A PERSPECTIVE ON PRECEDENTS

1. THE THEORY

1.1. HISTORICAL AND THEORITICAL BACKGROUND

One may begin this essay by recalling the question answer session in Vanaparba of the Mahabharata between the Yaksha and the Pandavas. One of the questions there was " Kah Pantha" (what is the right path). Though the younger Pandavas failed to answer the questions including this one correctly Yudhisthir – the eldest and wisest of the Pandavas answered the question thus "Mahajans Jena Gatah Sha Pantha" (the one trodden by the wise is the right path). The essence of this in the context of Judicial decision making is that the decision of the wise (the Judges of the Superior Court) is the correct decision on a particular point. Citing of previously decided cases in order to persuade the Court to decide the case at hand similarly is prevalent in most systems of administration of justice through Courts. But only in England previous decisions gradually began to acquire authority of law itself rather than evidence of the law as in most systems. English common law is entirely Judge made law consisting of authoritative decisions of the Courts followed in subsequent cases. In Rome also previous decisions were cited but not as law but as evidence of law. Because of this historical development "the doctrine of precedent has acquired two meanings. In the first, which may be called the loose meaning, the phrase means merely that precedents are reported, may be cited and will probably be followed by the Courts. In the second, the strict meaning, the phrase means that the precedents not only have great authority, but must (in certain circumstances) be followed". Among the Jurists there is variance regarding the Doctrine of precedents in its strict sense only. The continental law countries – France, Germany, Italy etc- use the Doctrine only in the loose sense. The common law countries like, England, America and India apply the Doctrine in the strict sence. Indeed, Article 141 of the Constitution of India has bestowed constitutional status and authority to the Doctrine of Precedents as regards the decisions of the Supreme Court. The theoretical basis for bestowing binding authority and the status of law to a decision on a question of law is addition of certainty, consistency and predictability to the legal system. Because of the same reason decisions of the High Courts within their jurisdiction also comprise binding authority for the subordinate judiciary within such jurisdiction. The judgments of the High Courts other than the one having control over the concerned

subordinate courts will attract the loose meaning of the Doctrine. Thus broadly precedents fall into two categories binding and persuasive.

1.2. *RATIO DECIDENDI, OBITER DICTA, PER INCURIAM AND SUB SILENTIO*

In deciding a case the court determines facts, applies the law to the set of facts found and arrives at a conclusion. The decision so arrived at after exhaustion of all remedies against it attains finality and is binding between the parties to the case. This in essence is the well known concept of Res judicata. But what the case decides generally as distinguished from the special decision for the parties is the principles of law applied in reaching the decision. This is known as the ratio decidendi. The facts are not part of the precedent whereas the principle of law is its core. Indeed Article 141 of the Constitution uses the phrase " law declared". It follows therefore that unless a decision declares, lays down and/or interprets any legal principle there is no ratio decindi involved and the decision may not be cited and applied in a later case.

In the course of a Judgment the Supreme Court and/or the High Court may make various observations not precisely relevant to issues in the case. There may be illustration in such a Judgment of the general reasoning by reference to a hypothetical situation. Such courts may decide a case on one point and may feel it unnecessary to pronounce on the other points raised by the counsels and yet indicate the thinking of the court on such other point. Such observations, hypothetical reasoning and indication are categorized as obiter dicta. They are not binding authorities. But they may throw some light on a problem arising before a subordinate court and thus have some persuasive authority.

Judgments pronounced even by the Supreme Court in ignorance of statute law or a binding precedent are known as judgments per incuriam. Such judgments do not have THE authority of a precedent and need not be followed. More than one point of law may be involved in a case. If the Supreme Court and/or High Court decided the case on only one point either because other points were not argued or because of inadvertence or conscious negligence such other points are said to pass sub-silentio and those points of law cannot be a precedent in other cases. In other words if in a suit the trial court amongst others decides a suit to be barred by res judicata as also by limitation and the High Court as also the Supreme Court decides the matter only on the point of res judicata and say nothing about limitation the point of limitation is said

to have passed sub silentio and that decision cannot be cited and applied as a precedent on the question of limitation.

Before concluding this part it needs to be noticed that as a matter of modern jurisprudence precedents no doubt are a source of law but they cannot be and need not be treated on par with legislation which is the primary and prolific source of law in the modern world. The Supreme Court also has in a number of cases deprecated the developing practice of treating Judgments as legislation. Lastly even a bird's eye view of the Doctrine, as this one surely is, will be incomplete if the pristine principle that a precedent is an authority for what it actually decides and not for what can be logically inferred from it does not find a mention here.

2. THE PRACTICE

2.1. THE DIFFICULTIES - FACTUAL

Usually in every segment of human activity theory is not difficult to comprehend and it is the practice or application of the theory to the reality which is beset with difficulties. Similar is the case in application and use of precedents by Courts. Not least of the difficulties in applying a precedent in deciding a case in court is the growing trend among lawyers and Judges alike to cite and use so called precedents indiscriminately, purpose being to impress and make a parade of knowledge of law. Judges, in addition do it as ornament to the Judgment delivered without such cases not even being cited by lawyers. Besides impacting on the brevity of the judgments such a habit/trend also has a significant impact on the quicker and timely delivery of the judgment. This in turn impedes speedy disposal of cases which is the crying need of the day. It may not be possible to control citation by lawyers but Judges can surely control their own temptation to flaunt knowledge of law. When there is a clear cut provision of Statute Law governing a matter it is difficult to see the necessity to quote Supreme Court. Yet one can read reported judgments proceeding somewhat as follows :- "Facts admitted need not be proved, as held by the Supreme Court in so and so case".

It is surprising that as compared to the situation prevailing in say fifty years ago in the 21st Century production of conflicting Judgments and Judgments per incuriam by the High Courts nay even by the Supreme Court has increased in numbers. A lot has been said and heard about application of information communication technology to Jutice delivery system. One expected that one of the first use of technology would be to obliterate production of conflicting Judgments and/or judgments per incuriam from the High Court and the Supreme Court. Subordinate Judiciary does not produce precedent but is only its consumer. Authority of a binding precedent can be denuded by

legislation, overruling and reversing. Unless the lawyers assist the Courts it is today difficult for the Judges to know the intervention of one or the other of the three factors noted above. Some illustrations on this aspect from a few judgments may be useful.

Question is whether a High Court can transfer a civil case from one court within its jurisdiction to another competent court within the jurisdiction of a different High Court. Considering the provisions of Section 22, 23 and 25 of the Code of Civil Procedure (CPC hereinafter) most of the High Courts both before and after the coming into force of CPC (Amendment) Act of 1976 with effect from 01.02.1977 held that High Court has the power of such inter state transfer of civil cases. It needs to be mentioned that before the Amendment of 1976 only the Govt. could order such inter state transfer. At present under Section 25 CPC the Supreme Court has the power to order inter state transfer. In a judgment delivered recently on the 26th of September 2008 (DURGESH SHARMA Vs JAYSHREE (2008) 9 SCC 648 and 2008 (13) SCALE 54) the Supreme Court has overruled the Judgments in this regard of the Patna, Andhra Pradesh Madhya Pradesh, Bombay, Kerala, Punjub and Haryana and Nagpur High Court by interpreting the provisions of Section 23(3) CPC as procedural and those of Section 25 CPC as substantive and holding that the power to order such inter state/inter High Court transfer rests only with the Supreme Court. Some of these High Courts relied also on a Judgment of the Supreme Court itself reported in WESTERN U.P. ELECTRIC POWER SUPPLY COMPANY LTD. Vs HIND LAMPS (1969)2 SCWR 16 which has not been accepted as an authority by the Supreme Court in DURGESH SHARMA (Supra) as being a Judgment on concession besides being a judgment before the CPC (Amendment) Act of 1976. DURGESH SHARMA (Supra) , on the 26th of September thus changes the law regarding transfer of civil cases from the jurisdiction of one High Court to that of another High Court drastically. It is very unlikely that a Judge in seizein of case of such transfer in October/November 2008 would be aware of this development unless the counsel places DURGESH SHARMA (Supra) before the Judge.

BANK OF INDIA Vs M/S MEHTA BROTHERS & ORS., 2008(12) SCALE 680 delivered by the Supreme Court on the 23rd of September 2008 is another such precedent where the first proviso to Order IX Rule 13 of the CPC has been interpreted as comprising even the power of setting aside a interpartes decree in favour of the other defendants if the criterion of indivisibility of the decree as a whole is satisfied. The effect of the Judgment is to overrule the Full Bench decision of KHARGESH CHANDRA Vs CHANDRA KANTA BARUA, AIR 1954 Ass 183(F.B.) holding the field since 26.03.1954. The date of the Judgment cited as a precedent and the dates of the events/facts of the case resulting in the said Judgment can help significantly in avoiding pilfalls, of change of law, overruling and reversal denuding the authority of that Judgment. Section 16(2) CPC (Amendment) Act 2002 provides that the amended provisions of Order VI Rule 17 that is the poviso of

Order VI Rule 17 would not be applicable to a pleading filed before 01.07.2002. Decisions like PRADEEP SINGHVI AND ANOTHER Vs HEERO DHANKANI AND OTHERS (2004) 13 SCC 432 dated 23.07.2004, USHA DEVI Vs RIJWAN AHMED AND OTHERS, AIR 2008 SC 1147 dated 17.01.2008 are apt to mislead lawyers and Judges alike as precedent on the proviso. The matter is further compounded by the Head Note in PRADEEP SINGHVI (Supra) which even mentions the proviso there. It is explicit on the dates mentioned in para 5 of PRADEEP SINGHVI (Supra) that the events there being of 2001 proviso is not at all attracted and the unamended law ruled the matter. USHA DEVI (Supra) eventually decided the case relying on the Three Judge decision in SAJJAN KUMAR Vs RAM KISHAN, (2005) 13 SCC 89 dated 22.08.2005 because it was found "closer on facts" though the counsels argued on the proviso. Again para 6 of SAJJAN KUMAR (Supra) clearly establishes that the proviso is not applicable in that case. No dates except the statement that issues were framed on August 13, 2002 in there is USHA DEVI (Supra). One can only guess that proviso is not applicable in USHA DEVI (Supra) either.

The same kind of factual error occurred in CHANDER KANTA BANSAL Vs RAJINDER SINGH ANAND , 2008 (4) SCALE 546 dated 11.03.2008 where lot of space and time had been spent on the proviso without noticing that the proviso is not at all attracted. These Judgments cannot be treated as precedents on the amended law as to amendment of pleadings. No doubt anxiety to dispose of cases quickly is one of the factors resulting in such errors at the highest level. Consumers of precedents that is the subordinate courts have thus to be discerning. The date of reporting of a judgment may often mislead Judges and Lawyers alike. Habit of not going beyond the Head Note of a Report also creates difficulties. At the level of the consumer errors illustrated above can be avoided if the entire judgment cited as a precedent is closely scrutinized.

2.2. DIFFICULTIES – LEGAL

Factual errors are the product of inadvertence, misinformation, and/or ignorance. In a sense they may be categorized as concrete. Legal errors are caused largely by mis-appreciation, arrogance and ignorance. Legal errors may also be compounded by misinformation as to facts. Legal errors thus being abstract cause the graver difficulty for the subordinate Judiciary in accepting the authority of a precedent cited by the lawyers. Tendency to breach the rule that precedent is an authority for what it actually decides and not for what can be deduced from it is at the core of legal errors in accepting a precedent as an authority on a particular question of law. The interpretation even by the Supreme Court on a particular provision of Statute would not be binding in interpretation of a similar provision of a different Statute. However pari materia Statute may be similarly interpreted not because of any

binding authority of the interpretation but because of persuasive authority only.

Some illustration in this regard may be useful. In BHARAT DAMODAR KALE Vs STATE OF A.P., AIR 2003 S.C. 4560 a Two Judge Bench of the Supreme Court interpreted the provisions of Chapter XXXVI of the Code of Criminal Procedure 1973 (Cr.P.C. hereinafter) regarding Limitation of criminal cases by laying down that limitation provided is for filing of the complaint or the charge-sheet and not for taking cognizance. A Three Judge Bench of the Supreme Court in KRISHNA PILLAI Vs T.A. RAJENDRAN, 1990 (Supp) SCC 121 relying on the Constitution Bench Judgment in A.R. ANTULAY Vs RAM DAS SRINIVAS NAYAK, (1984) 2 SCC 500 interpreting Section 9 of the Child Marriage Restraint Act 1928 held that the Magistrate is not competent to take cognizance beyond one year under the said Act. The Andhra Pradesh High Court in 2006 Cr. LJ 2438 read a conflict between the earlier Three Judge decision and the later decision in BHARAT DAMODAR (Supra) in dealing with the limitation of a case under Section 72 of the Standard Weights and Measures Act 1976 and followed the Three Judge decision. The legal error is too transparent to need any elaboration.

In DILIP S. DHANUKAR Vs KOTAK MAHINDRA AND CO. AND ANOTHER, (2007)6 SCC 528 the Supreme Court Judgment contained the sentencing portion of the accused. Sentencing portion says that in default of payment of the fine imposed on the company the representative of the company shall suffer imprisonment in default. The Supreme Court has not commented on this portion of the sentence. Merely because the erroneous sentencing portion is contained in a Judgment of the Supreme Court it cannot be applied as a precedent to support such a default sentence as permissible.

In MANISH JALAN Vs STATE OF KARNATAKA, AIR 2008 S.C. 3074 dated 11.07.2008 the Supreme Court reduced the imprisonment to the period undergone, confirmed the fine and in addition imposed compensation under Section 357(3) of the Cr.P.C. This Judgement cannot be used as a precedent by the consumers of precedent to permit imposition of fine and compensation in the teeth of the provision of Section 357(3) Cr.P.C.

3. THE CONCLUSION

What the Supreme Court does in a particular case is not a precedent to be followed by other courts. Only what the Supreme Court lays down or says to be the law is a precedent. Thus other courts have to be alert to distinguish between the word and the deed of the Supreme

Court in a case. In this connection DELHI ADMINISTRATION Vs MANOHAR LAL, AIR 2002 S.C. 3088 may be remembered.

Not the least of the difficulties in applying a precedent is presented by conflicting decisions of the High Court or the Supreme Court. Turning to SALMOND ON JURISPRUDENCE on which the author has copiously drawn in preparing the essay one can conclude that in such a case rule is better in law not later in time. It is thus open to the subordinate court to choose and apply one or the other of such decisions depending on its worth, in the opinion of the Court, taking care to see whether any change of law or other such factors have intervened or not.