IN THE SUPREME COURT OF INDIA
WRIT JURISIDICTION
W.P. (C) 468 OF 2022

IN THE MATTER OF :

SUBHASH DESAI ..... PETITIONERS

VERSUS

PRINCIPAL SECRETARY, GOVERNOR OF MAHARASHTRA & ANR. ..... RESPONDENT

SUBMISSIONS ON REFERENCE

SHRI TUSHAR MEHTA
SOLICITOR GENERAL OF INDIA

PRELIMINARY POINTS

1. It is submitted that the Petitioners have sought reconsideration of the judgment in ***Nabam Rebia & Bamang Felix v. Dy. Speaker, Arunachal Pradesh Legislative Assembly,*** **(2016) 8 SCC 1 [**specifically Paras 188-193 – hereinafter referred to as the "***Impugned Observations***"**]** on the following grounds :

I. The impugned observations are prone to misuse for the benefit of defecting MLAs / MPs
II. The Speaker performs a distinct role as a Tribunal under the Tenth Schedule, and therefore, proceedings for his removal as an Officer of the State Legislature cannot disrupt the continuity and functioning of the Tribunal
III. The impugned observations disrupt the continuity of functioning of the Tribunal and result in a Constitutional hiatus under the Tenth Schedule
IV. Impugned Observations are in violation of the law laid down in ***Kihoto Hollohan v. Zachillhu*****, 1992 Supp (2) SCC 651 -** Pg 71 – 164, CCJ–I]
V. The purportedly erroneous interpretation of "all the then members" in Article 179(c) and Article 181 in light of Constituent Assembly debates

2. It is submitted that the same may be, in short, responded to as under:

I. The judgment in ***Nabam Rebia*** **supra** considered the law on disqualification, the constitutional qualifications of the Speaker and the

constitutional provisions on the subject. The judgment takes note of all the relevant precedents on the subject.

It is not the case of the Petitioners that the judgment in ***Nabam Rebia*** **supra** has been passed in ignorance of the constitutional provisions or a judgment of a coordinate Bench.

Therefore, it is submitted that the judgment in ***Nabam Rebia*** **supra** considers the nuances of the subject, deeply appreciates the consequences of the opinion rendered and only thereafter pronounces a detailed verdict.

II. The judgment in ***Nabam Rebia*** **supra** decides the issue that the Petitioners have sought to question in Impugned Observations. From the facts and circumstances surrounding the judgment in ***Nabam Rebia*** **supra**, the said issue had clearly arisen in the facts and circumstances. Therefore, it cannot be said that the observations in this regard were *obiter*, or were not germane to the proceedings in ***Nabam Rebia*** **supra**.

III. It is not the case of the Petitioners that the judgment in ***Nabam Rebia*** is *per incurium***.** As stated above, the judgment considers all relevant aspects, previous case law and relevant constitutional provisions.

IV. It may be noted that the Petitioners themselves have sought to distinguish the judgment in ***Nabam Rebia*** **supra** which it claims to have been rendered in the specific facts and circumstances of the case.

In view of the said submission, it is clear that the same cannot be said to be a ground to reconsider the law laid down in ***Naban Rebia*** **supra**. It is settled law that a reference to a Larger Bench is only required in case of conflict opinion of coordinate bench.

It is submitted that such reference cannot be entertained merely because a particular law laid down by this Hon'ble Court, sitting in a combination of 5 Hon'ble Judges, appears to be "unsuitable" or "uncomfortable" to a party in a given case.

Therefore, merely because the said observations, as per the Petitioners' belief, are not in favour of the Petitioners, the same cannot be a ground to reconsider the same.

There need to be compelling reasons and clear, cogent and apparent errors on the face of it for a reference to a Larger Bench to be

sustainable especially considering that the judgment in ***Nabam Rebia*** **supra** is rendered by a Constitution Bench.

V. It is submitted that the ***Nabam Rebia*** judgment is culmination of judicial experience, which requires dealing with a situation where a leader of the legislative party loses confidence of other members of his own legislative party and is misusing the office of the Speaker to stifle the democratic dissent against him.

VI. The submission of the Petitioners that the observations in ***Nabam Rebia*** **supra** provide an escape route to "constitutional sinners" and that the judgment failed to consider the possibility of misuse for avoidance of disqualification proceedings by mere issuance of notice for removal of the Speaker, is wholly unsustainable.

The judgment in ***Nabam Rebia*** **supra,** specifically in paragraph 193, considers all possibilities that may arise in such situation and only thereafter renders its opinion. The judgment further ensures that there is no misuse of constitutionally vested powers in high authorities by ensuring that in case a Speaker is facing a notice for removal, the said Speaker is not disqualified *ad infinitum* from deciding the disqualification petitions.

The judgment in ***Nabam Rebia*** **supra** rather merely states that in such a situation, considering that the power of the Speaker to exercise power of disqualification is a function of the trust of the House and the majority enjoyed by the Speaker in the House itself, it is appropriate that the Speaker first ensures that he/she enjoys the confidence of the House before deciding the question of disqualification.

Therefore, the appropriate course of action, as rightly held by this Hon'ble Court in ***Nabam Rebia*** **supra**, is to first dispel any doubts as to the confidence enjoyed by him/her in the House and only thereafter exercise the high constitutional prerogative of deciding the disqualification petition.

The Speaker can always, at the earliest opportunity, raise the issue of his own trustworthiness/majority in the House and only if such Speaker enjoys the confidence of the House, can thereafter proceed to decide the disqualification petition(s).

The judgment in ***Nabam Rebia* supra**, being fully conscious of this *constitutional rigmarole* – of what is to be decided first – the disqualification petitions or the Speaker's removal motion, and after considering all possibilities arising therefrom, decided the issue. Therefore, there are no compelling reasons to disagree with the same and refer it to a Larger Bench.

VII. The argument of possible misuse by the Petitioner also has a flipside to it. If the proposition canvassed by the Petitioners is accepted, then it gives birth to an even graver possibility of misuse. The said proposition can allow – a minority Speaker [who does not enjoy the confidence of the House] to misuse the disqualification proceedings, in order to irreversibly, immediately and gravely alter the composition of the House, to perpetuate a minority government in the State or the Country.

There cannot be a graver "constitutional sin" than minority Speaker enabling a minority government in power in a constitutional democracy like ours. It was in light to these apprehensions that the Impugned Observations are made in judgment in ***Nabam Rebia* supra** and the Exception has been carved out of *quia timet* principle at the end of Para 110 in ***Kihoto* supra**.

VIII. The assertion of the Petitioners that the judgment in ***Nabam Rebia* supra** protects any member of a Legislative House facing disqualification petition is wholly unsubstantiated as the said member can always be subjected to disqualification proceedings by a Speaker whose majority in the House is not under the cloud of suspicion.

The jurisdiction and the constitutional basis for a Speaker to exercise the high power of disqualification under Tenth Schedule arises from the Speaker enjoying the majority in the House and in a situation where such majority is under doubt, the only constitutionally sustainable interpretation is to ensure that the high office of the Speaker is not shrouded in such suspicions at the time of deciding the disqualification petition(s).

The constitutional prerogative and jurisdiction of the Speaker to decide disqualification petition is, therefore, directly related to the trust of the House in the Speaker himself and the lack of the same results in

taking away the basis and striking at the root of the exercise of the power by the Speaker. Therefore, the opinion in ***Nabam Rebia*** **supra** balances the delicate constitutional position and arrives at a just and fair construction of Article 179, 181 read with the Tenth Schedule.

IX. The assertion of the Petitioners that the Speaker performs a distinct role as a "Tribunal" under the Tenth Schedule and as an "officer of the State Legislature" under the Rules of the House, does not further the case of the Petitioners.

The roles of the Speaker in both the situation may be different but the authority and the constitutional prerogative to exercise power under the Tenth Schedule is necessarily a function of the majority of the Speaker in the House.

Therefore, while the role of the Speaker and the duty, while exercising such powers, may be different but it is unequivocally clear that the source, on the basis of which powers are exercised, are clearly overlapping and cannot be treated in a disjunctive manner.

X. The assertions of the Petitioners that the observation in ***Nabam Rebia*** **supra** run contrary to paragraph 110 of the judgment in ***Kihoto Hollohan*** **supra** is *ex facie* erroneous. It may be noted that the judgment in ***Kihoto Hollohan*** **supra**, while discussing Paragraph 6 of the Tenth Schedule, which provided for finality of the decisions of the Speaker and ousted judicial review, made the said observations in Paragraph 110. The Petitioners in ***Kihoto Hollohan*** **supra** challenged the constitutional authority of this "finality clause" at the anvil of basic structure arguing that "judicial review" is a necessary part of the basic structure of the Constitution.

This Hon'ble Court in the light of the above, to an extent, read down Paragraph 6 of the Tenth Schedule in order to make it constitutionally workable. While making such observations, this Hon'ble Court ensured that the scope of judicial review in such matters is to be limited in scope and also observed that any *quia timet* action would not be permissible at a stage prior to the making of the decision by the Speaker.

While making such observations, the Constitution Bench itself in the very same paragraph which the Petitioners are relying upon, provided for an exception in situation wherein during the pendency of disqualification proceedings "*grave, imminent and irreparable consequences*" may occur.

Therefore, it cannot be said that the judgment in ***Kihoto Hollohan* supra,** completely barred or ousted the jurisdiction of the courts at a stage prior to the decision of the Speaker. When these observations and exceptions are taken note of, it is clear that the observations by this Hon'ble Court in ***Nabam Rebia* supra** at paragraph 188 to 193 are not in conflict with ***Kihoto* supra** but are rather in conformity and in consonance of the same. The judgment in ***Nabam Rebia,*** being a coordinate bench of 5-Hon'ble Judges, develops the law laid down in ***Kihoto* supra**.

XI. The assertion of the Petitioners that the observations in ***Nabam Rebia* supra** allow defecting MLAs/MPs, whose proceedings are pending before the Speaker to interdict the disqualification proceedings by merely issuing a notice for removal of the Speaker, are in violation of the law laid down in Paragraph 110 of ***Kihoto* supra**, are completely unsustainable.

As stated earlier, the observations in ***Kihoto* supra** at paragraph 110, are in the context of judicial review of Hon'ble Courts and not in the context of the right of the Members of a House to choose a Speaker who enjoys the majority in the House.

The observations concerning the limited scope of judicial review and impermissibility of the *quia timet* action or interference at an interlocutory stage of the proceedings are made ***vis***-à-***vis*** the power of courts for judicial review. The judgment in ***Kihoto* supra** was in the context of a constitutional challenge of the then newly enacted Tenth Schedule on the touchstone of basic structure.

The Petitioners have confused the limitations of imposed on judicial review laid down in ***Kihoto Hollohan* supra** with the right of the Members of the House to issue a valid notice for removal of the Speaker. Such observation cannot obviously oust the exercise of such right as they do not apply to the Members of the House and rather relate to the Courts of Law.

XII. The assertion of the Petitioners that unwanted/adverse consequences may flow from the judgment in ***Nabam Rebia* supra** is wholly unmerited as all the consequences highlighted by the Petitioners have been taken note of in the paragraphs 188 to 193 and further have been taken note of in the concurring view of J. *Dipak Misra* at paragraphs 233 to 238.

XIII. Further, with regard to the argument of the Petitioners with regard to "relating back" of the disqualification, it is submitted that the Tenth Schedule is in the nature of a drastic penal provision which ought to be applied within the four corners of the language used in Para 2 of the Tenth Schedule and not beyond it.

Considering the fact that the there exists an obligation on part of the Speaker to function as an "unbiased Tribunal" and no such corollary exists as far as the members of the Legislative House are considered, it is apposite that the Speaker first establishes his majority in House in case there exists genuine doubts over the same.

The "relating back" may indeed happen as far as the individual member is concerned however, the deeming of disqualification during the mere pendency of the disqualification petition [which can even be moved by non-members per ***Speaker, Orrisa Legisaltive Assembly v. Utkal Keshari Parida*, (2013) 11 SCC 794**] cannot take place as the same would enable grave, irreversible and unconscionable consequences.

XIV. The present matter may be examined from another angle – the power of disqualification, being a grave consequence, which results in nullifying the democratic mandate behind an elected member of a legislative House, ought to be exercised with a high degree of circumspection, care and responsibility. This nullification of the democratic mandate ought not to take place in a situation wherein the person who decides the issue, is facing a legitimate question as to the position that such person enjoys. The grave power of disqualification must therefore be above such clouds of lack of faith in the majority of Speaker himself.

SHORT SUBMISSIONS ON MERITS

3. It is submitted that notice for removal of Speaker restricts him from continuing with disqualification proceedings under Tenth Schedule of the Constitution as correctly held in ***Nabam Rebia & Bamang Felix v. Dy. Speaker, Arunachal Pradesh Legislative Assembly,*** **(2016) 8 SCC 1**.

4. It is submitted that the Speaker is not a separately elected or a directly elected person in the Legislative house. The Speaker is a part of the Legislative house and is elected with the popular will of the Legislative house itself. The functions and powers of the Speaker only subsist till the time the Speaker himself enjoys the popular support of the Legislative house. Once there is a genuine doubt raised as to the popular will enjoyed by the Speaker, through the relevant applicable House Rules, the functions and powers of the Speaker come under a democratic shadow. It is submitted that the Speaker is to necessarily enjoy the confidence of the Legislative house at all times and a "minority" Speaker cannot continue to function and/or exercise the vast and drastic constitutional powers vested with the high office.

5. Further, considering the nature of powers of the Speaker itself [especially the drastic power under Tenth Schedule] and the high constitutional ideals which the Speaker is supposed to uphold while exercising his functions, it is even more necessary for the Speaker to enjoy the confidence of the Legislative House. In that view of the matter, such power is directly proportional to the confidence and absence of the confidence of the Legislative House, the power vested with the Speaker [especially the power under the Tenth Schedule] ought to eviscerate.

6. It is submitted that the same is necessary for the democratic functioning of the Legislative house and ensuring that a Speaker in "minority" does not take decisions which have a lasting constitutional impact on the functioning of the Legislative House. It is submitted that therefore, the principle that a valid notice for removal of a Speaker restricts him from continuing with disqualification proceedings under Tenth Schedule of the Constitution, is a culmination of the application of ***intra House democracy***.

7. It is submitted that it is the democratic will of the Legislative House and the popularity that the Speaker enjoys in the Legislative House that clothes him/her with the power to disqualify an elected member. This principle of ***intra House democracy*** is manifested in the Constitution in Article 179(c) and Article 181 specifically which mandates that a Speaker may be removed as per popular will of the Legislative house and that the such Speaker or Deputy Speaker ought not to preside over the

proceedings when such removal notice is under consideration. It is submitted that the Constitution contains a similar provision under Article 92 and Article 96 for the Council of States and the Lok Sabha, respectively. When Article 92 was being debated in Constituent Assembly [then Article 75A] on 19th May, 1949, the following was noted :

"Mr. President : There is notice of a new article 75-A-amendment No. 28 of List II.
** New Article 75-A*

Shri T. T. Krishnamachari (Madras : General) Sir, I beg to move : "That after article 75, the following new article be inserted :-

> *'75-A. At any sitting of the Council of States, while any resolution for the removal of the Vice-President from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of the last preceding article shall apply in relation to every such sitting as they apply in relation to a sitting, from which the Chairman or, as the case may be, the Deputy Chairman, is absent.'"*

Sir, the reason for this new article is that in the event of proceedings being taken against the Chairman or the Deputy Chairman for their removal, the Chairman or the Deputy Chairman might be present in the House to answer the charges against him; and if he is present, unless it is expressly stated that he will not preside, the Chairman or, when he is absent, the Deputy Chairman, will have to preside. In order to obviate this particular difficulty, this new article is being moved.

Dr. P.S. Deshmukh (C.P. & Berar : General) : I cannot hear anything.

Shri T. T. Krishnamachari : This amendment is being moved to overcome the technical difficulty that will arise in the case of proceedings against the Chairman, or the Deputy Chairman, as the case may be, of the Council of States. The article is self-explanators and the difficulty that it seeks to overcome will be clear to any member who reads the article.

Shri H. V. Kamath : Mr. President, Sir, I feel that the article as has been moved before the House suffers from a slight lacuna. The lacuna has arisen because the article merely says that the Chairman or the Deputy Chairman shall not preside on any occasion when the question of his removal from office is under

consideration. So long as the article does not provide specifically, does not lay down explicitly in so many words that somebody else from the House or outside the House shall preside on such occasions, the article as it stands, cannot to my mind be clear in its significance or its import. The article must at the same time state that the House shall elect somebody from within the House or appoint somebody else to preside on such occasions. Otherwise, it will mean that when the question of removal of the Chairman is under consideration, the Chairman shall not preside; but who will preside? I feel that this lacuna must be removed before the article is passed by the House. The article as it stands cannot be accepted by the House. The

Honourable Dr. B.R. Ambedkar : Mr. President, Sir, no such difficulty as has been pointed out by Mr. Kamath is likely to arise, and there is, I submit , no lacuna whatsoever. The position will be this : If the Chairman is being tried, so to say-I am using the popular phrase-then, although he is present, the Deputy Chairman shall preside. If the Deputy Chairman is being tried, the Chairman will preside; and when the Deputy Chairman is being tried, if the Chairman is not present to preside, then what the new clause says is that clause (2) of article 75 will apply. Clause (2) of article 75 says that "During the absence of the Chairman or the Deputy Chairman from any sitting of the Council of States, such person as may be determined by the rules of procedure of the Council, or it no such person is present, such other person as may be determine by the Council shall act as Chairman." Therefore that difficulty is met by the application of clause (2) of article 75 to the case dealt with by this new article 75-A.

Mr. President : The question is : "That after article 75, the following new article be inserted :- '75-A. At any sitting of the Council of States, while any resolution for the removal of the Vice-President from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of the last preceding article shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman or, as the case may be, the Deputy Chairman, is absent.'"

The motion was adopted.
Article 75-A was added to the Constitution."

8. In light of the above, it is clear that the Constitution framers were adamant on the requirement of the Speaker enjoying the majority in the Legislative house and the

lack of the same, would hit the root of exercise of power by the Speaker thereby disentitling him from enjoying the privilege and conducting the functions of the Speaker of the Legislative house. It is submitted that *sans* such jurisdictional power to decide the question of disqualification, any decision on the same, would suffer from an inherent lacuna, going to the root of the matter, rendering the decision to be *void ab initio*.

9. The Petitioners submit that "***law laid down in Nabam Rebia's case allows for the possibility that persons committing the sin of defection disable the incumbent Speaker from considering the petitions for their disqualification, and replace him with a person who would decide the question of disqualification in their favour***". In this regard, it is submitted that the interpretation of the Petitioners, on the other hand would enable a minority Speaker to continue a minority Government in power. It is submitted that there is no graver "***constitutional sin***" than a minority government being in power and violate the democratic working of the Constitution and democratic election of the Government in power. The breach of democratic backing of government in power, would stand at a higher pedestal than all generic notions of constitutional morality amongst others. It is submitted that there no graver constitutional immorality than a minority Speaker enabling a minority Government in power.

10. It is submitted that therefore, the appropriate, democratically and constitutionally sustainable approach in the supposedly "difficult situation" that is created would be that "*..when the position of a Speaker is under challenge, through a notice of resolution for his removal, it would "seem" just and appropriate, that the Speaker first demonstrates his right to continue as such, by winning support of the majority in the State Legislature. The action of the Speaker in continuing, with one or more disqualification petitions under the Tenth Schedule, whilst a notice of resolution for his own removal, from the Office of the Speaker is pending, would "appear" to be unfair. If a Speaker truly and rightfully enjoys support of the majority of the MLAs, there would be no difficulty whatsoever, to demonstrate the confidence which the Members of the State Legislature, repose in him*." This is an exact reproduction of Para 189 of the judgment in ***Nabam Rebia*** **supra.**

PRINCIPLE OF STARE DECISIS

11. It is submitted that that the law laid down in ***Nabam Rebia* supra**, has been followed in numerous judgment subsequently.

12. It is submitted that in a legal system firmly grounded in the common law principle of binding precedents and *stare decisis,* the grounds for reconsideration of a judicial precedent, ought to be clear, cogent and weighty. That apart, a binding constitution bench judgment may not be referred to a larger Constitution Bench merely because some Petitioners have laid down an academic challenge to a statutory provision without any cause of action.

13. It is submitted that from the petitions filed by the Petitioner, no ground has been made which would require reconsideration of the judgment of the Constitution bench.

It is submitted that this Hon'ble Court, under Article 141 of the Constitution, lays down the law for the entire country. It is submitted that therefore, the requirement of binding precedent, well settled in the jurisprudence in the country, in the absence of any direct conflict, ought not to be interfered with.

14. It is submitted that the well-recognised definition of precedent is "*an adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law*".

It is submitted that Salmond defines a precedent as a judicial decision which contains in itself a legal authoritative element which is described as *ratio decidendi*. [*Salmond's Jurisprudence* (10th Edn.) 191.] is undoubtedly a binding precedent well settled in the constitutional jurisprudence in the country.

15. It is submitted that precedents have an intrinsic value attached to them which gives birth to the doctrine of stare decisis. It is submitted that *Stare decisis* refers to the policy of courts to stand by the precedents and not to disturb settled views and legal positions. The doctrine of stare decisis, according to *Black's Law Dictionary* is as under:

> *"Stare decisis.—…one of policy, grounded on theory that security and certainty require that accepted and established legal principle, under which rights may accrue, be recognized and followed, though later found to be not legally sound, but whether previous holding of court shall be adhered to, modified, or overruled is within the court's discretion under circumstances of case before it*."

16. It is submitted that *'Stare decisis'* means that the precedent is binding. It is based on the need for finality of litigation owing to *"the disastrous inconvenience of having each question subject to be regarded and the dealings of mankind rendered doubtful by reason of*

different decisions.....". [***Street Tramways v. London County Council,*** **(1898) AC 375 (378);** ***Radcliffe v. Ribble Motor Services*****, (1939) AC 215 (245)]**

17. The full form of the principle is, "*stare decisis et non quieta movere"* which means "*to stand by decisions and not to disturb what is settled*". Those things which have been so often adjudged ought to rest in peace [***Waman Rao v. Union of India,*** **(1981) 2 SCC 362**].

18. Stare decisis is a well-known doctrine of legal jurisprudence. The doctrine of *stare decisis* meaning to stand by decisions rests upon the principle that law by which men are governed should be fixed, definite and known, and that, when the law is declared by a court of competent jurisdiction authorized to construe it, such declaration, in the absence of palpable mistake or error, is itself evidence of law until changed by competent authority. It requires that rules of law when clearly announced and established by a court of last resort, should not be lightly disregarded and set aside, but should be adhered to and followed. What it precludes is that when a principle of law has become established by a series of decisions, it is binding on the courts and should be followed in similar cases. It is a wholesome doctrine which gains certainty to law and guides the people to mould their affairs in the future [***Sakshi v. Union of India,*** **(2004) 5 SCC 518**]. It is submitted that a view which has been holding the field for a long time should not be disturbed only because another view is possible [***Milkfood Ltd. v. GMC Ice Cream Private Ltd.,*** **(2004) 7 SCC 288**].

19. It is submitted that the doctrine of *stare decisis* is also applied rigorously by the House of Lords. It is submitted that previous judgments of the House are binding on a later House as precedents, so that nothing but legislation can directly override an erroneous decision of the House of Lords [***In re Compensation to Civil Servants*****, AIR 1929 PC 84 (87)**; ***Phanindra v. The King*** **(1949) 4 DLR (PC) 87**; ***Gideon v. R.*****, (1950) AC 379**].

It is submitted that particularly on constitutional questions it has been held that *"it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon by the Government and subjects"*

20. In *Corpus Juris Secundum,* the doctrine is explained thus: "*Under the stare decisis rule, a principle of law which has been settled by series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the courts, it is not universally applicable*."

21. It is submitted that this doctrine is of utmost importance in matters of constitutional validity of laws where practices and events have taken place based on long-settled legal positions enunciated by the courts. It is submitted that this Hon'ble Court explained the object of stare decisis in ***Narinder Singh* v. *State of Punjab*, (2014) 6 SCC 466**, as under :

> *22. … **Stare decisis is the fundamental principle of judicial decision-making which requires "certainty" too in law so that in a given set of facts the course of action which law shall take is discernible and predictable. Unless that is achieved, the very doctrine of stare decisis will lose its significance.** The related objective of the doctrine of stare decisis is to put a curb on the personal preferences and priors of individual Judges. In a way, it achieves equality of treatment as well, inasmuch as two different persons faced with similar circumstances would be given identical treatment at the hands of law. [Id, 480, para 22.]*

22. It is submitted that the entire legal system and the general populace arrange their affairs in accordance with the settled law which flows from the doctrine of stare decisis. It is submitted that changes, for that matter any change in the legal position, adversely affect matters relating to regulation of society, criminal law, commerce, business and industry. It is submitted that in matters of regulation of society, settled practices, procedures laws, help in shaping the societal ethos. Further, in the economic field, clarity, consistency and settled legal positions, lead to stability and efficiency.

23. It is submitted that where the point of law has been settled by a series of decisions and has been consistently applied over a long period of time, should not be departed from (even by larger Benches or by a superior court) merely on the ground that another view is possible. It is submitted that the court considering the long-standing view, will have to carefully decide when not to interfere with a settled position of law, and when to interfere in spite of a long-settled position.

Binding power of judgments – especially directly on the issue

24. It is submitted that a constitution bench of this Hon'ble Court in ***Central Board of Dawoodi Bohra Community v. State of Maharashtra*, (2005) 2 SCC 673**, held as under:

> ***5 [Ed.: Para 5 corrected vide Official Corrigendum No. F.3/Ed.B.J./21/2005 dated 3-3-2005.] .** In Bharat Petroleum Corpn. Ltd. case [(2001) 4 SCC 448] the Constitution Bench has ruled that **a decision of a Constitution Bench of this Court binds a Bench of two learned Judges of***

this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness. *At the most, they could have ordered that the matter be heard by a Bench of three learned Judges. Following this view of the law, what has been declared by this Court in Pradip Chandra Parija case [(2002) 1 SCC 1] clinches the issue. The facts in the case were that a Bench of two learned Judges expressed dissent with another judgment of three learned Judges and directed the matter to be placed before a larger Bench of five Judges. The Constitution Bench considered the rule of "judicial discipline and propriety" as also the theory of precedents and held that* ***it is only a Bench of the same quorum which can question the correctness of the decision by another Bench of coordinate strength in which case the matter may be placed for consideration by a Bench of larger quorum. In other words, a Bench of lesser quorum cannot express disagreement with, or question the correctness of, the view taken by a Bench of larger quorum. A view of the law taken by a Bench of three Judges is binding on a Bench of two Judges and in case the Bench of two Judges feels not inclined to follow the earlier three-Judge Bench decision then it is not proper for it to disagree or dissent with the earlier view; but doubting the correctness of such earlier view, it can only request the Chief Justice for the matter being placed for hearing before a three-Judge Bench which may agree or disagree with the view of the law taken earlier by the three-Judge Bench.*** *As already noted, this view has been followed and reiterated by at least three subsequent Constitution Benches referred to hereinabove.*

8 [Ed.: Para 8 corrected vide Official Corrigendum No. F.3/Ed.B.J./7/2005 dated 17-1-2005.] . *In Raghubir Singh case [(1989) 2 SCC 754] Chief Justice Pathak pointed out that in order to promote consistency and certainty in the law laid down by the superior court the ideal condition would be that the entire court should sit in all cases to decide questions of law, as is done by the Supreme Court of the United States. Yet, His Lordship noticed, that having regard to the volume of work demanding the attention of the Supreme Court of India, it has been found necessary as a general rule of practice and convenience that the Court should sit in divisions consisting of judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relating thereto and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. The Constitution Bench reaffirmed the doctrine of binding precedents as it has the merit of promoting certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs.*

9. *Further, the Constitution Bench speaking through Chief Justice Pathak opined that the question was not whether the Supreme Court is bound by its*

own previous decisions; the question was under what circumstances and within what limits and in what manner should the highest court overturn its own pronouncements. In our opinion, what was working in the mind of His Lordship was that being the highest court of the country, it was open for this Court not to feel bound by its own previous decisions because if that was not permitted, the march of judge-made law and the development of constitutional jurisprudence would come to a standstill. However, the doctrine of binding precedent could not be given a go-by. Quoting from Dr. Alan Paterson's Law Lords (pp. 156-57), His Lordship referred to several criteria articulated by Lord Reid. It may be useful to reproduce herein the said principles: (SCC pp. 770-71, para 16)

(1) The freedom granted by the 1966 Practice Statement ought to be exercised sparingly (the "use sparingly" criterion) (Jones v. Secy. of State for Social Services [1972 AC 944 : (1972) 1 All ER 145 : (1972) 2 WLR 210 (HL)] , AC at p. 966).

(2) A decision ought not to be overruled if to do so would upset the legitimate expectations of people who have entered into contracts or settlements or otherwise regulated their affairs in reliance on the validity of that decision (the "legitimate expectations" criterion) (Ross Smith v. Ross Smith [1963 AC 280 : (1962) 1 All ER 344 : (1962) 2 WLR 388 (HL)] , AC at p. 303 and Indyka v. Indyka [(1969) 1 AC 33 : (1967) 2 All ER 689 : (1967) 3 WLR 510 (HL)] , AC at p. 69).

(3) A decision concerning questions of construction of statutes or other documents ought not to be overruled except in rare and exceptional cases (the "construction" criterion) (Jones case [1972 AC 944 : (1972) 1 All ER 145 : (1972) 2 WLR 210 (HL)]).

(4)(a) A decision ought not to be overruled if it would be impracticable for the Lords to foresee the consequences of departing from it (the "unforeseeable consequences" criterion) (Steadman v. Steadman [1976 AC 536 : (1974) 2 All ER 977 : (1974) 3 WLR 56 (HL)] , AC at p. 542 C). (b) A decision ought not to be overruled if to do so would involve a change that ought to be part of a comprehensive reform of the law. Such changes are best done "by legislation following on a wide survey of the whole field" (the "need for comprehensive reform" criterion) (Myers v. DPP [1965 AC 1001 : (1964) 2 All ER 881 : (1964) 3 WLR 145 (HL)] , AC at p. 1022, Cassell & Co. Ltd. v. Broome [1972 AC 1027 : (1972) 1 All ER 801 : (1972) 2 WLR 645 (HL)] , AC at p. 1086 and Haughton v. Smith [1975 AC 476 : (1973) 3 All ER 1109 : (1974) 2 WLR 1 (HL)] , AC at p. 500).

(5) In the interest of certainty, a decision ought not to be overruled merely because the Law Lords consider that it was wrongly decided. There must be some additional reasons to justify such a step (the "precedent merely wrong"

criterion) (Knuller v. DPP [1973 AC 435 : (1972) 2 All ER 898 : (1972) 3 WLR 143 (HL)] , AC at p. 455).

(6) A decision ought to be overruled if it causes such great uncertainty in practice that the parties' advisers are unable to give any clear indication as to what the courts will hold the law to be (the "rectification of uncertainty" criterion) [Jones case [1972 AC 944 : (1972) 1 All ER 145 : (1972) 2 WLR 210 (HL)] and Oldendorff (E.L.) & Co. GmbH v. Tradax Export SA [1974 AC 479 : (1973) 3 All ER 148 : (1973) 3 WLR 382 (HL)] , AC at pp. 533, 535].

(7) A decision ought to be overruled if in relation to some broad issue or principle it is not considered just or in keeping with contemporary social conditions or modern conceptions of public policy (the "unjust or outmoded" criterion) (Jones case [1972 AC 944 : (1972) 1 All ER 145 : (1972) 2 WLR 210 (HL)] and Conway v. Rimmer [1968 AC 910 : (1968) 2 All ER 304 : (1968) 2 WLR 1535 (HL)] , AC at p. 938).

***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."*

25. It is submitted that the common law system places reliance on precedents for interpreting the provisions of law and for developing legal principles in areas not covered by the statutes. The decisions of this Hon'ble Court are binding precedents, not only because of the continuance of the common law system, but also on account of constitutional mandates—express in the case of the Supreme Court. Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Therefore, the need to follow the decisions of this Hon'ble Court, more so of larger benches, is not a mere requirement of common law principle, but a constitutional mandate.

26. It is submitted that the said doctrine of stare decisis and the binding value of precedents ensure uniformity and consistency in decision-making, and equality in treatment, thereby preventing or helping to prevent bias, prejudice and arbitrariness. It is submitted that the said doctrines provides judicial discipline and consistency.

Assisted by :

Kanu Agrawal, Madhav Sinhal & Padmesh Mishra