DISTRICT AND SESSIONS COURT, AURANGABAD.

WORKSHOP ON

CIVIL

"Law of Precedents"

1. Ratio decidendi.
2. Obiter dicta.
3. Per-incuriam.
4. Sub silentio.
5. Stare decisis.
6. Doctrine of prospective over ruling.
7. Binding effect of judgment of High courts.
8. Effect of orders of Higher Courts.

CRIMINAL

"Protection of Women from Domestic Violence Act, 2005"

1. Report of protection officer.
2. Monetary reliefs.
3. Protection order.
4. Residence order.
5. Custody orders.
6. Power to grant interim and exparte orders.
7. Procedure for getting reliefs and limitation.
8. Effect of breach of orders.

Held on 8th February, 2015

I N D E X

"LAW OF PRECEDENT"

Introduction :

1) A precedent is a statement of law found in the decision of a superior Court, which decision has to be followed by that court and by the Court inferior to it. Precedent is a previous model upon which, the judges have to follow the past decisions carefully in the cases before them as a guide for all present or future decisions. If the cases are decided without reference to the similar cases decided in the past, the result would be utter confusion, the law would be uncertain and the fate of the litigants would depend on the temperament of the judge or his mood on that day. Thus, the theory of precedent plays a very important role in the jurisprudence of every country.

2) Dictionary meaning of the word 'Precedent' is a judicial decision that serves as an authority for deciding a later case. A judicial precedent has been defined by the Oxford dictionary as a previous instance or case which or may be taken as an example or rule for subsequent cases or by which similar act or circumstances may be supported or justified.

3) Prior to Constitution of India, all the Courts in British India were bound by the decisions of the privy council and Federal Court. After 1950, according to Article 141 of the Constitution of India the law declared by the Supreme Court of India shall be binding

on all Courts within the territory of India. It is a law of land of binding character.

4) The decisions of the Hon'ble Supreme Court are of the highest authority. All the High Courts are bound by the Judgment of the Supreme Court and where there is conflict of views in Supreme Court decisions, the High Court is bound to follow the later pronouncement. High Courts in India are not bound by their previous Judgment and may depart from them. A judge of the lower court is bound to follow the ruling of the High Court of his own State when there is a conflict amongst various High Court. Unreported Judgment have as much binding authority as reported ones.

5) The Hon'ble Supreme Court of India is the Apex Court of this country. The framers of the constitution has given utmost importance to it while framing the constitution. Article 141 provides that, " Law declared by Hon'ble Supreme Court to be binding on all Courts". In short, Article 141 recognises the role of the Hon'ble Supreme Court to alter the law, in course of its function to interpret legislation, in order to bring law in harmony with social changes.

6) A judicial decision has a binding force for subsequent cases. However, the whole Judgment is not binding in future cases.

In the case of "**Commissioner of Income Tax V/s M/s Sun Engineering Works (P) Ltd.,** reported in **AIR 1993 S.C.- 43,** *the* Hon'ble apex Court held that, while applying the decision to a later

cases, the Court must carefully try to ascertain the true principle laid down by the decision of the Supreme Court and not to pick out words or sentences from the Judgment divorced from the context of the question under consideration by the Court to support their reasoning.

7) It is clear that, only those statements in an earlier decision which may be said to constitute the 'ratio decidendi' of that case are binding, statements which are not essential or necessary for deciding the later cases, such non authoritative statements are usually referred to as 'obiter dicta'.

8) It is necessary to bear in the mind while applying precedents facts and circumstances must be identical. For that purpose, going through the entire decision is necessary. It is general experience that prima-facie cited Judgment appears to be applicable in the matter in hand. However, after going through the entire decision some times it does not match. Therefore, it is necessary that while quoting the decision of the higher court, one should not rely or quote only foot note. It is also general experience that the foot note quoted in the journals does not come to aid. But, the other findings therein. Thus, in short, reading of entire judgment is necessary.

9) In the case of **Suganthi Suresh Kumar Vs. Jagdeesham reported in A.I.R. 2002- S.C. 681**, the Hon'ble Supreme Court held that, it is impermissible for the High Court to overrule the decision of the Apex Court on the ground that the Supreme Court laid down the

legal position without considering any other point. It is not only a matter of discipline for the High Courts in India, it is mandate of the constitution as provided in Article 141 of the Constitution of India.

10) Therefore, it is not permissible to take view contrary to the Judgment of the Hon'ble Apex Court. It is even not permissible to take the contrary view on any count. Article 141 of the Constitution of India reiterates the position of law that judgment of the Hon'ble Apex court is nothing but binding precedent in identical matters. It is important to note that though the decision of Hon'ble Apex Court is binding on all courts in the country, the Hon'ble Apex Court himself is not bound by it. The intention behind it that under changed situation whenever there are compelling circumstances to alter the earlier precedent, the Hon'ble Apex Court should be free to deal it. The Hon'ble Supreme Court is very much empowered to override its own precedent. For example in **P. Ratnam Nagbhushan Patnaik Vs. Union of India reported in 1994-3-S.C.C. 394**, the Hon'ble Supreme Court held that Section 309 of I.P.C. was against the constitution and suggested the legislature to delete it from I.P.C. The Hon'ble Supreme Court had also pleased to held that "right to live" includes "right to die". However, within two years after the decision in **Gain Vs. State of Punjab reported in A.I.R. 1996-S.C.-946**, the Hon'ble Supreme Court changed its decision and held that section 309 of I.P.C. is not against the constitution and also opined that no person has right to finish his life. In recent judgment of **CRIMINAL APPEAL No. 2287**

of 2009, Dashrath Rupsing Rathod Vs. State of Maharashtra & Another, the Hon'ble Supreme Court pleased to overrule the earlier ratio of jurisdiction laid down in **K. Bhaskaran Vs. Sankaran Vidhyan Balan (1999) 7 SCC. 510**.

11) When the case laws are cited before the Court, it has to find out it's ratio decidenti before applying it. In the case of **Padamsundara Rao and others V/s State of Tamilandu,** reported in **AIR 2002 (S.C.). 1334,** the Hon'ble Supreme Court, made it clear that, Court should not place reliance on decisions without discussing as to how the factual situation fit in with the fact situation of the decision on which reliance is placed. The Hon'ble Apex Court further held that, judicial decisions are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a difference between conclusions in two cases.

RATIO DECIDENDI (Stare Decisis)

12) Stare Decisis is a Latin phrase, which means 'to stand by decided cases', 'to uphold precedents', 'to maintain former adjudications'. It is a general maxim that when a point of law has been settled by decision, it forms a precedent which is not afterwords to be departed from. The rule as stated is 'to abide by former precedents' (Stare = see; decisis = decisions), where the same points came again in litigation as well to keep the scale of justice even and steady, and

not liable to waver with every new judge's opinion, as also because, the law in the case being solemnly declared and determined, what before was uncertain and perhaps indifferent, is now become a permanent rule, which is not in the mind of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land- not delegated to pronounce a new law, but to maintain, the expound the old one.

13) According to Professor Dias, three shades of meaning can be attached to the expression *'ratio decidendi'*.

1) Reason for deciding or even the finding of facts.
2) The rule of law offered by judges as the basis of his decision.
3) Rule of law, which others regard as being binding authority.

Among these the first one is mostly and widely acceptable by a judiciary. Even a finding of facts may in this sense be the *ratio decidendi*. Thus judge may state a rule and then decide that the facts do not fall within it.

14) In realist theory also 'fact skeptism' of Jerome Frank qualify the maxim '*Ex facto obiter jus*', which means law emanates from facts. So this first one meaning of ratio decidendi is widely acceptable by judges.

15) The object of adherence to doctrine of precedent is to do complete justice for maintenance of equality. In past decision, judges must have cored in rich knowledge which becomes handful for future judges. Rich knowledge and experience of those judges would become helpful for deciding matter in future course of judiciary. It results into equality, continuity, stability and efficiency of judges. These entire four characteristics constitutes ultimate justice. Thus, continuity, efficiency, equality and stability are the objects of doctrine of precedent.

16) When the notion of justice is not fulfilled by adherence to the doctrine of precedent then it would become necessary for judiciary to apply the power of overruling. But, it is equally important to note that though the power of overruling is necessary, at the same time judiciary should display self-restraint while resorting to the technique of power of overruling. Hence, it is clear that observance of precedent has to be rule and power of overruling has to be an exception. In rarest of rare cases where it is essential then only the power of overruling should be applied.

17) In identical matters there is no need to again and again make clear the legal position if, legal position is settled by the precedent. Ratio laid down by the Hon'ble Apex Court certainly helps in similar matters. Whenever contrary legal position appears in the matter, reiterating the ratio laid down by the Hon'ble Apex Court we can save the time and energy. It is also very much useful in guiding in

case of difficulty. Some times, in particular circumstances, a precedents are really helpful to clear the confusion. Some times circumstances appear to be complicated which never arise earlier. In such situation, decisions of the Superior Courts really plays vital role. While delivering the decisions of legal position is clear then no need to stretch the imagination. The precedent plays important role in settling the legal position. Whenever such legal issue arises, considering the Hon'ble Superior Courts decisions same can be dealt easily. The role of Superior Courts decisions in day to day court working is extensive and extreme.

OBITER DICTA

18) Dictum is an observation as to the law made by a Judge in the course of a case, but not necessary to its decision and is often called *obiter dictum*, 'a remark by the way'. In the course of the argument and decision of a case, many incidental considerations arise which are all part of logical process, but which necessarily have different degrees of relevance to the central issue. Judicial opinions upon such matters, whether they may be merely casual, or wholly gratuitous, or of what may be called collateral relevance, are known as *obiter dicta*, or simply dicta. *Obiter dicta* in this context mean what the words literally signify, namely statements by the way. If a Judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the

binding weight of the decisions of the case and the reasons for the decision.

19) However, there is a real distinction between an *obiter dictum* of a Superior Court and a *prima facie* view taken by the Superior Court. A *prima facie* view expressed on any question of law by a Judge is only his tentative view based on first impression whereas his *obiter dictum* is an expression of his definite opinion though it was not necessary for the decision of the case before him. "*Dicta by Judges*" however, eminent ought not to be cited as establishing authoritatively propositions of law unless these dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding. However, *obiter dictum* of Their Lordships of the Supreme Court is entitled to highest respect and is binding on all the Courts of the country **(Mahendra Pal Singh Vs. U.P. State A.I.R. 1959 All. 313).**

20) It is observed in case of **Mohandas Issardas and others Vs. A.N. Sattanathan & Others, A.I.R. 1995 (Bom.) 113** that, the court in India should accept as an authoritative pronouncement on the particular aspect of law and treat that pronouncement as binding. The Supreme court has now taken the place of privy council and we would like to say unhesitatingly that we must show the same respect for the '*obiter dicta*' of the Supreme Court that we did for those of privy

council. The Supreme Court is the highest judicial tribunal in India today and it is as much necessary as in the interest of judicial uniformity and judicial discipline that all the High Courts must accept as binding the '*obiter dicta*' of the Supreme Court in the same spirit as the High Courts accepted the '*obiter dicta*' of the privy council.

21) Obiter Dicta means all that is said by the court by the way or the statement of law which go beyond the requirements of the particular case and which laid down rule i.e. irrelevant or unnecessary for the purpose in hand are called obiter dicta. These dicta have the force of persuasive precedents only. The judges are not bound to follow them. Obiter Dicta help in the growth of law. These sometimes help the cause of the reform of law. The judges are expected to know of the law and their observations are bound to carry weight with the government. The defects in the legal system can be pointed out in the obiter dicta.

22) The term obiter dicta derived from latin word said, "by the way", "remark in judgment". It is concept derived from English Common Law. A judicial statement can be ratio decidendi only if it refers to the crucial facts and law of the case. Statements that are not crucial or which referred to the hypothetical facts or unrelated issues, law are obiter dicta. Obiter Dicta are remarks or observation made by a Judge that although included in the body of the courts opinion, don't form necessary part of the court's decision. All prepositions of law

entertain by the court cannot be called ratio decidendi of the case can be called as a obiter dicta.

23) A judicial statement can be ratio decidendi only if it refers to the curcial facts and law of the case. Statements that are not crucial, or which refer to hypothetical facts or to unrelated law issues, are obiter dicta. Obiter dicta (often simply dicta, or obiter) are remarks of observations made by a judge that, although included in the body of the court's opinion, do not form a necessary part of the court's decision. In a court opinion, obiter dicta include, but are not limited to, words " introduced by way of illustration, or analogy or argument". Unlike ratio decidendi, obiter dicta are not the subject of the judicial decision, even if they happen to be correct statements of law. The so-called Wambaugh's Inversion Test provides that to determine whether a judicial statement is ratio or obiter, you should invert the argument, that is to say ask whether the decision would have been different, had the statement been omitted. If so, the statement is crucial and is ratio; whereas if it is crucial, it is obiter.

24) An example of an instance where a court opinion may include obiter dicta is where a court rules that it lacks jurisdiction to hear a case or dismisses the case on the technicality. If the court in such case offers opinions on the merits of the case, such opinions may constitute obiter dicta. Less clear-cut instances of obiter dicta occur where a judge makes a side comment in an opinion to provide context for the other parts of the opinion, or make a through exploration of the

relevant area of law. Another example would be where the judge, in explaining his or her ruling, provides a hypothetical set of facts and explains how he or she believes the law would apply to those facts.

PER INCURIUM.

25) A precedent is not binding if it was rendered in ignorance of a statute or rule having the force of statute i. e. delegated legislation. Such decisions are "*per incuriam*" and not binding. The mere fact that the earlier court misconstrued a statute or ignored a rule construction is no ground for impugning the authority of precedent. It is clear law that a precedent loses its binding force if the court that decided it overlooked an inconsistent decision of a higher court. Such decisions are also per incuriam. A court is not bound by its own decision that is in conflict with one another. If the new decision is in conflict with the old, it is given per incurium and is not binding on later courts. In this circumstances the rule is that where there are previous inconsistent decisions of its own, the court is free to follow either i. e. earlier or later. To come within the category of per incuriam it must be shown not only that the decision involved some manifest slip or error but also that to leave the decision standing would be likely, inter alia, to produce serious inconvenience in the administration of justice or significant injustice to citizens.

26) In the case of **Government of A. P. and Another v/s B. Satyanarayana Rao (dead) by LRs. And others (2000) 4 SCC. 262** Honourable Supreme Court observed as under :

> "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".

27) In the recent case **Siddharam Satlingappa Mhetre v/s State of Maharashtra** reported in **AIR 2011 Supreme Court -312**, the Hon'ble Supreme Court has explained the concept of 'per incurium' which operates on a similar principle. Operating on a premise that when a bench of lower strength ignores the decision of a bench of a higher strength then the decision of the lower strength can be discarded, being per incurium of the decision of the higher strength.

SUB – SILENTIO

Introduction :

All Courts in India, subordinate to Hon'ble Apex Court, are bound to follow the Judgments delivered by Hon'ble Apex Court, however, those shall pertaining to the law declared by Hon'ble Supreme Court. The expression, "All Courts within the territory of

India" clearly mean Courts other than the Supreme Court of India. The Hon'ble Supreme Court is not bound by its own decision and may in proper case reverse its previous decisions. While dealing with the judgments of Hon'ble Supreme Court and Hon'ble High Courts, it is necessary to consider the doctrine of precedent. The doctrine of precedent is having some exceptions, such as Obiter Dicta, Sub Silentio & Per incuriam.

A decision passes *sub silentio* when the point of law involved in the decision is not perceived by the Court or not present to its mind. A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141 of the Constitution. That which has escaped in the judgment is not the *ratio decidendi*. This is the rule of *sub silentio*. In the technical sense it comes in operation when a particular point of law was not consciously determined. The phrase *sub silentio* is used when a particular point of law involved in the decision is not perceived by the Court.

DOCTORINE OF SUB SILENTIO

The concept, 'Sub Silentio' is borrowed from Latin term. The precedents, that pass sub silentio are of little or no authority. It can be understood as, " Without notice being taken or without making particular point in question amounts to sub silentio". So, such

observations or decision should not be treated as precedents.

Meaning of Sub Silentio :

The '***Black's Law Dictionary***', defined the meaning of Sub Silentio as '***the precedents that pass Sub Silentio are of little or no authority***'. It further described as 'silent uniform course of practice, uninterrupted though not supported by legal decisions'.

So far as its literal meaning is concerned, the Latin meaning of the concept is, 'Under' or 'In Silence".

Commonly, the term is used, when the Court overrules the holding of a case without specifically stating that it is doing so. Thus, the term mostly refers to matters that are not expressed by implied.

Jurisprudential meaning :

The renowned ***Jurist Salmond*****,** in jurisprudence by P.J. Fitzgerald referred as follows :

> "*Precedents Sub Silentio and without argument are of no moment. This 'rule' has ever since been followed. One of the chief reason for the doctrine of precedents is that a matter that has once been fully argued and decided should not be allowed to be reopened. The*

weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however, eminent, can be treated as an Ex-Cathedra statement having the weight of authority".

Doctrine Sub Silentio & Judicial Pronouncements :

The Hon'ble Apex Court as well as Hon'ble Bombay High Court discussed the principle of sub silentio in various judgments. Those judgments are need to be studied for understanding the concept sub slientio. The important judgments are discussed as herein below :

AIR 1989 SC 38

Municipal Corporation of Delhi Vs Gurunam Kaur

"Wherein three judges bench of Hon'ble Supreme Court laid down that the following categories of decisions of the Supreme Court have no binding force.

a) Obiter dicta, i.e. statements which are not part of ratio decidendi.

b) A decision Per incurium, i.e. given in ignorance of the term of a statute or rule having the force of a statute.

c) A decision passed sub silentio, i.e. without any argument or debate on the relevant question.

d) An order made with the consent of the parties, and with the reservation that it should not be treated as precedent".

In the supra judgment, the Hon'ble Supreme Court laid down that precedent sub silentio and without argument are of no moment. What is binding on an authority, is the principle upon which the case was decided. It is further observed that the only thing in a judge's decision binding as an authority upon a subsequent judge, is the principle upon which the case was decided. The statements which are not part of the ratio decidendi and passed without debate on a particular issue, are distinguished as sub silentio and are not authoritative.

Conclusion

Basically this paper is focused on the concept of Sub Silentio. What the Hon'ble Supreme Court does in a particular case is not a precedent to be followed by the other Courts. However, what the Hon'ble Supreme Court only laid down to be the law, is a precedent. The judges are required to analyse and bifurcate every judgment of Hon'ble Supreme Court or Hon'ble High Court as per the doctrines of precedents by litmus tests such as, Ratio Decidendi, Stair Decisis, Obiter Dicta, Sub Silentio and Per incuriam. The judge must be more careful & cautious while appreciating the judgments relied upon by the parties, in his day to day judicial work.

STARE DECISIS

Doctrine of Stare decisis envisages that when the rules of law are clearly pronounced and established by the highest Court they should not be lightly disregarded and set aside but they should be followed.

The operation of the doctrine of stare decisis is best explained by reference to the English translation of the Latin phrase. "Stare decisis" literally translates as "to stand by decided matters". The phrase "stare decisis" is itself an abbreviation of the Latin phrase "*stare decisis et non quieta movere*" which translates as "to stand by decisions and not to disturb settled matters".

Basically, under the doctrine of stare decisis, the decision of a higher court within the same provincial jurisdiction acts as binding authority on a lower court within that same jurisdiction. The decision of a court of another jurisdiction only acts as persuasive authority. The degree of persuasiveness is dependent upon various factors, including, first, the nature of the other jurisdiction. Second, the degree of persuasiveness is dependent upon the level of court which decided the precedent case in the other jurisdiction. Other factors include the date of the precedent case, on the assumption that the more recent the case, the more reliable it will be as authority for a given proposition, although this is not necessarily so.

In Halsbury's Laws of England, the principle of stare decisis is stated thus: "The decision which has been followed for a long period of time and has been acted upon by person in any formation of contracts or in the disposition of their property or in legal procedure of in other ways will generally be followed by courts of higher authority than the court establishing the rule even though the court before whom the matter arises afterwards might not have given the same decision had the question come before it originally. But the supreme appellate Court will not shrink from overruling a decision or series of decisions which establish a doctrine plainly outside the statute, (emphasis supplied) and outside the common law and given right and no contract will be shaken, no person can complain and no general course of dealing be altered by the remedy of a mistake. In Corpus Juris Secundum, it is stated in para 192 that "Under the stare decisis rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the courts it is not universally applicable." In para 193 at page 322, it was further stated that "previous decisions should not be followed to the extent that grievous wrong may result; and accordingly the courts ordinarily will not adhere to a rule or principle established by previous decisions which they are convinced is erroneous. The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any

case, but its application must be determined in each case by the discretion of the court and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong may result."

EXCEPTIONS TO THE DOCTRINE OF STARE DECISIS :

The doctrine of *stare decisis* requires subsequent courts to abide by the decisions of prior courts, whenever similar identical questions of law as were decided by the prior courts arise before them. The rule is not absolute. In *Bachhan Singh* v. *State of Punjab*, AIR 1980 SC 898, it was observed that the rule of adherence to precedents is not a rigid or inflexible rule of law, but is a rule of practice adopted by courts in order to provide uniformity and stability in the law. Where for instance, there is a change in the statutory provision on which the prior decision was based, the prior decision would no longer be a binding precedent. Also, where a particular decision or set of decisions have been overruled again, the decisions would not have a binding force. Other exceptions i.e., situations where a prior decision would not be binding on a subsequent court, include decisions *per incurium* and decisions *sub silentio*. In *Maktul* v. *Mst. Manbhari and Ors*, *AIR 1958 SC 918*, it was observed that the rule of stare decisis is not an inflexible rule and is inapplicable where the decision is clearly erroneous and where its reversal does not shake any titles or contracts or alter the general course of dealing.

i) PER INCURIAM :

Per incuriam means that a court failed to take into account all the relevant and vital statutes or case authorities and that this had a major effect on the decision. In loose sense, it means through inadvertence or through want of care. The *per incuriam* rule is a well-established technical rule; but you must be careful here. *Per incuriam* does not simply mean the earlier court got things wrong. It only means there was a significant oversight. A decision is per incuriam need not be relied upon as precedent.

The court is not bound by its own decisions found to have been made *per incuriam.* The fact that the case being examined had weaknesses in argument, or in the judgment, does not make the decision *per incuriam*.

In *Municipal Corporation of Delhi* v. *Gurnam Kaur*, *AIR 1989 SC 38*, it was held that decisions *per incurium* are those that have been rendered in ignorance of the terms of the statute and of a rule having the force of a statute

ii) SUB SILENTIO :

It is a latin word which means under silence or without any notice being taken. Precedents that pass *sub silentio* are of little or no authority. This is an another exception to the binding precedent. A judgment said to be *sub silentio* when either a proposition was not the subject matter of argument during the hearing or discussion in the

judgment or the proposition was assumed to be correct and the court acted upon that assumption. In *Muncipal Corporation of Delhi* v. *Gurnam Kaur* , it was observed that, " A decision passes subsilentio, in the technical sense that has come to be attached to that pharse, when the particular point of law involved in the decision is not perceived by the court or present to its mind". For instance in a recent case, *State of U.P. and ors.* v. *Jeet S. Bist*, *Civil Appeal No. 2740/2007, decided on 18.05.2007*, it was observed that in the decision in *All India Association and ors.* v. *Union of India, AIR 1992 SC 165,* while directions were given, there was no discussion on whether such direction s could be validly given by the court and thus the decision was found to have been passed *sub silentio.* If, however, the proposition was discussed at the time of arguments or in the judgment and thereafter a decision was reached, the same could not be said to be *sub silentio.*

CONCLUSION :

While statutes and enactments of the legislature lay down the general rules to be applied in the adjudication of disputes between parties, the final authority for the interpretation of those rules are the courts. The doctrine of *stare decisis* makes the decisions of courts, usually the higher forums, binding on subordinate courts in cases in which similar or identical questions of law are raised before the court. The application of this doctrine ensures that there is uniformity and

certainty in the law. It saves time and efforts of judges and helps in preventing arbitrary action on the part of judges. The doctrine thus ensures that at least over a certain period of time law remain certain and people are able to conduct their business in accordance with the prevalent interpretation of law. The doctrine is thus in the interest of public policy. In India, the doctrine is constitutionally recognized in respect of the decisions of the Supreme Court which have been declared under Article 141 to be binding on all courts and tribunals in the country. This of course implies that even a single pronouncement of the Supreme Court would be binding on subordinate courts. However, as held by Hon'ble Supreme Court in the case of Bengal Immunity vs. State of Bihar, decided on 4.12.1954, the decisions of the Supreme Court are not binding on itself. In so far as High Court are concerned, the decisions of a High Court are binding on all subordinate Courts within the jurisdiction of High Court. It is only the reasons for deciding a case i.e., the *ratio decidendi* of the case which are binding on future courts.

In India, the doctrine is constitutionally recognized in respect of the decisions of the Supreme Court which have been declared Under Article 141 to be binding on all courts and tribunals in the country. This of course implies that even a single pronouncement of the Supreme Court would be binding on subordinate courts. However, as held in the Bengal Immunity case, the decisions of the Supreme Court are not binding on itself. It is only the reasons for

deciding a case i.e., the ratio decidendi of the case which are binding on future courts. There is no definite view as to how the ratio decidendi is to be determined but there are a number of tests for its determination of which some are the material facts.

DOCTRINE OF PROSPECTIVE OVERRULING

The meaning of prospective overruling is to construe an earlier decision in a way so as to suit the present day needs but it does not create a binding effect upon the parties to the original case or other parties bound by the precedent. The use of this doctrine overrules an earlier laid down decisions and all the events that occurred before it are bound by the old precedent itself. In simpler terms it means that the court is lying down a new law for the future.

The doctrine of prospective overruling originated from the American Judiciary System. It was for the first time laid down by Cardozo J. and Hand J. The doctrine aims at overruling a precedent without causing retrospective effect. There are two aspects of this doctrine.

The first aspect was laid down by Lord Blackstone, according to this theory Judges don't make the law; their job is to define the law. They should however follow the doctrine of *Stare Decisis*. The doctrine of *Stare Decisis* means "to stand by precedent and not to disturb the settled point of law" the logic behind this doctrine is that people should not get confused as to what is legal and what is illegal.

The second aspect was propounded by Cardozo J. and Hand J. According to them if this doctrine is not given effect it will wash away the whole dynamic nature of law, it will be against the concept of judicial activism. Cardozo J. was of the view that the law should keep up with the changes occurring in the society, the law has to be dynamic and not static. If in a new and changed society, the citizens are bound by an old law it will lead to grave injustice. The citizens whose lives are bound by the law of land should be given laws according to changed needs. Therefore the doctrine of Prospective Overruling is an important tool in the hand of judiciary to give fair and timely justice to its citizens. The Doctrine of prospective overruling supplies the gap in legal theory and offers the doctrinal foundations for an extended view of judicial function with built in discretion in the Court to indicate the time dimension and the type of cases for which the holding in a particular case shall have operative effect. Mathew J. explains the thrust of the rationale behind the doctrine of prospective overruling by observing that, it is not meant to supplant the Blackstonian doctrine but is a necessary device in any system of law to protect the interest of the litigant public, when judicial overruling of a precedent entails a change in the law.

The doctrine of prospective overruling was for the first time applied in India in the case of ***Golaknath L. C. V/s State of Panjab,*** reported in ***AIR 1967 SC 1643,*** The Court overruled the decision laid down in ***Sajjansingh V/s State of Rajasthan*** reported in

AIR (1965) SC 845 and ***Shankari Prasad V/s Union of India,*** reported in ***AIR (1951) SC 458,*** The Hon'ble judges of Supreme Court laid down its view on this doctrine in a very substantive way by saying 'The doctrine of prospective overruling is a modern doctrine suitable for the fast moving society.'

Propositions laid down in Golak Nath's Case:

Because it was the first time that, the Court was applying a doctrine which had evolved in a different system of law so the Court laid down certain provisions restricting the application of the doctrine in the Indian system. It was laid down that :-

(1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution;

(2) It can be applied only by highest court of the country, ie. The Supreme Court as it has the constitutional jurisdiction to declare law binding on all the Courts as it has India;

(3) The scope of the retrospective operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with- the justice of the cause or matter before it.

In light of the above principles laid down for adopting the doctrine into our legal system, we see that the American idea of

Prospective overruling differs from what is adopted by the Indian Legal system.

Prospective Overruling: as defined by the Courts:

Further in the case of **Sarwan Kumar Vs. Madan Lal Aggarwal**, the Court defined prospective overruling as

"Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence."

Furthermore, it has been laid down that the prospective declaration of law is a device innovated by the apex court to avoid reopening of the settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of the prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated. This is done in the larger public interest. Therefore, the subordinate forums which are legally bound to apply the declaration of law made by this Court are also duty bound to apply such cases which would arise in future only.

Thus, Supreme Court has effectively by laying down

certain propositions since incorporation of the doctrine into our system kept a check on it. By expressly laying down that only the Supreme Court can decide as to whether the law will apply prospectively or retrospectively, the court has made sure that there is no injustice caused to any person in the society. It is very essential that the doctrine is applied within a definite scope for meeting the ends of justice.

Applicability in India :-

The concept of doctrine of prospective overruling has now been accepted in it's full form in India. Now, it is an integral part of the Indian Legal System. The purpose of prospective declaration of law by the Supreme Court is to avoid reopening of second issue and to prevent multiplicity of proceedings by implication, all contrary actions taken prior to such declaration stand validated. The Subordinate Courts are bound to apply the law to future cases only. Some times, the Court itself may fix a date, decision taken before which would not be disturbed, while invalidating a law or overruling a decision.

This doctrine is also applicable to other statues also, which again is a very dynamic steps, taken by the Judiciary to meet ends of justice. It is observed by Supreme Court in the case of **Ashok Kumar Gupta Vs. State of U.P. (AIR 1997 S.C. 201**. "It is a method evolved by the Courts to adjust competing rights of parties

so as to save transactions, whether statutory or otherwise, that were affected by earlier law. A similar definition of this doctrine was given by the Supreme Court in the case of **Sarwan Kumar Vs. Madan Lal (AIR 2003 S.C.W. 819**. "Under the doctrine of prospective overruling, the law declared by the Court applies to the cases arising in future only and it's applicability to the cases, which have attained finality is saved, because, the repeal would otherwise work hardship to those, who have trusted to its existence."

In the case of **Sawhney Vs. Union of India,** Justice Jeevan Reddy decided that the ruling in this case would be effective after five years from the date of the ruling. The Court thus postponed giving effect to the mandal ruling for five years from the date of the Judgment. This case not only sees the extension of the application of the doctrine but even the elongation of the time period when the judgment would be effective. In this case, the ruling of **Rangachari** was overturned.

In the case of **Orissa Cement Ltd. Vs. State of Orissa (AIR 1991 S.C. 1676)**. It is observed that " in our view, we need not enter into a discussion on principle of prospective validation enunciated by at least some of the Judges in Golak Nath. Another important point raised by the court is that the when a case is decided by the doctrine of prospective overruling, it must be stated by the learned Judges. This implies that the Indian aspect of this doctrine

different on this point from American point of view, which states that prospective overruling, can be both express and implied. The court in **Saurabh Choudhary Vs. Union of India (AIR (2004) S.C. 2212**. held "Prospective application of a judgment by the court must, there, be expressly stated." The honorable Supreme Court further added that " A statute is applied prospectively only when thereby vested or accrued right is taken away and not otherwise." In Indian Judiciary the limit for retroactivity of the law is at the discretion of the judges. It is up to them to decide the limit to which the new law is retroactive. This power of the court gives the judiciary a fair chance to give the right justice to the parties bound by the earlier precedent. Indian judges have certainly relied greatly on the Golak Nath case and till date, in a matter relating to the doctrine of prospective overruling, the case is referred. Judicial Activism is a concept in which this doctrine plays a very essential role, this concept of prospective declaration is very essential in order to keep up with changing needs of the society. Law does have a very dynamic nature and it cannot be kept too static as it will not match with the current needs of the people. It is also true that it should be left up to the judges to decide the limit of retro-activity of each case. However when in a case of prospective overruling a precedent is overruled the new decision is kept totally prospective and not at all retrospective, if it is given a retrospective effect it will certainly lead to chaos and people will not know what is the law.

BINDING EFFECT OF JUDGMENT OF HIGH COURTS

1] Section 212 of Government of India Act, 1935 and Article 141 of Constitution of India provided for binding effect of judgment of the Apex Court. So far as, High Courts are concerned there is no such provisions.

2] The issue is dealt with in the case of ***M/s East India Commercial Company Ltd. Vs. Collector of Customes Culcutta [AIR 1962 SC 1893] i***n which the Hon'ble Apex Court referred Articles 215, 226, 227 of Constitution of India and on consideration thereof gave cumulative effect to those provisions holding that the decisions of High Court shall have binding effect on its subordinate Courts and Tribunals.

3] The proposition regarding binding effect of decisions appears as under:

a) The Law laid down by the Hon'ble Supreme Court shall be binding on all Courts or Tribunals.

b) The decisions of High Court are binding on the subordinate Courts, Tribunals and Authorities, under its superintendence throughout the territories in relations to which it exercises the jurisdiction.

c) The decision of High Court is not having binding effect beyond its territorial jurisdiction. The decisions of other High

Courts have persuasive value and can be used as advisory, if on the same point, there is no decision of a parent High Court. Hence the doctrine of precedent can not be applicable to the decisions of other High Courts.

4] The Hon'ble Apex Court in ***Valliama Champaka Pillai v. Sivathanu Pillai*** **[AIR 1979 SC 1937]** dealing with the controversy whether a decision of the erstwhile Travancore High Court can be made a binding precedent on the Madras High Court on the basis of the principle of *stare decisis*, clearly held that such a decision can at best have persuasive effect and not the force of binding precedent on the Madras High Court. The doctrine of *stare decisis* cannot be stretched as far as to make the decision of one High Court a binding precedent for the other. This doctrine is applicable only to different Benches of the same High Court.

5] Hon'ble Apex Court in ***Muttulal Vs. Radhe's lal*** **[AIR 1974 SC 1596]** has observed that as a General Rule, the decision of High Court constituting the Larger Bench shall prevail over the decision of same High Court constituting Lesser Bench irrespective of point of time.

6] There may be conflicting views of the same High Court but different Benches. In those circumstances, the following guidelines are to be followed.

(a) The single judge of a High Court is bound by the decision of Single Judge or Division Bench of the same High Court.

(b) If the Single Judge of the same High Court, does not approve then the Single Judge should make a reference to the Hon'ble Chief Justice to constitute the Larger Bench.

(c) The Division Bench of the High Court has to follow the decision given by any Division Bench or Larger Bench of the same High Court.

(d) The mere fact that there is only one decision of any one High Court on a particular point or that a number of High courts have taken identical views in that regard, can not be relevant to decide the binding effect of that decision.

7] There may be a situation where two decisions of different benches of same High Court consisting of co-equal number of Judges are cited, but those two judgments cannot be reconciled. Hon'ble Culcutta High Court in case of ***Prematha Nat h Vs. Hon'ble Chief Justice of High Court of Culcutta*** **[AIR 1961 Culcutta 545]** has taken the view that the latter decision in point of time will have binding effect as it would be taken that the earlier view stood impliedly overruled by the latter decision. Similar view was taken by Hon'ble Bombay High Court in the case of "***Vasant Tatobi Vs. Dikkaya Muttaya Pujari, AIR 1980 Bom. 341".***

8] However, the interpretation changed in course of time.

9] Full Bench of the Hon'ble Punjab and Haryana High Court in the case of ***Indo Swiss Time v. Umrao*** **[AIR 1981 P & H 213]** held that if two inconsistent judgments of the benches of High Court constituted by co-equal number of judges are cited, instead of following the latter in point of time, the better or more accurate on point of Law should be followed.

10] The Hon'ble Bombay High court in the case of ***The State Land Acquisition Officer v. Municipal Corporation Greater Bombay*** **[AIR 1988 Bom. 9]** has endorsed the view taken by the Hon'ble Punjab and Haryana High Court cited supra.

11] Recently, the Hon'ble Supreme Court in the case of ***Sundeep Bafna v. State of Maharashtra*** **[AIR 2014 SC 1745]** has observed that if two or more mutually irreconcilable decisions of the Supreme Court are cited in the High Court, the inviolable recourse is to apply the earliest view as the succeeding one would fall in the category of per in-curium.

12] The Hon'ble Bombay High Court in ***Amrutta Babaji Mozar v. Kondabai Babaji Mozar*** **[1994 Mh.L.J.1663]** has held that even a gloss put by a High Court on the decision of the Supreme Court is binding on all the Courts in the State concerned until outweighed by a later decision of the Supreme Court or a larger bench of the High Court. Thus, the doctrine of precedent is not only

applicable to the interpretation of law made by the Supreme Court or High Court, but is also applicable to the interpretation of a decision of the Supreme Court or High Court made by the Supreme Court or High Court.

EFFECT OF ORDERS OF HIGHER COURT

13] Even before the Government of India Act, 1935, it was not open to the Courts in India to question any principle enunciated by the Privy Council.

14] Any interim order passed even by the Supreme Court is limited to that particular case and should not be used as precedent for other cases specifically when the Supreme Court itself has earlier authoritatively decided the question which is squarely involved in the later case.

15] Finally, The Hon'ble Apex Court in ***Megh Singh v. State of Punjab*** **[AIR 2003 SC 3184]** has held that circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases or between two accused in the same case. Each case depends on its own facts and a close similarity between one case and another is not enough because a single significant detail may alter the entire aspect.