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OF PRECEDENTS

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'Precedents', also called rulings, are searched and cited at the Bar and analysed and scrutinised in Courts, throughout the proceedings, so much as that, it has become a matter of routine In the system. Undoubtedly, however, this routine exercise plays a very important part in decision making process in the system of dispensation of justice. It is safer to tread a tried path, is not the only consideration, but many others too, behind the sanction of the doctrine .of precedents.

It is endeavour of any civilized society to be governed by rule of law. It necessarily requires 'law'. Precedents have been recognized as one of the sources of law. Judges make law is now an acknowledged. concept. A reference on the point may be made to a decision, reported in AIR 1991 SC *101,* Delhi Transport Corpn. vs. DTC Mazdoor Congress and others. Precedents are one of the sources of law, is found to be held in *AIR* 1988 SC 1325, All India Reporter Karmachari Singh and others v. All India Reporter Ltd. and others. An important limb of 'Rule of Law' is the even application of laws. By following precedents this object of 'Rule of Law' is also achieved.

An important feature of the administration of justice is that 'like cases should be decided alike', to avoid any kind of discrimination in the matter of application of laws in similar cases, though may be decided by different Courts in any part of a State or the country. It is possible only through binding judicial pronouncements.

As a matter of public policy, it is also important that there must be some degree of certainty in the laws so that people may conduct their

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affairs and plan their future accordingly. In one of the decisions reported In AIR 1968 Alld. 100, Ram Manohar Lohia and others v. State of U.P. and others, it has been observed that it is necessary to maintain judicial uniformity and judicial discipline. Precedents maintain judicial uniformity and judicial discipline by which disharmony in the application of laws is shell avoided. The observations made in one of the English decisions clearly highlight the importance and use of precedents. The following observations were made by Lord Gardener LC In *Davis* v. Johnson, (1978) 2 WLR 182:

> "their Lordships regard the use of Precedent as an Indispensable foundation, upon which, to decide, what Is the law and its application to Individual cases. It atleast provides some degree of certainty upon which Individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules"

Broadly speaking, doctrine of precedents, to a great extent advances the cause of rule of law, the Ingredients of which as envisaged by Dicey have been construed to mean-

> "Thus the law affecting individual liberty ought to be reasonably certain or predictable; where law confers wide discretionary powers there should be adequate safeguards against their abuse; like should be treated alike and unfair discrimination must not be sanctioned by law; a person ought not to be deprived of his liberty status or any other substantial Interest unless he is given the opportunity of a fair hearing before an impartial tribunal." (De Smith -Constitutional and Administrative Law; 6th Edition; Page 19)

Yet another important aspect of binding precedent is that in most of the judicial systems, there is hierarchy of Courts, that is to say, the Original or the Trial Court, the Appellate Court, Revisional Court etc. For working of such a system it is necessary that judgments of the higher Courts are followed unreservedly, otherwise, there may be a judicial chaos; each Court entirely going its own way. In this connection, observations made in 1972 AC 1027, Caspel CO.Ltd. v. Broome. may usefully be quoted, which read as follows:

" .. In hierarchal system of Courts It is necessary for each lower tier to accept loyally the decision of the higher tiers. It is inevitable in hierarchal system of Courts that there are decisions of Supreme Appellate Tribunal which do not attract the unanimus approval of all members of judiciary. But judicial system only works if some one is allowed to have the last word, which once spoken, is loyally accepted."

Earlier, it appears there has not been any statutory provision about the binding nature of the decisions of the Courts. The only sanction was through the decisions of the Court. In AIR 1925 P.C.272.Kr. Mata Prasad and another v. Kr. Nageshar Sahai and others, it was held that law laid down by the Privy Council was applicable with binding force upon all Courts in India. Later, in the two decisions of the Nagpur High Court, namely, AIR 1943 Nagpur 340 (FB), D.D. Bilimoria, Electric Contractor v.Central Bank of India Limited ... and AIR 1944 (FB), Vinayak shamrao Vs. Moreshwar Ganesh Padhe and others, it has been held that binding nature of precedent is an unwritten role based on judicial comity. In the meantime the Government of India Act, 1935, Section 212 provided for the binding nature of the decisions of the Federal Court and the Privy Council upon all Courts, and ultimately doctrine of precedents received Constitutional recognition under Article 141 of the Constitution of India while providing that the law declared by the Supreme Court shall be binding on all courts and tribunals within the territory of India. The law laid down by the Supreme Court is binding on all Courts and tribunals of the Country. In 1995 (3) SCC 17, Union of India v. Kantilal Hematram Pandya, where the Central Administration Tribunal noticed the decision of the Supreme Court, but without indicating any distinguishing features on facts of the case before it failed to follow the same, the approach of the Tribunal did not receive the approval of the Court.

So far the decisions of the High Courts are concerned there has not been any specific provision under the Government of India Act, 1935 nor in the Constitution of India, like Article 141. This question was considered by Hon’ble the Supreme Court in one of the decisions

reported in AIR 1962 SC 1893, M/s East India commercial Co. Ltd. V. collector of Customs, Calcutta. The Supreme Court, on consideration of Articles 215, 226 and 227 of the Constitution of India came to the conclusion that the cumulative effect of the above noted provisions of the Constitution is that the decisions of the High Court have binding effect upon the subordinate judiciary and the tribunals. In AIR 1994 Allahabad 371, Jagdish Narain v. Chief Controlling Revenue Authority, the same view has been taken. Article 227 of the Constitution also provides that the High Courts can frame regulation for the proper guidance of the subordinate judiciary.

But, every decision does not constitute a precedent nor is a ruling. Many cases are decided and disposed of on facts. What constitutes precedent is the proposition of law as laid down in the decision. This we find held in one of the early decisions of the Court reported in AIR 1953 Allahabad 378, Sitla Baksh Singh v. Kr. Surendra Bikram Singh, and it has been obvserved in AIR 19923 SC 195, State of Punjab and others v. Surinder Kumar and others, that a decisions is a precedent if it decides a question of law. Thus, what is to be ascertained from reading of the whole judgment is as to what is the principle of law which has been laid down in the decision. It is necessary to ascertain the rationale of the judgment on the point of law. In (1992) 4 SCC 363, Commissioner of Income Tax v. Sun Engineering Works (P) Ltd., it has been observed that it has to be ascertained as to what principle has been laid down in the judgment, in context with the question involved and stray sentences and words do not constitute a precedent. It is necessary to find out the principle enunciated in the case of the ratio decidendi which actually binds as also laid down in AIR 1990 SC 334, Supreme Court Employees Welfare Association v. Union of India and others. As also pointed other in Sukhwant Singh v. State of Punjab, 1995 (3) SCC 367, observations from a judgement of the Supreme Court should not be read in isolation and divorced from the context in which they are made. A point of law which already stands decided by the Supreme Court must be accepted and that question should not be looked into again by the High Court as laid down in 1991 AWC 134, Firangi Singh and others v. Assistant

Director of Consolidation and others.

As general rule a decision of Bench consisting of larger number of Judges prevails over the decision rendered by a Bench of lesser number of Judges. Even in a case where there may be a later decision but a decision rendered earlier on the point by a Bench consisting larger number of Judges have the binding effect. Reference to some decisions on the point may useful be made: AIR 1974 S.C. 1596, Muttulal v. Radhe's Lal, AIR '1976 SC 2433, Union of India and another v,K.S. Subramanian, (1995) 1 SCC 58, Commissioner Sales Tax J & K and Ors. v. Pine Chemicals Ltd. & others. It has been observe In AIR 1989SC 2027, N. Meera Rani v. Govt. of Tamil Nadu and another, that la1 decision of lesser number of Judges will have to be read along with the decision of a larger Bench or a Constitutional Bench as the later decision cannot me, to hold at variance with what has already been held by a larger Bench.

So far decisions of High Courts are concerned, they have binding effect within the State and the decisions of the High Courts of other States have on persuasive force. The High Court while deciding a matter, if faced with decisions of its own High Court of co-equal number of Judges, taking irreconcilable view on the point. the proper course is to refer the matter to larger Bench as this alone Is considered to be appropriate. The difficult however, is often faced by the Courts when two decisions of the Benches of the higher court consisting of co- equal number of Judges are cited on one point and the two decisions cannot be reconciled. The view which is coming down since long has been that the later decision will have the binding effect as it would be taken that the earlier view stands impliedly over-ruled by the later decision. This view h$ been taken by different High Courts, e.g., by Calcutta High Court in the cases reported in AIR 1961 Calcutta 545, Pramatha Nath Mitterand other v. Hon'ble the Chief Justice of the High Court at Calcutta, and AIR 1968 Calcutta 174, Mis Sqvachand Mulchand v. The Collector of Central Excise and Land Customs and others, By Mysore High Court in a decision reported in AIR 196 Mysore 3, M/s New Krishna Bhawan v. Commercial Tax Officer, and AIR 1981 Karnataka 92 (FB),

Govindanaik G.Kalaghatigi v. West Patent Press Co. Ltd. And another; by Bombay High Court in AIR 1980 Bombay 341, Vasant Tatobi Hargude and others v. Dikkaya Muttaya Pujari, and by Allahabad High Court if AIR 1977 Allahabad 1 (FB) U.P. State Road Transport Corporation v. The State Transport Appellate (Tribunal) U.P., Lucknow and others, and AIR 1981 Allahabad 300(FB), Gopal Krishna Indleyv. Vth Addl. District Judge, Kanpur and others. But there seems to be a drift in the view that the later decision will have binding effect. The view which is being now taken is that a decision which is better on point of law should be preferred. The rationale behind the later view is that fortuitous chance of point of time has no relevance and it should not be the deciding factor as to which case should be followed.

The Punjab and Haryana High Court in AIR 1981 P&H 213(FB), Indo Swiss Time Ltd. v. Umrao, took the above said view and held that the Court which is faced with two contrary views on one point decided by Benches of co-equal number of Judges, must find out, which of the two views, is better or more accurate on point of law and that should be followed. This view found favour with some other High Courts as well, namely, Bombay High Court in AIR 1988 Bombay 9, The State Land Acquisition officer (I) Bombay and another v. The Municipal Corpn. of Greater Bombay, Patna High Court, in AIR 1987 Patna 191, (FB), Amar Singh Vadav and another v. Shanti Deve and others, Calcutta High Court, in 1988 Calcutta 1 (FB), Bholanath Karmakar and others v. Madan karmakar and others. AlIa ha bad High Coun has also taken the same view in AIR 1991 Allahabad 115 = 1991 A.L.J. 159 (FB), Ganga Saran v. Civil Judge, Hapur, Ghaziabad and others.

It appears that before the Full Bench in Ganga Saran v. Civil judge, Hapur, AIR 1991 Alld. 115, the earlier Full Bench decision reported in AIR 1981 Alld. 300. Gopal Krishna Indley (Supra) was not brought to the notice of the Court since it finds no mention in the Judgment. In the earlier Full Bench case, Gopal Krishna Indley (Supra), however, an argument was sought to be advanced that a decision better on point of law should be followed, but the Full Bench was not impressed by the argument and it was held that later decision is 1° be taken to have

impliedly over-ruled the earlier decision. The Punjab & Haryana Court in Indo Swiss Time Ltd. (Supra) referred two English decisions, viz., Hampton v. Ho/man, (1877) 5 Ch.D. 183 and Miles v. Jarvis, (1883) 24 Ch.D. 633, wherein faced with same difficulty, it was observed:

> "...The question is which of these two decisions I should follow, and it seems to me that I ought to follow that of the master of The Rolls as being the better in point of law."

A reference may be also made to yet another English decision reported In (1944) KB 718, Young v. Bristol Aerop/ane Co. Ltd., where the Court of Appeal faced with Its precious conflicting decision, held that it was duty bound to decide which of the two conflicting decisions of Its own will it follow. The Punjab & Haryana High Court also preferred to follow the minority view In the Full Bench decision in Govindanaik G.Kalaghatigi (Supra), wherein it was observed that in the interest of administration of justice one should follow the judgment which is better on point of law than one later in point of time. An excerpt from the Constitutional Law of India by Seervai was also quoted as follows:

> "...But judgment of the Supreme Court, which cannot stand together, present a serious problem to the High Courts and subordinate Courts. It is submitted that in such circumstances the correct thing is to follow that judgment which appears to the Court to state the law accurately or more accurately than the other conflicting judgment."

A reference to the case of Mattulal v. Radhe Lal, AIR 1974 SC 1596, may be also made, particularly, the observations made by Justice Bhagwati, at page 1602 of the report, while following the earlier view on the ground that it was a decision of a larger Bench, it was also observed :

> "…..Moreover, on principle, the view taken in Sarvate T.B's case commends itself to us and we think that is the right view."

However, a direct decision of the Supreme Court on the point is still awaited. The position that emerges, in view of some later decisions of some of the High Courts, indicated above, is that presently it is the

task of the lower Court to find out which of the two conflicting decisions of the higher Court Is more accurate on the point of law and to follow the same. Possibility of different views as to which of the two judgments is more accurate on point of law Is not at all ruled out.

There are a few exceptions to the binding nature of earlier decisions, e.g., a consent decree does not constitute a precedent. It is very obvious too, as a consent decree is dependent on the compromise or the settlement arrived at between the parties. No proposition of law is enunciated or propounded in such a decree. The other two exceptions are 'per incurium' and 'sub-silentio'. In a case where by inadvertence or oversight something which is very obvious to be considered is left out of consideration and such important aspect is not noticed, it is said that the judgment is 'per incurium' and not binding. But such cases are exceptional where negligence or omission is so glaring that It renders the decision ineffective as a precedent. A decision rendered ignoring a provision of law, say e.g., a later amendment by which certain provisions may have been deleted or added but the same having not been noticed would be one of such cases where the judgment is rendered 'per-incurium'. The literal meaning of the word 'incuria' is carelessness and where what Is quotable in law is avoided and ignored and the Judgement is rendered 'in ignoratium' of a statute, it is then said the judgment is 'per incurium'. The relevant decisions on the point are (1991) 4 SCC 139, State of U.P. and another v. Synthetics and Chemicals Ltd. and another, AIR 1962 SC 83, Jaisri Sahu v. Rajdewan Dubey and others, AIR 1967 SC 1480, B.Shama Rao v. Union Territory of Pondichery, and AIR 1975 SC 907, Mamleshwar Prasad and another v. Kanahiya Lal.

Similarly, when an important or relevant point of law involved, is not perceived by the court or is not present in its mind while deciding the matter, it is said that the decision 'sub silentio'. A reference may be made to (1989) (1) S.C.C.101 Municipal Corporation Delhi V. Gurnam Kaur It is also observed in the said decision as may usefully be quoted:

> "...Restraint in dissenting or over-ruling is .for the sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

It is said that in such matters. application of 'sub silentio' relieves from injustice perpetuated by unjust precedent. But, it is to be carefully noted that 'per incurium' and 'sub silentio' are available only to the Court which is considering its own earlier judgment or to the higher court, e.g., it may not be possible or permissible to the lower courts to hold a decision of the High Court as rendered 'per Incurium' or that it passes 'sub silentio'. Same is the position of the High Court in respect of the decisions rendered by the Supreme Court. It is only the High Court which is considering its own earlier decision that it can apply the concept of per incurium and sub silentio. It cannot be applied by the High Court on a decision rendered by the Supreme Court. This caution we find clear and unequivocal in the observations made by Lord Diploch in Broom v. Cassel, 1972 AC 1027, where it has been observed :

> "The court of appeal found themselves able to disregard the decision of this House in Rook v. Barnard by applying to label per incurium. That label is relevant only to the right of an appellate court to decline to follow one of its own -previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal."

However, an effort is always made to adhere to what has been coming down, in law, since long before. It is based on principle of stare decisis'. A view on the point of law which is coming down for long is not lightly to be disturbed or dislodged unless there exist strong reasons for the same. Simply because another view is also possible with equal force would not be a good ground to unsettle a settled position. The principle of stare decisis has been elaborately discussed in (1981) 2 S.C.C. 362. Waman Rao others v. Union of India and others and it has been observed that though the rule was enunciated in England where Common Law prevailed in absence of a Code but it was considered to be a wise rule to conform to a certain measure of discipline so that decisions of long standing are not over-ruled for the reason that another view of the matter is being taken. Under the American Law also it has been considered to be a matter of wise policy. In a fit case where a

decision is found to be wrong or against the provisions of law, stare decisis would certainly not come in the way. The observation of Lord Denning as quoted in AIR 1985 S.C. 1585, Distributors v. Union of India, is:

> “The doctrine of precedent does not compel your lordship to follow the wrong path until you fall over the edge the cliff."

The gist of the matter seems to be that as far as possible within a reasonable limits a view which is coming down since long may be adhered to in the interest of public of predictability and certainty of law but as observed by the Supreme Court also it cannot stretched beyond a limit of rigidity. An obviously wrong Judgment against the law, cannot be protected either by doctrine of binding precedents nor stare decisis.

So far obiter dicta is concerned; it may be pointed out that an obiter dicta of the Supreme Court is binding on all Courts. This we find in AIR 1959 SC 814, The Commissioner of Income Tax, Hyderabad, Deccan v. Mls Vazir Sultan and sons, AIR 1975 S.C. 1087, Municipal Committee, Amritsar v. Hazara Singh, AIR 1969 Allahabad 304 (FB), Chobey Sunder Lal v.Sonu alias Sonpal and another, AIR 1989 Delhi 193(FB), D.C.M. Limited v. Union of India and others, AIR 1960 Allahabad 672, Union of India v. Firm Ram Gopal Hukum Chand and others, and AIR 1967 Rajas than 1, Radha Kishan v. State of Rajasthan and others. It has been observed that judicial uniformity and judicial discipline require that courts must also follow the obiter dicta of the Supreme Court.

In the present system of dispensation of justice, precedents playa very important role, but one of the serious problems is about the number of decisions multiplying every day and it is becoming difficult to keep track of the same. This problem is, however, not new and as far back as in AIR (30) 1943 Nagpur 340 (FB). D.D.Bilimoria, Electric Contractor v. Central Bank of India Ltd., Bombay, the judgment quotes from professor Allen's 'Law in the Making' as follows:

> “A more serious difficulty, and one likely to increase in future with the ceaseless growth of recorded cases, is that exact arid comprehensive

citation cannot be ensured. If the judge is to be bound by precedents he should have all the relevant authorities at his command. But he cannot carry them all in his head, nor is it always easy to find them, in spite of the many modern devices for facilitating the search. He must depend largely on the assistance of counsel, and since the industry and acumen of the bar are also fallible it is not uncommon to meet with cases which might have been decided otherwise, or are even overruled later. because pertinent decisions have not been taken into consideration."

As rightly foreseen, the growth of case law has been manifold. The difficulty of keeping track of all the decisions still continues. May be, by computerisation, a change may be seen shortly. In any case whatever be the difficulty, the necessity of following the precedents cannot be minimised or undermined. In one of very old decisions reported in 1i63-60 All E.R.Rep. 368, it has been observed :

> "A judge would desert his duty who did not act upto what his predecessors handed down as the Rules for his guidance in Administration of Justice".

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