A PRADIP CHANDRA PARIJA AND ORS.

v.

PRAMOD CHANDRA PATANAIK AND ORS.

DECEMBER 4, 2001

B [S.P. BHARUCHA, CJ., SYED SHAH MOHAMMED QUADRI, UMESH C. BANERJEE, S.N. VARIAVA AND SHIVARAJ V. PATIL, JJ.]

Constitution of India, 1950/Supreme Court Rules 1960.

C *Articles 145(2) and (3)/Order VII, Rules (1) and (2)—Supreme Court—Constitution of Benches and reference of matters by smaller Bench to larger Bench—A Two-Judge Bench not agreeing with the decision of an earlier three-judge Bench and referring the matter to five-Judge Bench—Held, judicial discipline and propriety demands that a Bench of two Judges should follow a decision of a Bench of three Judges—But, if a Bench of two Judges concludes* D *that an earlier judgment of three Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three Judges setting out the reasons why it could not agree with the earlier judgment—If, then, the Bench of three Judges also comes to the conclusion that the earlier judgment of three Judge-Bench is incorrect,* E *reference to a Bench of five Judges is justified—The only situation when a two Judge-Bench may refer a matter directly to a Constitution Bench is when the provisions of clause (3) of Article 145 are attracted—In the instant case, the Bench of two Judges has, in terms, doubted the correctness of decision of three-Judge Bench—By a judicial order the matter before the Bench of two Judges* F *were ordered to be placed before a Bench of five Judges—The Chief Justice, as master of the cause lists, was required only to issue consequential administrative directions—Matters could only have been referred to a Bench of three Judges—Accordingly, they shall be placed before a Bench of three Judges—Judicial Discipline—Judicial Propriety.*

G *Nityananda Kar and Anr. etc.* **v.** *State of Orissa and Anr.,* **[1990] Suppl. 2 SCR 644, referred to.**

Bharat Petroleum Corporation Limited **v.** *Mumbai Shramik Sangha and Ors.,* **[2001] 4 SCC 448 and** *Sub-Committee on Judicial Accountability* **v.** *Union of India and Ors.,* **[1992] 4 SCC 97, relied on.**

H

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 791 of 1993. A

From the Judgment and Order dated 23.4.91 of the Orissa Administrative Tribunal, Bhubaneswar in T.A. No. 402 of 1986.

WITH B

W.P. (C) No. 611 of 1992.

Soli J. Sorabjee, Attorney General, Sudhir Chandra Parmanand Gaur, Dipankar P. Gupta, Suchit Mohanty, Abhisth Kumar, Abhijit Sengupta, Vinoo Bhagat, Achintya Dvivedi, Ms. Manish Singhvi, Ms. Kirti Mishra, Raj Kumar C Mehta, Ms. M. Sarada and Abhishek Awasti for the appearing partes.

The folloinwg Order of the Court was delivered :

These matters come to be placed before this Bench of five Judges by D reason of an order passed on 24th October, 1996 by a Bench of two learned Judges. The two learned Judges stated in that order that they had been taken through the judgment of this Court (delivered by a Bench of three learned Judges) in *Nityananda Kar and Anr. etc.* v. *State of Orissa and Anr.*, [1991] Suppl. 2 SCR 644 and that, "with utmost respect"., they did "not agree with E the reasoning and the conclusions reached therein". The learned Judges set out four reasons why they disagreed with the said judgment. They then directed that these matters "be placed before a larger bench of five Judges of this Court. The Registry to place the papers before Hon'ble the Chief Justice for appropriate orders in this Case.".

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The question is whether two learned Judges of this Court can disagree with a judgment of three learned Judges of this Court and whether, for that reason, they can refer the matter before them directly to a Bench of five Judges?

We may point out, at the outset, that in *Bharat Petroleum Corporation* G *Limited* v. *Mumbai Shramik Sangha and Ors.*, [2001] 4 SCC 448, a Bench of five Judges considered a some what similar question. Two learned Judges in that case doubted the correctness of the scope attributed to a certain provision in an earlier Constitution Bench Judgment and, accordingly, referred the matter before them directly to a Constitution Bench. The Constitution Bench that then H

A heard the matter took the view that the decision of a Constitution Bench binds a Bench of two learned Judges and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness. At the most, the Bench of two learned Judges could have ordered that the matter be heard by a Bench of three learned Judges.

B

Learned counsel for the appellants drew our attention to the provisions of Article 145, clauses (2) and (3) of the Constitution of India. Clause (2) empowers the making of rules to fix the minimum number of Judges of this Court to sit for any purpose. Clause (3) says that the minimum number of Judges who are to sit for the purpose of deciding any case involving any C substantial question of law as to the interpretation of the Constitution or for the purpose of hearing any reference under Article 143 shall be five. Learned counsel drew our attention to Order VII, Rules (1) and (2) of the Supreme Court Rules, 1966. Rule (1) says that every cause, appeal or matter shall be heard by a Bench consisting of not less than two Judges nominated by the Chief Justice. D Clause (2) says that where, in the course of the hearing of any cause, appeal or proceeding, a Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it. Learned counsel submitted that the Bench of two learned Judges that made the reference in this case did not E over-rule the judgment of three learned Judges in the case of *Nityananda Kar*, as they could have, on the basis of an earlier Constitution Bench judgment (which, incidentally, is not even mentioned in the referral order), but had chosen to refer it to the Chief Justice who had constituted a Constitution Bench. In learned counsel's submission, circumstances could arise where it would be F permissible for a Bench of two learned Judges directly to make a reference to a Constitution Bench; for example, when two judgments of a Constitution Bench were in conflict with each other or a Judgment of a three-Judge Bench was *per incuriam*. In learned counsel's submission, the present was a case which justified the reference directly to a Constitution Bench.

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The learned Attorney General submitted that a Constitution Bench judgment of the Court was binding on smaller Benches and a judgment of three learned Judges was binding on Benches of two learned Judges - a proposition that learned counsel for the appellants did not dispute. The learned Attorney General drew our attention to the judgment of a Constitution Bench in *Sub-* H

Committee on Judicial Accountability v. *Union of India and Ors.*, [1992] 4 SCC 97 where it has been said that "no co-ordinate bench of this Court can even comment upon, let alone sit in judgment over the discretion exercised or judgment rendered in a cause or matter before another co-ordinate Bench". The learned Attorney General submitted that the appropriate course for the Bench of two learned Judges to have adopted, if it felt so strongly that the judgment in *Nityananda Kar* was incorrect, was to make a reference to a Bench of three learned Judges. That Bench of three learned Judges, if it also took the same view of *Nityananda Kar*, could have referred the case to a Bench of five learned Judges.

In the present case of the Bench of two learned Judges has, in terms, doubted the correctness of a decision of a Bench of three learned Judges. They have, therefore, referred the matter directly to a Bench of five, Judges, in our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then the Bench of three Learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified.

It is not necessary for us to go into the hypothetical cases spoken of by learned counsel for the appellants where a reference directly by a Bench of two learned Judges to a Constitution Bench would be justified. Suffice it to say that, for the present, we find it very difficult to accept the correctness of such hypothesis. The only situation when a two Judge Bench may refer a matter directly to a Constitution Bench is when the provisions of clause (3) of Article 145 are attracted.

We have quoted the relevant portion of the referral order in the present case. By a judicial order the matters before the Bench of two learned Judges were order to be placed before a Bench of five learned Judges. The Chief Justice, as master of the cause lists, was required only to issue consequential

A administrative directions.

In the result, we are of the view that these matters could only have been referred to a Bench of three learned Judges. We, accordingly, order that they shall be placed before a Bench of three learned Judges. Having regard to the B lapse of time, they shall be so placed in January, 2002.

R.P. Matter is still pending.