CHAPTER 4
THE FRONTIERS OF THE DOCTRINE OF *EX DEBITO JUSTITIAE*

SYNOPSIS

It has not been unknown that judges persist in error to avoid giving the appearance of weakness and vacillation.

—Frankfurter in *Craig v. Harney* 331 U.S. 367, 392 (1947)

Justice has been described as a lady who has been subject to so many miscarriages as to cast serious reflections upon her virtue.

—Prosser, *The Judicial Humorist*, Preface

1. Remedy after Review under Art 137 of the Constitution (The Rule in Rupa's Case)

In *Rupa's Case*[1] on appreciation of the arguing counsels' "unanimous approach to plead that even after exhausting the remedy of review under Art.137 of the Constitution, an aggrieved person might be provided with an opportunity under inherent powers of this Court to seek relief in cases of gross abuse of the process of the Court or gross miscarriage of justice because against the order of this Court the affected party cannot have recourse to any other forum," this Hon'ble Court formulated the question for judicial consideration thus:

1. *Rupa Ashok Hurra v. Ashok Hurra* AIR 2002 SC 1771.

> "whether an order passed by this Court can be corrected under its inherent powers after dismissal of the review petition on the ground that it was passed either without jurisdiction or in violation of the principles of natural justice or due to unfair procedure giving scope for bias which resulted in abuse of the process of the Court or miscarriage of justice to an aggrieved person."[2]

Our Supreme Court, in *Rupa's Case*, referred to the provisions of O. XL, R. 5 of the Supreme Court Rules that bars further application for review in the same matter. The Court formulated a pointed question to be answered in the case: whether any relief can be given to the petitioners who challenge the final judgment of this Court, though after disposal of review petitions, complaining of the gross abuse of the process of Court and irremediable injustice." The Court invoked the well-known maxim of *Interest reipublicae ut sit finis litium"*[3], and stated its effect:

> "The concern of this Court for rendering justice in a cause is not less important than the principle of finality of its judgment."

The Court weighed in its judicial calculus the competing public interests in the effective administration of justice and the stability of law, and came to a conclusion well in tune with the highest tradition of our Judiciary:

> "We are faced with competing principles ensuring certainty and finality of a judgment of the Court of last resort and dispensing justice on reconsideration of a judgment on the ground that it is vitiated being in violation of the principle of natural justice or apprehension of bias due to a Judge who participated in decision-making process not disclosing his links with a party to the case, or abuse of the process of the Court. Such a judgment, far from ensuring finality, will always remain under the cloud of uncertainty."[4]

which led this Hon'ble Court, in that case, to the following upshot:

> "The upshot of the discussion in our view is that this Court, to prevent abuse of its process and to cure a gross miscarriage of justice, may reconsider its judgments in exercise of its inherent power."

This Hon'ble Court rightly drew out the two vitiating blemishes: "the abuse of judicial process' and " miscarriage of justice", but failed in drawing up their necessary corollaries. The Hon'ble Court narrowed these two vitiating factors without considering the lethal consequences of their narrowing on the administration of justice, as the narrowed and constricted norms virtually denude the doctrine of *ex debito justitiae* of its wide content.

In *Rupa's Case* this Hon'ble Court considered the prescriptions to ward off apprehension of over-flooding with second review "as a matter of course in the guise of a curative petition under inherent power." It recognized that it "is neither

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2. *Ibid* 1782 para 23.
3. *Ibid* 1786 para 40.
4. *Ibid* p. 1787 para 42.

advisable nor possible to enumerate all the grounds on which such a petition may be entertained."

And then the Court prescribed the conditions and parameters for the operation of the Curative process in exercise of its inherent power:

> "Nevertheless, we think that a petitioner is entitled to relief *ex debito justitiae* if he establishes (1) violation of principles of natural justice in that he was not a party to the lis but the judgment adversely affected his interests or, if he was a party to the lis, he was not served with notice of the proceedings and the matter proceeded as if he had notice and (2) where in the proceedings a learned Judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner."[5]

On reading the above-mentioned judicial observation, one notices the following three points:

(i) The language in which the conditions are prescribed make it clear that this Hon'ble Court is not chartering the *full field* of the doctrine of *Ex debito justitiae*, but is describing only two of its imperative norms as grounds for judicial intervention;

(ii) Though the Court referred to the wide expressions (" the prevention of the abuse of its process of the court" and "the curing a gross miscarriage of justice"), it observed that:

> "It is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained."

The Court, in effect, while articulating the operative formulations drew up the frontiers of the doctrine in such words which rob it of much of its plenitude recognized all along by the Superior Courts in India and England.

(iii) The entitlement to obtain judicial correction of the impugned judgment is predicated on two conditions:

(1) violation of principles of natural justice 'in that' he was not a party to the *lis* but the judgment adversely affected his interests or, if he was a party to the *lis*, he was not served with notice of the proceedings and the matter proceeded as if he had notice; and

(2) where in the proceedings a learned Judge failed to disclose his connection with the subject matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.

The expression "in that" in the Court's judicial formulation reveals a semantic narrowing of the referent. This expression in plain language means: "You use "in

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5. *Ibid* p.1789 para 51.

that" to introduce the reason for the statement you have just made".[6] The first prescription for the remedy *Ex debito justitiae* is extremely formal as it considers only "impleading" and "notice" in themselves sufficient compliance. This sort of compliance is, no doubt, essential, but the rule of *Audi alteram partem can* get frustrated in many other ways. How can the requirement of this rule be considered fully met if serious lapses detrimental to the proper administration of justice take place in a given case in course of a judicial proceeding itself? The following paragraph contains a summary of lapses, which had actually taken place in a PIL (*Azadi Bachao*)[7] before a Division Bench of our Supreme Court[8]:

> "The core issue of Treaty Shopping was decided in a patent breach of the rule of *audi alteram partem* as (a) as Lord McNair has been misread to see X where it is Y; (b) as the Conduit Company Report 1987 was used in breach of the rule compounded by the error of overlooking that the view was later revised and departed from in several jurisdictions (pp. 172-176 of the Curative); (c) as many material observations are based on mere surmise having the effect of accepting the slur that the then Attorney-General chose to inflict by implication, in breach of the rule of natural justice, on Mrs. Indira Gandhi and Mr. Pranab Mukherjee as they had gone to Mauritius in 1982 when the Indo-Mauritius DTAC was under negotiation; (d) as the entire admitted factual substratum in the PIL was not considered by circling out the facts in the Assessment of Cox & Kings by overlooking the settled law accurately stated in Mulla [in his CPC 14th ed at p 868]; (e) as the sole reasoning for upholding Treaty Shopping is based on three long paragraphs from an interested person's worthless book, meant for tax haven masqueraders (which is a mere shabby defence of fiscal vampirism based on no judicial authority) utilized by the Hon'ble Court contrary to the rule of *audi alteram partem*; (f) as the perspective judicially mandated by *McDowell* and many other decisions of larger Bench was missed having deleterious effect on the operation of the rule of *audi alteram partem* and fundamental principles of justice."

2. Taints can overtake even after a proper commencement

The content of the rule of *Audi alteram partem* is not exhausted by the norms governing the two situations spelt out in the Court's observation quoted above. Even if someone may be a party to a proceeding and has sufficient notice thereof, yet the decision of the court may contravene the sacred rule. De Smith crisply states the law on this point[9]: "…in the *Anisminic* case members of the House of Lords emphatically repudiated the idea that the jurisdiction of an inferior tribunal was determinable only at the outset of its inquiry…" He spelt out four

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6. Collins Cobuild English Language Dictionary.
7. *Union of India & Ar. v. Azadi Bachao Andolan & Ar.* (2003) 263 ITR 706 SC.
An extract from the Summary of Points submitted in course of the Curative Petition.
8. An extract from the Summary of Points submitted in course of the Curative Petition filed against the Judgment in *Union of India and Another v. Azadi Bachao Andolan and Another*. [2003] 263 ITR 706.
9. De Smith, *Judicial Review of Administrative Action* 4th ed. p. 110-111.

situations in which a tribunal having jurisdiction over the matter in the first instance might exceed its jurisdiction:

(i) by breaking the rules of natural justice,

(ii) by applying a wrong legal test and answering the wrong question,

(iii) by failing to take relevant considerations into account, or

(iv) by basing the decisions on legally irrelevant considerations

Commenting on de Smith's statement of what was done in *Anisminic*, H.M. Seervai comments:

> "But this was nothing new, for…that idea had already been rejected in a number of earlier cases: *R. Nat Bell Liquors Ltd* (1922) A.C. 128, 156."[10]

3. The inherent power of Court and the concept of *ex debito justitiae*

"The inherent power," observes the Supreme Court in *Manoharlal v. Seth Hiralal*[11], "has not been conferred on the Court; it is a power inherent in the Court by virtue of its duty to do justice between parties before it." Section 151 of the Civil Procedure Code explains the ambit of the concept thus:

> "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

"The Court has, therefore, in many cases, where the circumstances require it, acted upon the assumption of the possession of inherent power to act *ex debito justios*. And to do that real and substantial justice for the administration for which alone it exists. But the power relates to matters of procedure."[12]

This author is of opinion that it is not correct to subsume the entire gamut of the court's inherent power under the conventional rubric of power *ex debito justitiae*. *Ex debito justitiae* contemplates that segment of inherent power, which must be exercised by the court as a matter of judicial duty if the proper circumstances for the exercise is pleaded. We have created the various constitutional organizations with expectations for public good. Our expectations from such organs become, by an inevitable logic, their duties, some mandatory others not. If the lapses, the correction of which are contemplated by the doctrine, occur in a judicial proceeding, the Court is under a duty to set the lapses right. This import emerges clearly from the definitions of the doctrine: it means -

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10. *Ibid* p. 113.
11. AIR 1962 SC 527.
12. Mulla, C.P.C. 14th ed. p. 784.

(i) As a matter of right; in opposition to a matter for the favour of or discretion. *Mozley Whiteley's Law Dictionary*

(ii) As debt of justice. As a matter of legal right. 3 *Bla. Com*. 48

(iii) It is well-established principle of law that every court has inherent power to act *ex debito justitiae*---to do that real and substantive justice for the administration of which alone it exists or to prevent abuse of the court. *Dinesh Dutt Joshi v State of Rajasthan* 2000 (8) SCC 570

(iv) From or as a debt of justice; in accordance with the requirement of justice; of right; as a matter of right. *Black's Law Dictionary* 7th ed.

It is a metaphor of great power and wide suggestion that the remedy that the court provides proceeds *ex debito* (from debt). In a sense, it is the court's debt, which is being discharged so that the administration of justice does not suffer. Those who have suffered from any remissness of the judicial process are entitled to remedy *ex debito justitiae*, by right. Once such lapses are shown to exist, the court has no discretion but to intervene *ex debito justitiae*. The court owes a debt to him, he must be given an opportunity to establish his case because, if he can make out a case, he is entitled to a remedy *ex debito justitiae*. It is worth mentioning that our Supreme Court missed this vital point otherwise it would not have prescribed the consideration of the Curative Petition in chamber by circulation. It is for this reason that this author, as a petitioner, had requested the Court, while his Curative Petition against the Division Bench decision in *Azadi Bachao* was on the board for disposal, that an opportunity to be heard must be given to the Petitioner. The specific reasons for this prayer contained, *inter alia*, the following reasons:

> "This is the rarest of the rare cases wherein Justice demands an Oral Hearing in disposing of the matter *ex debito justitiae*. This Petitioner has submitted in his Petition for Oral Hearing stating detailed reasons in support of the prayer as it is one of "some cases [where] the right to make written representations may not suffice" [per Lord Dilhorne *in Pearlberg v Varty* (1972) 1 WLR 534 HL], and it is a case where the grant of oral hearing would, to borrow the words of Lord Templeman in *McMahon* (1987) 2 WLR 869, 889, validate or reinforce "possible defenses foreshadowed in those written representations". Though by judicial interpretation "circulation" of the petition was interpreted to mean that the matter is to be discussed by the Hon'ble Judges (AIR 1980 SC 808 para 13), yet there can be some rare cases where Justice would languish if hearing is not granted. This is one such case.……
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> That this humble Petitioner has submitted in his Curative Petition that the impugned Judgment of this Hon'ble Court (i) has caused serious distortions of law, both statutory and constitutional; (ii) is vitiated by the breach of the rules of Natural Justice even on core issues; (iii) has gone on several points beyond its jurisdiction; (iv) has caused serious miscarriage of justice because of several patent errors and evident misdirection; (v) has wrongly decided many issues of greatest importance

> for the people of the Republic of India; (vi) has gone against the decision of the Constitution Bench (in *McDowell & Co v. CTO* [13], followed in many cases, by dubbing it a "hiccup" and "a temporary turbulence" (which act is patently without jurisdiction); and (vii) has, instead of deciding issues on legality, invoked totally extraneous political and economic reasons when in the whole corpus of the income-tax law policy quotient is legislatively enacted to become legal provisions leaving no scope for the operation of any doctrines of political prudence, economic holism, or of Necessary Evil…….
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> Whilst the Curative Petition sets forth in detail, it would be clear from the Opinion of Dr Upadhyaya[14] that the Hon'ble Court made a patent mistake in reading Ch XVII of Lord McNair's book; and this misreading and apparent error led it to sustain what amounts to a clear fraud on the law and the Constitution; and it would be clear from the Opinion of Prof August[15], an authority of international renown, how the courts in common law and civil law countries prevent *financial vampirism* through judicial process itself
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> That the Petitioner feels that under the decision-making procedure provided in *Rupa's case* justice might become a casualty if an open oral hearing is not given. The three Hon'ble Judges considering this matter for the first time would surely require this Petitioner's assistance to prove his points made in the Curative. There are still greater reasons why this Curative be heard in the open court. As the Hon'ble Judges who had decided the appeal and disposed of the Review would also consider this Curative, justice requires that an opportunity to this Petitioner to prove his points be given. This is all the more needed as stock-responses and inhibitions can lead to situations which Justice Frankfurter contemplated when he said in *Craig v Harne* (331 US 367,392 (1947): "It has not been unknown that judges persist in error to avoid giving the appearance of weakness and vacillation…"

But he could not succeed in persuading the Court to grant a hearing. The Curative Petition was dismissed as, in the Court's view, it was not in accordance with the parameters prescribed in *Rupa's Case*. It would have been appropriate to hear the petitioner on the reach and the ambit of *Rupa's Case*.

There is one more aspect of the matter. After the commencement of our Constitution the reach and ambit of the doctrine of *ex debito justitiae* are no longer what it was when the framework of reference was the Civil Procedure Code alone. Whenever a petitioner contends that his fundamental rights are breached, the Court's role and observation-post both change. Not only it should refuse to be astute to frustrate granting a remedy, but it should, to quote Earl Warren, "exercise the functions of the office to the limits of its responsibilities."

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13. 154 ITR, 148 SC.
14. Former Prof & Dean of the University Dept of Law, Calcutta University.
15. Professor of Business Law, Washington State University and the author of *International Business Law* (4th ed. 2004).

4. Judicial Correction *Ex debito justitiae*

On analysis and examination of decided cases a set of principles emerge which can cumulatively be considered the *categorical imperatives* of the doctrine of *Ex debito justitiae*. These can be classified under three heads:

I. ILLEGALITY	**Substantive *ultra vires*** (i) Decision *per incuriam* of the constitutional or statutory provisions; (ii) Decisions *per incuriam* of the binding judicial decisions;
II. PROCEDURAL IMPROPRIETY	**Procedural *ultra vires*** (i) Decisions without *jurisdiction*; (ii) Decisions in breach of *the Rules of Natural Justice*; (iii) Decisions tainted with *irrationality* (Objective unreasonableness).
III. *Actus Curiae Neminem Gravabit* **(An act of the Court shall prejudice no man)**	

In effect, essentially these grounds are one ground: *ultra vires*. The doctrine of *ultra vires* applies under our constitutional system as all the organs (including the judiciary) are the organs of the State.

5. Decision *per incuriam* of the constitutional or statutory provisions

On precedents and principles it is settled that the courts are competent to grant remedy *Ex debito justitiae* in the following situations:

(i) Where a fundamental right is violated. In *A. R. Antulay v. R. S. Nayak and Anr*[16] this Hon'ble Court observed:

> "In our opinion, we are not debarred from re-opening this question and giving proper directions and correcting the error in the present appeal, when the said directions on 16th February, 1984, were violative of the limits of jurisdiction and the directions have resulted in deprivation of the fundamental rights of the appellant, guaranteed by Articles 14 and 21 of the Constitution. The appellant has been treated differently from other offenders; accused of a

16. *A. R. Antulay v. R. S. Nayak and Anr.* AIR 1988 SC 1531 at 1554.

similar offence in view of the provisions of the Act of 1952 and the High Court was not a Court competent to try the offence. It was directed to try the appellant under the directions of this Court, which was in derogation of Article 21 of the Constitution."[17]

"We are clearly of the opinion that the right of the appellant under Article 14 regarding equality before the law and equal protection of law in this case has been violated. The appellant has also a right not to be singled out for special treatment by a Special Court created for him alone. This right is implicit in the right to equality. See *Anwar Ali Sarkar's case* (AIR 1952 SC 75)……"[18]

"In *Nawabkhan Abbaskhan v. State of Gujarat*, (1974) 3 SCR 427: (AIR 1974 SC 1471), it was held that an order passed without hearing a party which affects his fundamental rights, is void and as soon as the order is declared void by a Court, the decision operates from its nativity. It is proper for this Court to act *ex debito justitiae*[19]."

(ii) Where a statutory provision is not perceived or where binding judicial decisions are not followed.

"… We are correcting an irregularity committed by Court not on construction or misconstruction of a statute but on non-perception of certain provisions and certain authorities which would amount to derogation of the constitutional rights of the citizen."

(iii) Where statutory provisions stand disregarded. The Court of Appeal observed in the *Bristol Aeroplane Case*[20]:

"It cannot be right to say in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own when that provision was not present to its mind. Cases of this description are examples of decision given *per incuriam*."

It is a fundamental proposition of our constitutional law that "*the Constitution and the laws bind every court in India, and that though the courts are free to interpret, they are not free to overlook or disregard the Constitution and the laws*"[21] [italics supplied]

6. Decisions without jurisdiction

"Jurisdiction" of a Court involves an exercise of the judicial power, which is derived from the judicial power of the State. "Jurisdiction" means:

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17. *A. R. Antulay v. R. S. Nayak and Anr*. AIR 1988 SC 1531 at 1549.
18. *Ibid* p 1554 para 60.
19. *Ibid*. p.. 1554 para 62.
20. (1944) 1 K.B. 718.
21. H M Seervai, *Constitutional Law of India* 4th ed p. 2677.

> "…the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended."

It is within this 'jurisdiction' that judicial power is exercised. "Judicial power" means:

> "….the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

If a Court exceeds the limitations on its "jurisdiction", or ignores (or overlooks) the rules of procedural fair play, the Court would "abuse" the judicial process causing a "miscarriage of justice"[22]. In *A. R. Antulay v. R. S. Nayak and Anr* our Supreme Court states:

> "The Privy Council in *Debi v. Habib*, (1913) ILR 35 All 331, pointed out that an abuse of the process of the Court may be committed by the court or by a party. Where a court employed a procedure in doing something that it never intended to do and there is an abuse of the process of the court it can be corrected. Lord Saw spoke for the Law Lords thus: -
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> > "Quite apart from section 151, any court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made."

It was pointed out by the Privy Council in *Murtaza v. Yasin*, AIR 1916 PC 89 that:

> "Where substantial injustice would otherwise, result, the court has, in their Lordships' opinion, an inherent power to set aside its own judgments of condemnation so as to let in *bona fide* claims by parties .....".

Indian authorities are in abundance to support the view that injustice done should be corrected by applying the principle *actus curiae neminem gravabit* – "an act of the Court shall prejudice no one"[23]. In *Antulay's Case* Ranganath Misra J. observed:

> "Brother Mukharji has referred to several authorities in support of his conclusion that an order made without jurisdiction is not a valid one and can be ignored, over-

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22. Miscarriage of justice is a term of art: the *New Shorter Oxford Dictionary English Dictionary* defines it thus: "miscarriage of justice is a failure of the judicial system to attain the ends of justice.' But the 6th edition of the *Concise Oxford Dictionary* puts it more accurately when it defines it to mean "failure of court to attain the ends". *Collins Cobuild English Language Dictionary* explains it to mean "A miscarriage of justice is a wrong decision made by a court, which has the result that an innocent person is punished."

23. *A. R. Antulay v. R. S. Nayak and Anr*. AIR 1988 SC 1531 at 1570 para 105.

looked or brushed aside depending upon the situation. I do not propose to delve into that aspect in my separate judgment".[24]

"The Judge had jurisdiction to correct his own error without entering into a discussion of the grounds taken by the decree-holder or the objections raised by the judgment-debtors."[25]

In *Govind Menon v Union*[26] the Sup Ct said:

'A clear distinction must, therefore, be maintained between want of jurisdiction, and the manner in which it is exercised. If there is want of jurisdiction, then the matter is *coram non judice* and a writ of prohibition will lie to the Court or inferior tribunal forbidding it to continue proceedings therein in exercise of its jurisdic

The exercise of power within "jurisdiction" must conform to certain basic principles of justice *otherwise the Court would exceed its jurisdiction.* The following observations of *de Smith* deserve to be noted:[27]

"As a general rule, wrongful rejection of evidence by an inferior tribunal is not of itself a ground for the issue of mandamus or certiorari since it does not constitute a refusal or excess of jurisdiction but is merely an erroneous exercise of jurisdiction which is not redressable except on appeal. There are three main exceptions to this rule:

(a) *Where the refusal to admit evidence amounts to a refusal to hear a party before the tribunal,* or to a refusal to accord a hearing that complies with the *audi alteram partem* rule of natural justice, in which case certiorari will issue to quash the decision.

(b) *Where a refusal to admit evidence amounts to a refusal of jurisdiction*. This situation arises where the tribunal's reason for rejecting the evidence is that it believes, erroneously, that it has no authority to determine the matter which the evidence is designed to prove."

(c) *Even refusal to receive evidence may amount to a refusal to exercise jurisdiction.* Prof Wade has summarized this point by stating "Refusal to receive evidence on some relevant point may also amount to refusal of jurisdiction… Refusal to consider a party's case also has to be distinguished from refusal to accept his argument. As Lord Goodard CJ said:

'…to allow an order of mandamus to go there must be a refusal to exercise the jurisdiction. The line may be a very fine one between a wrong decision and a declining to exercise jurisdiction; that is to say, between

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24. *A. R. Antulay v. R. S. Nayak and Anr*. AIR 1988 SC 1531 at 1568 para 99.
25. Mahajan, J. speaking for a four-Judge Bench in *Keshar Deo v. Radha Kissen*, 1953 SCR 136, at page 153 : (AIR 1953 SC 23 at p. 28).
26. AIR 1967 SC 1274, 1277 The Court discussed the jurisdiction to grant a writ of prohibition with reference to English authorities p. 1277.
27. De Smith, *Judicial Review of Administrative Action* 4th ed. pp. 344-345.

finding that a litigant has not made out a case, and refusing to consider whether there is a case…"[28]

7. Anachronistic view of 'jurisdiction"

Rubinstein in his *Jurisdiction and Illegality* says:

> ".....In practice, every act made by a superior Court is always deemed valid (though, possibly, voidable) wherever it is relied upon. This exclusion from the rules of validity is indispensable. Superior Courts are the final arbiters of the validity of acts done by other bodies; their own decisions must be immune from collateral attack unless confusion is to reign. The superior Courts decisions lay down the rules of validity but are not governed by these rules."[29]

The idea that the decision of the apex court is beyond questioning even when it is nullity, or it causes a gross miscarriage of justice has nothing to commend itself. The Privy Council in *Calvin v. Carr* considered the implications of "void" and "voidable"[30]. A decision reached in violation of the principles of natural justice is void but until it is so declared by the court it has the existence in law. The inherent contradiction between the first two sentences in the definition as given by Rubinstein deserves to be noted. Even our apex court has never claimed to be above law and justice. "Lord Hailsham was right when he reminded the judges in his *Hamlyn Lectures* that the rule "Be you ever so high, the law is above you" applies to the judges as it applies to ministers. Rubinstein approves of a collateral attack only if "confusion is to reign". What precisely he means is what Sydney Smith says:

> "The only way to make the mass of mankind see the beauty of justice, is by showing them, in pretty plain terms, the consequences of injustice."

8. The conventional view of "jurisdiction"

De Smith has accurately stated the conventional view thus[31]:

> "Whenever a judicial tribunal is empowered or required to inquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on application for certiorari but are binding until reversed on appeal. *Where a court has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it was wrong in law or in fact.* It does not lose its jurisdiction even if its conclusion on any aspect of its proper field of inquiry is entirely without evidential support. The question whether a tribunal has jurisdiction depends not on the truth or falsehood of facts

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28. Wade, *Administrative Law* 7th ed. 651-652.
29. Quoted by Justice Venkatachaliah in *A.R. Antulay v. R.S. Nayak*, AIR 1988 SC 1531 para 125.
30. [1980] A.C. 574.
31. *De Smith*, 4th ed 110 (footnotes omitted).

into which it has to inquire, or upon the correctness of its findings on these facts, but upon their nature, and *it is determinable at the commencement, not at the conclusion, of the inquiry.*" (Italics supplied)

On the above-mentioned observations of De Smith the following comments are worthwhile:

(i) The idea that jurisdiction is *determinable at the commencement, not at the conclusion, of the inquiry* has been rejected by the House of Lords in *Anismanic;* and the subsequent decisions accord well with this view.

(ii) This view of the restrictive use of *certiorari* is largely on account of "the nuisance caused by the excessive use of *certiorari* in the century before 1848" which was effectively eliminated by enacting the Summary Jurisdiction Act, 1848." In fact the jurisdiction to correct for error apparent on the face of record was so effectively disarmed by the Act, that its existence was almost forgotten till it was rediscovered in 1951". [32] In India there is no special reason to adopt a restrictive approaches to *certiorari*. In 1951 the judgment in *R. V. Northumberland Compensation Appeal Tribunal Ex p. Shaw* [33] Lord Goddard C.J. held that *certiorar*i lay also to correct an error of law apparent on the face of the order, that is, a proposition of law stated in the order which on an examination by the court is found to be erroneous.

(iii) de Smith rightly points out that 'the distinction between errors going to jurisdiction and errors within jurisdiction, a distinction which has never been clearly delineated, seems to have been all but obliterated"[34]

(iv) It is well-recognized conventional view that jurisdiction depends on the "nature" of the facts rather on their correctness and legality. This view can explain the sort of situation as dealt with by the Supreme Court in *Ratilal v. Ranchodbhai* [35] in which the Court held that the limitations of Section 115 of the CPC constrained the High Court not to allow revision even when the order had gone contrary to a decision of the Supreme Court. The Supreme Court held:

"This Court then observed that the Privy Council had distinguished between cases in which on a wrong decision the Court assumes jurisdiction which is not vested in it or refuses to exercise jurisdiction which is vested in it by law and those in which in exercise of its jurisdiction the Court arrives at a conclusion erroneous in law or in fact, and that while in the former class of cases exercise of revisional jurisdiction by the High Court is permissible it is not permissible in the latter class of cases."

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32. Seervai, 4th ed. 1566.
33. (1951) 1K B 711.
34. *De Smith* p. 113.
35. AIR 1966 SC 439.

But could the Supreme Court hold similar view if there would have been patent breaches of fundamental right? The answer is clear "No" for the following reasons:

(a) For such breaches an order has to be held without jurisdiction. The concept of *jurisdiction* does not entitle a court to violate fundamental rights, or even the mandatory laws as a court acquires jurisdiction to uphold the law and the Constitution, not to break it on any sort of sophistry. Patent legal distortions would amount to error going to jurisdiction because the 'jurisdiction' of a court cannot include a license to distort the law.

(b) In *Ratilal's Case* the decision had to conform to the mandatory restrictions of Sec 115 of the CPC. Besides, none had challenged the constitutionality of the order.

(c) In England the conventional view evolved with reference to the "no certiorari" clause. But later the courts held that "no certiorari clauses' did not wholly exclude the jurisdiction of the courts. The jurisdiction extended, first, to the errors apparent on the face of the record, which errors were committed within jurisdiction and, secondly, to errors going to the jurisdiction of the inferior body or tribunal. *Anisminic v. Foreign Comp. Comm* was a revolutionary decision by the House of Lords, but this case came up for serious criticism later by vested interests. A harmony between the conventional and the revolutionary was effected by the Privy Council in *S.E. Asia Fire Bricks v. Non-Mettalic Mineral Products*[36]*:* per Lord Fraser--

"The second question then arises. The decision of the House of Lords in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 1 All ER 208 shows that, when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by certiorari, they must be construed strictly, and they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if 'it has done or failed to do something in the course of inquiry which is of such a nature that its decision is nullity'".

9. The notion of 'jurisdiction' in the post-Constitution era, and the role of *certiorari*

Before the topic is taken up for discussion it is appropriate to consider what was decided by the House of Lords in *Anisminic Ltd v. Foreign Compensation Commission*. There the main object was to get over the "no certiorari clause". The net effect of the decision was to remove the cobweb of the intricate distinctions

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36. [1980] 2 P.C. 689 at p.692 Lord Edmund-Davis, Lord Freser of Tullybelton, Lord Russell of Killowen and Lord Keith of Kinkel.

inter se error within jurisdiction and error going to jurisdiction. Inroads had been made on the distinction in subtler ways, viz by correcting the errors apparent on the face of record. Every error of law is jurisdictional. This decision, in effect, produced a sort of constitutional revolution for the reasons thus stated by Prof. Wade in his *Constitutional Fundamentals* (1980 at p. 68):

> "They (the British lawyers) would be much open to criticism if they remained content with the wretchedly narrow base to which they confined themselves 30 years ago, when they took clauses of the 'if the minister is satisfied' type at face value. For judicial control, particularly over discretionary power, is a constitutional fundamental. In their self-defensive campaign the judges have almost given us a constitution, *establishing a kind of entrenched provision to the effect that even Parliament cannot deprive them of their proper functions*. They may be discovering a deeper logic than the crude absolute of statutory omnipotence"

A new insight was generated to reconsider the traditional view felicitously expressed by de Smith "Where the court has jurisdiction to entertain an application, it does not lose its jurisdiction by giving a wrong conclusion, whether it was wrong in law or fact."

What the British Court was doing through *Anismic* is the very mandate under our Constitution. Any breach of the constitutional provision is extra-jurisdictional. The judges are bound to conform to the law and the Constitution whether the problems relate to matters going to jurisdiction, or those in course of the exercise of jurisdiction. The vision of the Rule of law under our Constitution is sturdier and more comprehensive. It is worthwhile referring to *Cellular Operators Association of India v. Union of India*[37] in which our Supreme Court quoted the following observation by Lord Reed in *Anisminic*[38]:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, *it has done or failed to do something in the course of the enquiry that is of such a nature that its decision is a nullity*. It may have given its decision in bad faith. It may have made a decision, which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect goods faith have misconstrued the provisions giving it power to act to that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something, which it was required to take into account. Or it may have based its decision on some matter, which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of

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37. AIR 2003 SC 899.
38. 1969 (1) All ER 208, pp. 313-314.

these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

Further, it is only fair and just that our court would not devise for itself standards lesser in rigour than those it prescribes subordinate tribunals. This is what Lord Bridge had also said in *Goldsmith v. Sperrings Ltd*[39]:

> "Hence there is a breach of the rule of *audi alteram partem* which applies alike to issues of law as to issues of fact. *In a court of inferior jurisdiction this would be ground for certiorari; and I do not think that this Court should adopt in its own procedure any lower standards than those it prescribes for others."*

An essential factor in the judicial perception in the post-Constitution era is the presence of Art 14 in our Constitution. It acts as a catalytic agent of immense potency capable of impacting on all legal solutions. This in itself makes a great departure from the British juridical tradition. The new dimension of Art. 14 has an activist magnitude to frustrate an act tainted with arbitrariness and unreasonableness. Our Supreme Court has rightly said: "an action that is arbitrary, must necessarily involve negation of equality."[40]

But the most important point is that there is no reason to frustrate the application of the doctrine of *ex debito justitiae*, which is founded on a distinct, but immanent principle that real and substantial justice be done in the administration of justice for which alone the court "exists". In *Rupa's Case* our Supreme Court has rightly applied the doctrine to remove serious procedural blemishes. Two things are most important in ensuring procedural propriety:

(a) That the essential legal provisions are not distorted as such distortions have the inevitable effect of frustrating the Rule of *Audi alteram partem.* Right hearing can never be granted if the judicial mind is held hostage by an error having seminal impact on the judicial decision-making.

(b) That the rules of natural justice must operate in full bloom because without it no fair play can be ensured.

A sequel to the point just made is a question: when the criticism of the judicial acts of the superior court is presented before the same court it is a sort of an appeal against Caesar's act before Caesar himself. But this argument is not fair. Our superior courts are answerable to the high institution of Judiciary itself. When a gross miscarriage of justice is to be prevented by a remedy *ex debito justitiae* the grievance can be examined by the court itself with a sense of detachment. This is done by a quality of the judicial discipline, which enables mind to achieve that creative detachment to which T.S. Eliot refers describing the art that a poet practices:

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39. (1977) 1 W.L.R. 487; [1977] 2 ALL ER 566 at 590.

40. *Ajaya Hasia v. Khalid Mujib,* AIR 1981 SC 487, 499 ; also in *Maneka Gandhi v. Union,* AIR 1978 SC 555 and *R.D. Shetty v. Airport Authority,* AIR 1979 SC 1628.

> "Poetry is not a turning loose of emotion, but an escape from emotion; it is not the expression of personality, but an escape from personality."[41]

And it is for such reasons that Lord Bridge in *R v. Shivpuri* evolved a method how he should consider a case which he had himself decided as part of the common palinode less than a year back but was found to have caused legal distortions.

How does the trained judicial sensibility operate is most clear from the technique which Lord Bridge evolved for himself when such distortions were brought out before the Court. How he went about in dealing with the criticism of his Judgment is best described in the words of Lord Bridge himself *R v. Shivpuri*[42]:

> 'That seems to me to afford a sound reason why, on being invited to re-examine the language of the statute in its application to the facts of this appeal, I should initially seek to put out of mind what I said in *Anderton v Ryan*. Accordingly, I propose to approach the issue in the first place as an exercise in statutory construction, applying the language of the Act to the facts of the case, as if the matter were *res integra*. If this leads me to the conclusion that the appellant was not guilty of any attempt to commit a relevant offence that will be the end of the matter. But, if this initial exercise inclines me to reach a contrary conclusion, it will then be necessary to consider whether the precedent set by *Anderton v Ryan* bars that conclusion or whether it can be surmounted either on the ground that the earlier decision is distinguishable or that it would be appropriate to depart from it under the 1966 Practice Statement."

10. Legal distortions

In *R. v. Shivpuri* the House of Lords departed from the view taken by five Law Lords in *Anderton v Ryan* given only a year back as the House felt that Anderton caused serious distortions in law. Lord Bridge in his principal speech articulated the ground for reconsideration in an extremely compressed, almost axiomatic statement: *"If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected better"*. A distortion of law is itself a matter of gravest concern [as is illustrated by *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mog*[43] wherein *locus standi* was given by the Queen's Bench Division to Lord Rees-Mogg on the sole ground that he brought "the proceedings because of his sincere concern for constitutional issues."] Distortions in law, like the distortions on account of a curved mirrors, seriously affect the administration of justice as their pathogenic effects subvert the operation of the Rule of Natural Justice, lead, inevitably, to jurisdictional errors, and result in a serious miscarriage of justice. Distortion of law is a portmanteau of such lapses, which affect the delivery system of justice, and cause a serious miscarriage of justice at the same time. It is this fundamental principle of fair justice delivery system, which our

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41. T.S. Eliot, *Selected Essays*, 1917-1932, (New York 1932) p 10.
42. [1986] 2 All ER H.L. 334.
43. [1994] 1 All ER 457.

Supreme Court stressed when it observed in *Devidayal Rolling Mills v. Prakash Chimanlal Parikh* [AIR 1993 SC 1982 at 1990] :

> "There is no question of any acquiescence, waiver or estoppels against a party where the error is committed by the court itself. This Court is under a bounden duty to correct its own mistake".

H.M. Seervai states the effect of this decision thus:

> "The above discussion shows that an order passed by the Supreme Court by mistake or under a miscomprehension is null and void, and the Supreme Court is under a duty to declare such an order null and void."

The word "distortion" means, as the *Collins Cobuild Dictionary* says: "Distortion is the changing of the meaning or purpose of something that you strongly disapprove of". The *New Shorter Oxford English Dictionary* defines it thus: 'The action of perverting words, facts, etc. from their natural interpretation or intent; misconstruction, misrepresentation". Lord Hailsham was right when he reminded the judges in his *Hamlyn Lectures* that the rule "Be you ever so high, the law is above you" applies to the judges as it applies to ministers. The word "final" does not mean *de hors* the law and justice. Our apex court has never claimed to be above law and justice. As a curved mirror puts things out of shape and makes them look crooked, serious legal mistakes (whether *per incuriam* or *per ignorantiam*) frustrate the right operation of the rules of Natural Justice, and create inhibitions, stock-responses, distractions, and mere assumptions in the judicial appreciation of the case presented.

11. Decision in breach of the Rules of Natural Justice

Our Supreme Court, which has produced a rich corpus of justice-oriented jurisprudence, with activist dimensions, would construe the *Audi alteram partem* creatively to render substantial and substantive justice. Even a conservative judge of the U.S Supreme Court, Justice Felix Frankfurter observed in *Caritativo v. California*[44]:

> "*audi alteram partem* ---hear the other side! --- a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and every branch of them…whenever any individual, however lowly and unfortunate, asserts his legal claim."

Some of the situations, under which the Rule of *Audi alteram partem* stands violated, are thus summarized in *Union v. T R Verma*[45] per Venkatarama Aiyar J.:

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44. 357 U.S 549, 558 (1958).
45. AIR 1957 SC 882.

> "Stating it broadly and without intending it to be exhaustive… rule of natural justice require that a party should have the opportunity of addressing all relevant evidence on which he relies, that the evidence of the opponent should be taken into account in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them."[Emphasis supplied]

Lord Loreburn made a classic formulation of the 'fair hearing test" in *Board of Education v Rice*[46]*:*

> "In such cases the Board of Education will have *to ascertain the law* and also *to ascertain the facts*… in doing either they must *act in good faith* and *fairly listen to both sides*, for that is a *duty lying upon everyone who decides anything*".

Justice Frankfurter had observed: 'The history of liberty has largely been the history of the observance of procedural safeguards."[47]When material evidence is omitted from consideration on patently erroneous ground, the rule of *Audi alterem partem* is violated. *Goldsmith v. Sperrings Ltd*[48] stated an important principle in the context of the Superior Court (here the Court of Appeal). It is a sound principle of justice that the Superior Courts should also be measured by the standards, which they prescribe for the court of inferior jurisdictions. The words of Lord Bridge italicized in that quotation from *Goldsmith v. Sperrings Ltd*[49] are the word in gold. This would lead to a deeper faith in the integrity of the justice delivery system at the level Supreme Court. The majority judgment in *Ridge* v. *Baldwin*[50] would suggest that an inferior tribunal, which does not observe the principles of natural justice, acts without jurisdiction and its order is a nullity. Consequently, *certiorari* lies to quash the order of the Tribunal acting contrary to the principles of natural justice.

Lord Bridge in *R. v. Home Sec. Ex p. Al-Mehdawi* [51] observed that the traditional view, that a tribunal which denies natural justice to one of the parties deprives itself of its jurisdiction, may or may not be correct. But, "a breach of the Rules of natural justice is certainly a sufficiently grave matter to entitle the party who complains of it to a remedy *ex debito justitiae*".

12. Judicial Faults are not to cause prejudice

"No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of the justice. *Ex debito justitiae*, we

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46. (1911) A C 179, 182.
47. *McNabb v U.S.* 318 U.S. 332 (1943).
48. (1977) 1 W.L.R. 487; [1977] 2 ALL ER 566 at 590.
49. (1977) 1 W.L.R. 487; [1977] 2 ALL ER 566 at 590.
50. (1964) A.C. p. 40.
51. (1990) 1A. C. 876.

must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied. This is a peculiar fact of this case which requires emphasis". That a Seven Judge Bench of this Court in *Synthetics and Chemicals Ltd. and others v. State of U. P. and others*, (1990) 1 SCC 109, quoting Lord Denning and Justice Jackson, stated that as soon as one finds a journey in the wrong direction, there should always be an attempt to turn to the right direction since law Courts ought to proceed for all times in the right path rather than in the wrong. In *S. Nagaraj's case*[52]. per Sahai, J: "Even the law bends before justice. "And Lord Hewart in what has become a *locus classicus* has observed in *Rex Sussex Justices*[53]:

> "…. A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly seen to be done.
>
> …. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

II

13. A Critique of *Azadi Bachao's Case*

A Curative Petition was filed against the Judgment of the Court in *Azadi Bachao's Case*, but the Petition was dismissed on the ground that it did not accord well with the parameters prescribed by the Supreme Court's decision on *Rupa's Case*. This Part of the Chapter deals with certain points, which should have received proper judicial consideration. The Curative Procedure was dismissed on the technical grounds of not conforming to the parameters laid down in *Rupa's Case*. It is submitted that the right judicial approach should have been of the sort Baron Martin recommended [54], of course, in the context of Mandamus:

> 'Instead of being astute to discover reasons for not applying this great constitutional remedy for error and mis-government we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable."

With utmost good faith this author discharged his public duty by reading the judgments "…not to contradict and confute, nor to believe and take for granted, not to find talk and discourse, but to weigh and consider"[55]

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52. 1993 Supp (4) SCC 595 .
53. [1924] 1 K B 256, 259.
54. *Rochester Corp v. R.* cited with approval in *Comptroller & Auditor-General of India*, AIR 1987 SC 537, 545.
55. Bacon, *Essays* "Of Studies".

14. Some jurisdictional lapses in *Azadi Bachao*

(i) Even refusal to receive evidence may amount to a refusal to exercise jurisdiction. Prof Wade has summarized this point by stating "*Refusal to receive evidence on some relevant point may also amount to refusal of jurisdiction…*"[56]…

The very substratum of the PIL got unfairly destroyed when the Court refused to consider the Assessment Order of M/S Cox & King. The Order contained the well-investigated facts showing the gruesome stratagem of a Treaty-Shopper Erroneous rejection of all materials constituting the factual substratum amounts to the breach of the *audi alteram partem*[57]. The Court adopted a mistaken view when it felt it was not proper to put the assessment order of M/S Cox & King into judicial focus when it was not a party. It had been pointed out to the Court that the PIL petitioner's grievance was against the wielders of public power exercised in the field of public law. It was not against specific individuals or assesses. If certain executive acts were found contrary to law, the consequences of such determination would overtake those who enjoyed the undeserved benefits of the governmental acts contrary to law. If a tree is to be uprooted in obedience to law, none should think mournfully about the black ants or red ants that flourished on the tree so long it stood erect before law ceased to be a rogue's charter. It is clear that the private beneficiaries of public wrong could not be the necessary parties. Mulla in his *CPC* 14th Ed at p 868 writes:

> 'Necessary parties are parties "who ought to have been joined", that is, parties necessary to the constitution of the suit without whom no decree at all can be passed[58]. "In order that a party may be considered a necessary party defendant, two conditions must be satisfied, first, that there must be a right to some relief against him in respect of the matter involved in the suit, and second, that his presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit."[59] Failure to implead a necessary party as a party to the proceeding is fatal.
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> "…. This principle has been applied to writ petitions also".[60]"

(ii) 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

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56. Wade, *Administrative Law* 7th ed. 651.
57. De Smith, Judicial Review of Administrative Action 4th ed pp.344-345.
58. *Kishan Prasad v. Har Narain Singh* (1911) 33 ALL. 272, 276, 9 I.C. 739 P.C; *Shahsaheb v. Sadashiv* (1919) 43 Bom. 573, 51 I.C. 223.
59. *Durga Charan v. Jatindra Mohan* (1900) 27 Cal. 493; *Jibandas v. Narbada Bai* (1959) A.C. 519; *Jivalal v. Narayan* 73 Bom L.R. 814; *S.C. Lew v. K.S. Ray* 1974 A.C. 274.
60. *K.B. Sharma v. Transport Commr.* 1968 A A 276; *Nagabhushnam v. Ankam v. Ankarah* 1968 A A P 74.

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". In doing so the Court committed an error going to jurisdiction. For that the Hon'ble Court (being a Division Bench) should not have departed from *McDowell*, a Constitution Bench decision. This was an act without jurisdiction. *A. R. Antulay v. R. S. Nayak and Anr*[61] our Supreme Court*:*

> "The principle in England that the size of the Bench does not matter, 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* . …."[Italics supplied].

Shetty J. in *Triveniben v. State of Gujarat*[62] observed:

> "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."

The effect of the fact is that in the hierarchic structure of the Supreme Court the rule, that a smaller Bench is bound by the decision of the larger Bench, virtually *ousts the jurisdiction* of the smaller Bench from departing from the view of the larger Bench. The situation is governed by a rule analogous to the law of limitation about which our Supreme Court observed in *Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee*[63]:

> "It is the duty of the Court not to proceed with the application if it is made beyond the period of limitation prescribed. The Court had no choice and if in construing the necessary provision of the Limitation Act or in determining which provision of the Limitation Act applies, the subordinate Court comes to an erroneous decision, it is open to the Court in revision to interfere with that conclusion as that conclusion led the Court to assume or not to assume the jurisdiction to proceed with the determination of that matter".

In effect, the treatment given to *McDowell's Case* in *Azadi Bachao's Case* was *beyond the jurisdiction* of the Division Bench of the Supreme Court. In *Antulay's case* it was clearly stated that the rule that a smaller Bench is bound by the decision of the larger Bench *operates as a rule of law*.

(iii) A decision clearly *per incuriam* should not be allowed to stand when it distorts law, and seriously affects the nation's interest. A decision in

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61. AIR 1988 SC 1531.
62. AIR 1989 SC 465.
63. AIR 1964 SC 1336.

which the material statutory terms are not taken into account; and a decision that promotes extraneous purpose, does cause a gross miscarriage of justice.

(iv) It would be acting without jurisdiction if this Hon'ble Court turns a bilateral tax treaty into a multi-lateral convention. The Court can only

(a) interpret the terms of the treaty; and

(b) can only hold whether certain provisions of the DTAC (or whole of it) are valid for domestic operation.

It can neither introduce a term in a treaty, nor can put a gloss thereon having the effect of modifying in any manner, proximately or not. Only the State possesses treaty-making power to be exercised in accordance with the Constitution[64]. A beneficiary under a tax Agreement must come within the Personal Scope[65] of the tax-treaty as defined in Art 1 of the DTAC. The Court's Judgment, against which the Curative was moved, went against the mandatory terms of the bilateral tax treaty, violated the established principles of Public International Law, and went counter to our Public Policy, and international *Jus cogens*. This fundamental error in the Judgment of this Hon'ble Court led it to uphold the evil of Treaty-shopping under the Doctrine of Necessary Evil, and by justifying it with reference to purpose wholly *extraneous* to the Act. The effect of the Hon'ble Court's Judgment is to *rewrite* the Personal Scope of the DTAC, which is beyond its Jurisdiction as the *consensus ad idem* must be of the Contracting States. Treaties, other than tax treaties, can be done in exercise of power under Art 73 of the Constitution; whereas a tax treaty is done in terms of Section 90 of the Income-tax Act, 1961. A tax treaty belongs to the province of contractual treaties. In *Azadi Bachao* the Court transgressed the principles of Public International law and the Constitution as it widened the *Personal Scope* of the Indo-Mauritius DTAC to legitimize the derivation of treaty benefits by the third State residents not within the *Personal Scope* of this DTAC.

15. Some instances of legal distortions

A careful reading of the Judgment in *Azadi Bachao* reveals that a lot of legal distortions crept in having the cumulative effect of causing a serious miscarriage of justice: some of these are briefly mentioned hereunder:

(i) It is a constitutional solecism to hold that the Agreement for the Avoidance of Double Taxation is done in exercise of power within the executive domain (Art. 73 of the Constitution of India), as under our Constitution,

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64. Oppenheim, *International Law* 9**th** ED Sec 595.

65. Art. 1 Personal Scope in the Indo-Mauritius DTAC runs thus:
"'This Convention shall apply to persons who are residents of one or both of the Contracting States."

as in the U.K., power over taxation wholly and exclusively went out to Parliament; and can be exercised by the executive only within the strict frontiers of power granted by Parliament. A tax-treaty is done in exercise of the *delegated power* on the terms of section 90 of the Income-tax Act, 1961. To call Section 90 a mere "special procedure" is to overlook the law as it is. The provision is couched and structured in *'If….then' format* (in technical language *protasis……apodosis*)

(ii) There are manifest distortions in this Hon'ble Court's view of Section 90 of the Income-tax Act as this Hon'ble Court overlooked many material terms of the Section: overlooked the terms at the base of the Section ("*enter into*"), overlooked the import of the core pre-condition for the exercise of the delegated power, "*the avoidance of double taxation*".

(iii) Patent legal distortions become much worse when they become telescoped. To illustrate this, a paragraph from the impugned Judgment is quoted:

> "The contention of the respondents, which weighed with the High Court, viz., that the impugned Circular No. 789 ([2000] 243 ITR (St.) 57) is inconsistent with the provisions of the Act, is a total non sequitur. As we have pointed out, Circular No. 789 ([2000] 243 ITR (St.) 57) is a circular within the meaning of section 90; therefore, it must have the legal consequences contemplated by sub-section (2) of section 90. In other words, the circular shall prevail even if inconsistent with the provisions of the Income-tax Act, 1961, in so far as assessees covered by the provisions of the DTAC are concerned".

A Circular is never issued under Section 90. There is not a word in that Section even to contemplate its issuance. The judicial logic suffers from the fallacy of *ex nihilo* (out of nothing). It refers to "notification in the Official Gazette" which is as different from a Circular as is chalk as to cheese. As the main holding is patently wrong, deduction from it is bound to be wrong. The mistake gets further compounded when it is observed, "it must have the legal consequences contemplated by sub-section (2) of section 90." The legal consequence of Section 90(2) has absolutely nothing to do with anything, which Section 90(1) contemplates. Section 90 (2) was inserted by the Finance Act (No 2) Act, with effect from 1. 4. 1972 for an entirely different purpose. It authorizes the grant of benefits that in view of statutory amendments taxpayers get, but the beneficiaries of a tax treaty do not get because of the terms of a governing tax-treaty remained as they were. To draw a crowning conclusion, "the circular shall prevail even if inconsistent with the provisions of the Income-tax Act, 1961, in so far as assessee covered by the provisions of the DTAC are concerned" has no statutory warrant.

(iv) The Court's view of Section 119 is clearly *per incuriam*. It is beyond comprehension to think that by exercise of power under this Section the Executive can exercise Dispensing Power, and bring the Income-tax

Act, so draconian for our citizenry, to a vanishing point by immunizing the foreigners from the scrutiny by the quasi-judicial authorities. To call Circular 789 an act towards the proper management of the Revenue is beyond comprehension. It is seen that in *Commissioner of Customs, Calcutta v. Indian Oil Corporation Ltd.* [2004 (165) E.L.T. 257 (S.C.) Justice P. Venkatarama Reddi J suggested that this issue deserves to be referred to the Constitution Bench. In *Commissioner of Central Excise, Bolpur v. (M/s.) Ratan Melting & Wire Industries, Calcutta*[66] a reference has been made for constituting a Constitution Bench. But in *Pahwa Chemicals Pvt Ltd v. Commissioner of Central Excise* [67] material propositions contradicting some seminal principles in the impugned Judgment, have already been declare.

(v) The view that the terms of the Agreement can override the statute clearly goes against the Income-tax Act and the Constitution of India. The High Court decisions mentioned in the judgment to constitute *stare decisis* deserved to be overruled *pro tanto*; and the invocation of the doctrine goes manifestly against its grammar as judicially expounded in many cases. The issue, whether the Circulars (or by that matter even the tax Agreements) can detract from the Statute, deserves to be referred to the Constitution Bench for an authoritative decision (as also suggested by Hon'ble Justice Reddy, referred above).

(vi) To sustain Treaty-shopping as valid is to go against the Personal Scope of the DTAC, to go counter to the universally established principle of public international law, and to do which has not before this Judgment was done anywhere in this wide World which has developed what the Statute of the International Court of Justice says, *civilized jurisprudence*. It is not a matter of pride for the common people of this Republic to know that its highest Court, constitutionally bidden to do complete justice, is helpless in the unravelment of fraud, but thinks it enough to make a *cri de Coeur* to Parliament.

(vii) In the jurisprudence of all the major jurisdictions, the courts always frustrate fraud. The common law courts had developed the Doctrine of the Lifting of Corporate Veil under its creative jurisdiction. This Petitioner would show later how the exposure of fraud is integral both to our Public Policy which the municipal courts give effect, and the International Public Policy recognized under the peremptory norm of *jus cogens*. The following observation is clearly *per incuriam*:

> "The decision of the Chancery Division in F.G. (Films) Ltd., In re [1953] 1 WLR 483 was pressed into service as an example of the mask of corporate entity being lifted and account be taken of what lies behind in order to

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66. Case No: Civil Appeal No. 4022 of 1999.
67. (2005) 2 SCC 720at p. 27 [Coram: S.N. Variava, Dr AR. Lakshmanan and S.H. Kapadia, JJ.].

prevent "fraud". This decision only emphasizes the doctrine of piercing the veil of incorporation. There is no doubt that, where necessary, the courts are empowered to lift the veil of incorporation while *applying the domestic law*."[Italics supplied].

Dias in his *Jurisprudence* has discussed *F.G. (Films) Ltd* as laying down a general principle for frustrating fraud on the law. Not only the common law courts, even civil law courts crack shell to see the inner operative realities if justice demands so. The continental courts invoke several variants of the anti-abuse doctrine. It is wrong to say, " the courts are empowered to lift the veil of incorporation while applying the domestic law." This observation is clearly *per incuriam*. The doctrine of the Lifting of Corporate Veil has been held relevant by the International Court of Justice in the famous *Barcelona Traction, Light and Power Company Ltd*[68]. The ICJ considers this doctrine relevant as it illustrates the "general principles of law recognized by civilized nations" (Art 38 of the Statute of the ICJ).

(viii) The Judgment permits the Executive to promote the economic policy of the government designed to invite more and more of the FDI and foreign exchange when this pursuit is wholly *extraneous* to the object for which power is granted under the Income-tax Act. There is not a word in the Income-tax Act, which would show that the executive possesses any open-ended power. Economic policies under the law of income tax are always enacted in specific terms. To use power to promote extraneous purpose is to act *mala fide*.

(ix) The Court read the Judgment of Justice Reddy in *McDowell* in a manner none would read it. The Hon'ble Division Bench of two Judges acted beyond jurisdiction in subjecting the Constitution Bench decision to a treatment which make it a mere "hiccup" or temporary turbulence".

16. Infraction of the Rules of Natural Justice

This author would catalogue a number of deviations which occurred in course of the judicial proceeding which culminated in the judgment of *Azadi Bachao's Case*: [This exercise is made to show how the Rule of *Audi alteram partem* can be breached or compromised even in the course of judicial hearing.]

(i) The very foundation of the PIL stood destroyed by the circling out of the facts set forth in the Assessment Order of *M/S Cox & King*. Erroneous Rejection of all materials constituting the factual substratum amounts to the breach of the *audi alteram partem.*[69] Where material facts get excluded from judicial deliberation there is clearly a gross breach of

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68. [1970] *International Court of Justice Reports* Index p.4.
69. De Smith, Judicial Review of Administrative Action 4th ed pp.344-345.

the principle of *Audi alteram partem*. Materials gathered by the Assessing Officer in the Assessment Order had been incorporated in the Writ Petition for rebuttal. All the facts stated in that Assessment Order stand admitted as none was ever denied, rebutted, or even qualified by the Union of India and others either before the Delhi High Court or before the Supreme Court. The exclusion of such materials, essential to support the core issue in this case and to provide substratum to the case itself, is, it is respectfully submitted, acting both beyond *Jurisdiction*, and in the breach of *Audi alteram partem.*

(ii) The Court was not correct in accepting the plea of the Att-Gen. Mr. Sorabji and the counsel for the tax haven company, Mr. Salve, that the abuse of Treaty-shopping was "perhaps, it may have been intended at the time when Indo-Mauritius DTAC was entered into." [The Judgment page 100: (263 ITR 706 at p. 753)]. This plea had absolutely no basis. The acceptance of this plea on "no material" destroyed the Petitioner's case against the Treaty Shopping. It has caused a serious miscarriage of justice. In *Dhirajlal Girdharilal v. CIT*[70], *CIT v. Daulatram Rawatmull*[71], *Dhakeswari Cotton Mills Ltd v. CIT*[72], *Omar Salay Mohammed v CIT*[73]; *and Lalchand Bhagat Ambica Ram v. CIT*[74], the Supreme Court set aside the assessment on the ground that it is based on bare suspicion, conjectures and surmises and further held in the first two cases that a finding of fact would be vitiated if it is based partly on conjectures or on material which were partly inadmissible or irrelevant, even though there may be some other relevant and admissible material to support the finding."[75] *Collins Cobuild English Language Dictionary* defines the terms of material blemishes thus: If you **surmise** that something is true, you guess it from the available evidence, although you do not know for certain." "**Conjecture** is the formation of ideas or opinions from incomplete or doubtful information."" **Suspicion** is the feeling that you do not trust someone or that something is wrong in some way, although you have no evidence for it." In fact, this Judgment reveals a far graver error: by accepting the Appellants' suggestion by this Hon'ble Court has led to the fallacy of *ex nihilo* (to draw something from nothing).

(ii) The Court quoted and relied on three long paragraphs from the book by Roy Rohatgi, *Basic International Taxation,* without putting them under critical focus in course of arguments. The Court was led to form its view on Treaty-shopping on the basis of the flawed ideas set forth in the book by an interested person. It was unfair.

(iv) In *Azadi Bachao* the Court upheld Treaty-Shopping for the following core reasons:

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70. 26 ITR 736.
71. 87 ITR 349.
72. 26 ITR 775.
73. 37 ITR 151.
74. 37 ITR 288.
75. Kanga & Palhivala's *Income-tax* 7th ed p. 1135.

> "There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing economy, in the interest of long term development. Deficit financing, for example, is one; Treaty Shopping, in our view, is another. Despite the sound and fury of the Petitioners over the so called 'abuse' of 'Treaty Shopping', perhaps, it may have been intended at the time when Indo-Mauritius DTAC was entered into. Whether it should continue, and, if so, for how long, is a matter which is best left to the discretion of the executive as it is dependent upon several economic and political considerations. This Court cannot judge the legality of Treaty Shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy."

The core thesis --"A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy."—was arrived at in clear breach of the Rules of Natural Justice. This thesis brings out points for research the outcome of which would depended on the variables and sub-variables about which reasonable persons can reasonably differ. This author would pursue this point in other chapters. Lord Bridge L.J. in *Goldsmith v. Perrings Ltd*[76] observed that a judgment based on the Judge's "judicial research", the result of which has not been put to counsel, violates the rules of *audi alteram partem* since that rule applies both to facts and law. Dissenting from Lord Denning, Scarman L.J. said:

> "….But the fourth and most important reason is that this part of the Master of Rolls' judgment decides against the plaintiff on a ground on which Mr. Howser, for the plaintiff, has not been heard. This is because Mr. Comyn never took this point, and the Court did not put the point to Mr. Howser during the argument. Hence there is a breach of the rule of *audi alteram partem* which applies alike to issues of law as to issues of fact."[77]

It was essential for the Union of India to produce in course of the judicial proceeding the book on which it relied. And it was the duty of the Court "to put the point" to the other side so that he could address the Court on the worth of the book relied on.

17. Conclusion

It is respectfully submitted that if our Supreme Court in *Rupa's Case* would have explored the wide frontiers of its inherent powers and the profundity of the doctrine of *Ex debito justitiae*, it could have provided an effective remedy for which *certiorari* is conventionally prayed for. Lord Diplock in *Council of Civil*

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76. (1977) 1 W.L.R. 487.
77. *Ibid* p. 508.

Service Unions v Minister for the Civil Service[78] classified under three heads the grounds on which administrative action is subject to control by judicial review: 'illegality", 'irrationality", and "procedural impropriety". Essentially these grounds are one ground, *ultra vires*.[79] But such serious blemishes in a judicial act of the Superior Judiciary also deserve to be set right, *a fortiorari*, as such lapses (if remain uncorrected on this or that ground) would shake people's confidence in the probity of justice delivery system. *Rupa's Case* went wrong in its view of the ambit and reach of the Court's inherent jurisdiction to grant remedy *Ex debito justitiae*.

78. [1984] 3 All ER 935 H.L.
79. All ER Annual Review 1984 Pp. 5.