REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8485 OF 2011

M/S SHANTI FRAGRANCES …APPELLANT

VERSUS

UNION OF INDIA AND ORS. …RESPONDENTS

WITH

CIVIL APPEAL NO. 8486 OF 2011

CIVIL APPEAL NO. 8487 OF 2011

CIVIL APPEAL NO. 8488 OF 2011

CIVIL APPEAL NO. 8491-8494 OF 2011

CIVIL APPEAL NO. 8495 OF 2011

CIVIL APPEAL NOS. 8496-8501 OF 2011

CIVIL APPEAL NO. 8502 OF 2011

CIVIL APPEAL NO. 8617 OF 2014

CIVIL APPEAL NOS. 10374-10379 OF 2014

J U D G M E N T

R.F. Nariman, J.

1) This batch of cases concerns Pan Masala containing tobacco and Gutka and their taxability under three State legislations, namely,

the Delhi Sales Tax Act, 1975, the U.P. Trade Tax Act, 1948 and the Tamil Nadu General Sales Tax Act, 1959. The central question raised in all these appeals is the same. We shall first take up the Delhi case.

2) Under the Delhi Sales Tax Act, 1975, all sales (of goods) that are effected after the commencement of the Act, are made to suffer tax under Section 3(1) of the Delhi Act, whose marginal note reads "incidence of tax". Section 3 (1) states as under:-

> **"3. Incidence of Tax**
>
> (1) Every dealer whose turnover during the year immediately preceding the commencement of this Act exceeds the taxable quantum and every dealer who at the commencement of this Act, is registered or is liable to pay tax under the Central Sales Tax Act, 1956 (74 of 1956) shall be liable to pay tax under this Act on all sales effected by him on or after such commencement."
>
> The obverse side of incidence of tax is provided by Section 7 of the said Act, which reads as under:-
>
> **"7. Tax free goods**
>
> (1) No tax shall be payable under this Act on the sale of goods specified in the Third Schedule subject to the conditions and exceptions, if any, set out therein.
>
> (2) The Lieutenant Governor may by notification in the Official Gazette, add to, or omit from, or otherwise amend, the Third Schedule either retrospectively or prospectively, and thereupon the Third Schedule shall be deemed to be amended accordingly:
>
> PROVIDED that no such amendment shall be made retrospectively if it would have the effect of prejudicially affecting the interests of any dealer."

3) Under Section 4, the marginal note of which reads “rate of tax”, if tax is payable by a dealer under the Act, various rates in respect of taxable turnover are set out depending upon whether the goods are “declared goods” under the Central Sales Tax Act, 1956 or are goods which suffer tax at the rate of either twelve paise or twenty paise in the rupee, depending upon whether they are specified in the First Schedule or Fourth Schedule of the Act. In addition, food or drink served for consumption in a hotel or restaurant with which a cabaret, floor show or similar entertainment is provided, is taxed at the rate of forty paise in the rupee. All cases not covered by the above are then covered by a residuary sub-clause, in which the relevant rate at the given time was eight paise in the rupee. Section 4 of the said Act reads as under:

> **“4. Rate of tax**
> (1) The tax payable by a dealer under this Act shall be levied –
>
> (a) in the case of taxable turnover in respect of the goods specified in the First Schedule, at the rate of twelve paise in the rupee;
>
> (b) in the case of taxable turnover in respect of the goods specified in Schedule II, at such rate not exceeding four paise in rupee as the Central Government may, from time to time, by notification in the official Gazette, determine;
>
> (c) in the case of taxable turnover in respect of any food or drink served for consumption in a hotel or restaurant or part thereof, with which a cabaret, floor show or similar entertainment is provided therein, at the rate of forty paise in the rupee;

[(cc) in the case of taxable turnover in respect of the goods specified in the Fourth Schedule, at the rate of twenty paise in the rupee;]

[(ccc) [***]

(d) in the case of taxable turnover of any other goods, at the rate of eight paise in the rupee:

[PROVIDED that the Lieutenant Governor may, by notification in the Official Gazette, add to, or omit from, or otherwise amend, the First Schedule, the Second Schedule or the Fourth Schedule, either retrospectively or prospectively, and there upon the First Schedule or the Second Schedule or, as the case may be, the Fourth Schedule, shall be deemed to be amended accordingly:]

PROVIDED FURTHER that no such amendment shall be made retrospectively if it would have the effect of prejudicially affecting the interests of any dealer:

PROVIDED ALSO that in respect of any goods or class of goods if the Lieutenant Governor is of the opinion that it is expedient in the interest of the general public so to do, he may, by notification in the Official Gazette, direct that the tax in respect of taxable turnover of such goods or class of goods shall, subject to such conditions as may be specified, be levied at such modified rate not exceeding the rate applicable under this section, as may be specified in the notification.

(2) For the purpose of this Act, “taxable turnover” means that part of a dealer’s turnover during the prescribed period in any year which remains after deducting there from:

(a) his turnover during that period on-

(i) sale of goods, the point of sale at which such goods shall be taxable is specified by the Lieutenant Governor under section 5 and in respect of which due tax is shown to the satisfaction of the Commissioner to have been paid;

(ii) sale of goods declared tax-free under section 7;

(iii) sale of goods not liable to tax under section 8;

(iv) sale of goods which are proved to the satisfaction of the Commissioner to have been purchased within a period of twelve months prior to the date of registration of the dealer and subjected to tax under the Bengal Finance (Sales Tax) Act, 1941 (Bengal Act VI of 1941), as it was then in force, or under this Act;

(v) sale to a registered dealer;

(A) of for “the Administrator is of opinion that it is expedient in the interest of the general public to do, he may, with the previous approval of the Central Government and” goods of the class or classes specified in the certificate of registration of such dealer, as being intended for use by him as raw materials in the manufacture in Delhi of any goods, other than goods specified in the Third Schedule or newspapers, –

(1) for sale by him inside Delhi; or

(2) for sale by him in the course of inter-State trade or commerce, being a sale occasioning, or effected by transfer of documents of title to such goods during the movement of such goods from Delhi; or

(3) for sale by him in the course of export outside India being a sale occasioning the movement of such goods from Delhi, or a sale affected by transfer of documents of title to such goods effected during the movement of such goods from Delhi, to a place outside India and after the goods have crossed the customs frontiers of India; or

(B) of goods of the class or classes specified in the certificate of registration of such dealer as being intended for resale by him in Delhi, or for sale by him in the course of inter-State trade or commerce or in the course of export outside India in the manner specified in sub-item (2) or sub-item (3) of item (A), as the case may be; and

(C) of containers or other materials used for the packing of goods, of the class or classes specified in the certificate of registration of such dealer, other than goods specified in the Third Schedule, intended for sale or resale;

(vi) such other sales as are exempt from payment of tax under section 66 or as may be prescribed:

PROVIDED that no deduction in respect of any sale referred to in sub-clause (iv) shall be allowed unless the goods, in respect of which deduction is claimed, are proved to have been sold by the dealer within a period of twelve months from the date of his registration and the claim for such deduction is included in the return required to be furnished by the dealer in respect of the said sale:

[PROVIDED FURTHER that no deduction in respect of any sale referred to in sub-clause (v) shall be allowed unless a true declaration duly filled and signed by the registered dealer to whom the goods are sold and containing the prescribed particulars in the prescribed form obtainable from the prescribed authority in the manner and subject to such condition as may be prescribed is furnished in the prescribed manner and within the prescribed time, by the dealer who sells the goods:]

PROVIDED ALSO that where any goods are purchased by a registered dealer for any of the purposes mentioned in sub-clause (v), but are not so utilised by him, the price of the goods so

purchased shall be allowed to be deducted from the turnover of the selling dealer but shall be included in the taxable turnover of the purchasing dealer; and

(b) the tax collected by the dealer under this Act, as such and shown separately in cash memoranda or bills, as the case may be."

The question that has been raised in the present appeals relates to "tobacco" specified in the Third Schedule, read with Section 7, as tax free goods as follows:-

"22. Tobacco as defined under the Central Excises and Salt Act, 1944 (1 of 1944)."

4) We have been taken to the Central Excises and Salt Act, 1944 as it obtained in the year 1975. The relevant entry in the said Act contained in the First Schedule reads as follows:-

"4. TOBACCO -

"Tobacco" means any form of tobacco whether cured or uncured and whether manufactured or not, and includes the leaf, stalks and stems of the tobacco plant, but does not include any part of a tobacco plant while still attached to the earth.

Item No.	Description of goods	Rate of duty
I.	Unmanufactured tobacco -	Per kilogram
	(1) if flue cured and used in the manufacture of cigarettes.	Five rupees

(2) if flue cured and used for the manufacture of smoking mixtures for pipes and cigarettes.	Forty rupees
(3) If flue cured and not otherwise specified.	Four rupees
(4) if other than flue cured and used for the manufacture of – (a) cigarettes or (b) smoking mixtures for pipes and cigarettes.	Four rupees
(5) If other than flue cured and not actually used for the manufacture of (a) cigarettes or (b) smoking mixtures for pipes and cigarettes or (c) biris- (i) stems of tobacco larger than 6.35 milli-meters in size, (ii) dust of tobacco. (iii) xx xx xx xx (iv) tobacco cured in whole leaf form and packed or tied in bundles, hanks or bunches or in the form of twists or coils.	Three rupees
(6) if other than flue cured and not otherwise specified.	Four rupees
(7) if used for agricultural purposes	Nil
(8) stalks.	One rupee &ninety paise.

II. Manufactured tobacco-

(1) Cigars and cheroots.	Twenty-five rupees per hundred
(2) Cigarettes.	Two hundred and fifty percent. *ad valorem*.
(3) (i) Biris in the manufacture of which any process has been conducted with the aid of machines operated with or without the aid of power.	Three rupees and eighty paise per thousand

(ii) other biris	Eighty paise per thousand
(4) Smoking mixtures for pipes and cigarettes.	Two hundred per cent. *ad valorem*
(5) Chewing tobacco.	Ten per cent. *ad valorem*
(6) Snuff.	Two rupees and fifty paise per kilogram”*[1*]

This is obviously a case of legislation by incorporation as a result of which the only thing that is to be looked at is “tobacco” contained in this Schedule and not subsequent amendments that have been made after the introduction of the Central Excise (Tariff) Act, 1985 w.e.f. February, 1986. It has, in any event, been argued before us that the subsequent legislation would throw light on what is contained in the earlier legislation, for subsequently under the Central Excise Tariff, Pan Masala which contains tobacco, commonly known as Gutka, is specified under Entry 2404.49 under the heading “Chewing Tobacco and preparations containing chewing Tobacco; Pan Masala containing Tobacco”. In addition, it was pointed out that under the Chapter notes, para 3 in particular, the definition of “tobacco” remains exactly what it was in 1975, which now subsumes Pan Masala which includes tobacco.

[1] Effective from 1-3-75

5) The impugned judgment of the Delhi High Court dated 05.11.2004 has held, on a reading of the aforesaid provisions, that a notification dated 31.03.2000, which introduced as Item 46 in the First Schedule “Pan Masala and Gutka” w.e.f. 01.04.2000, would have to be read as eating into the exemption for “tobacco” generally, and that therefore, on and from this date, Pan Masala which includes tobacco would become exigible to sales tax. This was done on two bases; first, that, as was held by the Kerala High Court in **Reliance Trading Company** vs. **State of Kerala,** (2000) 119 STC 321 (Ker.), if there are two entries, one general and another specific, the general entry must give way to the specific entry. The exemption entry being general in nature, therefore, must give way to the specific entry contained in the First Schedule, and that therefore, sales tax became payable on Pan Masala which includes tobacco. The other basis of the judgment is that there is a dichotomy between two lines of Supreme Court judgments. The first line is contained in **Kothari Products Ltd.** vs. **Government of A.P.,** (2000) 9 SCC 263 and **State of Orissa** vs. **Radheshyam Gudakhu Factory**, (1987) 68 STC 92; the second line of decisions being **Commissioner, Sales Tax U.P.** vs. **M/s Agra Belting Works, Agra** (1987) 3 SCC 140 as followed in **Sales Tax Officer, Section IX, Kanpur** vs. **Dealing Dairy Products and Another**, 1994 Supp. (2) SCC 639 and **State of Bihar and**

Others vs. **Krishna Kumar Kabra and Another**, (1998) 108 STC 1. Whereas the **Kothari Products** (supra) line of judgments had held that an entry under a sales tax statute which only specifies rate cannot be used to eat into an exemption entry, the **Agra Belting Works** (supra) line of judgments states the exact opposite, which is that the charging section, the rate of tax section, and the exemption section all form part of one scheme, and when a notification is issued under a rate of tax section, which is subsequent to a notification exempting certain goods, the intention of the legislature is that such exemption then gets withdrawn and makes the sale of such goods liable to tax. The High Court preferred to follow the **Agra Belting Works** (supra) line, and therefore, dismissed the writ petition of the assessees.

6) To similar effect are the impugned judgments from the Allahabad and Madras High Courts which are contained in C.A. No. 8617/2014 and C.A. No. 8502/2011. It may only be noted that in the Madras High Court judgment, though this point was squarely raised and argued, the Madras High Court has preferred to rest its decision on only one point, which is that even though additional duty of excise may be levied on Pan Masala containing tobacco, the legislative competence of the State to enact a State sales tax levying sales tax on the same goods is not taken away.

7) It is well settled that in the area of taxation, the question of going to the measure of a tax would arise only if it is found that the charge of tax is attracted. [See **Tata Sky Limited** vs. **State of Madhya Pradesh and Others**, (2013) 4 SCC 656 at para 29] Also, in a recent Constitution Bench judgment delivered by this Court in **Commissioner of Income Tax (Central)-I, New Delhi** vs. **Vatika Township Private Limited,** (2015) 1 SCC 1, after referring to an earlier judgment of this Court, this Court stated that the components which enter into the concept of taxability are well known and distinct. The first is the imposition of tax which prescribes the taxable event attracting the levy. The second is an indication of the "taxable person" i.e. the person on whom the levy is imposed and who is obliged to pay the tax. The third is the rate at which tax is imposed. The fourth is the measure or value to which the levy will be applied for computing tax liability.

8) Keeping these parameters in mind, a three-Judge Bench of this Court held, in **Reliance Trading Company, Kerala** vs. **State of Kerala,** (2011) 15 SCC 762 at 766-767, on pari materia provisions of the Kerala General Sales Tax Act, that there can be no confusion or mixing up between the incidence of tax and exemption of tax on the one hand and the rate of tax on the other. On the facts of that case, "Tarpaulin" was separately classified under the First Schedule to the

Kerala Act and was made taxable at a certain specified rate. The Third Schedule, which contained entries enumerating exempted goods from sales tax, contained entry 7 which read, *inter alia*, “cotton fabrics”. The case of the assessee was that so far as cotton based Tarpaulin is concerned, it was exempted from the payment of tax since it fell within the term “cotton fabrics” under the relevant entry contained in the Third Schedule to the Kerala Act. On the other hand, the Revenue urged that since “Tarpaulin” was a specific entry as opposed to “cotton fabrics” which was general, the latter must give way to the former.

9) This Court repelled the aforesaid argument of the Revenue, and set aside the Kerala High Court judgment, which was referred to and relied upon by the Delhi High Court in the impugned judgment dated 05.11.2004, as follows:

> “15. The High Court seems to have brushed aside the argument of the appellant by merely focusing on the general principle that when there are two taxing entries – one general and the other specific – then the specific entry would have to be given priority as compared to the general entry. In our view, this principle has no application in the facts of the present appeal as it was not a case of goods being exigible to tax under two entries. On the other hand, the appellant’s case is one where the goods had been granted a special exemption provided they were already subjected to tax under the ADEA. The High Court fell into the error of assuming that the problem presented to it with regard to exemption could be solved by resort to the general principle of specific entry versus general entry of a taxable head.”

More importantly, the Revenue's contention that when an exemption has already been granted, if the State legislature amended Schedule I, which only deals with the rate of tax, such amendment would take away exemption of tax of the same goods, was directly turned down by this Court, stating as under:

> "16. The Revenue's contention that when an exemption had already been granted to the goods concerned, if the State Legislature had specifically amended Schedule I so as to include the said goods in Schedule I and make it exigible to tax, it would be incorrect to interpret an entry in a manner so as to defeat the object of the statute, is also not tenable. In the first place, there could be nothing like exemption from tax unless goods are exigible to tax. Thus, unless the goods were specified in Schedule I or II of the KGST Act the goods would not be liable to tax at all and, therefore, there would be no question of granting exemption from tax. Thus, it would be unnecessary to specify them in the Third Schedule, unless by reason of Section 5 read with Schedule I or II, the goods were exigible to tax. The fact that "tarpaulin" was included in the First Schedule does not carry the matter any further in favour of the Revenue as it is clear that the exemption operating in favour of *cotton-based tarpaulin* as covered by "cotton fabrics" in the Third Schedule continues as no corresponding change has been made therein by the legislature even after the amendment of the First Schedule by the introduction of "tarpaulin". The legal result, consequently, is that *cotton-based tarpaulin* would continue to be leviable to tax under the ADEA, and by reason of Entry 7/Entry 11 of the Third Schedule the said goods would be exempted from exigibility to sales tax under the KGST Act. This legal result would follow irrespective of whatever might have been the presumed intention of the legislature in amending Schedule I. The intention of the legislature has to be gathered from the words used in the statute, and as long as Entry 11 in the Third Schedule remains unamended, the legal result of exemption of *cotton-based tarpaulin* from exigibility to sales tax under the KGST Act cannot be avoided."

10) It does appear that there is a direct conflict between **Kothari Products** (supra), **Radheshyam Gudakhu Factory** (supra) and **Reliance Trading Company** (supra) judgments on the one hand, and **Agra Belting Works** (supra), 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. Interestingly enough, in **Agra Belting Works** (supra), this Court held by a majority of two to one as follows:

> "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."
>
> (at pages 142-143)

B.C. Ray, J. dissented from this view and followed the view of the Allahabad High Court, which accords the view of this Court in the **Kothari Products** (supra) and **Reliance Trading Company** (supra) judgments. One other interesting feature of this case is whether, after **Union of India** vs. **Raghubir Singh**, 1989 (3) SCR 316 at 335-337, it can be stated that Judges of this Court do not sit in 2's and 3's 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 and Another** vs. **Emperor**, AIR 1941 Bombay 408 at 409, the position in law could be as under:

> "... 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**, (1894) 18 Bom 377 (FB), 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 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**, (1926) 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** (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."

11) This conundrum was also addressed by M.B. Lokur, J. in **Supreme Court Advocates-on-Record Association and Another** vs. **Union of India**, (2016) 5 SCC 1 at 577-578 as follows:

> "669. One of the more interesting aspects of *Pradeep Kumar Biswas* (**Pradeep Kumar Biswas** v. **Indian Institute of Chemical Biology**, (2002) 5 SCC 111) 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). Two of the learned Judges in *Pradeep Kumar Biswas* found that *Sabhajit Tewary* 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 Judes in *Pradeep Kumar Biswas* had decided to overrule *Sabhajit Tewary* 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* 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 the *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!"

12) It may be pointed out that in the present case, if numbers are toted up, the **Kothari Products** (supra) line, as followed in **Radheshyam Gudakhu Factory** (supra) and **Reliance Trading Company** (supra), will go to a Bench strength, numerically speaking, of eight learned Judges, as against the **Agra Belting Works** (supra) 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** (supra) 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 (supra), and by Lokur, J. in **Supreme Court Advocates-on-Record** (supra).

13) Let us consider a hypothetical example, where a 2 Judge Bench has laid down the law in a particular way. If nine other 2 Judge Benches have followed the first 2 Judge Bench decision, is it open for three learned Judges to overrule all of the 2 Judge Benches i.e. twenty learned Judges? The obvious answer would be yes, because the 3 Judge Bench is really overruling the first 2 Judge Bench decision, which was merely followed by nine other 2 Judge Benches. As against this, however, if a unanimous 5 Judge Bench decision is overruled by a 7 Judge Bench, with four learned Judges speaking for the majority, and three learned Judges speaking for the minority, can it be said that the 5 Judge Bench has been overruled? Under the present practice, it is clear that the view of four learned Judges speaking for the majority in a 7 Judge Bench will prevail over a unanimous 5 Judge Bench decision, because they happen to speak for a 7 Judge Bench. Has the time come to tear the judicial veil and hold that in reality a view of five learned Judges cannot be overruled by a view of four learned Judges speaking for a Bench of 7 learned Judges? This is a question which also needs to be addressed and answered.

14) An allied question, which often arises, is the discovery of the

true ratio decidendi in a given case. In **Harper and Others** vs. **National Coal Board** [1974] 2 All ER 441, the Court of Appeal was faced with a judgment of the House of Lords in **Central Asbestos Co Ltd** vs. **Dodd** [1972] 2 All ER 1135 by five learned Judges. Whereas Lord Reid and Lord Morris took a particular view of the law in favour of Dodd, stating that his claim was not barred, two other learned Judges namely, Lord Simon and Lord Salmon disagreed on the law, and held that his claim was barred. Lord Pearson was stated to be the odd man out. He held that time did not run against Dodd, since Dodd did not appreciate that the appellants were at fault and that his injuries were attributable to their fault. On that ground, he agreed with Lord Reid and Lord Morris, as a result of which Dodd succeeded. However, he went on to say that he agreed with the opinion of the minority as to the proper construction of the statute in law. Faced with this, Lord Denning M.R. set out four interesting propositions on how a ratio is to be discovered and or read in a judgment. He stated:

> "How then do we stand on the law? We have listened to a most helpful discussion by counsel for the proposed plaintiffs on the doctrine of precedent. One thing is clear. We can only accept a line of reasoning which supports the actual decision of the House of Lords. By no possibility can we accept any reasoning which would show the decision itself to be wrong. The second proposition is that, if we can discover the reasoning on which the majority based their decision, then we should accept that as binding on us. The third proposition is that, if we can discover the reasoning on which the minority based their decision, we should reject it. It must be wrong

because it led them to the wrong result. The fourth proposition is that if we cannot discover the reasoning on which the majority based their decision we are not bound by it. We are free to adopt any reasoning which appears to us to be correct, so long as it supports the actual decision of the House."

(at page 446)

He then went on to state as follows:

"Applying the propositions to the decision in *Central Asbestos Co Ltd v Dodd* the position stands thus. (1) The actual decision of the House in favour of Dodd must be accepted as correct. We cannot accept any line of reasoning which would show it to be wrong. We cannot therefore accept the reasoning of a minority of two – Lord Simon of Glaisdale and Lord Salmon – on the law. It must be wrong because it led them to the wrong result. (2) We ought to accept the reasoning of the three in the majority *if* we can discover it. But it is not discoverable. The three were divided. Lord Reid and Lord Morris of Borth-y-Gest took one view of the law. Lord Pearson took another. We cannot say that Lord Reid and Lord Morris of Borth-y-Gest were correct, because we know that their reasoning on the law was in conflict with the reasoning of the other three. We cannot say that Lord Pearson was correct because we know that the reasoning which he accepted on the law led the other two (Lord Simon of Glaisdale and Lord Salmon) to a wrong conclusion. So we cannot say that any of the three in the majority was correct. (3) The result is that there is no discernible ratio among the majority of the House of Lords. In these circumstances I think we are at liberty to adopt the reasoning which appears to us to be correct.

In my opinion we should adopt the reasoning which was accepted in *this* court in the long line of cases before the decision of the House of Lords. None of these was overruled. They may therefore be said to be binding on us. But in any case we should follow their reasoning, especially as it was accepted by two of their Lordships who were in the majority and was expressed convincingly by Lord Morris of Borth-y-Gest in the passage I have quoted."

(at page 446)

Stephenson LJ. concurred. The learned Lord stated:

"I agree. I cannot find any discernible ratio decidendi common to the majority of the House of Lords in deciding *Dodd's* case. Their Lordships were divided three to two in the decision to affirm the judgment of the Court of Appeal; but in the reasons for their decision they appeared to be divided two to two, Lord Pearson taking a third view which perhaps came closer to the view of the minority. In those circumstances I do not think that we can treat the reasoning of the majority of the majority – Lord Reid and Lord Morris of Borth-y-Gest – as the ratio decidendi of the house. It is the ratio given by only two out of five. Still less can we treat the 'ratio dissentiendi' appearing from the speeches of the minority - Lord Simon of Glaisdale and Lord Salmon - as binding if added to Lord Pearson's. That seems to have been the view of Thesiger J; but having had the advantage denied to him of counsel's argument, I respectfully disagree with him. We are therefore bound by the decision of the House of Lords affirming the decision of this court, but not by the reasoning in the speeches of their Lordships. That, in my judgment, sends us back to the decision of this court[2] and the ratio of its decision. If there is in the Court of Appeal a discernible reason for their decision common to the majority, it stands and binds us. I think that there is. I agree that we should take the same view of the 1963 Act as was taken by the Court of Appeal in Dodd's case, confirmed as it is most persuasively by the approval of Lord Reid and Lord Morris of Borth-y-Gest in the House of Lords. Applying that construction of the Act to the circumstances of this case, I agree with Lord Denning MR that they are stronger on the facts, as we have them on affidavit only, than those which enabled Dodd to bring himself, not without difficulty, within the Act. I therefore concur in allowing this appeal and giving the appellants leave.

(at page 447)

[2] [1971] 3 All ER 204, [1972] 1 QB 244

15) Given the head on conflict between the **Kothari Products** (supra) line of judgments and the **Agra Belting Works** (supra) line of judgments, together with the aforesaid conundrum insofar as the doctrine of precedent *qua* this Court is concerned, we request the Hon'ble Chief Justice of India to constitute an appropriate Bench in order to decide as to whether the **Kothari Products** (supra) line or the **Agra Belting Works** (supra) line is correct in law, and also to lay down, as a matter of law, as to whether and to what extent the propositions contained in **Ningappa Ramappa Kurbar** (supra), Lokur, J.'s observation in **Supreme Court Advocates-on-Record Association** (supra), and the **Harper** (supra) judgment of the Court of Appeal in U.K. should guide us for the future.

……J.
(R.F. Nariman)

……J.
(Sanjay Kishan Kaul)

New Delhi;
September 21, 2017