CASE NO.:
Writ Petition (civil) 740 of 1986

PETITIONER:
Central Board of Dawoodi Bohra Community & Anr.

RESPONDENT:
State of Maharashtra & Anr.

DATE OF JUDGMENT: 17/12/2004

BENCH:
CJI R.C. LAHOTI, SHIVARAJ V. PATIL, K.G.BALAKRISHNAN, B.N.SRIKRISHNA & G.P.MATHUR.

JUDGMENT:
J U D G M E N T

I.A. NO. 4 in W.P. (C)740 OF 1986

R.C. LAHOTI, CJI

In Sardar Syedna Taher Saifuddin Saheb Vs. State of Bombay \026 1962 Suppl.(2) SCR 496, a five-Judge Bench of this Court ruled by a majority of 4 : 1 that the Bombay Prevention of Ex-communication Act (Act No.42 of 1949) was ultra vires the Constitution as it violated Article 26 (b) of the Constitution and was not saved by Article 25(2). On 26.2.1986 the present petition has been filed seeking re-consideration, and over-ruling, of the decision of this Court in Sardar Syedna Taher Saifuddin Saheb's case (supra) and then issuing a writ of mandamus directing the State of Maharashtra to give effect to the provisions of the Bombay Prevention of Ex-communication Act, 1949.

The matter came up for hearing before a two-Judge Bench of this Court which on 25.8.1986 directed 'rule nisi' to be issued. On 18.3.1994 a two-Judge Bench directed the matter to be listed before a seven-Judge Bench for hearing. On 20.7.1994 the matter did come up before a seven-Judge Bench which adjourned the hearing awaiting the decision in W.P.No.317 of 1993. On 26.7.2004 IA No.4 has been filed on behalf of respondent no.2 seeking a direction that the matter be listed before a Division Bench of two judges. Implicitly, the application seeks a direction for non-listing before a Bench of seven Judges and rather the matter being listed for hearing before a Bench of two or three judges as is the normal practice of this Court. In the contents of the application reliance has been placed on the Constitution Bench decisions of this Court in Bharat Petroleum Corpn. Ltd. Vs. Mumbai Shramik Sangha & Ors. (2001) 4 SCC 448 followed in four subsequent Constitution Bench decisions namely Pradip Chandra Parija & Ors. Vs. Pramod Chandra Patnaik & Ors. - (2002) 1 SCC 1, Chandra Prakash & Ors. Vs. State of U.P. & Anr., (2002) 4 SCC 234, Vishweshwaraiah Iron & Steel Ltd. Vs. Abdul Gani & Ors. - (2002) 10 SCC 437 and Arya Samaj Education Trust & Ors. Vs. Director of Education, Delhi & Ors. - (2004) 8 SCC 30.

The prayer made on behalf of respondent no.2 has been opposed by the petitioners submitting that the matter must come up before seven-Judge Bench only. Two reasons have been canvassed in opposing the prayer contained in IA No.4 by Ms.

Indira Jaising, the learned senior counsel for the petitioners. It was submitted that as the writ petition specifically calls for reconsideration of a five-Judge Bench decision of this Court wherein 'rule nisi' has been issued, the matter must necessarily be heard by a seven-Judge Bench. Next, it was submitted that the decisions relied on by the learned counsel for the respondent no.2 and referred to in IA No.4 do not lay down the correct law.

We have heard the learned counsel for the parties at length. In our view, the prayer contained in the application deserves to be allowed only in part.

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

Ms. Indra Jaisingh, the learned senior counsel for the petitioners submitted that the view of the law taken by the abovesaid four Constitution Benches is per incuriam and is not the correct law as previous decision of this Court by a Constitution Bench in Union of India and Anr. Vs. Raghubir Singh (dead) by Lrs. etc. \026 (1989) 2 SCC 754 takes a contrary view and being an earlier decision was binding on the subsequent Benches. We do not agree with the submission of the learned senior counsel that the decisions referred to by the learned counsel for the respondent no.2/applicant are per incuriam. She has also placed reliance on a Constitution Bench decision in Union of India & Anr. Vs. Hansoli Devi & Ors. \026 (2002) 7 SCC 273 wherein the Constitution Bench heard a Reference made by two-Judge Bench expressing disagreement with an earlier three-Judge Bench decision.

The Constitution Bench in the case of Chandra Prakash and Ors. Vs. State of U.P. & Anr. \026 (2002) 4 SCC 234 took into consideration the law laid down in Parija's case and also referred to the decision in Union of India and Anr. Vs. Raghubir Singh (dead) by Lrs. etc. relied on by Ms. Indra Jaising, the learned senior counsel and then reiterated the view taken in Parija's case. Per incuriam means a decision rendered

by ignorance of a previous binding decision such as a decision of its own or of a Court of co-ordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law. A ruling making a specific reference to an earlier binding precedent may or may not be correct but cannot be said to be per incuriam. It is true that Raghubir Singh's case was not referred to in any case other than Chandra Prakash & Ors.' case but in Chandra Prakash & Ors. case Raghubir Singh's case and Parija's case both have been referred to and considered and then Parija's case followed. So the view of the law taken in series of cases to which Parija's case belongs cannot be said to be per incuriam.

In Raghubir Singh (dead) by Lrs.'s case, Chief Justice Pathak pointed out that in order to promote consistency and certainty in the law laid down by the superior Court the ideal condition would be that the entire Court should sit in all cases to decide questions of law, as is done by the Supreme Court of the United States. Yet, His Lordship noticed, that having regard to the volume of work demanding the attention of the Supreme Court of India, it has been found necessary as a general rule of practice and convenience that the Court should sit in divisions consisting of judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate related thereto and by such other considerations with the Chief Justices, in whom such authority devolves by convention, may find most appropriate. The Constitution Bench reaffirmed the doctrine of binding precedents as it has the merit of promoting certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individuals as to the consequence of transactions forming part of his daily affairs.

Further, the Constitution Bench speaking through Chief Justice Pathak opined that the question was not whether the Supreme Court is bound by its own previous decisions; the question was under what circumstances and within what limits and in what manner should the highest Court overturn its own pronouncements. In our opinion, what was working in the mind of His Lordship was that being the highest Court of the country, it was open for this Court not to feel bound by its own previous decisions because if that was not permitted, the march of Judge-made law and the development of constitutional jurisprudence would come to a standstill. However, the doctrine of binding precedent could not be given a go-by. Quoting from Dr. Alan Paterson's Law Lords (pp.156-157), His Lordship referred to several criteria articulated by Lord Reid. It may be useful to reproduce herein the said principles:-

(1) The freedom granted by the 1966 Practice Statement ought to be exercised sparingly (the 'use sparingly' criterion) (Jones Vs. Secretary of State for Social Services, 1972 AC 944, 966).

(2) A decision ought not to be overruled if to do so would upset the legitimate expectations of people who have entered into contracts or settlements or otherwise regulated their affairs in reliance on the validity of that decision (the 'legitimate expectations' criterion) (Ross Smith Vs. Ross-Smith, 1963 AC 280, 303 and Indyka Vs. Indyka, (1969) AC 33, 69).

(3) A decision concerning questions of construction of statutes or other documents ought not to be overruled except in rare and exceptional cases (the 'construction' criterion) (Jones case (supra))

(4) (a) A decision ought not to be overruled if it would be impracticable for the Lords to foresee the consequence of departing from it (the 'unforeseeable consequences' criterion) (Steadman Vs. Steadman, 1976 AC 536, 542C). (b) A decision ought not to be overruled if to do so would involve a change that ought to be part of a comprehensive reform of the law. Such changes are best done 'by legislation following on a wide survey of the whole field' (the 'need for comprehensive reform' criterion) (Myers Vs. DPP, 1965 AC 1001, 1022; Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027, 1086; Haughton Vs. Smith, 1975 AC 476, 500).

(5) In the interest of certainty, a decision ought not to be overruled merely because the Law Lords consider that it was wrongly decided. There must be some additional reasons to justify such a step (the 'precedent merely wrong' criterion) (Knuller Vs. DPP, 1973 AC 435, 455).

(6) A decision ought to be overruled if it causes such great uncertainty in practice that the parties' advisers are unable to give any clear indication as to what the courts will hold the law to be (the 'rectification of uncertainty' criterion), (Jones case (supra)); Oldendorff (E.L.) & Co. GamBH Vs. Tradax Export SA, 1974 AC 479, 533, 535: (1972) 3 All ER 420)

(7) A decision ought to be overruled if in relation to some broad issue or principle it is not considered just or in keeping with contemporary social conditions or modern conceptions of public policy (the 'unjust or outmoded' criterion) (Jones case (supra)); Conway Vs. Rimmer, (1968) AC 910, 938).

Reference was also made to the doctrine of stare decisis. His Lordship observed by referring to Sher Singh Vs. State of Punjab, (1983) 2 SCC 344, that although the Court sits in Divisions of two and three Judges for the sake of convenience but it would be inappropriate if a Division Bench of two Judges starts overruling the decisions of Division Benches of three. To do so would be detrimental not only to the rule of discipline and the doctrine of binding precedents but it will also lead to inconsistency in decisions on points of law; consistency and certainty in the development of law and its contemporary status \026 both would be immediate casualty.

In Raghubir Singh & Ors. case (supra), a Bench of two learned Judges had made a reference to a larger Bench for reconsideration of the questions decided earlier by two Division Benches of the quorum of two and three respectively. The Constitution Bench then opined that the matter could be heard by the Constitution Bench on such reference. It is pertinent to note that in Raghubir Singh & Ors. case the Constitution Bench has nowhere approved the practice and propriety of two-Judge Bench making a reference straightaway to Constitution Bench disagreeing with a three-Judge Bench decision. On the contrary, the Constitution Bench had itself felt inclined to hear the issue arising for decision and therefore did not think it to be necessary to refer the matter back to a Bench of three Judges. Similar was the situation in Union of India & Anr. Vs. Hansoli Devi & Ors., (2002) 7 SCC 273. Therein the Constitution Bench has reiterated the principle of judicial discipline and propriety demanding that a Bench of two learned Judges should follow the decision of a Bench of three learned Judges and if a Bench of two

learned Judges was inclined not to do so then the proper course for it to adopt would be (i) to refer the matter before it to a Bench of three learned Judges, and (ii) to set out the reasons why it could not agree with the earlier judgment. The Constitution Bench concluded, "then if the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect then a reference should be made to a Bench of five learned Judges". The Constitution Bench has very clearly concluded and recorded, "the very reference itself in the present case made by the two-Judge Bench was improper". However, the Constitution Bench then proceeded to observe that as the question involved had very wide implications affecting a large number of cases, it considered it appropriate to answer the questions referred instead of sending the matter back to a Bench of three Judges for consideration. The decision of this Court in Pradip Chandra Parija (supra) was followed. Thus, the course adopted by the Constitution Bench in the case of Hansoli Devi was by way of an exception and not a rule.

Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms :-

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

(2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions : (i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh & Ors. and Hansoli Devi & Ors.(supra).

So far as the present case is concerned, there is no

reference made by any Bench of any strength at any time for hearing by a larger Bench and doubting the correctness of the Constitution Bench decision in the case of Sardar Syedna Taher Saifuddin Saheb's case (supra). The order dated 18.3.1994 by two-Judge Bench cannot be construed as an Order of Reference. At no point of time the Chief Justice of India has directed the matter to be placed for hearing before a Constitution Bench or a Bench of seven-Judges.

In the facts and circumstances of this case, we are satisfied that the matter should be placed for hearing before a Constitution Bench (of five Judges) and not before a larger Bench of seven Judges. It is only if the Constitution Bench doubts the correctness of the law laid down in Sardar Syedna Taher Saifuddin Saheb's case (supra) that it may opine in favour of hearing by a larger Bench consisting of seven Judges or such other strength as the Chief Justice of India may in exercise of his power to frame a roster may deem fit to constitute.

Ordered accordingly.

I.A. No.4 is disposed of.