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The doctrine of Legal Precedent: Analysing Sub-Silentio and Per Incuriam

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The administration of justice is based on consistency. The system's consistency is what inspires trust in it, and it is impossible to maintain consistency without adhering to the finality rule. The courts developed the rule of precedents, the principle of stare decisis, etc. to create uniformity in judicial decisions. These guidelines and standards are based on public policy, and the administration of justice will be in disarray if courts do not adhere to them. The courts have perfected the art of distinguishing between Sub-silentio and Per Incurium, two expectations regarding the binding authority of precedents that have a thin line separating them in evaluating and rendering a judgment.

Keywords: *precedents, public policy, judicial decision.*

INTRODUCTION

Due to the extensive British colonial influence under the British raj, English common law forms the foundation of the majority of Indian law. Only under British administration in India did precedents become a source of law. The government of India act of 1935 established a federal court and Privy Council, whose rulings were binding on all other courts in the nation. This was the beginning of precedent use in formulating judgments, and over time, precedents

came to be given a great deal of weight.[1] These days, precedent serves as the main source of law. It tends to reinforce the nation's laws and judicial system and aids in the improvement of law formulation by ensuring that laws are situation-appropriate. However, the fundamental issue with its use is the lack of appropriate records for its efficient execution. Resolving this issue will help the situation and increase the system's flexibility.[2] A precedent is a past occurrence or action that serves as a model for current circumstances. Bentham claimed that precedents are laws created by judges. Any specific example creates a concept or a guideline that is used when making comparable decisions.

According to the Black's law dictionary, "Rule of law established for the first time by a court for a particular type of case and thereafter referred to deciding similar cases."[3]

According to Keeton, "A judicial precedent is judicial to which authority has in some measure been attached."[4]

DOCTRINE OF LEGAL PRECEDENT

The principle of legal precedent is referred to by the Latin phrase "Stare Decisis" which translates to "stand by the determined cases," "to uphold precedents," or "to sustain previous adjudications," which refers to courts using comparable or prior precedents as a reference to make decisions in the future. The constitution's article 141 refers to this notion. It is applied to all legal matters and in all courts.[5] The Indian Constitution's Article 141, which states that rulings of higher courts are conclusive on lower courts, has embraced the stare decisis theory. Since the Supreme Court does not follow the Stare Decisis concept, it is not bound by its own decisions and may overturn them in exceptional or unique circumstances or when doing so serves the greater good. A precedent is frequently seen as legislation's most powerful foe. Without a question, the primary tool for legal development is legislation. Legislation has the

[1] G. Kusuma, 'Precedents as a source of law' (*Legal Service India*) <https://www.legalserviceindia.com/legal/article-2216-precedents-as-a-source-of-law.html#:~:text=The%20doctrine%20of%20precedent%20is,within%20the%20territory%20of%20India.> accessed 21 August 2022
[2] *Ibid*
[3] 'Definitions for precedent' (*Definitions and Translations*) <https://www.definitions.net/definition/precedent> accessed 21 August 2022
[4] G. Kusuma (n 1)
[5] *Ibid*

power to repeal existing laws just as effectively as it does to create new ones, unlike precedent, which operates irreversibly under strict precedent-binding systems. In other words, it only does what it does once. And it is unable to reverse its actions.

TYPES OF PRECEDENT

Binding precedents: Authoritative precedents and binding precedents both refer to the same thing. A lower court or other comparable courts must follow these precedents once a decision has been issued, whether they agree with it or not.

Persuasive precedents: Decisions made by a lower court that a higher court or any other court is not required to follow are examples of persuasive precedents. The decision of whether or not to consider it rests with the court.

Original precedent: When the court has to rely on its judgment to decide because it has never made one in a case, an original precedent occurs. New laws are facilitated by it.

Declaratory precedents: A declaratory precedent is when a previous precedent is applied to a specific situation. A declaratory precedent just confirms an already-existing law and puts it into effect; it does not contribute to the creation of new legislation.[6]

ARTICLE 141 OF THE INDIAN CONSTITUTION

It states that "*Law declared by Supreme Court to be binding on all courts the law declared by the Supreme Court shall be binding on all courts within the territory of India.*"[7]

The Supreme Court's interpretation of the law is definitive and enforceable. Its accuracy cannot be questioned because, among other things, (a) another viewpoint existed but was not taken into account, (b) was never argued for and taken into consideration, and (c) the Supreme Court's position is now consistent with "the mores of the day," or that events have changed and called for a change in the way the law should be interpreted. The core of the Constitution is Article 141. According to Article 141, the judgment rendered by the Supreme Court in the course of its advisory jurisdiction likewise controls all courts located on Indian soil. The

[6] *Ibid*
[7] Constitution of India 1950, art. 141

Supreme Court's broad principles are therefore applicable to everyone, even those who are not parties to order.[8]

If a majority of the Supreme Court's judges express an opinion on a particular piece of legislation, the Supreme Court will declare that opinion to be the law, making it binding on all courts. The Supreme Court has stressed the significance and legality of Article 141 of the Constitution in several rulings, provided that the general rules of Obiter-Dictum, Ratio-Decidendi, Stare decisis, per incuriam, Prospective Overruling, and Legislative provisions are followed.

Obiter-Dictum

A court's statement on a legal issue raised by a case it is currently hearing, but which does not warrant a ruling, is known as an obiter dictum. Because the observation was superfluous to the Court's ruling, it is not enforceable as a precedent. A judge may make several observations that are not specifically pertinent to the matter at hand while rendering a decision. He might, for instance, use hypothetical instances and the law that he thinks would apply to them to illustrate his broader points. By the way, these observations are known as Obiter Dicta and have no legal weight.[9]

Ratio Decidendi

The Latin word Ratio Decidendi means "the reason" or "the justification for the decision." Ratio-Decidendi is the deciding factor that serves as the foundation for an assessment. Ratio-Decidendi is a crucial precedent that subordinate courts must abide by in circumstances of a similar nature.

In Dalbir Singh v State of Punjab, the Supreme Court ruled that every judgment has three fundamental components-

- The direct and inferential findings of material facts;
- The legal standards that apply to the legal issues revealed by the facts; and

[8] Justice Nagendra Kumar Jain, 'Law of Precedents'
<http://justicenagendrakjain.com/Law_of_Precedents3.php> accessed 22 August 2022
[9] *Ibid*

- The conclusion is drawn from the combined application of steps 1 and 2.

Ingredient 2 is crucial to the notion of precedents. It does fit into the decidendi ratio. A ruling on a sentencing issue based on the individual facts of a case cannot ever be considered a binding precedent, much less "law announced."[10] In *Director of Settlements, A.P. v M.R. Apparao*, Only a decision's Ratio has legal force. The Ratio here refers to the principle discovered after reading the ruling in the context of the Court's query. Because certain factors were not considered when crafting the pertinent provisions, the Supreme Court's orders cannot be used. The Supreme Court was asked to rule on the validity of the A.P. Act as revised in 1971. Before the court, the respondent's attorney admitted something. However, the Supreme Court stated that "we are likewise of the view that changes are lawful" after recording the concession. The decision is made consciously and not as a result of giving in. Under Article 141, it has legal force.[11]

Stare decisis: In Latin, "to stand by things decided" is known as "stare decisis." When a court hears a legal argument, if another court has previously made a ruling on the same or any case that is somewhat connected closely, the court will then follow that ruling in making its own decision.

Prospective Overruling: The Apex Court may refrain from reopening issues that have previously been resolved and considering the same will raise unnecessary complexity of processes in the interest of the greater good of the public. The preceding judgments' legal significance is diminished by the overturning. The higher court or a similar court with a larger bench may potentially overrule, but this cannot be done by obiter dictum.

Legislative Provisions: As the ultimate legislative body, the parliament has the power to repeal precedents set by the Supreme Court by enacting statutory laws. The precedent may be repealed by law either expressly or implicitly.

[10] *Dalbir Singh & Ors v State Of Punjab* (1979), AIR 1384
[11] *Director of Settlements, A.P. & Ors v M.R. Apparao & Anr. (*2002) Appeal (Civil) No. 2517/1999

ANALYSING THE SUPREME COURT JUDGEMENTS

The Ratio-Decidendi of a Supreme Court decision, which the Constitution holds to be the supreme law of the land, is crucial to consider when determining whether it applies to the facts of the specific case. Any court that attempts to make a fine distinction between the facts of the current case and those in the Supreme Court case will be wrong if the ratio is applicable. In several rulings, the Supreme Court itself has made it clear what exactly binds the lower Courts. What is binding on everyone is the ratio of the decision to be drawn from the legal grounds on which the Supreme Court resolves the issue. This is not all that the Supreme Court said in its ruling. Although a Supreme Court minority decision is not a precedent that must be followed, it has significant persuasive power because it comes from the highest court.[12]

It has been established in *C. Narayanaswamy v State of Karnataka* (DB) that it is improper for a High Court to follow the recommendation of an author, regardless of his or her renown, where the Supreme Court has already made a direct ruling on the contested issue. The guiding concept of a decision is what is legally binding. Therefore, while implementing a previous decision in a subsequent case, the subsequent Court should make an effort to determine the true principle established by the prior decision, in light of the issues raised in that case from which this decision draws its inspiration. The reasons or assertions that were not essential for judging the earlier case would bind the later court.[13]

However, the Supreme Court's ruling in *P.G.I. of M.E. and Research v Raj Kumar*, which was founded on unusual facts and circumstances, was held not to establish precedent in a subsequent case based on those same facts.[14]

A decision, as stated in *Bhavnagar University v Palitana Sugar Mill Pvt. Ltd.*, is an authority for what is determined and not what can be rationally inferred from it. It is also widely accepted that a small modification in the facts or the addition of new facts may have a significant impact on a decision's precedent-setting potential.[15]

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[12] Justice Nagendra Kumar Jain (n 8)
[13] *C. Narayanaswamy And Others, Etc. v State Of Karnataka And Another* AIR 1992 Kant 28
[14] *P.G.I. of M.E. and Research v Raj Kumar* (2001) Appeal (Civil) No. 6576/1999
[15] *Bhavnagar University v Palitana Sugar Mill Pvt. Ltd. & Ors.* (2002) Appeal (Civil) No. 8003/2002

In the case of *K. Santhakumari v The Central Council for Research in Ayurveda and Siddha*, Any party cannot gain from a lawyer's admission or concession on an incorrect legal point of law. Law established by the Court based on an incorrect concession or admission does not set a precedent that must be followed.[16]

There is no denying that the principle of binding precedent encourages uniformity and predictability in court rulings. In *Chandra Prakash v State of U.P.*, where a two-judge bench's decision conflicted with a three-judge bench's decision, it was determined that the two-judge bench's law was incorrect and could not be implemented. A three-judge bench was instructed to hear the case and make a decision.[17]

The argument that the judgment in *I.F.C.I. Ltd. v Cannanore Spinning & Weaving Mills Ltd.*[18] lacks binding authority was rejected.

In *Delhi Administration v Manoharlal*, it was decided that a Supreme Court order could not be automatically adopted by the High Court as a standard procedure when it did not establish any law or principle but only provided specific instructions on how to resolve the case in the unique circumstances of the case. Before applying the Supreme Court's ruling to other instances, courts must identify the ruling's ratio and the law that was so stated by carefully reading the ruling.[19]

Treating words of judgment as though they were words in legislative legislation is always dangerous. It is important to keep in mind that judicial statements are issued in the context of a specific case's circumstances. Because of circumstantial flexibility, a single extra or distinct fact could drastically alter the outcomes of two cases. It is improper to dispose of matters by relying solely on decisions. Because of circumstantial flexibility, a single extra or distinct fact could drastically alter the outcomes of two cases. Circumstantial flexibility, extra information, or a different fact could significantly alter the outcomes of two cases or the guilt of two defendants in the same case. A close resemblance between one instance and another does not suffice because a single important factor can change the entire picture. Each case depends on

[16] *The Central Council For Research v Dr. K. Santhakumari* (2001) Appeal (Civil) No. 3595/2001
[17] *Chandra Prakash v State of U.P.* AIR 2002 SC 1652
[18] *I.F.C.I. Ltd. v Cannanore Spinning & Weaving Mills Ltd.* (2002) Appeal (Civil) No. 3239/1995
[19] *Delhi Administration v Manoharlal* (2002) Appeal (Crl.) No. 863/20002

its unique circumstances. It is more obvious in criminal cases where fact-based adjudication forms the basis of decision-making. Therefore, as stated in *Ashwani Kumar Singh v U.P. Public Service Commission*, one cannot rely on a judgment without examining whether it was made under the same factual and legal circumstances. Since judges interpret the text of statutes, court rulings cannot be regarded as laws.[20]

In *Supreet Batra v Union of India*, the Supreme Court observed that its plans should not be interpreted as legislation or as giving the parties unalienable rights.[21] In the case of *Union of India v Jaipal Singh*, dismissal of SLP as threshold without a reasoned ruling lacks precedence.[22]

It is not permissible to read a sentence or term in a decision out of context or as though interpreting a statutory provision to give the observation a different interpretation. *State of M.P. v Prabha Shankar Dubey*.[23]

In the *State of Maharashtra v Mehboob Dawood Singh*, Only when a decision resolves a legal issue is it admissible as a precedent. A ruling must be read in its entirety, and any observations made must be viewed in the context of the Supreme Court's questions.[24]

EXCEPTIONS TO THE BINDING AUTHORITY OF PRECEDENTS

The binding authority of precedents has two exceptions to it and they are:

a) Sub-Silentio and

b) Per Incuriam

a) Sub-Silentio

Sub-silentio is a legal term that simply refers to a situation in which a court makes a ruling or applies a principle without taking into account the law that applies or makes an argument. The Black's Law Dictionary gives the definition of the term as, "The precedents that pass sub-silentio are of little or no authority". Its literal meaning is 'in silence and it's used to describe ideas that aren't explicitly articulated. Sub-silentio is frequently used to make an exemption to

[20] *Ashwani Kumar Singh v U.P. Public Service Commission* (2003), AIR 2661
[21] *Supreet Batra v Union of India* (2003) Writ Petition (Civil) No. 393/2002
[22] *Union of India v Jaipal Singh* (2004) 1 SCC 121
[23] *State of M.P. v Prabha Shankar Dubey* (2003) Appeal (Crl.) No. 634/2003
[24] *State of Maharashtra v Mehboob Dawood Singh* (2004) AIR 362

the precedents rule. Over the years, many attorneys have exploited this exception as a defense to get over obstacles in hearings and trials.[25] It's interesting to note that the Indian judiciary has occasionally allowed interpretations of the idea while maintaining an open mind about it. According to Professor P.J. Fitzgerald's explanation of the idea of sub-silentio in the 12th edition of Salmond on Jurisprudence:

"*A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub-silentio.*"[26]

CASE LAWS DEALING WITH SUB-SILENTIO

International Perspective

In ***Gerard v Worth of Paris, Ltd.,*** the claimant's debt priority was the only issue raised, and the Court of Appeal upheld the ruling after hearing this argument. The issue of whether a garnishee order could be legitimately issued on an account in the name of the liquidator was not taken into account. Therefore, the court claimed it was not bound by its earlier decision when this very subject was raised in a future case before the Court of Appeal. Sir Wilfrid Greene, M.R., stated that he could not help but believe that the argument that was being brought at this time had been purposefully passed sub-silentio by the attorney for the substantive question to be decided. He continued by stating that the earlier court had to rule on the issue before it could issue the order that it did, but that the ruling was not final and

[25] Satyam Tandon & Sanya Bhatia, 'Sub-silentio and per incuriam: The art of distinguishing a judgment' (*Bar and Bench,* 20 June 2021) <https://www.barandbench.com/columns/sub-silentio-per-incuriam-the-art-of-distinguishing-a-judgment> accessed 23 August 2022

[26] Professor P.J. Fitzgerald, *Salmond on the Jurisprudence* (12th edition, Sweet & Maxwell 1966)

would not be upheld because it was made "without argument, without reference to the crucial words of the rule, and any citation of authority."[27]

Indian Perspective

Similar findings were made as follows:

At least as early as 1661, when counsel declared that "A hundred precedents sub-silentio are not material" and Twisden, J. agreed that "Precedents sub-silentio and without argument are of no moment," the rule that a precedent sub silentio is not authoritative was established.

In the ***Regional Manager and Anr. v Pawan Kumar Dubey***, which was reported in AIR 1976 SC 1766, this Court made the following observation: The term "sub-silentio" has a lengthy history. ***The Lancaster Motor Co. Ltd v Bremith Ltd*** case provides the clearest explanation of the sub-silentio exception. In this case, the court disapproved of a lower court decision that had been made without proper consideration, without argument, without referring to the key language of the rule, and without citing any authorities.[28]

In ***Municipal Corporation of Delhi v Gurnam Kaur***, the Supreme Court of India has repeatedly reaffirmed the application and meaning of this exception. The Delhi High Court had instructed the appellant to build a stall or kiosk as of the date of the ruling or to provide a plan of action with the necessary clearance for the respondent Gurnam Kaur for an alternative stall. However, the Court cited a precedent that was founded on parties' assent, and there was essentially no justification for directing the Corporation in this case. When the Supreme Court became aware of this, it was ruled that *"a decision which is not express and is not founded 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 by Article 141."*[29]

[27] *Deb Narayan Shyam & Ors v State of West Bengal & Ors.* (2004) Appeal (Civil) No. 1179/2002
[28] The Regional Manager ans Anr. v Pawan Kumar Dubey (1976), AIR 1976 SC 1766
[29] *Municipal Corporation of Delhi v Gurnam Kaur* (1989), AIR 38

In ***A-One Granites v State of UP and Ors***. where it was determined that a direction regarding the issuance of a mining license could not be granted without reference to the pertinent rule for granting such a license.[30]

The foundation of judicial discipline is uniformity and consistency. Ratio decidendi, however, does not apply to anything that is excluded from the judgment without cause. In ***B. Shama Rao v Union Territory of Pondicherry***, it was noted that it is cliché to claim that a judgment is binding not because of its conclusions but rather of its ratio and the principles set forth therein. Any judgment or statement reached without consideration or one that was preceded by no justification cannot be regarded as a general proclamation of law or authority that sets a precedent. To maintain stability and uniformity, it is important to exercise restraint while descending or overruling, but excessive rigidity is harmful to the development of the law.[31]

In M/s Purbanchal Cables & Conductors Pvt. Ltd. sued Assam State Electricity Board and others, July 10, 2012,Assuming Shri Dwivedi's position on this matter, Shri Sunil Gupta, distinguished Senior Counsel, would argue that the doctrine of precedent has two exceptions: per incuriam and sub silentio. Based on the latter, Shri Gupta would argue that the court's rulings in Assam Small Scale Industries and Shakti Tubes (already mentioned) cannot be regarded as precedents. The learned Senior Counsel would say that when the Court has neglected to analyze the aims and purpose of the in question Act as well as some prior judgments of this Court, a decision would not apply as a precedent. He would also argue that the aforementioned rulings suffer from the sub-silentio principle being applied without thorough and sufficient justification. The experienced Senior Counsel would further add that the Court did not examine the matter from the angle presented above.[32]

These cases give an inference to add to our conclusion that a court's decision extends its binding value only when it is directly addressing, discussing, and weighing a question. Any decision that is made explicitly falls under the scope; any references made indirectly are not included.

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[30] *M/S. A-One Granites v State of U.P. & Ors.* (2001) Appeal (Civil) No. 6459/1998
[31] *B. Shama Rao v The Union Territory of India* (1967), AIR 1480
[32] *M/S.Purbanchal Cables v Assam State Electricity Board* (2012) Civil Appeal No. 2348/2003

PER INCURIAM

Per incuriam is a Latin phrase that corresponds to "through lack of care". A judicial judgment rendered per incuriam is incorrect and without legal standing because it disregards a conflicting law or other authoritative authority. One such exemption is referred to as a per incuriam judgment, which has no binding power since it was made without knowledge of a prior binding judgment of its own, of a court with greater jurisdiction, of the contents of legislation, or of a rule that has the force of law. There are two ways to interpret the doctrine of precedents' exception for per incuriam. Per incuriam is Latin for "carelessness," but in usage, it implies "per ignoratium," which is Latin for "per not knowing the law." When courts make decisions and disregard the law, these decisions fall under the per incuriam category and are not always required to be upheld.[33]

CASE LAWS DEALING WITH PER INCURIAM

International Perspective

In ***Morelle Ltd. v Wakeling***, the Court of Appeal stated that in general, the only instances wherein the decisions should be deemed to have been made per incuriam are those in which decisions were made without knowledge of or inadvertent disregard for a conflicting statutory provision or a precedent that was binding on the court in question. As a result, in such instances, some aspect of the decision or a step in the reasoning upon which it is based.[34]

In ***Huddersfield Police Authority v Watson***, the Chief Justice, Lord Godard, made the following observations: "*Where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam*."[35]

Per incuriam has been explained as follows-

In Halsbury's Laws of England, Fourth Edition, Vol. 26-

[33] Satyam Tandon & Sanya Bhatia (n 25)
[34] *Morelle Ltd. v Wakeling* [1955] 2 QB 379
[35] *Huddersfield Police Authority v Watson* [1947] KB 842, [1947] 2 All ER 193

"*A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow.*[36]*In the case of* ***Huddersfield Police Authority v Watson****, 1947; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force*."[37]

Indian Perspective

It was recognized that a decision would be delivered in per incuriam if a case or statute had not been brought to the court's attention and the court had to decide the decision without being aware of the case or statute or without remembering its existence.

This court made the following observations in ***Government of A.P. and Others v B. Satyanarayana Rao (dead) by LRs. and Others***: "*The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue*."[38]

In ***Union of India v Raghubir Singh,*** Chief Justice Pathak from the Constitutional Bench made the following observations: "*The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides assuring the individual as to the consequence of transactions forming part of his daily affairs. Therefore, there's a need for a clear and consistent enunciation of legal principle in the decisions of a court*."[39]

A two-judge panel ruled in ***Thota Sesharathamma and Others v Thota Manikyamma (Dead) by LRs. and Others*** that the three-judge panel's ruling in ***Mst. Karmi v Amru*** was per incuriam and made the following observations: "*...It is a short judgment without adverting to any provisions of Sec. 14(1) or 14(2) of the Act. The judgment neither makes any mention of any argument raised in this regard nor there any mention of the earlier decision in Badri Pershad v Smt. Kanso Devi. The*

[36] *Young v Bristol Aeroplane Co. Ltd.* [1944] KB 718 at 729 : [1944] 2 All ER 293 at 300
[37] Karl Shroff, 'Per Incurium- An analysis' (*SCC Online,* 2 June 2020) <https://www.scconline.com/blog/post/2020/06/02/per-incuriam-an-analysis/> accessed 23 August 2022
[38] *A.P. and Others v B. Satyanarayana Rao (dead) by LRs. and Others* (2000) 4 SCC 262
[39] *Union of India v Raghubir Singh* (1989) 2 SCC 754

decision in Mst. Karmi cannot be considered as an authority on the ambit and scope of Sec. 14(1) and 14(2) of the Act."[40]

The question of whether this Court was obligated to accept the judgment in ***Gujarat Steel Tubes Ltd. v Mazdoor Sabha***, which was not following the judgment of a Constitution Bench in ***P.H. Kalyani v Air France***, was raised by a two-judge bench in ***R. Thiruvirkolam v Presiding Officer and Others*** (1997) 1 SCC 9. According to J.S. Verma, J., who was speaking for the court "*With great respect, we must say that the above-quoted observations in Gujarat Steel at P. 215 are not in line with the decision in Kalyani which was binding, or with D.C. Roy to which the learned Judge, Krishna Iyer, J. was a party. It also does not match with the underlying juristic principle discussed in Wade. For these reasons, we are bound to follow the Constitution Bench decision in Kalyani, which is the binding authority on the point*."[41]

A Constitutional Bench of this Court ruled in ***Bharat Petroleum Corporation Ltd. v Mumbai Shramik Sangra and others*** that judicial discipline requires a bench of two learned judges of this Court to adopt a Constitution Bench's decision, regardless of their misgivings regarding its accuracy.[42]

In ***Central Board of Dawoodi Bohra Community v State of Maharashtra***, a Constitution Bench of this Court noted that the law established by this Court in a decision made by a bench with greater strength is binding on any succeeding bench with lesser or equal strength.[43]

In ***Official Liquidator v Dayanand and Others***, a three-judge bench of this court once again reaffirmed the law's clear position that under Article 141 of the Constitution, the ***State of Karnataka and Others v Umadevi and Others*** (2006) 4 SCC 1 judgment of the Constitution Bench is binding on all courts including this court until the same is overruled by a larger Bench. Less powerful benches must follow the ratio of the Constitution Bench. According to the court's observations in para. 90,

[40] *Thota Sesharathamma and Others v Thota Manikyamma (Dead) by LRs. and Others* (1991) 4 SCC 312
[41] *Gujarat Steel Tubes Ltd. v Mazdoor Sabha* (1980) 2 SCC 593
[42] *Bharat Petroleum Corporation Ltd. v Mumbai Shramik Sangra and others* (2001) 4 SCC 448
[43] *Central Board of Dawoodi Bohra Community v State of Maharashtra* (2005) 2 SCC 673

"*We are distressed to note that despite several pronouncements on the subject, there is a substantial increase in the number of cases involving the violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Court refused to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing the minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have a grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmarks of judicial jurisprudence developed in this country in the last six decades and an increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system since the courts at the grassroots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed*."[44]

In ***Subhash Chandra and Others v Delhi Subordinate Services Selection Board and Others***, this court once more reaffirmed the established legal principle that Benches of Smaller Strength are bound by the decisions of the Constitutional Bench and that any Benches of a Smaller Strength taking a different stance is per incuriam. As noted by the court in paragraph 110,

"*Should we consider S. Pushpa v Sivachanmugavelu to be an obiter following the said decision is the question which arises herein. We think we should. The decisions referred to hereinbefore clearly suggest that we are bound by a Constitution Bench decision. We have referred to two Constitution Bench decisions, namely, Marri Chandra Shekhar Rao v Seth G.S. Medical College and E.V. Chinnaiah v the State of A.P. Marri Chandra Shekhar Rao had been followed by this Court in a large number of decisions including the three-Judge Bench decisions. S. Pushpa therefore, could not have ignored either Marri Chandra Shekhar Rao or other decisions following the same only based on an administrative circular issued or otherwise and more so when the constitutional scheme as contained in clause (1) of Articles 341 and 342 of the Constitution of India putting the State and Union Territory in the same bracket. Following Official Liquidator v Dayanand and Others (therefore, we believe that the dicta in S. Pushpa is an obiter and does not lay down any binding ratio. The analysis of English and Indian Law leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of*

[44] *Official Liquidator v Dayanand and Others* (2008) Appeal (Civil) No. 2985/2007

judges of co-equal strength. In the instant case, judgments mentioned in paragraphs 135 and 136 are by two or three judges of this court. These judgments have ignored a Constitution Bench judgment of this court in Sibbia's case which has comprehensively dealt with all the facets of anticipatory bail enumerated under section 438 of Cr.P.C. Consequently, judgments mentioned in paragraphs 135 and 136 of this judgment are per incuriam."[45]

The court recently reiterated the significance of the doctrine of precedents and stare decisis as fundamental principles of the legal system in the case of ***Dr. Shah Faesal and Ors. v Union of India and Anr.*** the court also said that this per incuriam only applies to the ratio of the case.

As a result, it is possible to conclude that a lower court's decision can be thrown out as being per incuriam of a higher court's decision when the lower court disregards the decision of the higher court.

CONCLUSION

The ability to identify and come up with the most suitable law that could be applied to a case which also calls for distinguishing between various laws and legal terms which are close enough but have a thin line of differentiation that changes the game is not only a skill that calls for a high level of preparation and effort, but it is also something that makes a competent advocate. Such an exercise can never be finished by reading a judgment's head note. Therefore, not only attorneys but even courts must abandon the habit of referencing judgments only after reading the head notes. Like statutes, decisions made by superior courts do have a binding effect on lower courts. However, there is a distinction in how binding they are:

'Judges interpret statutes, they do to interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.'

Per incuriam and sub-silentio exclusions' fundamental rationale is to strike a balance between judicial restraint and uniformity, while preserving the flexibility to correct demonstrably incorrect judgments. A judgment passed sub-silentio is essentially one that was made "without consideration/discussion" on a specific legal point that should have been taken into account/discussed for the decision, whereas a judgment passed per incuriam is one that is

[45] *Subhash Chandra and Others v Delhi Subordinate Services Selection Board and Others* (2009) 15 SCC 458

clearly in violation of a law, rule, or judgment of a superior court/larger bench. It presents a challenge for advocates since the holding of a case is typically directly related to the existence of a particular fact, and the holding is inapplicable unless the peculiar circumstance is predominately present in the case where the judgment has been referenced. The sub silentio rule is helpful in these situations. Similar to this, courts should thoroughly examine the referenced case, and the nature of the precedent, avoid passing references, determine whether a recent judgment has been rendered on the matter, and more to prevent the judgment from being overturned under the doctrine of per incuriam. Lower courts must cautiously decide cases where such arguments are raised and review the decision's language at each stage if such a reference is made.