CHAPTER 5
JUDICIAL HIERARCHY AND THE RESULTANT NORMS

SYNOPSIS

I believe in discipline. From boyhood days on,
I have sought to discipline my own mind, pen, and tongue.
And throughout my service on the Law Faculty
I have sought to discipline the minds, pens, and tongues of the students.
I have never suffered fools gladly, and regard such sufferance as mischievous.

—Edward H. Warren, *Spartan Education* Preface

Ah! Don't say you agree with me. When people agree with me
I always feel that I must be wrong

—Oscar Wilde, *The Critic as Artist*

I

It must have been excruciatingly painful for H. M. Seervai to write:

> "In *Javed Ahmed Abdul Hamid Pawala v. Maharashtra*[1] Chinnappa Reddy J. showed gross indiscipline by refusing to accept the judgment of 3 judges which had overruled his earlier decision".

In *Triveniben v. Gujarat*[2] a Constitution Bench dealt with the conflict in the two decisions of the Supreme Court: *T.V. Vatheeswaran v. State of Tamil Nadu*, (1983) 2 SCR 348: (AIR 1983 SC 361, *Sher Singh v. State of Punjab* (1983) 2 SCR 582: (AIR 1983 SC 465) and observations in the case of *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra,* (1985) 2 SCR 8: (AIR 1985 SC 231). In *Vatheeswaram's case* a Bench of two Judges of this Court held that two years' delay in execution of the sentence after the judgment of the trial Court would entitle the condemned prisoner to ask for commutation of his sentence of

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[1]. AIR 1985 SC 231.
[2]. AIR 1989 SC 1335.

death to imprisonment for life. In *Sher Singh v. State of Punjab* it was held that delay alone is not good enough for commutation, and "two years" rule could not be laid down as no fixed period of delay could be held to make the sentence of death inexecutable. Thus the earlier decision reported in AIR 1983 SC 361 (2) laying down the "two years" rule was overruled. *Sher Singh*[3] had been decided by a Division Bench of three Judges whereas *Vatheeswaram's case* had been decided by a Division Bench[4] of two Judges. In *Javed Ahmad's Case* Division Bench consisting of Chinnappa Reddy and Venkataramiah JJ differed from the view of the Division Bench of 3 Judges. Speaking for the Court, Reddy J. justified his competence to do so stating:

> "The case also raises the further question whether a Division Bench of three Judges can purport to 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 purport to overrule the decision of a Division Bench of two Judges: vide *Young v. Bristol Aeroplane Co. Ltd. (*1944) 2 All ER 293. It may be otherwise where a Full Bench or a Constitution Bench does so. We do not however desire to embark upon this question in this case. In the present case we are satisfied that an overall view of the circumstances appears to us to entitle the petitioner to invoke the protection of Art. 21 of the Constitution. We accordingly quash the sentence of death and substitute in its place the sentence of imprisonment for life."

The matter came up before the Constitution Bench in *Smt. Triveniben, Petitioner v. State of Gujarat*[5] to resolve the conflict *inter se* the two earlier decisions by the Supreme Court. The Constitution Bench held that the Court might consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentences should be carried out or should be altered into imprisonment for life. It observed, "No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in *Vatheeswaran's case* (AIR 1983 SC 361 (2)) cannot be said to lay down the correct law and therefore to that extent stands overruled."

In the said Constitution Bench, the view of Reddy J as to the binding nature of the decision by a Division Bench of three Judges on the Division Bench of two Judges was squarely answered against in the following words: per Shetty J in his concurring judgment. —

> "The practice over the years has been that a larger bench straightway considers the correctness of and if necessary overrules the view of a smaller bench. This practice has been held to be a crystallized rule of law in a recent decision by a Special Bench of seven learned Judges. In *A. R. Antulay v. R. S. Nayak*, AIR 1988 SC 1531, Sabyasachi Mukharji, J., speaking for the majority said (at p. 1548 of AIR):

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3. Y.V. Chandrachud, C J I, V.D. Tulzapurkar and Varadrajan JJ.d.
4. Chinnappa Reddy and R.B. Misra JJ.
5. AIR 1989 SC 1335 *Triveniben v. State of Gujarat* G. L. Oza, , M. M. Dutt, , K. N. Singh, K. Jagannath Shetty and L. M. Sharma, JJ.

> "The principle that the size of the bench whether it is comprised of two or three or more judges does not matter, was enunciated in *Young v. Bristol Aeroplane Ltd*., (1944-2 All ER 293) (supra) and followed by Justice Chinnappa Reddy in *Javed Ahmad Abdul Hamid Pawla v. State of Maharashtra*, (1985) 2 SCR 8: (AIR 1985 SC 231) where it has been held that a Division Bench of two judges, has not been followed by our Courts.
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> "The law laid down by this Court is somewhat different. There is a hierarchy within the Court itself here where larger benches overrule smaller benches. See *Mattulal v. Radhey Lal*, (1975) 1 SCR 127: AIR 1974 SC 1596, *Union of India v. K. S. Subramanian*, (1977) 1 SCR 87 at p. 92: AIR 1976 SC 2433 at 2437 and *State of U.P. v. Ram Chandra Trivedi*, (1977) 1 SCR 462 at p. 473: AIR 1976 SC 2547 at p. 2555. This is the practice followed by this Court and now it is a crystallized rule of law."

Shetty J referred to Justice Frankfurter's suggestion to Mr. Rau that the full Court, not through Divisions, should exercise any jurisdiction, exercisable by the Supreme Court. Shetty J. considered it a good suggestion; but it was not accepted by our Constituent Assembly. For a proper working management in the Court, Rules have been framed. Article 145 of the Constitution confers power on the Chief Justice to constitute benches for disposal of cases.

The question with which this Chapter deals with is an important constitutional question of wide relevance. *A.R. Antulay v. R.S. Nayak*[6] answers this question with pointed crispness of a magisterial declaration: Sabyasachi Mukharji, J., speaking for the majority, said:

> "The principle in England that the size of the Bench does not matter, is clearly brought out in the decision of Evershed M.R. in the case of *Morelle v. Wakeling*, (1955 (1) All ER 708) (supra). The law laid down by this Court is somewhat different. There is a hierarchy within the Court itself here, where larger Benches overrule smaller Benches…"

1. A precedent is binding as a rule of law

It is imperative to note the import and importance of the view taken in the decision by a Special Bench of seven learned Judges in Antulay's Case that the practice, that a smaller Bench is bound by the decision of a larger Bench, has now crystallized into a rule of law. Dias has made a succinct differentiation between the rule of practice and the rule of law in the context of Note on (Judicial Practice) by which the House of Lords abolished the rule that it was bound by its decisions. To quote Dias:

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6. AIR 1988 SC 1531.

> "Are the rules regulating the binding force of precedents rules of law or of practice? the House has treated it merely as one of practice[7], which means simply that a new rule of practice has been substituted for the old and is descriptive of what the House is now doing without prejudice to what it may decide to do in future. If, on their hand, it were treated as a rule of law, there might be doubt as to whether a rule of law can be unsettled by a practice statement forming no part of the decision of any dispute."[8]

Under our Constitution there is no scope for any ambiguity on this score. For a proper working management in the Court, Rules have been framed in exercise of power under Art 145 of the Constitution. The Rules are subject to only two restrictions:

(a) the rules are subject to a Parliamentary enactment; and

(b) the rules require the approval of the President of India.

The Chief Justice constitutes benches for disposal of cases. Order VII R. 1 of the Supreme Court Rules, 1966 provides that a Bench consisting of not less than two judges nominated by the Chief Justice shall hear every cause, appeal or matter. But this rule is subject to the requirement under Art. 145(3) of the Constitution. Art. 145(3) requires a minimum number of five judges for deciding any case involving substantial question of law as to interpretation of the Constitution. In any event, the Supreme Court has to sit in benches with judges distributed as the Chief Justice desires. Order VII R. 2 of the Supreme Court Rules provides:

> "Where in the course of the hearing of any cause, appeal or other proceeding, the bench considers that the matter should be dealt with by a larger bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a bench for the hearing of it."

The Rules have the conjoint effect of building up a hierarchic structure in the Supreme Court of India, and expressly prescribes the regulating norms for it's functioning. Whilst Art 141 of the Constitution gives a constitutional status to the theory of precedents, Art 145(3) prescribes how the judgments, in which law can be declared, shall be delivered. No judgments can be delivered except with the concurrence of the majority of the Judges who heard the matter. Besides, the matrix of judicial administration operates within our constitutional framework which subjects it to an effective constitutional limitations and discipline. What distinguishes our system from that in the U.K. is the subject matter of a full Chapter entitled "On the Trident of Lord Shiva".

Justice Reddy misdirected himself by not taking note of our constitutional specifics. This led him to rely on *Young v. Bristol Aeroplane Co. Ltd.*, (1944) 2 All ER to hold that it may be inappropriate for a Division Bench of three judges to

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7. [1966] 3 All ER 77.
8. Dias, Jurisprudence 5th ed p. 132.

purport to overrule the decision of a Division Bench of two Judges. But he conceded that it "may be otherwise where a Full Bench or a Constitution Bench does so." In *Young v. Bristol Aeroplane Co. Ltd* the full Court of Appeal of six members, held:

(i) that the Court of Appeal was bound by its own decisions;

(ii) that it 'rejected the suggestion made by Greer L.J. in *Newsholme Bros v. Road Transport and General Insurance Co*, [1929] 2 K.B. 356, 384 that the full court of Appeal had grater power than a single division of the Court to overrule itself."[9]

But the rule was subjected to three significant qualifications thus by Dias:

(1) If two decisions are in conflict, the Court of Appeal must choose between them.

(2) If a decision, although not overruled, is inconsistent with a decision of the House of Lords or the Judicial Committee of the Privy Council, the Court of Appeal is not bound by it.

(3) If a decision was given *per incuriam*, i.e., in ignorance of a statute or other binding authority, the Court of Appeal is not bound by it; nor may it be bound where the previous court had followed an incomplete report of a still earlier case. The *incuria* do not apply where the previous court, which is alleged to have overlooked an earlier case, had in fact alluded to it; nor does it apply where the earlier of the conflicting cases exerted only persuasive authority.

Lord Denning M. R. in *Industrial Properties v. AEI Ltd*. has stated the British position, with remarkable precision:[10]

> "For some years now I have tried to persuade others that this court should not be absolutely bound by a previous decision which is later found to be wrong. In this effort I have failed. The law has been stated, and the reasons given, by Lord Simon of Glaisdale in *Farrell v. Alexander* [11]. But it is still open to this court to depart from a previous decision if it was given *per incuriam*; and we can so find if we can fasten on something in the previous decision and say of it; 'Here was a manifest slip or error' (see *Morelle v. Wakeling* [12])*.*

Like our Supreme Court, the Court of Appeal sits in a number divisions; and like our Supreme Court it is concerned a lot to maintain stability in the legal system. It appears that the view in *Young's Case* or *Morelle's Case* is founded on the British constitutional fiction of the royal presence in the judicial administration. The hierarchic structure in the Supreme Court of India is a constitutional creation;

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9. Allen, *Law in the Making* 7th ed p. 242.
10. [1977] 2 All ER 292 at 303.
11. [1976] 2 All ER 721 at 742.
12. [1955] 1 All ER 708 at 713.

and the ambit and reach of its judicial power is determined by our Constitution. Under our Constitution we have not preserved historical fossils. Our Constitution provides a specific perspective and prescribes norms for unflinching obedience. The fundamental rights are bound to constitute an immanent guiding factor in judicial decision-making. The British judiciary is much different for historical reasons including absence of written constitution with entrenched fundamental rights. Justice Reddy's view that it "may be otherwise where a Full Bench or a Constitution Bench does so" is also flawed for two reasons:

(i) that even in the U.K. no such idea is considered valid; and

(ii) that under our system we have a rigidly structured hierarchy in judicial decision-making erected by the Constitution and the law so that its breach would give to questions relating to the legality of decision itself.

2. The status of this rule

Once the rule concerning the binding effect is viewed as a rule of law, not a mere rule of practice, then an important question crops up. What is the effect of its beach by a court on its decision? It is submitted that this rule belongs to the category of rules to which the rule of limitations, which oust a court's jurisdiction once the breach of limitation is patent, belong. Section 3 of the Limitation Act enjoins a Court to dismiss any suit instituted, appeal preferred and application made, after the period of limitation prescribed therefore by Schedule I irrespective of the fact whether the opponent had set up the plea of limitation or not. In short, if a court violates this rule of law it acts *without jurisdiction* which renders the decision *non est.*

3. The Operational Style Of The Rule

This Chapter is not meant to catalogue the rules governing judicial precedents but it is worthwhile to epitomize certain rules before it is appropriate to move on to the next Section of this Chapter to the decision of a Division Bench (of two Judges) of the Supreme Court in *Union of India & Anr. v. Azadi Bachao Andolan & Anr*[13]. The relevant rules are thus stated:

(i) The effect of a larger Bench decision cannot be diluted or affected by a smaller Bench. [14]

(ii) If the Bench of two Judges in *Jeet Ram's case* found themselves unable to agree with law laid down in *Motilal Sugar Mills case* (a decision by another Bench of two Judges), they could have referred *Jeet Ram's Case* to a larger Bench. It was not right on their part to express their disagreement

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13. Delivered on 7-10-2003 (B N Srikrishna & Ruma Pal JJ. [2003] 263 ITR 706 (SC).
14. *Ramachandra Rao v. State of Karnataka*, AIR 2002 S C 1856.

with the enunciation of the law by a co-ordinate Bench of the same Court in *Motilal Sugar Mills.*[15] It is also settled that the effect of a larger Bench decision cannot be diluted or affected by a smaller Bench. This is what this Hon'ble Court observed in a recent decision[16]

(iii) The decision of a Constitution Bench of the Supreme Court binds a Division Bench of that Court, even if it doubts its correctness[17].

(iv) In case of conflict between the decisions of the Supreme Court, the decision of the larger bench is to be followed.[18]

II

4. When the rule is plucked up by the root

Union of India & Anr. v. Azadi Bachao Andolan & Anr[19] is one more illustration of the breach of the rule, which this author discussed in Part I of this Chapter. As I have had the highest regards for the Judiciary even a slight deviation from norms on its part is a distressing experience. It was a mere sense of public duty which led H.M. Serervai to criticize Chinnappa Reddy for his patent breach of the rule pertaining to precedents in *Javed Ahmed Abdul Hamid Pawala v. Maharashtra*[20]. This author also deems it the public duty to show how *Azadi Bachao* is one more example of judicial fault. It deserves to be criticized as a matter of public duty. For this reason this author examines the treatment meted out to *McDowell*[21] in *Azadi Bachao* in two chapters of this book: (i) "Judicial hierarchy and the resultant norms", and (ii) "*McDowell*: its decision and *ratio*".

In the Chapter on "*McDowell*: its decision and ratio" it has been pointed out that if their Lordships would have tried to explore *upakraopsamharo (the threshold and the conclusion) of* the judgment of *McDowell*, they would not have criticized the judgment by Justice Chinnappa Reddy as it contains neither the *upakrama* (the threshold issue) nor *upsamhar* (the conclusion) of the judgment. The *upakrama* and *upsamhara* are to be found only in the judgment delivered by Ranganath Misra J. on behalf of Chandrachud C.J., Desai, Venkataramiah and Ranganath Misra J. Justice Chinnappa Reddy 'entirely' agreed with the judgment

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15. *UoI & Ors v. Godfrey Phillips India Ltd.*, AIR 1986 SC 806.
16. *P. Ramachandra Rao v. State of Karnataka*, AIR 2002 SC 1856.
17. *Bharat Petroleum Corp Ltd v. Mumbai Shramik Sangh*, AIR 1998 SC 720.
"It appears to us that the matter is important and also that the observations of the Constitution Bench in Gammon (at pp. 669, 671 of SCR) : (at pp. 963, 964 of AIR) in so far as Section 10 was concerned were indeed not strictly necessary because Gammon was not a case dealing with prohibition of contract labour. Whether the restricted scope attributed to Section 10 of the Act given in Gammon (AIR 1974 SC 960) is correct or not must, in our opinion be decided independently. We are therefore of the view that this question is to be decided by a Constitution Bench."
18. *Indo-Burma Petroleum v. C.I.T.*, 136 ITR 251, 276.
19. Delivered on 7. 10.(B N Srikrishna & Ruma Pal JJ. [2003] 263ITR 706 (SC).
20. AIR 1985 S C 361.
21. *McDowell and Company Limited v. Commercial Tax Officer* AIR 1986 S 649.

delivered by Misra J. and also delivered a separate judgment confined to the points of tax avoidance, which was at the heart of the matter in the main Judgment, which, in its turn, expressed *agreement* with the supplemental judgment in specific terms in the penultimate paragraph.

Justice Reddy's judgment is *supplemental*. He supplements the main judgment by an in-depth exposition of the topic of avoidance with a view to articulating the right judicial approaches for the tax avoidance cases. At the outset of his judgment, Reddy J says:

> "While I entirely agree with my brother, Ranganath Misra, J. in the judgment proposed to be delivered by him, I wish to add a few paragraphs, particularly to supplement what he has said on the "fashionable" topic of tax avoidance".

In *Azadi Bachao* the Division Bench of the Supreme Court misses the *supplemental* character of the judgment by Chinnappa Reddy. Perhaps this mistake was made because the main judgment was treated as the 'majority judgment'. It is surprising to read in *Azadi Bachao* the Court saying: "This opinion of the majority is a far cry from the view of Chinnappa Reddy J." It even observed:

> "We are afraid that we are unable to read or comprehend the majority judgment in *McDowell's case* [1985] 154 ITR 148 (SC) as having endorsed this extreme view of Chinnappa Reddy J., which, in our considered opinion, actually militates against the observations of the majority of the judges which we have just extracted from the leading judgment of Ranganath Mishra J. (as he then was)."

The Court in *Azadi Bachao* has, through a miscomprehension, treated Justice Reddy's judgment as if it were a dissenting judgment. His ideas have been circled out as is usually done while dealing with a dissenting judgment. Salmond says [22]:

> "A dissenting judgment valuable and important though it may be. Cannot count as part of the *ratio*, for it played no part in the court's reaching the decision."

"To agree" is explained in *Collins Cobuild* thus: "If one person agrees with another or if two or more people agree, they have the same opinion as each other." The *COD* defines it as "hold a similar opinion." *"Agree"* is semantically cognate with the expression "*approve*". *Collins Cobuild* says, "If you approve of an action, event, situation, etc. you are pleased that it has happened or that it is going to happen." It defines it to mean: "Confirm authoritatively; sanction" [from Latin *approbare*, assent to as good]. In *R. v. Shivpuri*[23] Lord Bridge of Harwich in his principal speech, which sent *Anderton v Ryan* packing only after less than a year holding that if "a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected better", observed (at p. 341):

"I was not only a party to the decision in *Anderton v. Ryan*, I was also the author of one of the two opinions approved by the majority which must be taken to express the House's *ratio*."

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[22]. Salmond, Jurisprudence, 12th ed. p. 183.
[23]. [1986] 2 All ER 334 (H.L.).

The purpose of this reference to the opinion of Lord Bridge is to submit that as the "approval" by the House turns the declarations of principles in Lord Bridge's Opinion in *Ryan* as "the House's *ratio*", so the expression of agreement in the penultimate para in the Judgment of Justice Misra (for himself and the three other Hon'ble Judges) makes the principles stated by Justice Chinnappa Reddy the Constitution Bench's *ratio.* Any other view accords neither with the language used, nor with judicial decorum and propriety we are duty bound to assume. To make the expression "we agree" in the Judgment of the 4 Hon'ble Judges mean something other than the adoption of Justice Reddy's approach in *McDowell* can be done, it is submitted, only on an authority to which Lord Atkin referred in his famous dissent in *Liversidge v Anderson*[24]:

> "I know of only one authority which might justify the suggested method of construction. 'When I use a word' Humpty Dumpty said in rather scornful tone, 'it means just what I chose to mean, neither more nor less'. 'The question is,' said Alice 'Whether you can make words mean different things'. 'The question is,' said Humpty Dumpty, 'who is to be the master ---that is all."

In this author's view both the principal and the concurring judgments in *McDowell* are good law. Justice Misra in his judgment, in the penultimate paragraph, draws up an excellent summary of Justice Reddy' judgment. No better précis of Justice Reddy's judgment can be made than what is contained in the concluding paragraph of Justice Misra's judgment.[25]

The following paragraph is being quoted from the judgment in *Azadi Bachao's Case* as it contains an assortment of three reasons put forth for criticizing the judgment of Justice Reddy expressly, and the whole of the judgment in *McDowell*, by implication:

> "The judgment of the Privy Council in *Bank of Chettinad's case* [1940] 8 ITR 522, wholeheartedly approving the dicta in the passage from the opinion of Lord Russell in *Westminster's case* [1936] AC 1 (HL); [1935] 19 TC 490, was the law in this country when the Constitution came into force. This was the law in force then, which continued by reason of article 372. Unless abrogated by an Act of Parliament, or by a clear pronouncement of this court, we think that this legal principle would continue to hold good. Having anxiously scanned *McDowell's case* [1985] 154 ITR 148 (SC), we find no reference therein to having dissented from or overruled the decision of the Privy Council in *Bank of Chettinad's case* [1940] 8 ITR 522 (PC). If any, the principle appears to have been reiterated with approval by the Constitutional Bench of this court in *Mathuram's case* [1999] 8 SCC 667 at page 12. We are, therefore, unable to accept the contention of the respondents that there has been a very drastic change in the fiscal jurisprudence, in India, as would entail a

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24. (1942) A.C. 206,at 245.

25. "Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges. On this aspect one of us, Chinnappa Reddy, J., has proposed a separate and detailed opinion with which we agree."

departure. In our judgment, from *Westminster's case* [1936] AC 1 (HL); 19 TC 490 to Bank of 122 *Chettinad's case* [1940] 8 ITR 522 (PC) to *Mathuram's case* [1999] 8 SCC 667, despite the hiccups of *McDowell's case* [1985] 154 ITR 148 (SC), the law has remained the same."

Critically studied, the aforementioned paragraph brings out the following two reasons for treating *McDowell* the way it has been treated: they are---

(i) As the judgment of the Privy Council in Bank of *Chettinad's case* [1940] 8 ITR 522, wholeheartedly approved the dicta in *Westminster's case* [1936] AC 1 (HL); [1935] 19 TC 490, and as the law declared by the Privy Council continued to be the law of the land in terms of Art 372 of the Constitution, the Constitution Bench was not correct in *McDowell* in departing from it.

(ii) As the principle set forth in *Westminster's case* appears to have been reiterated with approval by the Constitution Bench of this court in *Mathuram's case* [1999] 8 SCC 667 at page 12, *McDowell* must be held to erred in taking a different view.

Mr. Sorabji, the counsel for *McDowell & Co* had relied on *Bank of Chettinad Ltd v. CIT*. Besides, he relied on *CIT v A Raman & Co*; *CIT v. B. M. Kharwar*; *Jiyajerao Cotton Mills Ltd v. CEPT*; and *CIT v. Sakarlal Balabhai*, but had lost the case. Justice Misra in his main judgment quoted with an implied approval a whole paragraph from the speech of Viscount Simon in *Latilla v. IRC*[26] which is the *locus classicus* of the new approach in tax-jurisprudence of which *McDowell* is as great a crowning achievement in India as *Furniss* is in England. He said:

"Of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income, without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods maybe, those who adopt them are "entitled" to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary one result of such methods, if they succeed, is of course to increase *pro tanto* the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these maneuvers. Another consequence is that the Legislature has made amendments to our Income Tax Code which aim at nullifying the effectiveness of such schemes."

It deserves to be noted that Justice Reddy too had quoted Viscount Simon's observations with his clear approval. These ideas resonate in his judgment all along, to quote a fragment:

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26. (1943) 25 Tax Cas 107.

> "In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it."

The Privy Council in *Bank of Chettinad Ltd v. CIT*[27] was dealing with a *bona fide* situation clearly coming within the category to which the situation in the *Duke of Westminster* belongs. It examined facts to see whether there was a business connection within the meaning of Section 42 of the Income-tax Act, 1922. The Privy Council held in favour of the Revenue. In *Mathuram Agrawal v. State of M.P.*[28], this Hon'ble Court referred to *Bank of Chettinad Ltd. v. Commr. of Income-tax* and *Inland Revenue Commissioner v. Duke Westminster* but *McDowell & Co. Ltd v. CTO* was not even referred. The Hon'ble Court was considering matters relating to M .P. Municipalities Act (37 of 1961), S.127A(2)(b) to see whether certain provisions were *ultra vires* the charging section. The fact-situation was a *bona fide* situation involving statutory construction. The Constitution Bench in *Mathuram* said nothing about *McDowell*, though its awareness cannot be doubted. It presented a *bona fide* situation. It is a manifest error to say that this Constitution Bench decision had to deal with a situation with which *McDowell* dealt with. In the case of *Bank of Chettinad Ltd. v. Commr. of Income-tax*, Madras, (AIR 1940 PC 183), the Privy Council quoted with approval a passage from the opinion of Lord Russell of Killowen in *Inland Revenue Commissioners v. Duke of Westminster*, (1936) AC 1.The Hon'ble Court was not examining what should be the right judicial approach in a case involving a camouflage causing wrongful gains to the treaty-shoppers and wrongful loss to the people of India. It was not a case wherein there is a clear evasion of reality by excluding transparency so that a good faith arrangement is used to promote bad faith of deriving profits contrary to law and justice. In *CWT v. Arvid Narottam*[29], the Court did not consider it appropriate to invoke *McDowell* as it was dealing with a *bona fide* situation involving no cover-up. In *Mathuram Agrawal v. State of M.P.*[30], this Hon'ble Court considered matters relating to M .P. Municipalities Act (37 of 1961), S.127A(2)(b) to see whether certain provisions were *ultra vires* the charging section: it was a bona fide situation involving merely statutory construction. *Arvid Narottam*, *Mathuram*, and the *Bank of Chettinad* belong to a group evidently distinct from the group to which *McDowell* belongs.

It is submitted that the Court was mistaken in thinking that the law declared in *Bank of Chettinad,* which approved *the Westminster,* was binding on the Supreme Court in view of Art. 372 of the Constitution of India. The Hon'ble Court observed:

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[27]. AIR 1940 P.C. 183 [Lord Russell of Killowen, Sir Lancelot Sanderson, and Sir M.R. Jayakar].
[28]. AIR 2000 S C 109.
[29]. (1998) ITR 479 SC.
[30]. AIR 2000 S C 109.

> "Unless abrogated by an Act of Parliament, or by a clear pronouncement of this Court, we think that this legal principle would continue to hold good".

Art 372 of the Constitution deals with the continuance in force of existing laws even after the commencement of the Constitution. With respect it is submitted that:

(a) what *McDowell* declares is the law which is binding on all courts within the territory of India by Art 141 of the Constitution; and

(b) the Hon'ble Court missed to see that facts in the *Bank of Chettinad* or *Mathuram Agrawal* are as different from those of *McDowell* as chalk is from cheese. The *Bank of Chettinad* did not deal with the bad-faith operators causing wrongful gains to itself by causing wrongful loss to others.

Even the Privy Council's *Bank of Chettinad*, which *Azadi Bachao* purported to follow, was a decision by only three judges [(AIR 1940 P.C. 183 (Lord Russell of Killowen, Sir Lancelot Sanderson, and Sir M.R. Jayakar)] whereas *McDowell* was by a Constitution Bench of five Judges. It is surprising that in *Azadi Bachao* observed:

> "And as far as this country is concerned, the observations of Shah J. in *CIT v. Raman* [1968] 67 ITR 11 (SC) are very much relevant even today."

despite the fact that not only this view was rejected in Justice Reddy's Judgment in *McDowell*, it was noticed in specific terms in the main Judgment by Misra J. in *McDowell* which in its summing-up observed:

> "On this aspect, one of us, Chinappa Reddy J. has proposed a separate and detailed opinion with which we agree."

It is to be noted that the main judgment had taken specific cognizance of Justice Shah's dicta in *Raman's Case,* which had repeated almost verbatim the observations in *Westminster* (1936 AC 1) and *Fishers Executors* (1926 AC 395). The main judgment mentions that the counsel of the appellant cited and relied not only on *Raman* but also on *Commr. of Income-tax v. Kharwar*, 72 ITR 603 (AIR 1969 SC 812). Immediately thereafter the main judgment refers to *Latilla.*

III

It can be argued that in *Azadi Bachao* there is no departure from the main judgment delivered by the four judges as it *disapproves* only the thesis advanced by Justice Reddy in his supplemental judgment. But it is difficult to agree with this sort of view for the following reasons:

(i) The following two observations in *Azadi Bachao* amply indicate that the whole of *McDowell* was in the firing range:

"We are, therefore, unable to accept the contention of the respondents that there has been a very drastic change in the fiscal jurisprudence, in India, as would entail a departure. In our judgment, from *Westminster's case* [1936] AC 1 (HL); 19 TC 490 to *Bank of Chettinad's case* [1940] 8 ITR 522 (PC) to *Mathuram's case* [1999] 8 SCC 667, despite *the hiccups of McDowell's* case [1985] 154 ITR 148 (SC) the law has remained the same." (Italics supplied)

"It thus appears to us that not only is the principle in *Duke of Westminster's case* [1936] AC 1 (HL); 19 TC 490 alive and kicking in England, but it also seems to have acquired judicial benediction of the Constitutional Bench in India, notwithstanding the *temporary turbulence* created in the wake of *McDowell's Case* [1985] 154 ITR 148 (SC)."

It was beyond the jurisdiction of a Division Bench of the Supreme Court to treat the views of Justice Chinnappa Reddy in *McDowell*, with which all other 4 Hon'ble Judges had agreed, as a mere "hiccup" and "temporary turbulence". Not only this is against judicial decorum, it is beyond its jurisdiction.

It also produces a gross miscarriage of justice when a smaller Bench refuses to be bound by the decision of a larger Bench as it destroys the integrity of our judicial delivery system. If the Division Bench of two judges departs from the decision of the Constitution Bench by dubbing it a "temporary turbulence" and "hiccups", there would be good reason to believe that justice becomes a casualty in some way. "A hiccup" is a small problem or difficulty, usually one which can be fairly easily put right" (*Collins Cobuild English Language Dictionary*) "Turbulence" is "a state of confusion and constant, disorganized change". It is humbly submitted that this is what has happened in this case.

(ii) It was improper to treat the supplemental judgment by Justice Reddy as if it were a dissenting judgment worthy to be excluded in determining the ratio of *McDowell.* There is no "a far cry" between the supplemental and the main judgment in *McDowell.* Chinnappa Reddy J. observed: "In our view the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether a provision should be construed literally or liberally nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it." In *Azadi Bachao* the Court commented with barbs:

"We are afraid that we are unable to read or comprehend the majority judgment in *McDowell's case* [1985] 154 ITR 148 (SC) as having endorsed this extreme view of Chinnappa Reddy J., which, in our considered opinion, actually militates against the observations of the majority of the judges which we have just extracted from the leading judgment of Ranganath Mishra J".

It is impermissible for the Division Bench of two Hon'ble Judges to cast a verdict on the judgment of the Constitution Bench this way.

(iii) The Division Bench of two Hon'ble Judges in *Azadi Bachao* went to the extent of strange mind reading of the Constitution Bench, which decided *McDowell*. The Division Bench said that

> " …….though Chinnappa Reddy J. dismissed the observation of J. C. Shah J. in *CIT v. A. Raman and Company* [1968] 67 ITR 11 (SC) based on *Westminster's Case* [1936] AC 1 (HL); 19 TC 490 [68] and *Fisher's Executors case* [1926] AC 395 at 412 (HL), by saying ([1985] 154 ITR) "we think that the time has come for us to depart from the Westminster principle as emphatically as the British courts have done and to dissociate ourselves from the observations of Shah J., and similar observations made elsewhere", it does not appear that the rest of the learned judges of the Constitutional Bench contributed to this radical thinking.

The reason advanced to show a perceptual difference *inter se* the judgment of Justice Reddy and the main judgment delivered by Misra J is amazing. The author would show, on the analysis of the observation of Misra J, that there is no difference between the supplemental and the main judgments. To discover a difference, where it does not exist, is unfair.

IV

The right approach is what has been adopted by the 3-Judges Bench of our Supreme Court in *Commr of Central Excise v. Ratan Smelting & Wire*, (2005) 2 SCALE 280 :

> "…. we feel that the earlier judgment in *Dhiren Chemical's* case being by a Bench of five Judges, it would be appropriate for a bench of similar strength to clarify the position. In the circumstances, we refer the matter to a larger bench of five Hon'ble Judges. Let the papers be placed before Hon'ble the Chief Justice of India for constituting an appropriate Bench."

If the Judges had any lingering doubt about what was decided in *McDowell* the only proper course was to refer the matter to a larger Bench to clarify the correct position. Judicial doubts may be better than ordinary mortals' certainties, yet the decorum of the constitutional conduct cannot be given a go-by. In England it may be possible, as *Rothwell v. Caverswall Stone Co. Ltd.*[31] shows, to treat the perception of conflict *inter se* cases as a mere matter of individual interpretation of the cited cases, but in our country no such thing is possible that way. As the decision in *McDowell* was by the Constitution Bench, the only course open to the Division Bench in *Azadi Bachao* was to refer the issue to a larger bench for interpretation involving the narrowing or widening of principles stated in *McDowell*.

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31. [1944] 2 All ER 350.