

Law by majority - Number does not matter

SEPTEMBER 21, 2022

By Vijay Kumar

SUPPOSE there is an issue whether a particular service is liable to GST

1. A five member bench of the Supreme Court decided unanimously that it is liable (5+0)
2. This case is referred to a larger bench of seven judges and this bench by a majority of four to three over-ruled the first decision and held that it is not liable to GST. (4+3)

Now the real situation is that we have twelve judges, all of them of equal rank of the same Supreme Court and actually eight held that is liable to tax and four held that it is not. But as per the law/practice now, the second judgement holds, because it is the decision of a larger bench. Did four judges overrule the decision of eight judges? This was the question raised in this column last week. I would seek your indulgence to go back and read last week's column - [Law by majority - tear the judicial veil](#).

Is this such a big issue? Isn't it elementary? Not really. The question was raised by a Division Bench of the Supreme Court exactly five years ago on September 21, 2017 in ***Shanti Fragrances*** - [2017-TIOL-379-SC-CT](#), which referred the question to a Larger Bench of five judges.

A year earlier, Justice Madan Lokur in the ***Advocates-on-Record Association*** case had observed,

If this anomaly is perpetuated then the unanimous decision of 9 Judges can be overruled by 6 Judges in a Bench of 11 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 Judges being taken as the law!

So, the question is not all that simple. Last week, I told you that a five member bench has been constituted and heard the matter and judgement was reserved on 09 09 2022. Now, the judgement has been delivered on 19 09 2022 - [2022-TIOL-78-SC-CX-CB](#). The five member bench headed by Justice Indira Banerjee noted a previous judgement

Dr. Jaishri Laxmanrao Patil v. The Chief Minister and Others, wherein the Supreme Court had observed,

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).

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.

And so, this bench observed,

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.

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

While agreeing with the judgement written by Justice Indira Banerjee, Justice Hemant Gupta gave a separate order to supplement the opinion. He quoted from an earlier Constitution Bench judgment in ***Union of India and Anr. v. Raghubir Singh*** - [2002-TIOL-810-SC-MISC-](#) which had summed 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.

And so, he concluded:

(1) 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.

(2) 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.

So, it was decided that in view of the earlier decision of the five Judge Bench decision in ***Dr. Jaishri Laxman Rao***, it is not necessary for this Court to answer the question referred.

Though the Supreme Court decided the issue this week, this has been an issue since long. In 1988, the Supreme Court observed in ***Raghubir Singh***.

Taking note of the hierarchical character of the judicial system in India, it is of paramount importance that the law declared by this court should be certain, clear and consistent.

The doctrine of binding precedent has the merit of promoting a 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.

Legal compulsions cannot be limited by existing legal propositions, because there will always be, beyond the frontiers of the existing law, new areas inviting judicial scrutiny and judicial choice-making which could well affect the validity of existing legal dogmas.

The question then is not whether the Supreme Court is bound by its own previous decisions. It is not. The question is under what circumstances and within what limits and in what manner should the highest court overturn its own pronouncements.

Justice Chinnappa Reddy raised an interesting question in *Javed Ahmed Abdul Hamid Pawala*, **"Whether a Division Bench of three judges could overrule the judgment of a Division Bench of two judges merely because three is larger than two. The court sits in Divisions of two and three judges for the sake of convenience and it may be inappropriate for a Division Bench of three judges to overrule the decision of a Division Bench of two judges"**.

When I tried to discuss this situation with a senior tax officer, he asked me, **"why should a five-member decision again go to a larger bench? Can't they simply accept it?"**

The Supreme Court in *Raghubir Singh* observed,

a pronouncement of law by a Division Bench of this court is binding on a Division Bench of the same or smaller number of judges and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or Constitution Bench of the court. We would, however, like to think that for the purpose of imparting certainty and endowing due authority, decisions of this court in future should be rendered by Division Benches of at least three judges unless, for compelling reasons, that is not conveniently possible.

Where do we stand?

Until Next week