

**IN THE SUPREME COURT OF INDIA
NEW DELHI**

IA No. 5 of 2014

in

Writ Petition (Civil) No. 833 of 2013

BETWEEN:

Aruna Roy and another

... Petitioners

AND:

Union of India and others

... Respondents

**WRITTEN SUBMISSIONS BY SAJAN POOVAYYA, SENIOR
ADVOCATE, FOR THE IMPLEADING APPLICANT IN IA NO. 5 OF
2014 IN WP (C) NO. 833 OF 2013.**

The following written submissions are placed for the kind consideration and perusal of this Hon'ble Court in furtherance and addition to arguments already canvassed on behalf of the Petitioners:

1. The postulated issue of recognition of the right to privacy as a fundamental right is not merely to be looked at from the view point of judicial dicta (whether that in the cases of *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300, and *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1285, or the series of judgments thereafter on the right to privacy) but also from how the Parliament has manifested its understanding of the said right.

2. Even in pre-constitutional legislations the sacrosanct position of a right to privacy had been legislatively recognised insofar as special procedures had been established in such laws to create any curb or fetter on any aspect of the said right to privacy. [*refer Indian Post Office Act, 1898: Section 26. Power to intercept postal articles for public good; The Indian Telegraph Act, 1885: Section 5. Power for Government to take possession of licensed telegraphs and to order interception of messages*]

3. Likewise, in post-constitutional statutes, similar procedures established by law has always been provided to create fetters on aspects of privacy. In fact, specific recognition has also been given to the right of privacy. [*refer Information Technology Act, 2000: Section 69; Right to Information Act, 2005: Section 8(1)(j). Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen [...] information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual [...]* ; The Protection of Human Rights Act, 1993: Section 2(1)(d): "human rights"]

4. This Hon'ble Court, in the specific context of the Right to Information Act, 2005, in *Thalappalam Service Coop Bank Ltd. v. State of Kerala*, (2013) 16 SCC 82, observed that the right to privacy is not only recognised as a basic human right under Article 12 of the Universal Declaration of Human Rights, but, more importantly, that the Parliament has recognised the right to privacy as a sacrosanct facet of Article 21. The above was observed with specific reference to Section 8(1)(j) of the Right to Information Act, 2005, wherein this Hon'ble Court was called upon to adjudicate

the scope and ambit of an exception to a general right to information. The same goes to inform the *contemporanea expositio* that the Legislature has granted to the right to privacy under the framework of the Constitution of India.

5. Therefore, *de hors* the line of judicial precedents subsequent to *M.P. Sharma* and *Kharak Singh*, it is no longer *res integra* that the said right to privacy is a fundamental right guaranteed under Part III of the Constitution which implies a prerequisite of a specific and special procedure established by law to derogate from. It is in this light that this Hon'ble Court has also interpreted the said right to privacy as 'sacrosanct facet of Article 21'.

6. In particular, a Three-Judge Bench of this Hon'ble Court in *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5, observed:

"60. The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance with procedure validly established by law. Thus, what the court is required to see is that the procedure itself must be fair, just and reasonable and non-arbitrary, fanciful or oppressive."

7. This constitutional requirement for any procedure in law restricting the right to privacy from being 'non-arbitrary, fanciful or oppressive' stems from the understanding that the said right to privacy is a facet of Article 21. Therefore, the said right to privacy is deeply engrained in Part III of the Constitution and detraction from the same is constitutionally impermissible on the mere dint of the twin cases in *M.P. Sharma* and *Kharak Singh*.

8. In any event, the march of law, keeping pace with sociological developments, through judicial pronouncements of this Hon'ble Court, has been that the right to privacy (i) is a fundamental right, and (ii) that it deals with 'persons' and not merely 'places.' More specifically, this Hon'ble Court in *District Registrar v. Canara Bank*, (2005) 1 SCC 496, on the strength of (i) its earlier decisions, including *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148, and (ii) those decisions of the United States Supreme Court which are in tune with *R.C. Cooper v. Union of India*, (1970) 1 SCC 248, expounded on the position of importance of a fundamental right to privacy as facets of *inter alia* life and personal liberty under Part III of the Constitution of India. Pertinently, this Hon'ble Court in *Gobind* observed:

"20. There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandeis, J. said in his dissent in *Olmstead v. United States* [277 US 438, 471] the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the Government a sphere where he should be let alone."

9. Furthermore, this Hon'ble Court in *District Registrar*, also observed a forward march of the law; a requirement necessitated by this Hon'ble Court's decision in *Gobind*, supra:

"28. The right to privacy in any event will necessarily have to go through a process of case-by-case development."

10. It is most respectfully submitted that a case-by-case development of the right to privacy has taken place in a series of decisions of this Hon'ble Court, including *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632; *People's Union for Civil Liberties (PUCL) v. Union of India*, (1997) 1 SCC 301; *Mr 'X' v. Hospital 'Z'*, (1998) 8 SCC 296; *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5; *Selvi v. State of Karnataka*, (2010) 7 SCC 263; *Ram Jethmalani v. Union of India*, (2011) 8 SCC 1; *Ramlila Maidan Incident, In re*, (2012) 5 SCC 1.

11. Inasmuch as this Hon'ble Court has relied upon the understanding of Part III as rendered in *R.C. Cooper and Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, i.e. Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man, and that the right to personal liberty means a life free from encroachments unsustainable in law, a person has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other aspects.

12. It is most respectfully submitted that an authoritative pronouncement of a bench consisting of Eleven Judges of this Hon'ble Court leaves no manner of doubt that the premise upon which the twin decisions of *M.P. Sharma* and *Kharak Singh* were predicated stands altered, and therefore, when the main pillars are removed, the edifice of these twin judgments cannot be allowed to remain. [See *R.C. Cooper and Maneka Gandhi*.]

13. This submission is further strengthened insofar as a Constitution Bench of this Hon'ble Court has subsequently observed that the wheel has turned full circle and that minority opinion in *Kharak Singh* has come to hold the field. [See *Mohd. Arif v. Registrar, Supreme Court of India*, (2014) 9 SCC 737]

14. This understanding of the said right to privacy is also in consonance with International Covenants, particularly those which (i) have been judicially recognized and applied in the context of Part III of the Constitution, and (ii) have found place in *opinio juris*, i.e. India's State Practice in the context of international law, such as parliamentary enactments and executive incorporation. Such reliance, in the context of interpreting and applying the provisions of Part III of the Constitution, would not only 'foster respect for international law' in accordance with Article 51(c), but also bring the true purport of Part III of the Constitution to the forefront.

15. This Hon'ble Court, in a series of its decisions, including decisions considering the 'right to privacy', has relied upon international instruments to interpret fundamental rights:
 - i. This Hon'ble Court in *District Registrar v. Canara Bank*, (2005) 1 SCC 496, relied upon the Universal Declaration of Human Rights, International Covenant of Civil and Political Rights, and the European Convention on Human Rights, to understand the scope of right to privacy.

 - ii. This Hon'ble Court in *PUCL v. Union of India*, (1997) 1 SCC 301, relied upon the International Covenant of

Civil and Political Rights, to which India is a signatory, to interpret the Article 21 in a manner which would be in conformity with international law.

- iii. This Hon'ble Court in *Thalappalam Service Coop Bank Ltd. v. State of Kerala*, (2013) 16 SCC 82, observed that the right to privacy (i) is recognised as a basic human right under Article 12 of the Universal Declaration of Human Rights, and (ii) that the Parliament has recognised the right to privacy as a sacrosanct facet of Article 21.
 - iv. This Hon'ble Court in *Selvi v. State of Karnataka*, (2010) 7 SCC 263, referred to the European Convention on Human Rights, to construe the scope of Article 20(3) and Article 21 of the Constitution.
 - v. This Hon'ble Court in *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 has held that it is now an acceptable rule of judicial construction that regard must be had to international conventions and norms for domestic law when there is no inconsistency between them and there is a purported void in domestic law.
 - vi. This Hon'ble Court in *Nilabati Behara v. State of Orissa*, (1993) 2 SCC 746, relied upon the International Covenant of Civil and Political Rights, to assert an enforceable right to compensation.
16. State practice, or *opinio juris*, importing international instruments, has also been thus consistent:
- i. India is a signatory to the International Covenant on Civil and Political Rights.

- ii. Under Section 2(1)(d) of the Protection of Human Rights Act, 1993, human rights 'means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.'
 - iii. Under Section 8(1)(j) of the Right to Information Act, 2005, it is stated that, 'Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen [...] (j) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen [...]'
17. Some of the International Instruments which directly ensure the 'right to privacy', are as follows:
- i. The Universal Declaration of Human Rights, in Article 12, states that, 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'
 - ii. The International Covenant on Civil and Political Rights, in Article 17(1), states that, 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.', and, in Article 17(2), 'Everyone has the right to the protection of the law against such interference or attacks.'

- iii. The European Convention on Human Rights, in Article 8(1), states that, 'Everyone has the right to respect for his private and family life, his home and his correspondence.'
18. Thus, enunciation of the said right to privacy within the scope and ambit of various provisions of Part III of the Constitution of India, upon a conjoint understanding of the law as stated above, is a natural corollary of basic human rights inherent in every individual, and recognised internationally.
 19. The evolution of constitutional interpretation from the 'isolated islands of individual articles in Part III' to a 'syncretic and holistic understanding of fundamental rights, including the golden triangle of Articles 14, 19 and 21' removes the requirement of identifying the said right to privacy in one watertight compartment of a singular article in the Constitution. In contrast, what is envisaged is the identification of this basic human right across the length and breadth of the Constitution and its application in accordance with law.
 20. Inasmuch as the Constitution is a living document, and for it is the usufruct of the living, rather than the property of the dead, it becomes imperative to construe its provisions in light of the prevailing circumstances and jurisprudential mores. In this light, it would be apt to refer to the observations in the decision of the United States in the case of *United States v. Jones*, 565 US 400 (2012):

GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political,

professional, religious, and sexual associations. [...] Disclosed in [GPS] data [...] will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on [...] The Government can store such records and efficiently mine them for information years into the future. [...] And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: “limited police resources and community hostility.” [...]

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may “alter the relationship between citizen and government in a way that is inimical to democratic society.”

21. In light of the above, and in specific conclusion from the march of law pertaining to Part III, generally, and the right to privacy, particularly, the chilling effect on an individual’s exercise of freedom under Article 19 of the Constitution, the Minority opinion in *Kharak Singh* is instructive to

determine the necessity and propriety of recognizing a right which is already inherent in our constitutional ethos:

"In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channeling one's actions through anticipated and expected grooves. So also creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare the right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty."

Submitted accordingly.

19.07.2017

New Delhi