

8.

**DOCTRINE OF STARE DECISIS V. PER INCURIAM
WITH SPECIAL REFERENCE TO BASHEER M.
PICHA V. INDIAN BANK [2013(2) KLT 951]**

A K Mariamma¹

The High Court of Kerala, Justice Antony Dominic on 10th April 2013 decided the above case. In this case, the petitioner availed of a performance mobilization guarantee of Rs.100 lakhs from the respondent bank. Though defaulted, the petitioner paid Rs.1.5 crore but the bank claimed that more than 2.7 crores is due to it. In 1995, Bank filed a suit, the Sub-Court declared the defendants *ex parte* and decreed to realise 58,07,134,05/- with interest @23.25% with quarterly rest till realisation. In 1999, the bank filed petition before the Debt Recovery Tribunal and it was allowed to realise Rs.1,32,69,251/- together with interest @23.25% with quarterly rest till realization.

In 2007, the petitioner approached the Debt Recovery Tribunal, Ernakulam praying to set aside the *ex parte* decree passed by the Sub Court and to condone the delay of 10years and 10 months as the summons issued by the Sub Court were not served on the defendants' as they were in Bahrain since 1996 and on account of the orders passed in Bahrain Courts, the first Petitioner was restrained from travelling outside that country. Besides, from the beginning, the petitioner was trying to persuade the bank to settle the liability and relying on the *ex parte* judgment and decree illegally obtained, the bank was making unreasonable demands and according to the petitioners, the delay of 10 years and 10 months was not wilful so delay may be condoned, lest serious injustice and prejudice would be caused to them.

In order to decide the condonation of delay, the Court referred the following judgments, viz.

1. *Collector, Land Acquisition Anathanag & Another v. Mst.Katiji & Ors*², wherein Supreme Court laid down that “ordinarily a litigant does not stand to

¹ Dr. Mariamma A. K., is an Associate Professor of Government Law College Calicut.

benefit by lodging an appeal late. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. There is no presumption that delay is occasioned deliberately or on account of culpable negligence or on account of malafides. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and expected to do so”.

2. In another case, *N. Balakrishnan v. M. Krishnamurthy*³ wherein Supreme Court held that “it is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within certain limit. Length of delay is no matter; acceptability of the explanation is the only criterion”. Rules of limitations are not meant to destroy the right of parties but to seek their remedy promptly. So a life span must be fixed for each remedy as unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on a public policy”.
3. In *Post Master General & Others v. Living Media India Ltd. & Another*⁴, where Supreme Court on 24th February 2012 held that “Law of Limitation undoubtedly hands everybody, including the Government. Government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the Government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few”. The Department miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay of 427 days and dismissed the appeals on the ground of delay.
4. In *Maniben Devraj Shah v. Muncipal Corporation of Brihan Mumbai*⁵ Supreme Court in this case observed that “if the Court finds that there has been

² (1987)2 SCC 107.

³ (1998) 7 SCC 123.

⁴ (2012) 3 SCC 563.

⁵ (2012) 5 SCC 157.

no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is bound to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and or/ its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest? According to the Corporation, the papers required for filing the first appeals were misplaced and not traceable inspite of good efforts. But in our considered view, the cause shown by the Corporation for delayed filing of the appeals was, to say the least, wholly unsatisfactory and the reasons assigned by the learned single Judge for condoning more than 7 years delay cannot but be treated as poor apology for the exercise of discretion by the Court under Section 5 of the Limitation Act”.

5. In this case *Basheer M. Picha v. Indian Bank*, the counsel for the Bank contended that judgment in the case of *Maniben Devraj* (supra) was rendered without referring to the judgment in Post Master General’s case (supra). Since the said case is being *per incuriam*, court should follow the judgment in Post Master General’s case (supra). Though the Supreme Court agreed that the ‘Counsel is right in contending the *Maniben Devraj*’s case was decided by a Bench of equal strength and that it did not make reference to the Post Master General’s case judgment, it observed that ‘ having gone through both the judgments, there is nothing contradictory in these judgments’. On the other hand, the judgments in *Post Master General’s* case (supra) shows that liberal construction should be adopted to advance substantial justice, but Supreme Court declined to condone the delay due to absence of proper explanation. High Court of Kerala went on “even if there is substance in the contention that these two judgments lay down principles which are inconsistent then also the question would be which of the judgments is to be followed by the Court, for which it relied on *Raman Gopi v. Kunju Rman Uthaman*⁶, where in it was held that “ in case of conflicting views taken in the decision of two benches of equal

⁶ 2011 (4) KLT 458 (FB).

strength of the Apex Court, the decision later in point of time, will prevail over the earlier one⁷.

Here comes the question, whether the above findings in Raman Gopi v. Kunju Rman Uthaman (supra), which was relied on by the Kerala High Court in this case (Basheer M. Picha v. Indian Bank) was correct? To answer this question, it is necessary to analyse binding *precedent* and *per incuriam* with few judgments:

Salmond on Jurisprudence⁸ says, ‘from the earliest times the Judges of the king’s courts have been a small and compact body of legal experts. They have worked together in harmony, imposing their own views of law and justice upon the whole realm, and establishing thereby a single homogeneous system of common law, with little interference either from local custom or from legislation. The centralisation and concentration of the administration of justice in the royal courts gave to the royal judges a power and prestige which would have been unattainable in any other system. The authority of precedents was great in England because of the power, the skill, and the professional reputation of the judges who made them. In England the bench has always given law to the bar’. Judicial decisions may be distinguished as authoritative and persuasive. An authoritative precedent is one which judges must follow whether they approve of it or not. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration, and to which they will attach such weight as it seems to them to deserve. Authoritative precedents are legal source of law, while persuasive precedents are merely historical.⁹

Owing to the vast number of precedents, and the heterogeneous ways in which they are reported or are not reported, it is only too easy for counsel to miss a relevant authority. Whenever a relevant prior decision is not cited before the court, or mentioned in the judgment, it must be assumed that the Court acts in ignorance or forgetfulness of it. If the new decision is in conflict with the old, it is given *per incuriam* and is not binding on a later court.¹⁰ The lower court may refuse to follow the later decision on the ground

⁷ See Para 60(1) of 2011 (4) KLJ 126 (FB).

⁸ See Salmond on Jurisprudence, 12 Edn., 2006, at p.142.

⁹ *Ibid* at p. 145.

¹⁰ *Ibid* at p.152.

that it was arrived at *per incuriam*, or it may follow such decision on the ground that it is the latest authority. Which of these two courses the court adopts depends or should depend, upon its own view of what the law ought to be¹¹.

The single bench Justice S. S. Satheshchandran in *Raman Gopi's case*¹² High Court of Kerala, expressed a doubt- when conflicting views are expressed by co-equal benches in respect to the same matter which one has to be followed and what are the principles if any applicable to such a case. After referring several cases on the same point, expressed doubt about the principles to be followed when two conflicting decisions of the Apex Court, both rendered by co-equal benches are found applicable, and since there appears to be no binding decisions by this High Court on that question, it is proper and appropriate that the question be considered by a Division Bench of this High Court¹³.

It is a relevant question- when conflicting views are expressed by two co-equal benches, which is to be considered as binding precedent or whether the High Court is bound to follow the later decision binding? Regarding this question also there are conflicting views, viz.

1. *In Deputy Commissioner v. Andaman*¹⁴, a division bench of Kerala High Court held that “when both the decisions have been rendered by benches of equal strength, High Court is bound to follow the later decision”.
2. In *State of U.P. and Another v. Synthetics and Chemicals and Another*¹⁵ Supreme Court of India explained the procedure to be followed when conflicting decisions of co-equal benches of the High Court arise for solution, the Apex Court held that a decision which is not express and is not found on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated under Article 141 of the Constitution of India. Uniformity and consistency is core of judicial

¹¹ *Ibid* at p.153.

¹² 2009 (4) KLT 414.

¹³ *Ibid* at para 10.

¹⁴ 1987 (1) KLT 192.

¹⁵(1991) 4 SCC 139.

discipline¹⁶. It has also been 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 general nature binding as a precedent¹⁷. “Law declared is not that can be culled out, but that which is stated as law to be accepted and applied. A conclusion without reference to relevant provision of law is weaker than even casual observation¹⁸”.

3. In *Union of India v. Dhanavanti Devi*¹⁹ Supreme Court held that it is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution and in order to understand and appreciate the binding force of a decision, it is always necessary to see what were the facts in the case in which the decision was given and what was the point which has to be decided. It has also observed that ‘no judgment can be read as if it is a statute’.
4. In *Director of Settlements, A.P. v. M.R. Apparao*²⁰ Supreme Court held that “Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret legislation. The statements of the Courts on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that the ratio and not any particular word or sentence. A judgment of Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. It is now well settled that a decision of the Court based on specific facts does not operate as a

¹⁶ *Municipal Corporation of Delhi v. Gurnam Kaur*, AIR 1989 SC 38.

¹⁷ *Sharma Rao v. State of Pondicherry*, AIR 1967 SC 1680.

¹⁸ (1991) 4 SCC 139 at para. 6.

¹⁹ (1996) 6 SCC 44.

²⁰ (2002) 4 SCC 638.

precedent for future cases. Only the principles of law that emanate from a judgment of this court, which have aided in reaching a conclusion of the problem, are binding precedents within the meaning of Art.141. However, if the question of law before the Court is same as in the previous case, the judgment of the Court in the former is binding in the latter, for the reason that the question of law before the Court is already settled. In other words, if the Court determines a certain issue for a certain set of facts, then that issue stands determined for any other matter on the same set of facts”.

The above said point was made it clear by the Supreme Court in *Haryana Financial Corp. v. Jagdamba Oil Mills*²¹ where in the Apex Court had observed, “Courts should not place reliance on the decision without discussing as to how the situation fits in with the fact situation of the decision of which reliance is placed”. Judgments of Courts are not construed as Statutes. Judges interpret statutes, they do not interpret words of statutes, and their words are not to be interpreted as statutes”. In *Ganapati Sitaram Balvarkar & Another v. Woman Shripad Mage*²² also, Supreme Court laid down the principle that decision of four Judges Bench is binding on a Bench of three Judges.

Per Incuriam:

In *State of U.P. and Another v. Synthetics and Chemical Limited and Another*²³ Supreme Court explained the term ‘*Incuria*’ literally means ‘carelessness’. In practice *per incuriam* appears to mean *per ignoratium*. English Courts have developed this principle in relaxation of the rule of *stare decisis*. The ‘quotable in law’ is avoided and ignored if it is rendered, ‘in ignoratium of a statute or other binding authority’.

In *Dr. Vijay Laxmi Sadho v. Jagdish*²⁴ it has been observed by the Supreme Court that “As the learned Single Judge was not in agreement with the view expressed in *Devilal*’s case it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distress that

²¹ (2002) 3 SCC 496.

²² AIR 1981 SC 1956.

²³ 1993 (41) SCC 326.

²⁴ (2001) 11 SCR 95.

the said course was not followed. It is well-settled that if a Bench of coordinate jurisdiction whether on the basis of ‘different arguments’ or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs”. The same view was reiterated in *Pradip Chandra Parija and Others v. Pramod Chandra Patnaik and Others*²⁵, wherein Supreme Court held that “Judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If then, the Bench of three learned judges also comes to the conclusion that earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned judges is justified”.

In *Subash Chandra and Another v. Delhi Subordinate Services Selection Board and Others*²⁶, Justice S.B. Sinha stated that “it is now well settled principle of law that a division bench, in case of conflict between a decision of Division Bench of two Judges and a decision of a larger Bench and in particular Constitution Bench, would be bound by the latter”.

In *Union of India and others v. S.K. Kapoor*²⁷ Supreme Court held that “it is well settled that if a subsequent co-ordinate bench of equal strength wants to take a different view, it can only refer the matter to a larger bench, otherwise the prior decision of a co-ordinate bench is binding on the subsequent bench of equal strength. Since the decision in *S.N. Narula’s case*²⁸ was not noticed in *T.V. Patel’s case*²⁹, the latter decision is a judgment *per incuriam*. The decision in *S. N. Nirula’s case* was binding on the subsequent bench

²⁵ (2002) 1 SSC 1.

²⁶ (2009) 5 SCC 458.

²⁷ (2011) 4 SCC 589.

²⁸ *S. N. Narula v. Union of India and Ors.*, Civil Appeal No. 642 of 2004 decided on 30/1/2004.

²⁹ *Union of India v. T. V. Patel*, (2007) 4 SCC 785, decided on 19/4/2007.

of equal strength and hence, it could not take a contrary view, as is settled by a series of judgments of this Court”.

Supreme Court again in *Safiya Bee v. Mohammad Vajahath Hussain alias Fasi*³⁰ it was held that “judicial discipline and practice required them to refer the issue to a larger Bench. The learned judges were not right in over-ruling the statement of the law by a co-ordinate Bench of equal strength. It is an accepted rule or principle that the statement of the law is considered binding on a Bench of the same or lesser number of Judges. In case of doubt or disagreement about the decision of the earlier Bench, the well accepted and desirable practice is that the later Bench would refer the case to a larger Bench”.

Three Judge Bench of Supreme Court in *Official Liquidator v. Dayanand and Others*³¹ reiterated the necessity to maintain judicial discipline and stated, “We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hall mark of judicial jurisprudence developed in this country in last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system in as much as the courts at the grass root will not be able to decide as to which of the judgment lay down the correct law and which one should be followed” ... “We may add that in our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the Constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is *sine qua non* for effective and efficient functioning of

³⁰ AIR 2011 SC 421.

³¹ (2008) 10 SCC 1.

judicial system. If the Courts command others to act in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law”.

From the above mentioned cases it was very clear that the Supreme Court has consistently taken the view that “if the co-equal bench is not in agreement with the decision of the earlier bench, it can only refer the matter to the Bench with more judges. A Bench of lesser quorum cannot question the correctness of the view taken by a larger Bench”. Therefore, the Kerala High Court in this case could have followed the above said principle as laid down by the Supreme Court of India because the judgment later in point of time will be *per incuriam* unless there is change of law. Only when the later decision was of the changed law that can be followed, otherwise the second one by the co-equal bench will only be *per incuriam*.

Though the High Court in the present case condoned the delay of 10 years and 10 months on the ground that the respondent did not get the notice issued by the Sub Court, the finding of the Court to follow the judgment rendered later in point of time does not sound good as it is *per incuriam*. That apart, it sets a bad precedent which scuttles the credibility of judicial institution and encourages chance litigation and opportunism.

Auricle

Adventures of Crossing the Boundaries of Legal Studies: The Experiences from Writing an Inter-Disciplinary PhD Thesis

P M Aarathi

