

## THE WASTED LESSONS OF A PRECEDENT

By

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### 1. THE PREFACE

The precedent in question is the famous three Judge decision of the Supreme Court reported as **SOM MITTAL -Vs- GOVERNMENT OF KARNATAKA (2008) 3 SCC 574**. The Judgment will, hereinafter, be referred to as **SOM MITTAL**. The lessons are not many but the waste is considerable. The lessons are as follows :-

1. **“This court has repeatedly cautioned that while rendering judgments, courts should only deal with the subject matter of the case and issues involved therein. Courts should desist from issuing directions affecting executive or legislative policy, or general direction, unconnected with the subject matter of the case.”**
2. **“The subject matter of an appeal, whether civil or criminal, is the correctness of the decision of the court below. There is no question of appellate court traveling beyond and making observations alien to the case. Any opinion, observation, comment or recommendation de hors the subject matter of the appeal, may lead to confusion in the minds of the litigants, members of the public and authorities as they will not know how to regulate their affairs, or whether to act up on it”.**
3. **“The law declared by this Court is binding on all courts. All authorities in the territory of India are required to act in-aid of it. Any interpretation of a law or a judgment, by this Court, is a law declared by this Court. The wider the power, more onerous is the responsibility to ensure that nothing is stated or directed in excess of what is required or relevant for the case, and to ensure that court’s order and decisions do not create any doubt or confusion in regard to a legal position in the minds of any authority or citizen, and also to**

**ensure that they do not conflict with any other decision or existing law.”**

**The extracts would show that the last sentence of lesson No. 3 above though directed specially to the Supreme Court itself there is no difficulty in applying this to the respective High Courts within their territorial jurisdiction. Lessons emphasize their binding character. Because of various factors the High Courts sometimes, nay even the Supreme Court on a rare occasion, render judgments compelling the conclusion that lessons have been wasted on the courts. Analytical illustration of this compelling conclusion is the theme of the essay. It will be worthwhile first to explore the context of the lessons first.**

## **2. THE CONTEXT OF THE LESSONS**

**India’s Silicon Valley that is the Electronic City, Bangalore was shaken by the early morning rape and murder of Smti. Pratibha Srikant Shetty a young woman employee of M/S Hewlett Packard Global Soft Ltd. while on her way to work place on a transport provided by the Company. A complaint under Section 25 read with Section 30(3) of the Karnataka Shop and Commercial Establishments Act 1961 was lodged against the Managing Director of the Company Som Mittal who on receipt of the summons reached the Karnataka High Court via Section 482 of the Code of Criminal Procedure. The High Court declined to quash the complaint. Som Mittal obtained special leave to appeal. His appeal to the Supreme Court being Criminal Appeal No.206 of 2008 decided on January 29, 2008 produced two judgments by two Judges forming the Division Bench of the Supreme Court. These judgments can be perused at (2008) 3 SCC 753. Both judges agreeing with the conclusion of the Karnataka High Court refused to quash the complaint. However the second concurring Judgment from paragraph 38 to 60 (SCC Report) went at a tangent and spoke extensively on what is happening in the State of Uttar Pradesh in particular with regard to deletion of Section 438 of the Code of Criminal Procedure by a State amendment. Paragraphs 57, 59 and 60 of the second judgment respectively contain**

**(1) “a strong recommendation to the U.P. Government to immediately issue an ordinance to restore provisions of anticipatory bail by repealing Section 9 of the U.P. Act 16 of 1976”.**

**“(2) a direction “that Amarawati case must be implemented in letter and spirit by the Sessions Courts in U.P. and in this connection the Registrar General of the Allahabad High Court will circulate letters to all the District Judges in U.P. alongwith a copy of this Judgment.”**

*A further direction (3) that “the Secretary General of this court shall send a copy of my judgment to the Chief Secretary, Home Secretary and Law Secretary of U.P..... A copy shall also be sent to the Chief Secretary, Home Secretary and Law Secretary of all the State Government/Union Territories in India who shall direct all officials to strictly comply with the judgment of this court in Joginder Kumar Case.”*

**Eventually the Three Judge Bench in SOM MITTAL intervened to forestall the issue of the directions by holding that the observations, recommendations and directions in paras 17 to 39 of the concurring judgment (edited paras 38 to 60 in SCC Report) do not relate to the subject matter of the appeal. Laying down the law as in the three lessons already quoted the Supreme Court concluded thus :-**

*“..... the directions issued to the Secretary General of the Supreme Court, State Governments and Union Territories and recommendations to the Government of U.P. in the “aside” contained in paras 17 to 39 of the concurring Judgment are not directions to be complied with.”*

### **3. ANALYTICAL ILLUSTRATION**

**SOM MITTAL because of the involvement of the Information Technology Industry, the sensational nature of the story and the Corporate World’s interest made prominent news in the national dailies. It is therefore surprising that in the illustrative case shortly to be unfolded SOM MITTAL was not at all mentioned. Generally non citing of a relevant precedent is the prime factor of its waste. SOM MITTAL was decided on the 21<sup>st</sup> day of February 2008 and the Gauhati High Court decided RAMCHANDRA RABIDAS @ RATAN RABIDAS –Vs- State of TRIPURA, 2009(1) GLT 90, (2009)2 GLR 741 on the 22<sup>nd</sup> day of December 2008. This judgment of the Gauhati High Court will be referred hereinafter as RAMCHANDRA. Like the “concurring judgment” of the Supreme Court RAMCHANDRA ended with a direction which read thus :-**

*“ The Registry is directed to forward a copy of this judgment to the Director General of Police, Tripura and of all other States under Gauhati High Court for information and issuing appropriate instructions to their*

*sub-ordinate officers that road traffic offences shall ordinarily and invariably be registered under various provisions of Motor Vehicle Act, 1988, subject to the just exceptions formulated in paragraph 37 of this judgment.”*

**Even de-hors the context of the above direction it can be said that had SOM MITTAL been cited the High Court might not have issued the directions. To appreciate the relevance of the direction in the backdrop of SOM MITTAL as also its legal status context of RAMCHANDRA needs to be understood. One may, therefore, look at the context of RAM CHANDRA before proceeding further.**

#### **4. THE CONTEXT OF RAMCHANDRA**

**In RAMCHANDRA the High Court was dealing with a revision petition challenging the concurrent finding of guilt, conviction and sentence of the petitioner under Section 279/304-A/337 of the Indian Penal Code. In paragraph 6 of the judgment the High Court affirmed the conclusion of guilt of the petitioner as regards rash and negligent driving. Thereafter the High Court impressed by the submissions “on the question of legality of investigation and trial” made by the petitioner’s counsel has been persuaded to issue the directions already referred to. While the directions, recommendations etc in SOM MITTAL aptly capsuled in the word “aside’ suffers from extreme irrelevance , the direction in RAMCHANDRA because of submission by counsel suffer not so much from irrelevance, as from lack of foundation in law. One other feature of SOM MITTAL vis-à-vis RAMCHANDRA is that despite the fact that the Judges of the Division Bench in (2008) 3 SCC 753 did not refer the case to a larger Bench under Rule 2 of Chapter VII of the Supreme Court Rules, 1966 perhaps the Supreme Court Registry brought the “asides” in SOM MITTAL to the notice of the Chief Justice and eventually a larger Bench forestalled the issue of the “asides”. For all one knows the direction issued by the Registry of Agartala Bench of the High Court may have already reached the seven Director Generals of Police of the Seven North Eastern States. In the paragraphs of this writing to follow the legal status of the direction in RAMCHANDRA is being analyzed.**

#### **5. DIRECTION IN RAM CHANDRA ANALYZED**

**One feature of RAMCHANDRA that immediately catches the eye and the mind is that because of the nature of the submission of the counsel for the petitioner there has been a mix-up of substantive**

local or special law and the procedural or adjective local or special law. The six Supreme Court Judgments relied on by the petitioner's counsel as recorded at the end of para 8 of the judgment and discussed by the High Court from para 12.1 to 18 of RAMCHANDRA deal only with procedural special law covered by Section 4(2) of the Code of Criminal Procedure 1973. Support sought to be derived from these judgments regarding illegality of the trial under Section 279/337/304-A IPC instead probably under Section 184, 185 etc of the Motor Vehicle Act is absolutely non-existent. All the above provisions are substantive provisions describing the offence and prescribing the punishment respectively under general law the Penal Code and the special law. The Motor Vehicle Act. RAMCHANDRA records that the "counsel emphatically submitted that Section 5 of the Indian Penal Code statutorily debars trial and conviction of any person under IPC in the event of existence of special or local law on the specific subject, covering similar offences." The Supreme Court Judgments do not even mention Section 5 of the Penal Code. Persuaded by the submission the High Court, despite the fact that the Supreme Court Judgments do not at all mention Section 5 of IPC held that authorities from the Supreme Court leave no scope for giving a different interpretation to as regards the limited applicability of IPC and Cr.P.C. in the light of exclusion Clause u/s 5 and 4(2) respectively. It appears that amid the mass of authorities and quotation of the several provisions of both the IPC, Cr.P.C. and the Motor Vehicles Act the true meaning of Section 5 I.P.C. has been lost. The provisions cannot be called an "exclusion clause" if anything it is an inclusion clause. This becomes clear if Section 2 and 5 of I.P.C are read together. The true scope and meaning of these provisions is that despite the wide sweep of the provision of Section 2 containing the words "under this code and not otherwise" unless a provision like that of Section 5 preserving the penal provision of certain laws specified there generally and special or local laws would not have continued to be operational after 6<sup>th</sup> of October 1860 when the Indian Penal Code came into force. It is surprising that though in paragraph 22 of RAMCHANDRA Indian Penal Code by Ratanlal and Dhiraji Lal (29<sup>th</sup> Edition) has been mentioned in connection with general law or special law" the Five Judge unanimous special Bench decision of the Calcutta High Court SATISH CHANDRA CHAKRAVARTI -VS- RAM DOYAL DE, AIR 1921 Calcutta 1 mentioned in that Book and which enunciated the real meaning of Section 5 of the Indian Penal Code has been missed. The Special Bench was dealing with Section 5 I.P.C. before it attained the present shape by virtue of the Adaptation Order 1950. The Special Bench spoke thus :-

*"It need not be disputed that the effect of Section 5 is to qualify the general repeal provided by Section 2. The two sections taken together declare that offences*

*defined by special and local laws continue to be punishable as before; in other words, all acts or omissions contrary to the provisions of the Code itself, or of the provisions of special and local laws, and the other laws enumerated in Section 5, and these alone and others are punishable as offences.”*

**The High Court also appears to have accepted the submission on Section 208 of the M.V. Act as laying down a special procedure for trial of traffic offences stopping short only of holding, as submitted, that M.V. Act is a complete Code procedurally for investigation and trial of traffic offences. Unfortunately the counsel did not take the High Court through the entire section 208 which even in the opening sentence contains within bracket the following :- “( other than an offence which the Central Government may by rules specify in this behalf)”. The rule indicated in the quote above is Rule 164 of the Motor Vehicle Rules, 1989. Section 182, 184, 185 and a few others are within the excepted category of offences under the Motor Vehicles Act. Thus the so called special procedure cannot be applied to trial of the offences indicated in Rule 164.**

**Responding to the submission of the counsel for the petitioner on Section 20 to 24 of the M.V. Act the High Court held that “the penal provisions of the Indian Penal Code do not have subsidiary line of punishments by way of suspension or cancellation of driving licences.....” (see para 36 of RAM CHANDRA). Existence of precedents from other High Courts ordering suspension or disqualification under Section 20 of the M.V. Act basing on the following words in that section : “or of an offence in the commission of which a motor vehicle was used” after conviction under Section 279/337 etc. I.P.C. apart even in RAMCHANDRA the High Court while keeping the conviction under Section 279, 337 and 304-A of the I.P.C. undisturbed despite dubbing them as unsustainable ordered disqualification of the licence under Section 20 of the M.V. Act. Para 36 and 38 of RAMCHANDRA may be referred to in this connection.**

**The most potent argument by the Public Prosecutor basing on Section 26 of the General Clauses Act 1897 probably because of lack of supporting precedents matching the array of precedents cited by the counsel for the petitioner could not find its mark . Going by what has been stated in para 26 of RAMCHANDRA the worth of the argument was not at all appreciated by the High Court.**

**None of the provisions of law quoted in RAM CHANDRA and none of the precedents discussed there would support the holdings that :-**

- (1) *“that prosecution of road traffic offenders under the provisions of Indian Penal Code is not permitted since it has no sanction of law (see para 26).*
- (2) *“that the conviction of the petitioner u/s 279, 304-A and 337 of I.P.C. are unsustainable (see para 38).*

**Offences under 279, 337, 338 and 304-A I.P.C. are cognizable offences. The directions in RAM CHANDRA will fly in the face of the mandatory duty of the police officers prescribed under Section 154/155/156 etc. of the Code of Criminal Procedure. There can be no question that the directions are in flagrant breach of lesson No.3 in SOM MITTAL in that they will create “doubt or confusion in regard to a legal position in the minds of” the police.**

## **6. THE “LEGAL POSITION”**

**The phrase “legal position” has been borrowed from SOM MITTAL. In order “to promote the convenience of motorists and to give increased facilities for motor travel” THE MOTOR VEHICLE INTERNATIONAL CIRCULATION ACT, 1912 was the first central legislative step in British India to achieve that object . After two years of its existence the 1912 Act gave way to the more comprehensive INDIAN MOTOR VEHICLES ACT 1914 which repealed apart from the 1912 act several provincial Acts like Bengal Act of 1903, Bombay Act of 1904, Burma Act of 1906, Madras and Punjab Act of 1907 and U.P. Act of 1911. The 1914 Act was repealed by the MOTOR VEHICLES ACT 1939 which in turn was replaced by THE MOTOR VEHICLES ACT 1988 that came into force on and from 01.07.1989. For the present purpose it is not necessary to go into the details of the changes effected over a period of about 75 years in the laws relating to Motor Transport by the above mentioned Acts. However it needs to be pointed out that with a bit of changes in the phraseology the offence under Section 5 of the Indian Motor Vehicles Act 1914 became the offence under Section 116 of the Motor Vehicles Act 1939 and eventually became the offence under Section 184 of the Motor Vehicles Act 1988. Indian Penal Code has been continuing in force since 6<sup>th</sup> October 1860. During such a long period of nearly a century the co-existence of Motor Vehicles offences and similar offences like those under 279 etc of the Penal Code do not appear to have been questioned by any High Court till RAMCHANDRA did it. The directions in RAMCHANDRA in effect would unsettle a legal position continuing for such a long period of time. In para 28 of RAMCHANDRA there is the hint of an advice bordering on a recommendation for repeal of the offence under Section 279 I.P.C. Most surprisingly none mentioned**

the doctrine of implied repeal. The directions could have only been legally sustained if the High Court had concluded that the offences under Section 279, 337 etc. of I.P.C. have been impliedly repealed by the enactment of the same or similar offences under the Motor Vehicles Act 1988. Since 1957 the Supreme Court has in a series of decisions, dealing with the matter of co-existence of similar/same offences under two different statutes, with the doctrine of implied repeal, with the role of Section 26 of the General Clauses Act 1897 and the statutory and constitutional concept of double jeopardy, spoken on the aspect of law very relevant for a correct decision of the point but inadequately argued and considered in RAMCHANDRA. Not a single one of the said seminal judgments of the Supreme Court was placed before the High Court. Sampling of a selection of the Supreme Court judgments should be very illuminating and instructive.

### *6.1. LIGHT FROM THE SUPREME COURT*

On the 11<sup>th</sup> of January 1957 a Five Judge Constitution Bench of the Supreme Court decided OM PRAKASH GUPTA -VS- STATE OF U.P. AIR 1957 S.C. 458. It was held that the offence under Section 409 of the Penal Code and Section 5(1) of the Prevention of Corruption Act, 1947 are not identical in essence, import and content, that there is no implied repeal of the earlier provision of the penal code by the later provision of the Prevention of Corruption Act and both offence can coexist.

On the 5<sup>th</sup> of April 1957 another Five Judge Constitution Bench in STATE OF MADHYA PRADESH -VS- VEERESWAR RAO, AIR 1957 S.C. 592 reiterated the law laid down in the judgment of 11<sup>th</sup> January 1957 after considering the same two substantive provision for offences. The Supreme Court also spoke about the provision of 403 Cr.P.C., of Article 20 of the Constitution of India and those of Section 26 of the General Clauses Act, 1897 as not prohibiting trial and conviction under of the provision of Section 409 I.P.C. and Section 5 of the prevention of Corruption Act 1947.

On the 9<sup>th</sup> December 1960 a Four Judge Bench of the Supreme Court decided STATE OF BOMBAY -VS- S.L. APTE AND ANOTHER, AIR 1961 S.C. 518. In that case two accused who were officers of an Insurance Company were tried for offences under Section 409 of the Indian Penal Code and Section 105 of the Insurance Act and were convicted. The Sessions Judge affirmed the conviction and sentence under Section 409 of the I.P.C. but acquitted them of the charge under Section 105 of the Insurance Act because of absence of sanction under Section 107 of the Insurance Act. After obtaining sanction a complaint charging them with the offence under Section 105 of the Insurance Act

was filed once again. The trial Court acquitted them by reason of the provisions of Article 20(2) of the Constitution of India and the provisions of Section 26 of the General Clauses Act, 1897. The State's appeal against acquittal having been dismissed by the High Court the State appealed to the Supreme Court. The Supreme Court found that "there was not any complete identity in the statement of facts which set out the acts and omissions on the part of the respondents which were alleged to constitute the two offences S. 409 of the Indian Penal Code and S. 105 of the Insurance Act." The Supreme Court posed unto itself the question whether to attract the bar under Article 20(2) of the Constitution and that under Section 26 of the General Clauses Act 1897 substantial similarity of the allegation regarding two offences is sufficient or the identity of the ingredients of the two offences is necessary. Judgment drew on the two Constitution Bench decision of 1957. **OM PRAKASH (Supra)** and **STATE OF MADHYA PRADESH (Supra)** and reiterated the law there. It was held that if the ingredients of the offences are not identical the offences cannot be called the "same offence". Para (15) of the Judgments concludes thus :-

*"(15) If, therefore the offences were distinct there is no question of the rule as to double jeopardy as embodied in Article 20(2) being applicable."*

**Interpreting the provisions of Section 26 of the General Clauses Act it was held thus :-**

*"Though S. 26 in its opening words refers to "the act or omission constituting an offence under two or more enactments" the emphasis is not on the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to "shall not be liable to be punished twice for the same offence". If the offences are not the same but are distinct, the ban imposed by this provision cannot be invoked."*

**The Supreme Court concluded by observing that the same is the law under Section 403 (2) of the Criminal Procedure Code 1898 (now Section 300 of the 1973 Act). The appeal was allowed and the subsequent trial was ordered to be continued.**

**Next the doctrine of implied repeal not argued by the counsels in RAMCHANDRA was the core contention before a Three**

**Judge Bench of the Supreme Court in T.S. BALIAH -VS- T.S. RANGACHARI, AIR 1969 S.C. 701 decided on 12.12.1968. The offences involved were under Section 177 of the Indian Penal Code and under Section 52 of the Income Tax Act 1922 which is now Section 277 of the Income Tax Act 1961 relating to false statement in verification. The Supreme Court concluded thus :-**

*“ ..... having regard to the terms and language of the two enactments, we are of opinion that there is no repugnancy or inconsistency and the two enactments can stand together and they must therefore be treated as cumulative in effect. We are of the opinion that the doctrine of implied repeal cannot be applied.....”.*

**Next responding to the argument that in view of the provisions of Section 26 of the General Clauses Act 1897 the appellant cannot be prosecuted both under section 177 of the Penal Code and Section 52 of the Income Tax Act, 1922 and can only be prosecuted either under one or the other of the said provisions the Supreme Court held thus :-**

*“ A plain reading of the Section shows that there is no bar to the trial and conviction of the offender under both enactments but there is only a bar to the punishment of the offender twice for the same offence”.*

**In MUNICIPAL CORPORATION OF DELHI -VS- SHIV SHANKAR, AIR 1971 S.C. 815 decided on 01.02.1971, another three Judge Bench of the Supreme Court dealt with an argument of implied repeal centering round the provisions of Fruit Products Order as having impliedly repealed those of the Prevention of Food Adulteration Act 1954 relating to sale of Vinegar. The Supreme Court held that two provisions can stand together, they are cumulative in operation and are not repugnant to each other and there is no legislative intent discernible from the various amendments of the earlier Act regarding such repeal. OM PRAKASH (Supra) and T.S. BALIAH (Supra) were referred to.**

**A selection of Division Bench Judgments from the Supreme Court very relevant for a correct decision of the point involved/raised in RAMCHANDRA will include V.K. AGARWAL -VS- VASANTRAJ BHATIA (1988)3 SCC 467 where there was a challenge to a second prosecution of two of the accused acquitted of a charge under Section 135 of the Customs Act 1962 and were sought to be prosecuted under Section 85 of the Gold (Control) Act 1968. Facts/allegations in the**

two prosecutions were same yet upsetting the holdings by the Courts below applying STATE OF BOMBAY (Supra) the Supreme Court held the second prosecution maintainable.

In considering the clash between a complaint under Section 9(1), 51 of the Wild Life (Protection) Act 1972 and a police case under Section 429 of the Indian Penal Code for shooting and killing an Elephant and removing the tusks the Supreme Court reiterated the law emenciated since 1957 as indicated above. That was in STATE OF BIHAR -VS- MURAD ALI KHAN, AIR 1989 S.C. 1 dated 10.10.1988.

Apart from the above it needs to be remembered that there is a presumption against repeal by implication and if the two penal provisions of two different enactments are not repugnant to each other and can stand together no repeal by implication can be inferred. If such conclusion cannot be reached no direction as in RAMCHANDRA to police to ignore penal code and concentrate only on the offence under Motor Vehicle Act can be legally sustainable. Indeed the test of repugnancy as applied in deciding cases involving Article 254 of the Constitution has been applied in determining questions involving implied repeal. As has been done by the Supreme Court in the cases referred to above it was necessary for the counsels to argue before the High Court as regards the ingredient of the offences under Section 279, 337 of the Penal Code those under Section 184 etc of the Motor Vehicle Act. Unfortunately such an exercise was not undertaken. A brief look at this aspect of the problems would be appropriate.

## *6.2. INGREDIENTS - LIGHT FROM THE HIGH COURT*

The legislative history of the Indian Penal Code since 1860 and that of the Motor Vehicles Act since 1912 indicated in the opening part of this paragraph is against any implied repeal of the provisions of Section 279 etc. of the I.P.C. by the comparable penal provisions in the Motor Vehicles Act. Even a bird's view of the said provisions of the two enactments is enough to conclude that the ingredients are different. What is dangerous driving to a passenger in a Motor Vehicle may not at all be rash and negligent driving to a member of the public walking a public road outside the vehicle. Section 279 I.P.C. seeks to maintain public safety on the public road while Section 184 etc. of the Motor Vehicles Act is directed at regulating driving of the vehicle principally for the safety of the passengers in places not necessarily in public road. Offences under Section 337, 338 and those under Motor Vehicles Act are too distinct to need more comments. All this is, of course, subject to detailed analysis only after which a correct conclusion could be reached and should have been reached in RAM CHANDRA before the issue of the

**direction. This part is ended with a few decisions of the High Court where the question as to whether offences were under section 279 IPC and that under the Motor Vehicle Act are identical came up.**

**In AIR 1921 SIND 97 a Division Bench of the Court speaking of the offences under section 279 and that under Section 5 of the 1914 Act (which has become Section 16 of the 1939 Act and Section 184 of the 1988 Act) held that they are different. AIR 1930 Sind 64 also throws same light on the matter. A Division Bench of the Rangoon High Court in AIR 1938 Rangoon 161 held similarly. AIR 1953 Pat 56; AIR 1957 Andhra Pradesh 100 and AIR 1967 Patna 368 also had spoken about the matter.**

## **7. THE CONCLUSION**

**On the law as discussed above the conclusion is inescapable that RAMCHANDRA has not been adequately argued and this has resulted in issuing of the direction which besides being in breach of the lessons in SOM MITTAL is on the wrong-side of law both statutory and as enunciated by the Supreme Court in the decisions indicated above. Unless corrected by a larger Bench or the Supreme Court these directions will create confusion for the concerned authorities.**