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Law of Precedence

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महाजनो येन गतः स पन्थाः ।

The text of Mahabharata says ‘that path is the right path which has been followed by virtuous men.’ The concept of precedent is based on this theory. The edifice of the common law is made up of judicial decisions. The doctrine of precedents grew in England in absence of codified laws. The rule of law requires not over turning precedents too often. Aristotle said “the habit of lightly changing the laws is an evil”.

In Government of India Act, 1935, the hierarchy of courts was created, with federal court as the superior court. Section 212 of the Act provided that law declared by the federal court and any judgment of the Privy Council shall, so far as applicable, be recognised as binding on and shall be followed by all courts in British India. After independence, Article 141 of the Constitution provided that law declared by the Supreme Court shall be binding on all courts within the territory of India.

Precedents: A source of “law” under the Constitution of India

Article 141 of the Constitution lays down that the “law declared” by the Supreme Court is binding upon all the courts with the territory of India. The “law declared” has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided. Hence, it flows from the above that the “law declared” is the principle culled out on the reading of a judgment as a whole in the light of the questions raised, upon which the case is decided. (See: *Fida Hussain v. Moradabad Development Authority* (2011) 12 SCC 615;

Ambica Quarry Works v. State of Gujarat (1987) 1 SCC 213; and *CIT v. Sun Engg. Works (P) Ltd.* (1992) 4 SCC 363).

The Supreme Court has consistently held that a decision which is not found on reasons nor proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141 of the Constitution. In *State of U.P. v. Synthetics & Chemicals Ltd.*, (1991) 4 SCC 139, the Court held that “any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as precedent.... A conclusion without reference to relevant provision of law is weaker than even casual observation”. This principle is not only the evidence of laws but source of law also. It is instrument for persuasion of judges.

Case decided by the court without any consideration on principle of law, cannot be treated as precedent (Vide: *Satish Kumar Gupta v. State of Haryana*, AIR 2017 SC 2072).

The High Courts are Court of record under Article 215 of the Constitution. By virtue of the provisions of Article 227, the High Courts have power of superintendence over all Courts and tribunals in their respective jurisdiction. Thus, it is implied that all Courts and Tribunals in the respective State will be bound by the decisions of the High Court. (See: *East India Commercial Co. Ltd. v. Collector of Customs*, AIR 1962 SC 1893; *Prakash Chandra Pathak v. State of Uttar Pradesh*, AIR 1960 SC 195; and *Raval & Co. v. K G Ram Chandran*, AIR 1974 SC 818).

The full form of the principle is “*Stare decisis et non quieta movere*”, which means “stand by decisions and do not move that which is quite”.

There are vertical and horizontal *stare decisis*. The horizontal one is a rule of prudence, and may be diluted by factors e.g. manifest error,

distinction on facts, etc. (vide *Keshav Mills Co. Ltd. v. C.I.T.* AIR 1965 SC 1636). The vertical principle require only compliance, being a rule of law. It's breach would cause judicial indiscipline and impropriety. (See: *Nutan Kumar v. IInd Additional District Judge* AIR 2002 SC 3456).

Judgments of the courts are not computer outputs ensuring consistency and absolute precision but they are product of human thoughts based on the given set of facts and interpretation of the applicable law. If the doctrine of precedent is not applied, there may be confusion in the administration of law and respect for law would irretrievably suffer.

It is necessary to create a predictable and a non-chaotic condition. The cardinal principle of uniformity is basic principle of jurisprudence that promotes equity, equality, judicial integrity and fairness. Predictability is a powerful tool in the modern law literature.

- Precedents form foundation of administration of justice (*Tribhovandas P. Thakker v. Rattilal Motilal Patel*, AIR 1968 SC 372).
- Precedents keep the law predictable. (*Surinder Singh v. Hardial Singh*, AIR 1985 SC 89)
- Follow it to mark Path of Justice (*Union of India v. Amrit Lal Manchanda*, AIR 2004 SC 1625).

A decision made by a higher court is binding and the lower court cannot over turn it. The court not to overturn its own precedent unless there is a strong reason to do so.

In *Union of India v. Raghubir Singh*, AIR 1989 SC 1933, the Supreme Court held that the binding precedent is necessary to be followed in order to maintain consistency in judicial decision and enable an organic development of the law. It also provides an assurance to an individual as to the consequence of transactions forming part of his daily affairs.

In *Mamleshwar Prasad v. Kanahaiya Lal*, AIR 1975 SC 907, the Supreme Court held as under:—

“Certainty of the law, consistency of rulings and comity of Courts – all flowering from the same principle - converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission.”

The benefit of this doctrine is to provide certainty, stability, predictability and uniformity. It increases the probability of judges arriving a correct decision, on the assumption that collective wisdom is always better than that of an individual. It also preserve the institutional legitimacy and “adjudicative integrity”. It is flexible in nature, as there are ways to avoid precedents. It provides equality in treatment and thus prevents bias, prejudice and arbitrariness and avoids inconsistent / divergent decisions. It prevents uncertainty and ambiguity in law [*Union of India v. Raghubir Singh*, (1989) 2 SCC 754; and Justice R V Raveendran : “Precedents – Boon or Bane”, (2015) 8 SCC 1 (J)].

The courts have to nurture, strengthen, perpetuate and proliferate certainty of law and not deracinate its clarity (Vide: *State of U.P. v. Ajay Kumar Sharma*, (2016) 15 SCC 289).

The disadvantages are to find out the *ratio decidendi*, if there are number of reasons. The distinction can be made on facts to avoid inconvenient precedents.

When it speaks of the law declared, it means only the *ratio decidendi* of the decision and it may also include *obiter dictum*, provided it is upon a legal point raised and argued. Several decisions of the Supreme Court are

exclusively determined on facts and as the facts of two cases cannot be similar, such decisions cannot be relied upon as precedents for the decision of other cases.

Authoritative precedents are legal sources of law. Observations contained in the opinion of a judgment cannot be regarded as laying down law on the point.

(See: *John Martin v. State of W.B.*, AIR 1975 SC 775)

The use of precedent is an indispensable foundation upon which to decide what is the law and its application in individual case. It provides a basis for orderly development of legal rules. (Vide: *Gopabandhu Biswal v. Krishna Chandra Mohanty*, AIR 1998 SC 1872).

Ratio decidendi: consists in the reasons formulated by the court for resolving an issue arising for determination and not in what may logically appear to flow from observation on non-issues. A case is an authority, for what it decides, and not for what logically follows from it. [*Union of India v. Meghmani Organics Ltd.*, AIR 2016 SC 4733; and *ITC Ltd. v. CIT (TDS), Delhi*, (2016) 6 SCC 652].

The binding effect of decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which the argument was subsequently advanced was actually decided.

(Vide: *Somawanti v. State of Punjab*, AIR 1963 SC 151)

Departure

In *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661, the Supreme Court overruled its own decision in *State of Bombay v. The United Motors Ltd.*, AIR 1953 SC 255, observing that the Supreme Court can depart

from its previous decisions if it is convinced of its error and its baneful effect on the general interest of the public.

The overruling of a decision is permissible, “if the rule of construction accepted by the Supreme Court is inconsistent with the legal philosophy of the Constitution” (*Superintendent and Legal Remembrancer, State of West Bengal v. Corporation of Calcutta*, AIR 1967 SC 997)

In *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845, the Supreme Court held that the court reviews its earlier judgment in the interest of public good where it had a significant impact on the fundamental rights of the citizens.

In *Golaknath v. State of Punjab*, AIR 1967 SC 1643, the Supreme Court held that the law in Article 13(2) of the Constitution included the amendment of the Constitution under Article 368 and overruled its two previous judgments in *Sankari Prasad v. Union of India*, AIR 1951 SC 458, and *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845, where it had been held otherwise. The most important instance of the rule that Supreme Court is not bound by its own decision is in the case of *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, as the *Golaknath* was partly overruled in this case. It was held therein that power of the Parliament to amend the Constitution is derived from Article 245, 246 and 248 and not from Article 368. Therefore, amendment is a legislative process and in case the amendment takes away the right conferred by Part III of the Constitution, it is void.

In *Maganlal Chagganlal (Pvt.) Ltd. v. Municipal Corporation of Greater Bombay*, AIR 1974 SC 2039, the Supreme Court held that if the previous decision is erroneous and has given rise to public inconvenience and hardship, there is no harm in overruling such decision.

(See also: *H H Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India*, AIR 1971 SC 530; *State of Gujarat v. Mirzapur Moti Kureshi*

Kassab Jamat, (2005) 8 SCC 534; and *Subramanian Swamy v. State of T.N.*, (2014) 5 SCC 75)

Deprecation

The Apex Court deprecated the practice of not following the settled legal proposition and unsettling the legal issues in *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.*, AIR 1997 SC 2477, observing as under:—

“When a position, in law, is well settled as a result of judicial pronouncement of the Court, it would amount to judicial impropriety to say the least, for the subordinate Courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate Courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.”

Similar view has been reiterated in *State of Punjab v. Satnam Kaur*, (2005) 13 SCC 617.

While dealing with a similar issue, the Supreme Court in *Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel*, AIR 1968 SC 372, observed as under:—

“Precedents which enunciate rules of law form the foundation of administration of justice under our system. It has been held time and again that a single Judge of a High Court is ordinarily bound to accept as correct judgments of Courts of co-ordinate jurisdiction and of Division Benches and of the Full Benches of his Court and of the Supreme Court. The reason for the rule which makes a precedent binding lies in the desire to secure uniformity and certainty in the law.”

In *Sundarjas Kanyalal Bhathija v. The Collector, Thane, Maharashtra*, AIR 1990 SC 261, the Supreme Court held as under:—

“One must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority.”

--Reference to Larger Bench

In *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.*, AIR 2011 SC 312, the Supreme Court held that the judgment of a larger Bench is binding on a smaller Bench or co-equal Bench. If the court doubts the correctness of the judgment, the only proper course would be to make a request to the Hon'ble Chief Justice to refer the matter to a larger Bench of appropriate strength. In case the judgment is given in ignorance of the earlier judgment, doctrine of *per incuriam* is attracted. A similar view has been reiterated in *Rattiram & Ors. v. State of M.P.*, (2012) 4 SCC 516; and *Sudeep Kumar Bafna v. State of Maharashtra & Anr.* AIR 2014 SC 1745.

In *Nutan Kumar v. IInd ADJ*, AIR 2002 SC 3456, the Supreme Court dealt with a case wherein a full Bench of the High Court, while considering the case under the provisions of Indian Contract Act, 1872, made an observation that the authority was “perhaps in conflict with other decisions namely, *Waman Srinivas Kini v. Ratilal Bhagwandas & Co.*, AIR 1959 SC 689; *Krishna Khanna v. ADM, Kanpur & Ors.*, AIR 1975 SC 1525; and *Mannalal Khaitan v. Kedar Nath Khaitan*, AIR 1977 SC 536. The Court held that one must ensure whether there was any conflict of decisions and if there is no conflict, judicial discipline and propriety required with the majority of the full Bench followed the appointing authority of the Supreme Court.

In *State of Orissa v. Mohd. Illiyas* (2006) 1 SCC 275, the court held that every decision contains three basic postulates: (i) findings of material

facts, direct and inferential, (ii) statements of the principles of law, and (iii) judgement based on the combined effect of the above.

The Supreme Court has consistently held that in case of conflicting judgments of co-equal benches, it is desirable to refer the matter to a larger Bench. (*State of MP v. Mala Banerjee*, (2015) 7 SCC 698; *Atma Ram v. State of Punjab*, AIR 1959 SC 519; *Zenith Steel Tubes and Industries Ltd. v. SICOM Ltd.* (2008) 1 SCC 533).

Precedents are not to be read as a statute.

The Courts should not place reliance on the decisions without discussing as to how the situation fits in with the factual situation. Circumstantial flexibility, one addition or a different fact, makes a difference between conclusions in two cases. (*Union of India v. Amrit Lal Manchanda* (2004) 3 SCC 75; and *Haryana Financial Corporation v. Jagdamba Oil Mills* (2002)3 SCC 496).

Exceptions to binding precedents

Consent order, *obiter dicta*, *per incuriam*, *sub silentio* (when a particular point of law involved in the decision is not perceived by the court or present to its mind, that is without argument, without reference to the rule and without citation of any authority) are the exceptions to this doctrine.

Per incuriam:

“*In curia*” literally “carelessness”. In practice, *per incuriam* is taken to mean *per ignoratium*. Thus, there are those decisions given in ignorance or forgetfulness of some statutory provisions or some authority binding on the court concerned.

(See: *Fibre Boards (Pt.) Ltd. v. CIT*, (2015) 10 SCC 333; *CCE v. Vijay Vallabh Rolling Mills*, (2015) 12 SCC 802; *K P Manu v. Scrutiny Committee for Verification of Community Certificate*, AIR 2015 SC 1402; and *Jagannath Temple Managing Committee v. Siddha Math*, AIR 2016 SC 564.

Neither factual findings nor directions issued under Article 142 are to be treated as precedents. (*Indian Bank v. ABS Marine Products (P) Ltd.* (2006) 5 SCC 72; *Ram Prakash Singh v. State of Bihar*, (2006) 8 SCC 381; and *State of UP v. Neeraj Awasthi*, (2006) 1 SCC 667.)

In *Kumari Madhuri Patil & Anr. vs. Addl. Commissioner, Tribal Development & Ors.*, AIR 1995 SC 94, the Supreme Court issued interim mandamus for establishing committees to verify the community certificates. This was challenged in *Daya Ram v. Sudhir Batham & Ors.*, (2012) 1 SCC 333, on the ground that the Court had no competence to issue the guidelines which amounted to legislation. The Court upheld the directions so issued observing that the Court has power to issue interim mandamus till the legislature enacts the competent legislation placing reliance on its earlier judgments in *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, *Vinit Narain v. Union of India*, (1998) 1 SCC 226 and *Dr. Dinesh Kumar v. Motilal Nehru Medical College*, (1990) 4 SCC 627.

In the aforesaid cases, not only directions were issued but it was made clear that non observance of any such direction would amount to disobedience of the order of the court and thus had to be strictly adhered to. However, in *Union of India v. Prakash Hinduja*, AIR 2003 SC 2612, the Court discussed the issue as to whether non-compliance of its order passed under Article 142 amounted to contempt of court. The Supreme Court observed that direction issued regarding conferment of statutory status on CVC could not be treated to be of such a nature, as the court was not competent to issue such a direction, the non-compliance whereof may amount to contempt of the order passed by the Supreme Court.

(a) The Supreme Court in *Anugrah Narain Singh v. State of U.P.* (1996) 6 SCC 303, cautioned the High Courts of the judicial discipline and adherence to the rule of precedents, observing that when there is a difference of views between coordinate Benches of equal strength, the matter should be referred to a larger bench, instead of passing any order. (See also: *Jaisri Sahu v. Rajdewon Dubey*, AIR 1962 SC 83; *Delhi Development Authority v. Ashok Kumar Behal*, AIR 2002 SC 2940; and *Union of India v. Raghubir Singh*, (1989) 2 SCC 754).

(b) Decision of larger Bench will prevail over the decision of a smaller Bench.

(c) Decisions of a smaller Bench prevails, which deals with and explains the decision of larger Bench. (*Union of India v. Nirala Yadav* (2014) 9 SCC 457).

(d) If decision of coordinate Benches of equal strength differ, and the later decision does not notice or consider the earlier decision, then the Court may choose to follow that decision which is closer to the facts of the case at hand and deals more directly with the legal issue.

(e) If a court considering a particular provision of law is faced with two decisions, it will follow the one, which deals with the same or identical provision rather than the decision which deals with a similar but not an identical provision, even if the latter is by a larger Bench or a later judgment.

(f) When a Constitution Bench has decided an issue and subsequent smaller Benches have not considered it or answered the similar issues somewhat differently, the later decisions should be construed in terms of the Constitution Bench decision as the smaller Benches could not have intended a different view.

[See: Mohan Parasaran: “How to Comprehend Precedents” (2016) 2 SCC 28 (J)]

Circumstances destroying or weakening the binding force of precedent

(i) Abrogated decisions.

(ii) Affirmation or reversal on a different ground

- (iii) Ignorance of statute
- (iv) Inconsistency with earlier decision of higher court
- (v) Inconsistency with earlier decision of same rank
- (vi) Precedents *sub silentio* or not fully argued
- (vii) Decisions of equally divided courts
- (viii) Erroneous decision

Application of Precedents in criminal cases.

The Supreme Court in *Parsaraja Manikyala Rao v. State of A.P.* AIR 2004 SC 132, held that each criminal case depends on its own facts. Thus one should avoid the temptation to decide cases by matching the colour of one case against the colour of the other.

To render speedy and effective justice, it is required to avoid the tendency to refer to and rely upon precedents to arrive at findings of fact in criminal cases.

[See: *Naib Singh v. State of Punjab*, AIR 1986 SC 2192; *Megh Singh v. State of Punjab* (2003) 8 SCC 666; and *Gian Chand v. State of Haryana* (2013) 14 SCC 420]

Conflicts between Benches:

There are three mutually repugnant streams of precedents:

- (i) Subordinate court may follow the earlier precedent, i.e., view of the earlier vintage will prevail.
- (ii) Later Decision will prevail: *Joseph v. Special Tehsildar* (2001) 1 KLT 958 (FB). *Vasant Tatabo Hargude & Ors. v. Dikkaya Muttaya Pujari*, AIR 1980 Bom. 341; *Govindanaik G. Kalaghatigi v. West Patent Press Co. Ltd. & Anr.*, AIR 1980 Kant 92)
- (iii) Better in point of law:
Amar Singh Yadav v. Shanti Devi, AIR 1987 Pat. 191 (FB)

Where the law has been laid down more elaborately and accurately.

In *Swin Times Limited v. Umrao & Ors.*, AIR 1981 P&H 213 (FB), contradiction in two judgments of the Supreme Court in *Himalayan Tiles & Marbles (P) Ltd. v. Francis Victor Coutinho*, AIR 1980 SC 1118; and *Municipal Corporation of the City of Ahmedabad v. Chandanlal Shamal Das Patel* (1971) 3 SCC 821, on the line of representation of the entity for which the land is acquired in land acquisition cases for determination of amount of compensation (It was held positively in 1980 case but repelled in 1971 case).

Vedica Procon Private Ltd. v. Balleshwar Greens Private Ltd. & Ors., AIR 2015 SC 3103, the Supreme Court found contradiction in two judgments of the court of equal strength on the issue of opening of sale in liquidation proceedings in *Navalkha and Sons vs. Ramanuja Das & Ors.* (1969) 3 SCC 537; and *Divya Mfg. Co. (P) Ltd. v. Union Bank of India*, (2000) 6 SCC 69, observing that in the latter case, the Supreme Court departed from the principle laid down in 1969 case – unnecessarily, thus 1969 case followed.