REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8486 OF 2011

M/S TRIMURTHI FRAGRANCES (P) LTD. THROUGH ITS DIRECTOR SHRI PRADEEP KUMAR AGRAWAL **APPELLANT (S)**

VERSUS

GOVERNMENT OF N.C.T. OF DELHI THROUGH ITS PRINCIPAL SECRETARY (FINANCE) & ORS. **RESPONDENT (S)**

WITH

CIVIL APPEAL NO. 8485/2011
CIVIL APPEAL NO. 8487/2011
CIVIL APPEAL NO. 8496-8501/2011
CIVIL APPEAL NO. 8502/2011
CIVIL APPEAL NO. 8617/2014
CIVIL APPEAL NO. 10374-10379/2014
CIVIL APPEAL NO. 8488/2011
CIVIL APPEAL NO. 8491-8494/2011
CIVIL APPEAL NO. 8495/2011
SPECIAL LEAVE PETITION (C) No. 33322/2017

J U D G M E N T

INDIRA BANERJEE J.

1. The main question raised in this batch of appeals is, whether, 'Pan Masala', which contains tobacco and gutka, covered by an Entry in the First Schedule to the Additional Duties of Excise (Goods of Special

Importance) Act 1957, hereinafter referred to as the 'ADE Act', are taxable by the State under the Delhi Sales Tax Act 1975 and/or the Uttar Pradesh Trade Tax Act 1948 and/or the Tamil Nadu General Sales Tax Act, 1959.

2. In ***Shanti Fragrances v. Union of India and others***[1], a Division Bench of this Court observed:-

> **12.** It does appear that there is a direct conflict between *Kothari Products* [*Kothari Products Ltd.* v. *State of A.P.*, (2000) 9 *SCC* 263], *Radheshyam Gudakhu Factory* [*State of Orissa* v. *Radheshyam Gudakhu Factory*, (2018) 11 SCC 505 : (1988) 68 STC 92 (SC)] and *Reliance Trading Co.* [*Reliance Trading Co.* v. *State of Kerala*, (2011) 15 SCC 762] judgments on the one hand, and *Agra Belting Works* [*CST* v. *Agra Belting Works*, (1987) 3 SCC 140 : 1987 SCC (Tax) 233] , which was also followed by two other judgments, on the other. We may hasten to add that there are three-Judge Bench decisions on both sides. ..."

3. The Bench further observed:-

> *"13. ... One other interesting feature of this case is whether, after Union of India v. Raghubir Singh*[2]*, SCR at pp. 335-37 : SCC pp. 777-78, para 27, it can be stated that Judges of this Court do not sit in 2s and 3s for mere convenience, but that a Bench which is numerically superior will prevail over a Bench of lesser strength. If the doctrine of precedent, as applied by this Court, is to be a matter of numbers, then, interestingly enough, as has been held by Beaumont, C.J. in Ningappa Ramappa Kurbar v. Emperor*[3]*, the position in law could be as under: (AIR p. 409 : SCC OnLine Bom)*
>
> > *"...The Court in that case consisted of five Judges, one of whom, Shah, J., dissented from that proposition. The authority of the case may be open to question, since there had been a previous decision of a Full Bench of this Court of four Judges in Queen Empress v. Mugappa Bin Ningapa [Queen Empress v. Mugappa Bin Ningapa, ILR (1893) 18 Bom 377] , which had reached a different conclusion. Apparently it was considered that five Judges, by a majority of four to one, could overrule a unanimous decision of four Judges, the net result being that the opinion of four Judges prevailed over the opinion of five Judges of co-ordinate jurisdiction. There seems to be very little authority on the powers and constitution of a Full Bench. There can be no doubt that a Full*

1 (2018) 11 SCC 305
2 (1989) 2 SCC 754; (1989) 3 SCR 316
3 1941 SCC OnLine Bom 41 : AIR 1941 Bom 408

Bench can overrule a Division Bench, and that a Full Bench must consist of three or more Judges; but it would seem anomalous to hold that a later Full Bench can overrule an earlier Full Bench, merely because the later Bench consists of more Judges than the earlier. If that were the rule, it would mean that a Bench of seven Judges, by a majority of four to three, could overrule a unanimous decision of a Bench of six Judges, though all the Judges were of co-ordinate jurisdiction. In Enatullah v. Kowsher Ali [Enatullah v. Kowsher Ali, 1926 SCC OnLine Cal 104 : ILR (1927) 54 Cal 266] , Sanderson, C.J., stating the practice in Calcutta, seems to have been of opinion that a decision of a Full Bench could only be reversed by the Privy Council or by a Bench specially constituted by the Chief Justice. Even if this be the true rule, there is nothing to show that the Chief Justice acted upon it in Emperor v. Purshottam Ishwar Amin [Emperor v. Purshottam Ishwar Amin, 1920 SCC OnLine Bom 144 : ILR (1921) 45 Bom 834] . I do not recollect myself ever to have constituted a Special Bench to consider the ruling of a Full Bench, though I have constituted many Full Benches to consider rulings of Division Benches. However, I need not pursue this subject further, since, for the purpose of the present appeal, I am prepared to assume that an alternative charge of perjury lies, and that it was a charge of that nature which the learned Additional Sessions Judge contemplated. The question then is whether it is expedient in the interests of justice that such a charge should be made."

14. This conundrum was also addressed by M.B. Lokur, J. in *Supreme Court Advocates-on-Record Assn.* v. *Union of India* [*Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (2016) 5 SCC 1] , as follows: (SCC pp. 577-78, para 669)

"669. One of the more interesting aspects of Pradeep Kumar Biswas [Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111 : 2002 SCC (L&S) 633] is that out of the 7 (seven) learned Judges constituting the Bench, 5 learned Judges overruled the unanimous decision of another set of 5 learned Judges in Sabhajit Tewary [Sabhajit Tewary v. Union of India, (1975) 1 SCC 485 : 1975 SCC (L&S) 99] . Two of the learned Judges in Pradeep Kumar Biswas [Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111 : 2002 SCC (L&S) 633] found that Sabhajit Tewary [Sabhajit Tewary v. Union of India, (1975) 1 SCC 485 : 1975 SCC (L&S) 99] had been correctly decided. In other words, while a total of 7 learned Judges took a particular view on an issue of fact and law, that view was found to be incorrect by 5 learned Judges, whose decision actually holds the field today. Is the weight of numbers irrelevant? Is it that only the numbers in a subsequent Bench are what really matters? What would have been the position if only 4 learned Judges in Pradeep Kumar Biswas [Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111 : 2002 SCC (L&S) 633] had decided to overrule Sabhajit Tewary [Sabhajit Tewary v. Union

of India, (1975) 1 SCC 485 : 1975 SCC (L&S) 99] while the remaining 3 learned Judges found no error in that decision? Would a decision rendered unanimously by a Bench of 5 learned Judges stand overruled by the decision of 4 learned Judges in a subsequent Bench of 7 learned Judges? Pradeep Kumar Biswas [Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111 : 2002 SCC (L&S) 633] presents a rather anomalous situation which needs to be addressed by appropriate rules of procedure. If this anomaly is perpetuated then the unanimous decision of 9 learned Judges in Third Judges case [Special Reference No. 1 of 1998, In re, (1998) 7 SCC 739] can be overruled (as sought by the learned Attorney General) by 6 learned Judges in a Bench of 11 learned Judges, with 5 of them taking a different view, bringing the total tally of Judges having one view to 14 and having another view to 6, with the view of the 6 learned Judges being taken as the law!"

15. It may be pointed out that in the present case, if numbers are totted up, the *Kothari Products* [*Kothari Products Ltd.* v. *State of A.P.*, (2000) 9 SCC 263] line, as followed in *Radheshyam Gudakhu Factory* [*State of Orissa* v. *Radheshyam Gudakhu Factory*, (2018) 11 SCC 505 : (1988) 68 STC 92 (SC)] and *Reliance Trading Co.* [*Reliance Trading Co.* v. *State of Kerala*, (2011) 15 SCC 762] , will go to a Bench strength, numerically speaking, of eight learned Judges, as against the *Agra Belting Works* [*CST* v. *Agra Belting Works*, (1987) 3 SCC 140 : 1987 SCC (Tax) 233] line, which goes up to a numerical strength of six learned Judges. If the dissenting judgment of B.C. Ray, J. is to be added to the *Kothari Products* [*Kothari Products Ltd.* v. *State of A.P.*, (2000) 9 SCC 263] line, then we have a numerical strength of 9:6. The question of numerical strength gains poignancy when one judgment is overruled by another, as has been pointed by Beaumont, C.J. in *Ningappa Ramappa Kurbar* [*Ningappa Ramappa Kurbar* v. *Emperor*, 1941 SCC OnLine Bom 41 : AIR 1941 Bom 408] , and by Lokur, J. in *Supreme Court Advocates-on-Record Assn.* [*Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (2016) 5 SCC 1]"

4. The two-Judge Bench, referred to the Constitution Bench, the following questions:

i) Whether the ***Kothari Products Ltd. v. State of A.P.***[4] line of judgments or the ***Central Sales Tax vs. Agra Belting Work***[5], line of judgments is correct in law; and

4 (2000) 9 SCC 263
5 (1987) 3 SCC 140

ii) What should be the proper guidelines for the future for overruling an earlier decision of this Court, and to what extent should the Courts be guided by the propositions in ***Ningappa Ramappa Kurbar v. Emperor***[6], the observations of Lokur, J. in ***Supreme Court Advocates-on-Record Assn. v Union of India***[7] and the judgment of the Court of Appeal in ***Harper v. National Coal Board***[8].

5. The ADE Act has been enacted to provide for the levy and collection of additional duties of excise in respect of certain goods, over and above the duties of excise levied under the Central Excise Act 1944. The Statement of Objects of the ADE Act reads:-

> *"The object of the Bill is to impose additional duties of excise in replacement of the sales taxes levied by the Union and States on sugar, tobacco and mill-made textiles and to distribute the net proceeds of these taxes, except the proceeds attributable to Union Territories, to the States. The distribution of the proceeds of the additional duties broadly follows the pattern recommended by the Second Finance Commission. Provision has been made that the States which levy a tax on the sale or purchase of these commodities after 1.4.1958 do not participate in the distribution of the net proceeds. Provision is also being made in the Bill for including these three goods in the category of goods declared to be of special importance in inter-State trade or commerce so that, following the imposition of uniform duties of excise on them, the rates of sales tax if levied by any State are subject from 1.4.1958 to the restrictions in Section 15 of the Central Sales Tax Act, 1956."*

6. In ***Mahalakshmi Oil Mills v. State of A.P.***[9], this Court, held:-

> *"5 .. In short, the object of the Act was to substitute additional duties of excise in place of sales tax so far as these goods were concerned. Since the State legislatures were at liberty, if they wished, to levy taxes on the sale or purchase of these*

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6 1941 SCC Online Bom 41 : Air m1941 Bom 408
7 (2016) 5 SCC 1
8 [1974] QB 614
9 (1989) 1 SCC 164

commodities, the Act provided that the additional excise duties will be distributed only among such States as did not levy a tax on the sale or purchase of these commodities. Also, by including these goods in the category of goods declared to be of special importance in inter-State trade or commerce, the legislation ensured that, if any State levied sales tax in respect of these commodities, such levy was subject to the restrictions contained in the Central Sales Tax Act, 1956."

7. It is well settled that once goods are chargeable under the ADE Act, the State cannot levy sales tax on the same goods under a State enactment. In ***Godfrey Phillips India Ltd. v. State of U.P***[10]**.**, this Court held:-

"70. So even if tobacco is an article of luxury, a tax on its supply is within the exclusive competence of the State but subject to the constitutional curbs prescribed under Article 286 read with Sections 14 ad 15 of the Central Sales Tax Act, 1956 and most importantly the ADE Act of 1957 under which no sales tax can be levied on tobacco at all if the State was to take the benefits under that Act."

8. In ***Kothari Products Ltd.*** *(supra)*, the question was, 'tobacco' being specified in the First Schedule to the ADE Act, and exempted from Sales Tax under Section 8 of the Andhra Pradesh General Sales Tax Act 1957, whether 'gutka' could be taxed by the State of Andhra Pradesh. The Court found that "gutka" being tobacco, covered by an Entry in the First Schedule to the ADE Act and liable to be taxed under the ADE Act, it was covered by the exemption in Section 8 of the Andhra Pradesh General Sales Tax Act . The State Act could not have been amended to tax "gutka".

10 (2005) 2 SCC 515

9. There is a line of decisions of this Court, taking the same view as ***Kothari Products Ltd.*** *(supra)* and holding that items covered by the expression 'tobacco' and other items included in the First Schedule to the ADE Act are not taxable by the State.

10. In the ***State of Orrisa vs. Radhey Shyam Gudakhu Factory***[11], the issue was whether Gudakhu was covered by the expression 'tobacco' as defined in Section 2(c) of ADE Act. Following the decision of the Calcutta High Court in ***Gulabchand Harekchand v. State of West Bengal***[12]**,** this Court held that Gudakhu is a product of 'tobacco' and hence, a product which falls within the exemption covered by S. No. 35 of the Schedule to the Orissa Sales Tax Act 1947.

11. In ***Reliance Trading Company, Kerala v. State of Kerala***[13], this Court took the view that cotton based tarpaulin was exempted from Sales Tax under the Kerala General Sales Tax Act, 1963, since it was exigible to Additional Excise Duty under the First Schedule of the ADE Act.

12. In ***Agra Belting Works*** *(supra)*, the question was whether any class of goods – cotton fabrics of all kinds, to be specific, exempted from Sales Tax Act under section 4 of the Uttar Pradesh Sales Tax Act, 1948, would be exigible to Sales Tax by virtue of a subsequent Notification under

11 (2018) 11 SCC 505
12 1984 SCC Online Cal 274
13 (2011) 15 SCC 762

Section 3-A of the said Act, specifying the rate of sales tax in respect of an item of the class of goods exempted under Section 4, without withdrawing the earlier Notification under Section 4. While the majority held that a Notification of recall of exemption was not a condition precedent for imposition of tax, by a valid Notification under Section 3-A, B.C.Ray, J. dissented with the view of the majority.

13. In ***Agra Belting Works*** *(supra)*, the majority of the three-Judge Bench of this Court, by ratio of 2:1, *inter alia*, held:-

> *"6. As has been pointed out above, Section 3 is the charging provision; Section 3-A authorises variation of the rate of tax and Section 4 provides for exemption from tax. All the three sections are parts of the taxing scheme incorporated in the Act and the power both under Section 3-A as also under Section 4 is exercisable by the State Government only. When after a notification under Section 4 granting exemption from liability, a subsequent notification under Section 3-A prescribes the rate of tax, it is beyond doubt that the intention is to withdraw the exemption and make the sale liable to tax at the rate prescribed in the notification. As the power both for the grant of exemption and the variation of the rate of tax vests in the State Government and it is not the requirement of the statute that a notification of recall of exemption is a condition precedent to imposing tax at any prescribed rate by a valid notification under Section 3-A, we see no force in the contention of the assessee which has been upheld by the High Court. In fact, the second notification can easily be treated as a combined notification — both for withdrawal of exemption and also for providing higher tax. When power for both the operations vests in the State and the intention to levy the tax is clear we see no justification for not giving effect to the second notification. We would like to point out that the exemption was in regard to a class of goods and while the exemption continues, a specific item has now been notified under Section 3-A of the Act."*

14. B.C. Ray, J. dissenting with the majority view, held:-

> *"**14**. The next question for consideration is what is the effect of a notification under Section 3-A including an item in the Schedule for*

imposition of sales tax though there is a general exemption from sales tax under Section 4 of the Sales Tax Act.

...

15. *A similar question also arose in the case of CST v. Rita Ice Cream Co., Gorakhpur [1981 UPTC 1239 (DB)(All HC)] and it was held that so long as the general exemption under Section 4 continues a particular item notified under Section 3-A of Sales Tax Act cannot be taxed.*

16. *On a conspectus of all these decisions aforesaid, the only irresistible inference follows that so long as the general exemption granted under Section 4 with regard to cotton fabrics of all kinds continues no sales tax can be imposed on beltings of all kinds which fall within the cotton fabrics of all kinds and the general exemption under Section 4 will prevail over the notification made under Section 3-A of the Sales Tax Act. I am unable to subscribe to the view that since the notification under Section 3-A of the U.P. Sales Tax Act has been made subsequent to the notification issued under Section 4 of the said Act, the subsequent notification under Section 3-A will prevail over the general exemption granted under Section 4 of the said Act. In my considered opinion the reasonings and conclusions arrived at by the High Court are unexceptionable."*

15. In ***Sales Tax Officer, Sector-IX, Kanpur vs. Dealing Dairy Products and Anr.***[14], a two Judge Bench of this Court followed the majority decision in ***Agra Belting Works*** *(supra),* and held that, even though the State of Uttar Pradesh had been issuing notifications under Section 4 of the U.P. Sales Tax Act 1948, exempting milk and milk products from levy of sales tax, a later notification under Section 3-A notifying the rate of tax on ice-cream amongst other items, withdrew the exemption in respect of all kinds of ice-cream and made the sale of ice-cream exigible to sales tax at the rate specified in the Notification under Section 3A.

14 (1994) Supp. 2 SCC 639

16. In ***State of Bihar and Others v. Krishna Kumar Kabra and Another***[15], a two Judge Bench of this Court referred to and followed ***Agra Belting Works*** *(supra) and* ***Dealing Dairy Products*** *(supra)* and held that Sections 3-A and 4 of the U.P. Sales Tax Act were parts of a taxing scheme incorporated in that Act and therefore, where the notification was issued under Section 3-A prescribing the rate of tax on goods, which had been exempted from tax under Section 4, by an earlier notification, it had to be held that the later notification was intended to withdraw the exemption and make the sale leviable to tax at the rate prescribed in the later notification.

17. In our considered opinion there is no conflict between the ***Kothari Products*** *(supra)* line of cases and the ***Agra Belting*** line of cases. The ***Kothari Products*** *(supra)* line of cases was on the question of whether "tobacco" or other goods specified in the First Schedule to the ADE Act and hence exempted from Sales Tax under State sales tax enactments, can be made exigible to tax under the State enactments by amending the Schedule thereto. On the other hand, ***Agra Belting Works*** *(supra)* line of cases was on the question of interplay between general exemption of specified goods from sales tax under Section 4 of the U.P. Sales Tax Act and specification of rates of sales tax under Section 3-A of the said Act. This Court held that goods exempted from sales tax under Section 4 would be exigible to tax by virtue of subsequent notification under Section 3-A specifying the rate of sales tax for any specific item of the class of

15 (1997) 9 SCC 763

goods earlier exempted under Section 4. There being no conflict, the reference to Constitution Bench is incompetent. The cases may be placed for decision before the regular Bench.

18. The second question is answered by the judgment of the Constitution Bench of this Court in ***Dr. Jaishri Laxmanrao Patil v. The Chief Minister and Others.***[16]. The Constitution Bench speaking through Bhat, J. held:-

> ***"10.*** *A careful reading of the judgments in Indra Sawhney v. Union of India [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] , clarifies that seven out of nine Judges concurred that there exists a quantitative limit on reservation—spelt out at 50%. In the opinion of four Judges, therefore, per the judgment of B.P. Jeevan Reddy, J., this limit could be exceeded under extraordinary circumstances and in conditions for which separate justification has to be forthcoming by the State or the agency concerned. However, there is unanimity in the conclusion by all seven Judges that an outer limit for reservation should be 50%. Undoubtedly, the other two Judges, Ratnavel Pandian and P.B. Sawant, JJ. indicated that there is no general rule of 50% limit on reservation. In these circumstances, given the general common agreement about the existence of an outer limit i.e. 50%, the petitioner's argument about the incoherence or uncertainty about the existence of the rule or that there were contrary observations with respect to absence of any ceiling limit in other judgments (the dissenting judgments of K. Subba Rao, in T. Devadasan v. Union of India [T. Devadasan v. Union of India, (1964) 4 SCR 680 : AIR 1964 SC 179] , the judgments of S.M. Fazal Ali and Krishna Iyer, JJ. in State of Kerala v. N.M. Thomas [State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 : 1976 SCC (L&S) 227] and the judgment of Chinnappa Reddy, J. in K.C. Vasanth Kumar v. State of Karnataka [K.C. Vasanth Kumar v. State of Karnataka, 1985 Supp SCC 714 : 1985 Supp (1) SCR 352]) is not an argument compelling a review or reconsideration of Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] rule.*
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> ***11.*** *The respondents had urged that discordant voices in different subjects (Devadasan [T. Devadasan v. Union of India, (1964) 4 SCR 680 : AIR 1964 SC 179] , N.M. Thomas [State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 : 1976 SCC (L&S) 227] and Indra*

16 (2021) 8 SCC 1

Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1]) should lead to re-examination of the ratio in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] . It would be useful to notice that unanimity in a given Bench (termed as a "super majority") — denoting a 5 : 0 unanimous decision in a Constitution Bench cannot be construed as per se a strong or compelling reason to doubt the legitimacy of a larger Bench ruling that might contain a narrow majority (say, for instance with a 4 : 3 vote, resulting in overruling of a previous unanimous precedent). The principle of stare decisis operates both vertically — in the sense that decisions of appellate courts in the superior in vertical hierarchy, bind tribunals and courts lower in the hierarchy, and horizontally — in the sense that a larger Bench formation ruling, would be binding and prevail upon the ruling of a smaller Bench formation. The logic in this stems from the raison d'être for the doctrine of precedents i.e. stability in the law. If this rule were to be departed from and the legitimacy of a subsequent larger Bench ruling were to be doubted on the ground that it comprises of either plurality of opinions or a narrow majority as compared with a previous Bench ruling (which might be either unanimous or of a larger majority, but of lower Bench strength), there would be uncertainty and lack of clarity in the realm of precedential certainty. If precedential legitimacy of a larger Bench ruling were thus to be doubted, there are no rules to guide the courts' hierarchy or even later Benches of the same court about which is the appropriate reading to be adopted (such as for instance, the number of previous judgments to be considered for determining the majority, and consequently the correct law).

***12.** In view of the above reasoning, it is held that the existence of a plurality of opinions or discordant or dissident judgments in the past — which might even have led to a majority (on an overall headcount) supporting a particular rule in a particular case cannot detract from the legitimacy of a rule enunciated by a later, larger Bench, such as the nine-Judge Bench ruling in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] ."*

19. The view of Bhat, J. was expressly concurred by Rao, J. (Para 196) and Gupta, J. (Para 227). There was no dissent to the view. In view of Article 145(5) of the Constitution of India concurrence of a majority of the judges at the hearing will be considered as a judgment or opinion of the Court. It is settled that the majority decision of a Bench of larger strength

would prevail over the decision of a Bench of lesser strength, irrespective of the number of Judges constituting the majority.

20. In view of the five-Judge Bench decision in ***Dr. Jaishri Laxman Rao (supra)***, it is not necessary for this Court to answer the question.

..... J.
[INDIRA BANERJEE]

..... J.
[SURYA KANT]

..... J.
[M.M. SUNDRESH]

..... J.
[SUDHANSHU DHULIA]

NEW DELHI;
SEPTEMBER 19, 2022

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

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J U D G M E N T

HEMANT GUPTA, J.

A. I entirely agree with the judgment authored by Hon. Indira Banerjee J. However, in respect of Question No.2, I would like to supplement the opinion expressed.

B. Mr. Gopal Sankaranarayanan, learned Senior Advocate referred to Article 145(5) of the Constitution to contend that a judgment of this Court is mandated to be delivered with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion. Thus, the Constitution itself envisaged that the judgment is by the majority of the Judges.

C. A reference was made to insertion of Article 144A in the Constitution by the 42nd Amendment with effect from 01.02.1977. The amendment reads thus:

> "144-A. Special provisions as to disposal of questions relating to constitutional validity of laws – (1) The minimum number of Judges of the Supreme Court who shall sit for the purpose of determining any question as to the constitutional validity of any Central law or State law shall be seven.
>
> A. A Central law or a State law shall not be declared to be constitutionally invalid by the Supreme Court unless a majority of not less than two-thirds of the Judges sitting for the purpose of determining the question as to the constitutional validity of such law hold it to be constitutionally invalid."

D. The said amendment was undone by 43rd Amendment when Article 144-A was omitted with effect on and from 01.02.1977. Though the said insertion of Article 144-A stands repealed, but it shows that the legislature also considered majority of not less than 2/3rd of Judges should determine the question as to the constitutional validity of law. Therefore, even such amendment contemplated dissent and a minority view.

E. A similar question has been examined by a Full Bench of the High Court of Gujarat in a judgment reported as ***State of Gujarat*** v ***GordhandasKeshavji Gandhi and Ors***.[17]. The Court was considering the binding nature of the judgments of the Bombay High Court in the successor Gujarat High Court but an ancillary question was considered in respect of numerical strength of the Bench as well. Though there is divergence of opinion amongst the judges of the Court, but the minority view was relevant for the second question arising for consideration. The minority view is expressed by N.M. Miabhoy J and P.N.Bhagwati J. We are in agreement with the said view. The order passed by learned Hon'ble Mr. Justice N.M. Miabhoy J reads thus:

> "44. .....The principles which guided the latter Court in the matter of judicial precedents have been set out by that Court in (1944) 1 KB 718. All Division Benches considered themselves to be bound by the judicial precedents created by Full Benches not only on the ground of judicial comity but also on the ground that a Full Bench consisted of more number of Judges than a Division Bench. If a judicial precedent created by a Full Bench required to be reconsidered, then, the usual practice was to refer the matter to a Full Bench consisting of more number of Judges than the number which constituted the former Full Bench whose decision was sought to be revised. The practice was to regard the precedent of a larger Full Bench as having greater efficacy and binding authority than the precedent of a Full Bench consisting of a smaller number of Judges. This practice was criticised by Beaumont, C.J. in 43 Bom LR 864 at p. 868 : (AIR 1941 Bom 408 at p. 409). It is not necessary to express any opinion in this case as to whether this criticism was or was not justified. However, the observations made by the learned

17 AIR 1962 Guj 128

Chief Justice in the above case ignores the important fact that, when a *Full Bench consists of a larger number of Judges, then, the decision is not merely of a greater number of Judges, but it is one arising from out of the joint deliberations and discussions of a greater number of Judges* and that this fact may give to the decision of a Full Bench consisting of a larger number of Judges a greater binding authority than that of a Full Bench consisting of a smaller number of Judges..... In view of the observations made by Their Lordships of the Supreme Court in the aforesaid two cases[18], the view that should prevail in India is the view-that the decision of a larger Full Bench should be followed in preference to the decision of a smaller Full Bench.

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The order passed by learned Hon'ble Mr. Justice P.N.Bhagwatireads thus:-

xxx xxx xxx

117. .....Is the subsequent Full Bench of the High Court bound to follow the decision of the previous Full Bench of the High Court, though the previous Full Bench consisted of a lesser number of Judges than the subsequent Full Bench? The question ultimately resolves itself into a narrow one, namely, how far the principle of superiority of numerical strength should be carried. If the principle of superiority of numerical strength is applied to Full Benches of the High Court whatever be the numerical strength of the Judges constituting the Full Benches, a Full Bench of four Judges would be able to override the previous decision of a Full Bench of three Judges, a Full Bench of five Judges would be able to override the previous decision of a Full Bench of four Judges and so on and so forth. Beaumont, C.J., expressed a doubt as regards the correctness of this position in 43 Bom LR 864 : (AIR 1941 Bom 408) in the following terms:—

> "……Apparently it was considered that five Judges by a majority of four to one, could overrule a unanimous decision of four Judges, the net result being that the opinion of four Judges prevailed over the opinion of five Judges of co-ordinate jurisdiction. There seems to be very little authority

18(1) AIR 1960 SC 936
(2) AIR 1960 SC 1118

> on the powers and constitution of a Full Bench.-There can be no doubt that a Full Bench can overrule a Division Bench, and that a Full Bench must consist of three or more Judges; but it would seem anomalous to hold that a later Full Bench can Overrule an earlier Full Bench, merely because the later bench consists of more Judges than the earlier. If that were the rule, it would mean that a Bench of seven Judges, by a majority of four to three, could overrule a unanimous decision of a Bench of six Judges, though all the Judges were of co-ordinate jurisdiction."
>
> ..... It was the anomaly of this situation which prompted Beaumont, C.J., to make the aforesaid observations. *This anomaly is, however, inherent in the principle of superiority of numerical strength and should not stand in the way of acceptance of that principle in its application to Full Benches of the High Court*. The same anomaly also arises when four or five Judges of the High Court, each sitting singly take one view of the law on a particular point while a Division Bench consisting of two Judges takes a different view or when three or four Division Benches, each consisting of two Judges, take one view on a point of law while a Full Bench of three Judges takes a different view. The opinion of two Judges prevails over the opinion of four or five Judges in the former case while in the latter case the opinion of three Judges prevails over the opinion of eight or ten Judges, though all the Judges are of co-ordinate jurisdiction. This anomaly cannot, therefore, be a valid argument against the application of the principle of superiority of numerical strength amongst Full Benches of the High Court. The principle of superiority of numerical strength is a principle which, as I have already pointed out above, imparts flexibility to the law and provides an easy machinery within the framework of the High Court itself for correction of erroneous decisions which would otherwise stand inviolate, immune from challenge except on appeal to the Supreme Court." *(Emphasis Supplied)*

F. It may be mentioned that a Constitution Bench of this Court in a judgment reported as ***Central Board of Dawoodi Bohra Community and Anr.*** v. ***State of Maharashtra and Anr.***[19] quoted from the earlier Constitution Bench

19 (2005) 2 SCC 673

judgment in ***Union of India and Anr.*** v. ***Raghubir Singh (Dead) By Lrs. Etc.***[20] and held as under:

> "10. Reference was also made to the doctrine of stare decisis. His Lordship observed by referring to Sher Singh v. State of Punjab [(1983) 2 SCC 344 : 1983 SCC (Cri) 461] that although the Court sits in divisions of two and three Judges for the sake of convenience but it would be inappropriate if a Division Bench of two Judges starts overruling the decisions of Division Benches of three. To do so would be detrimental not only to the rule of discipline and the doctrine of binding precedents but it will also lead to inconsistency in decisions on points of law; consistency and certainty in the development of law and its contemporary status — both would be immediate casualty.
>
> xxx xxx
>
> 12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms:
>
> (1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.
>
> (2) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

20 (1989) 2 SCC 754

(3).....”

G. The conclusion (1) is that a decision delivered by a Bench of largest strength is binding on any subsequent Bench of lesser or coequal strength. It is the strength of the Bench and not number of Judges who have taken a particular view which is said to be relevant. However, conclusion (2) makes it absolutely clear that a Bench of lesser quorum cannot disagree or dissent from the view of law taken by a Bench of larger quorum. Quorum means the bench strength which was hearing the matter.

H. Thus, it has been rightly concluded that the numerical strength of the Judges taking a particular view is not relevant, but the Bench strength is determinative of the binding nature of the Judgment.

.....J.

(HEMANT GUPTA)

NEW DELHI;

SEPTEMBER 19, 2022.