Azadi Bachao is impliedly *overruled*: hence, it seems, not good under Article 141 of our Constitution

[By Shiva Kant Jha][1] (August 2013)

It is submitted that *Azadi Bachao* is *impliedly overruled,* and hence is no longer good, and deserves to be respectfully ignored by the courts. I submit that it stands impliedly overruled for reasons, inter alia, these:

(i) The juristic foundation of *Azadi Bachao* no longer survives because its role perception has been disapproved by the Constitution Bench of the Supreme Court[2], and when the perception of the role is wrong, the decision in exercise of that jurisdiction can never the law of the binding within the meaning of Article 141 of the Constitution of India.[3]

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[1] www.shvakantjha.org

[2] *Standard Chartered Bank* [AIR 2005 SC 2622]

[3] In *Azadi Bachao,* our Supreme Court overlooked the proper role of the Supreme Court as conceived under our Constitution. The Hon'ble Court articulated its province and function in these words: per B.N. Srikrishna J.---

> "The maxim "*Juices est. jus dicer, non dare"* pithily expounds the duty of the Court. It is to decide what the law is, and apply it; not to make it".

In *Assistant Commissioner of Income-tax v. Velliappa Textiles & Ors [*2003) 184 CTR Reports 193].

in a one-sentence paragraph the three judges Bench of our Supreme Court in its majority judgment reiterated the above quoted view: per B.N. Srikrishna, J. ---

> "The maxim pithily expounds the duty of Court. It is to decide what the law is and apply it; not to declare it."

But the minority view of Justice G.P. Mathur struck a contrary note.

The Flawed Judicial Thesis Soon Reversed. The Flawed Judicial Thesis Soon Reversed In *Standard Chartered Bank* [AIR 2005 SC 2622]our Supreme Court (Coram: N. Santosh Hegde, K.G. Balakrishnan, D.M. Dharmadhikari, Arun Kumar and B.N. Srikrishna, JJ.) reversed the view, taken in *Assistant Commissioner of Income-tax v. Velliappa Textiles & Ors* [(2003) 184 CTR Reports 193], on the role of judiciary. Hon'ble Justice B.N. Srikrishna in his dissenting Judgment (on behalf of Justice N. Santosh Hegde and himself) acknowledges it tersely in these telling words:

> "The interpretation suggested by the learned counsel arguing against the majority view taken in *Velliappa*, which has appealed to our learned brothers Balakrishnan, Dharmadhikari and Arun Kumar, JJ., would result in the Court carrying out a legislative exercise thinly disguised as a judicial act."

B.N. Srikrishna, J., in his dissenting Order observed that the dicta of Denning L.J. in *Seaford Court Estates Ltd. v. Asher* had been dismissed in by the House of Lords, per Lord Simonds, in *Magor & St. Mellons R.D. C. v. Newport Corporation* . 'judicial heroics' Lord Simonds had said, "the duty of the Court is to interpret the word that the legislature has used." Our Supreme Court in *Bangalore Water Supply v. A. Rajappa*[3] approved the rule of construction stated by Denning L.J. while dealing with the definition of Industry in the Industrial Disputes Act, 1947. Beg C.J. nodded at "some judicial heroics to cope with the difficulties raised". K. Iyer, J., who delivered the leading majority judgment in that case referred with approbation the passage extracted above from the judgment of Denning, L.J. in *Seaford Court Estates Ltd. v. Asher*. Further, in *Rupa Ashok Hurra v. Ashok Hurra* [AIR 2002 SC 1771 [S. P. Bharucha, C.J.I., S. S. Mohammad Quadri, U. C. Banerjee, S. N. Variava and Shivaji V. Patil, JJ] our Supreme Court had observed:

> "The role of judiciary merely to interpret and declare the law was the concept of by-gone age. It is no more open to debate as it is fairly settled that the Courts can so mould and lay down the law formulating principles and guidelines as to adapt and adjust to the changing conditions of the society, the ultimate objective being to dispense justice. In the recent years there is a discernible shift in the approach of the final Courts in favour of rendering justice on the facts presented before them, without abrogating but by-passing the principle of finality of the judgment".

[*For more vide* "The Pragmatics of the Right Judicial Role" in *Judicial Role in Globalised Economy* by Shiva Kant Jha [Wadhwa 2005] pp. 145-180 **VIDE Paper Book Vo. V at pp. 141-150]**

(ii) In the penultimate para of *Azadi Bahao*, the Court's operative order highlighting the prime issues for actual decision is crisply stated thus:

> "The judgment under appeal is set aside and it is held and declared that Circular No. 789 dated April 13, 2000 ([2000] 243 ITR (St.) 57), is valid and efficacious."

The grounds which enabled the Court to come to the aforementioned conclusion are the following:

(a) It is clearly established that "the principle that circulars issued by the Central Board of Direct Taxes under section 119 of the Act are binding on all officers and employees employed in the execution of the Act, even if they deviate from the provisions of the Act" [Navnit Lal C. Javeri v. K. K. Sen, AAC [1965] 56 ITR 198 (SC); Ellerman Lines Ltd. V. CIT [1971] 82 ITR 913 (SC); CIT v. Anjum M. H. Ghaswala [2001] 252 ITR 1 (SC); Collector of Central Excise v. Dhiren Chemical Industries [2002] 254 ITR 554. After examining the 'Effect of circular under section 119' the *Azadi Bachao* relied on *Dhiren Chemical* where the Supreme had observed in para 11:

> > "We need to make it clear that, regardless of the interpretation that we have placed on the said phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue."

(b) "The impugned Circular 789 of 200 was *intra vires* Section 119 of the Income-tax Act, 1961. The Court held :it is erroneous to say that the impugned Circular No. 789 dated April 13, 2000 ([2000] 243 ITR (St.) 57) is *ultra vires* the provisions of section 119 of the Act. In our judgment, the powers conferred upon the Central Board of Direct Taxes by sub-sections (1) and (2) of section 119 are wide enough to accommodate such a circular."

(c) From the above two premises followed the judicial verdict as an inevitable corollary. The Supreme Court reversed the decision of the High Court holding that the " said circular is *ultra vires* the provisions of section 90 and section 119 of the Income-tax Act, 1961, and also otherwise bad and illegal."

SUBMISSIONS

6. It is submitted that the above reasons buttressing the Court's order do not accord well with a number of subsequent decisions, even by the Constitution Bench. The reasons for so submitting are, in brief, the following:

(I) But the above view of the Court cannot survive as very recently our Supreme Court in *Commissioner of Central Excise, Bolpur vs M/s Ratan Melting & Wire Industries* **[**2008-TIOL-194-SC-CX-CB**]** [at Paper Book Vol V pp.125-127] has noted the above para, and disagreed with *Dhiren Chemicals*. It is submitted that *Azadi Bachao* can no longer stand comfortably with the recent decision of the Constitution Bench in *Ratan.* For detailed reasons for this view vide my articles[4]:

(II) The Effect of *Ratan* has been examined by an expert[5] who thinks that "the decisions given earlier get impliedly overruled and the CBDT/CBEC's circulars, contrary to the enacted laws or SC's decisions, would be invalid."[6]

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[4] Both the articles on www.taxindiaonline.com and www.shivakantjha.org

[5] *T. N. Pandey,* in Business Line of Saturday, Jan 03, 2009 [http://www.thehindubusinessline.com/2009/01/03/stories/2009010350800900.htm]

[6] "**Apex court's decision**

(III). The view to which the Constitution Bench of the Supreme Court has taken has a long and complex background in the post-*Azadi Bachao* phase. In *Commissioner of Customs, Calcutta v. Indian Oil Corporation Ltd*. [2004 (165) E.L.T. 257 (S.C.), decided on February 2004, the Supreme Court considered the status of the CBDT circulars. Justice P. Venkataraman Reddy J took note not only of *Dhiren Chemical Industries, Navnit Lal C. Javeri v. K. K. Sen, Ellerman Lines Ltd. V. CIT, K. P. Varghese v. ITO, Sirpur Paper Mills Ltd v. CWT,*[7] *Keshavji Raiji & Co v. CIT*[8]*, Bengal Iron CTO*[9]*, CST v. Indra Industries*[10]*, Wilh, Wilhelmsen v. CIT*[11] but also of ***UOI v. Azadi Bachao Andolan***[12]*. Hindustan Aeronautics v. CIT*[13]. Justice Reddy referred to *Sirpur Paper Mills Case* on which the Hon'ble Delhi High Court too had relied for formulating the propositions governing the CBDT's power under consideration. He observed:

> "It is now trite law that by reason of any power conferred upon any statutory authority to issue any circular, the jurisdiction of a quasi judicial authority in relation thereto can[not] be taken away".

Hon'ble Justice Reddy concludes his judgment expressing his desire that the matter should go to the Constitution Bench. The Hon'ble Lordship was pleased to observe:

The scope of circulars issued by the CBDT/CBEC has been clarified by the five-judge bench of the apex court in the *CCE vs Rattan Melting & Wire Industries (2008 220 CTR SC 98)* case, decided on December 14, 2008. The issue considered in this decision relates to the binding nature of CBEC's circulars *vis-À-vis* the apex court's decision, but the decision given should apply to circulars concerning all legislated laws.

The Supreme Court has said that circulars and instructions issued by the Board are, no doubt, binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of the apex court or the High Court.

So far as the clarifications/circulars issued by the Central Government and the State Governments are concerned, they represent merely their understanding of the statutory provisions. They are not binding upon the court.

It is for the court, and not the executive, to declare what the particular provision of statute says. Looked at from another angle, a circular, which is contrary to the statutory provisions, has really no existence in law.

Thus, the court has held that a circular, which is contrary to the statutory provisions, has no existence in law [para 6].

The law declared by the Supreme Court is supreme law of the land under Article 141 of the Constitution and the circulars issued by executive bodies such as the CBDT/CBEC cannot be given supremacy over the apex court's decisions.

Thus, the decisions given earlier get impliedly overruled and the CBDT/CBEC's circulars, contrary to the enacted laws or SC's decisions, would be invalid.

The decision of the five-judge bench of the apex court has settled the controversy that circulars and instructions issued by the Central/State governments, CBDT/CBEC or any other authority, contrary to the legislated law or the law pronounced by the Supreme/High Courts, even if such circulars give benefits to the persons concerned, would not be valid and would have really no existence in law. "

[7]. (1970) 1 SCC 795.
[8]. (1990) 2 SCC 231.
[9]. (1994) Supp 1 SCC 310.
[10]. (200) 9 SCC 66.
[11]. (1996) 161.
[12]. 2003(8) SCALE 287, 306.
[13]. (2000) 5 SCC 365.

> "I have referred to these cases to demonstrate that a common thread does not run through the decisions of this Court. The dicta/observations in some of the decisions need to be reconciled or explained. The need to redefine succinctly the extent and parameters of the binding character of the circulars of Central Board of Direct Taxes or Central Excise looms large. *It is desirable that a Constitution Bench hands down an authoritative pronouncement on the subject.*"(emphasis supplied)

A Division Bench of 3 Hon'ble Judges[14] in their judgment dated February 23, 2005 in *Commissioner of Central Excise, Bolpur v. M/s Ratan Melting & Wire Iindustries, Calcutta*[15] has directed a reference to a Constitution Bench in these words:

> "Though the view expressed in Kalyani's case (supra), and our view about invalidation might clarify the observations in para 11 of Dhiren Chemical's case (supra), we feel that the earlier judgment in Dhiren Chemical's case (supra) being by a Bench of five Judges, it would be appropriate for a bench of similar strength to clarify the position. In the circumstances, we refer the matter to a larger bench of five Hon'ble Judges. Let the papers be placed before Hon'ble the Chief Justice of India for constituting an appropriate Bench."

The propositions, which our Supreme Court in *Pahwa Chemicals Pvt Ltd v. the Commissioner of Central Excise*[16] (decided by a Division Bench of 3 Hon'ble Judges) established, go counter to the basics of the judicial thinking in *Azadi Bachao*.[17]

(IV). The *Azadi Bachao* is rich in *obiter dicta*, neither relevant to the actual decision nor ever *argued* or *considered*. Such observations do not declare law. Some of such *unwarranted dicta* are mentioned here by way of illustrations:

> " The power of entering into a treaty is an inherent part of the sovereign power of the State."…….

> "An important principle which needs to be kept in mind in the interpretation of the provisions of an international treaty, including one for double taxation relief, is that treaties are negotiated and *entered into at a political level and have several considerations as their bases*." [*italics supplied*].

> " Many developed countries tolerate or encourage treaty shopping, even if it is unintended, improper or unjustified, for other non-tax reasons, unless it leads to a significant loss of tax revenues. Moreover, several of them allow the use of their treaty network to attract foreign enterprises and offshore activities."

> "The entire discussion on the 'concept of "fiscal residence" of a company' and 'Treaty shopping', and 'Treaty-making. Under Article 73 and Article 253 are obiter not required for the actual decision: hence not required to be argued and decided."

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[14]. Ruma Pal, Arijit Pasayat and C.K. Thakker, JJ.

[15]. Case No: Civil Appeal No. 4022 of 1999.

[16]. (2005) 2 SCC 720 at p. 27.

[17] It laid down the following propositions:

(1) '*It is the Act which confers jurisdiction on the concerned Officer/s.* If, therefore, the Act vests in the Central Excise Officers jurisdiction to issue show-cause-notices and to adjudicate, *the Board has no power to cut down that jurisdiction*.'

(2) 'However, *for the purposes of better administration of levy and collection of duty* and for purpose of classification of goods the Board may issue directions allocating certain types of works to certain Officers or classes of Officers'.

(3) 'It is thus clear that the Board has *no power to issue instructions or orders contrary to the provisions of the Act or in derogation of the provisions of the Act*.'

(4) 'The instructions issued by the Board have to be within the four corners of the Act.'

(5) 'The Circulars relied upon are, therefore, nothing more than administrative directions allocating various types of works to various classes of Officers.'

(6) 'These *administrative directions cannot take away jurisdiction vested in a Central Excise Officer under the Act*.''But if an Officer still issues a notice or adjudicates contrary to the Circulars it would not be a ground for holding that he had no jurisdiction to issue the show cause notice or to set aside the adjudication.'

It is submitted that the wide observations on the above issues are wholly obiter which do not declare law under Article 141 of our Constitution.[18] 'What is binding is the ratio of the decision and not any finding on facts, or opinion of the Court on any question which was not required to be decided in a particular case, it is the principle found out upon a

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[18] WHAT is binding in a given case decided by the Supreme Court or the High Court is (i) the law declared as the reason for *decision* which, we call ratio decidendi, and also (ii) what is decided in judgment culminating in the operative order. Whilst the (ii) is a decision *inter partes* which can be modified only through the review and the curative procedures, the *ratio decidendi* constitutes law for all who are subject to its jurisdiction. In Orissa v. *Sudhansu Sekhar Misra (AIR 1968 SC 647)* our Supreme Court cited with approval the following observations of the Earl of Halsbury L.C.:

> "A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and every observation found therein nor what logically follows from the various observations made in it."

Experts have mentioned two methods for determining what constitutes the ratio of a case: one is what Professor Wambaugh calls the "**reversal" test**; the other is what Dr Goodhart calls the "**material facts**" test. The former test suggests that we should take proposition of law put forward by the judge, then reverse or negates it, and then see if its reversal would have altered the actual decision done in that case. The latter suggests that the *ratio* is to be determined by ascertaining the facts treated as material by the judge together with the decision on those facts. Salmond articulates its reason when he says (Jurisprudence 12th ed. p. 181): "The "material facts" test is also valuable in stressing that propositions of law are only authoritative in so far as they are relevant to facts in issue in a case: a judicial statement of law therefore must be read in the light of facts of the case. And of course in the light of issues raised in the pleadings."

The Supreme Court Court has frequently emphasized that in dealing with constitutional matters it is necessary that the decision of the Court should be confined to the narrow points which a particular proceeding raises before it. "Often enough, in dealing with the very narrow point raised by a writ petition wider arguments are urged before the Court, but the Court should always be careful not to cover ground which is strictly not relevant for the purpose of deciding the petition before it" *(Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr AIR 1967 SC 1).*

Salmond states: "For the fundamental notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides…In course of his judgment, however, a judge may let fall various observations not precisely relevant to the issue before him…" And Lord Brightman J observed in *London Hospital v. I.R.C [(1976) 1 W.L.R. 613]*: "But a case that proceeds on the basis of a proposition that is not tested by argument is not of much value as an authority for the validity of that proposition." In *Ranchhoddas Atmaram v. Union* (AIR 1961 SC 935) our Supreme Court held that the observations in three of its decisions were not binding as "the question was never required to be decided in any of the cases and could not,.

Our Supreme Court in *Oriental Insurance Co Ltd v. Smt Raj Kumari & Ors* AIR 2008 SC 403 has observed:

> "A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving a judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the *ratio decidendi*. According to the well-settled theory of precedents, every decision contains three basic postulates (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent."

reading of the judgment as a whole in the light of the question s before the court, and not particular words or sentences.' [*CIT v. S.E.W. AIR 1993 SC 43*]. 'An *obiter dictum* is an observation by a Court on a legal question suggested by the case before it, but not arising in such manner as to *require* decision. It is not binding as a precedent , because the observation was *unnecessary* for the decision pronounced by the Court' [AIR 1971 SC 530; AIR 1976 SC 1207 (para 546): vide Basu, Shorter Constitution, 12th ed. P. 448.]

(V). To call the Constitution Bench in *McDowell's case* [1985] 154 ITR 148 (SC) mere ' hiccups" or ""temporary turbulence" is not only wholly *obiter* but patently without the jurisdiction of the D.B. of the two Hon'ble Judges.[19] In case of conflict between decisions of the Supreme Court itself, it is the latest pronouncement which will be binding upon the inferior Courts, unless the earlier was a larger Bench.

State of U.P. v. Ram Chandra AIR 1976 SC 2547 (para 22);

Mattu Lal v. Radhe Lal AIR 1974 SC 1596 (para 11).

(VI).All the following observations in *Azadi Bachao* are wholly *obiter*:

(i)"The power of entering into a treaty is an inherent part of the sovereign power of the State……"

(ii) "An important principle which needs to be kept in mind in the interpretation of the provisions of an international treaty, including one for double taxation relief, is that treaties are negotiated and entered into at a political level and have several considerations as their bases……"

(iii). "An important principle which needs to be kept in mind in the interpretation of the provisions of an international treaty, including one for double taxation relief, is that treaties are negotiated and entered into at a political level and have several considerations as their bases."

And as these were not in issue to be decided in the Case, the latest view on the above points were not presented. The observations are *per incuriam* for reasons including these:

(i) The concept of 'Sovereignty' in the obiter, borrowing idea from the observations in Berubari and *Maganbhai*, is no longer valid and in consonance

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[19] The Court relied on A. *R. Antulay v. R. S. Nayak (*AIR 1988 SC 1531) wherein Sabyasachi Mukharji, J., speaking for the majority, said that under our practice the structure of the Court is hierarchic. The Court made out the following two points:

(a) In our Supreme Court the structure that has evolved is hierarchic where under " larger Benches overrule smaller Benches". The concept of "hierarchy within the Court itself" is one of seminal importance, as disobedience to this binding norm would render the decision in breach of the norm clearly without jurisdiction, hence *non est.*

(b) "This is the practice followed by this Court and now it is crystallized into a rule of law." *Crystallization* as a rule of law means the emergence of a binding rule of substantive law. In effect, the view is derived from the well-known maxim *Cursus Curlaef Est Luxe Curiae* (The practice of the Court is the law of the Court).

Our Supreme Court stated in *Triveniben v. State of Gujarat*[19] *per Shetty J. (*AIR 1989 SC 465):

> "This is undoubtedly a salutary Rule, but it appears to have only a limited operation. It apparently governs the procedure of a smaller bench when it disagrees with the decision of a larger bench. If the bench in the course of hearing of any matter considers that a larger bench should deal with the matter it shall refer the matter to the Chief Justice. The Chief Justice shall then constitute a larger bench for disposal of the matter. This exercise seems to be unnecessary when a larger bench considers that a decision of a smaller bench is incorrect unless a constitutional question arises. 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 crystallised rule of law in a recent decision by a Special Bench of seven learned Judges."

with the present-day Customary International Law: vide *Oppenheim*[20]*;* Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States 1970 by the General Assembly of the U.N. creating norms of international customary law; *Hamdan v. Rumsfeld* [548 US 557 (2006); *Nicargua v. U.S.* (1986 ICJ); *Synthetic Chemicals v. U.P*. AIR 1990 SC 1927 (H.N. 'B'); ***Gramophone Company of India v. Birendra Bahadur Pandey*** AIR 1984 SC 667; *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977 (1) All ER 881].

(ii) When the Petitioner questioned the Central Government's power in exercising Treaty-making, he does so on the constitutional grounds, not for political reasons. H. M Seervai aptly said *Constitutional Law* pp. 2636-"

> "It is submitted that there is no place in our Constitution for the doctrine of the political question." H M Seervai, He said further:
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> ".In this sense, there is nothing outside the judicial process .The jurisdiction of a court may be excluded by the Constitution." (at p.). 2640-

(iii) How *obiter* finds spurious circulation has been thus explained by Allen in his *Law in the Making* (at p. 262):

> "And yet it is remarkable how sometimes a dictum which is really based no authority, or perhaps on a fallacious interpretation of authority, acquires a spurious importance and becomes inveterate by sheer repetition in judgments and textbooks……'

This is what happened in our country. Liberal use of the expressions 'political' and 'sovereign' was made in 1960s in Berubari and Maganbhai when such issues were wholly irrelevant to the actual decision. In fact such obiter dicta suggest our Executive Government's ideas which it had conveyed to the Secretary General of the U.N. in 1951[21] . The Government informed the Secretary General that "the President's power to enter into

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[20] Oppenheim, *Inter. Law* 9th ed. Vol. 1 'Peace' p. 125

[21] [U.N. Doc. ST/LEG/SER.B/3, at63-64 (Dec. 1952) (Memorandum of April 19, 1951) quoted in *National Treaty Law and Practice* ed. Duncan B Hollis, Merritt R. Blakeslee & L. Benjamin Ederington p. 356-357 (2005 Boston): TO QUOTE—

1. "Under Article 73 of the Constitution of India "the Executive power of the Union shall extend to the matters in respect to which Parliament has power to make laws", and under Article 53 the Executive power of the Union "is vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution." Under Article 246(1), "Parliament has exclusive power to make laws with respect o any matter enumerated in List I in the Seventh Schedule (in the Constitution referred to as the 'Union List." List I, clause 14, contains the item: "entering into treaties and agreements with foreign countries and implementing of treaties , agreements and conventions with foreign countries.'
2. Parliament has not made any laws so far on the subject, and , until it does so, the President's power to enter into treaties (which is after all an executive act) remains unfettered by any "internal constitutional restrictions.
3. In practice, the President does not negotiate and conclude a treaty or agreement himself. Plenipotentiaries are appointed for this purpose , and they act under full powers issued by the President. It is, however, the President who ratifies a treaty.
4. Apart from treaties made between heads of States, agreements of technical and administrative character are also made by Government of India with other governments. Such agreements are made in the name of the signatory governments, and are signed by the representatives of these governments. Full powers are granted , ratification is effected on behalf of the Government."

treaties (which is after all an executive act) remains unfettered by any "internal constitutional restrictions". In effect the U.N. was told that in India Treaty-making power is "extra-constitutional power"! This wils and preposterous proposition is still not revised. This view was repeated by Justice Shah in Maganbhai by selectively quoting from Lord Atkin in *Attorney General for Canada v. Attorney General for Onterio*[22] **But none of the parties before the Court bothered as the decisions turned on wholly different grounds.**

(iv) The syndrome mentioned at (iii) supra is again illustrated by the frequently repeated *obiter* that a tax treaty prevails on the statute. *Azadi Bachao* traced its history. The CBDT issued a Circular No. 333 dated April 2, 1982 ([1982] 137 ITR (St.) 1), directing : "it was held that the conclusion is inescapable that in case of inconsistency between the terms of the agreement and the taxation statute, the agreement alone would prevail." It was repeated *CIT v. Davy Ashmore India Ltd*. [1991] 190 ITR 626 (Cal): thereafter it turned into a shibboleth as both the Department and the assesee had best of times none caring about the wreck of the law under the Executive's act under Section 119 or under Section 90 of the Income-tax Act. Such obiter dicta have sadly become, to quote Allen "inveterate by sheer repetition in judgments and textbooks……"

[22] AIR 1937 PC 82