is relied upon the Union of India:-

> *"A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to*

assume that the constitutional protection under Article 20 (3) would be defeated by the statutory provisions for searches.

6. The reference to a "right" analogous can only mean rights against unlawful searches and seizures. This was the ambit of the Fourth Amendment as held in *Olmstead v. United States* 277 US 438 (1928).

7. The decision in *M.P. Sharma* was based on the above constitutional interpretation in the U.S. Indeed, the Court had referred to a few U.S. Supreme Court decisions, which held the field at the time.

8. However, the above view was overruled in *Katz v. United States* 389 U.S. 347 (1967).

9. Mathew J. noticed the important changes in the United States in *Gobind v. State of M.P.* (1975) 2 SCC 148. In paras 17 and 18 of the judgement, the learned judge noted that the right to privacy is not based on the Fourth Amendment but to the Fourth, Fifth and Ninth Amendment and in the "penumbras of the Bill of Rights".

10. Thus, the U.S. Constitution has also recognized the right of privacy as a fundamental right. It would indeed be regressive to hold, in 2017, that there is no fundamental right to privacy based on one sentence occurring in a decision rendered 63 years ago.

11. The decision in *Kharak Singh*case struck down regulation 236 (b) of the U.P. Police Regulations, which referred to "domiciliary visits at

night". The Court referred to *Wolf v. Colorado* 338 US 25 and noted that police incursion into privacy would run counter to the guarantee of the Fourteenth Amendment. Accordingly, the above regulation was held to be violative of Article 21 and was struck down as unconstitutional. Like M.P. Sharma, there was an observation that "*the right of privacy is not a guarantee under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.*"

12. The *Kharak Singh* decision was rendered in December, 1962 and before the important changes that took place in the United States. The *M.P. Sharma* and *Kharak Singh* cases related to search/seizure and surveillance respectively and had nothing to do with the ambit and scope of the constitutional right of privacy.

13. It is submitted that the two sentences in the above two judgments cannot be treated as a full exposition of law on a question which did not even fall for consideration in those judgements. (*CIT v. Sun Engineering Works (P) Ltd*. (1992) 4SCC 363 – following *MadhavRaoScindia v. Union of India* (1971) 1 SCC 85).

14. It is, therefore, submitted that various decisions that have held that there is a fundamental right to privacy, *albeit* of smaller Benches, represent the correct view.