IS ‘STARE DECISIS’ A TABOO ON THE SINGLE BENCH?

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‘Stare decisis’ is an abbreviation of Latin phrase ‘stare decisis et non quieta movere’ meaning that ‘to stand by decisions and not to disturb settled matters’. Till London Street Tramways v London County Council (1), House of Lords in England was not bound by its own decision. After London Street Tramways case, once the House of Lords had given a ruling on a point of law, the matter was closed unless and until Parliament made a change by statute. On 26th July 1966 Lord Gardiner L.C. on his behalf and on behalf of other Law Lords said that ‘too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law’ and that ‘they propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so’ (2). The House of Lords has, thereafter, over a number of years, laid down various criteria in the matter of the Practice Statement of 1966 which have been summarized by Dr. Alan Patterson (3). A constitution bench of the Supreme Court in Union of India v. Raghubir Singh (4) referred to the criteria as follows:

1. The freedom granted by the 1966 Practice Statement ought to be exercised sparingly;
2. A decision ought not to be overruled if to do so would upset the legitimate expectations of the people who have entered into contracts or settlements or otherwise regulated their affairs in reliance on the validity of that decision;
3. A decision concerning questions of construction of statutes or other documents ought not to be overruled except in rare and exceptional cases;
4. A decision ought not to be overruled if it would be impracticable for the Lords to foresee the consequences of departing from it;

(1) 1898] AC 375
(2) (1966) 3 All.E.R. 77
(3) Dr. Allan Paterson; Law Lords
(4) (1989)2 SCC 754
5. A decision ought not to be overruled if to do so would involve a change that ought to be part of comprehensive reform of the law.

6. In the interest of certainty, a decision ought not to be overruled merely because the Law Lords consider that it was wrongly decided. There must be some additional reasons to justify such a step;

7. A decision ought not to be overruled if it causes such great uncertainty in practice that the parties’ advisers are unable to give any clear indication as to what the courts will hold the law to be;

8. A decision ought to be overruled if in relation to some broad issue or principle it is not considered just or in keeping with contemporary social conditions or modern conceptions of public policy.

In Raghbir Singh’s case the Supreme Court observed that ‘in order to promote consistency and certainty in the law laid down by the superior court, the ideal condition would be that the entire Court should sit in all cases to decide questions of law’ but ‘having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the court should sit in divisions’. The Supreme Court also said that ‘it is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the rule has been evolved’ that the statement of the law by a Division Bench is considered binding on Division Bench of the same or less number of Judges. It has also been pointed out that this principle had been followed in India by several generations of judges. Referring to an earlier decision in State of Bombay v. United Motors (5) the Court held that if the previous decision was patently erroneous’ there …………………………………………………………………………………

(5) AIR 1953 SC 1069
was a duty on court to say so and not to perpetuate the mistake. The Court also referred to *Bengal Immunity Company Ltd. v. State of Bihar* (6) wherein the Supreme Court held that one instance where overruling is permissible is a ‘situation where contextual values giving birth to the earlier view had altered substantially’. In *Lt. Col. Khajoor Singh v. Union of India* (7) Supreme Court held that if there was fair amount of unanimity that the earlier decision was *manifestly wrong* departure from earlier interpretation was permissible. In *Keshav Mills Co. Ltd. v. CIT* (8) Supreme Court said that ‘revision of earlier decision would be justified if there were compelling and substantial reasons to do so’. In other words, the Supreme Court has adopted the view of Justice Brandeis in *State of Washington v. Dawson & Co.* (9) that stare decisis is ‘not a universal, inexorable command’.

In *Central Board of Dawoodi Bohra Community v. State of Maharashtra* (10) a Constitution Bench of the Supreme Court referred to Raghubir Singh’s case and held that what was held in Raghubir Singh’s case was that being highest court of the country, it was open for the Supreme Court not to feel bound by its own previous decisions because if that was not permitted the *march of judge-made law and the development of constitutional jurisprudence would come to a stand still*. In Dawoodi Bohra Community Case the Supreme Court summed up the legal position as follows:

1. The law laid down by the Supreme Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength;
2. A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum.

References:

(6) AIR 1955 SC 661
(7) AIR 1961 SC 532
(8) AIR 1965 SC 1636
(9) 264 US 393
(10) (2005) 2 SCC 673
3. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration.

In so far as High Court is concerned the application of rule of stare decisis is two fold. Law laid down by a Bench of larger strength of the High Court is binding on subsequent Bench of lesser or coequal strength. When a court binds itself the rule is called ‘horizontal stare decisis’. When a court is bound by a precedent of a higher court it is called ‘vertical stare decisis’. A high court is bound by a law declared by the Supreme Court by way of rule of ‘vertical stare decisis’ which is embodied in Article 141 of the Constitution of India.

In Peter v. Sara (2006 (4) KLT 219) the Full Bench was concerned with two major legal questions. One related to the nature of proceedings before Family Court under Section 125 of the Code of Criminal Procedure, 1973 (Cr.P.C), and the other was regarding Court fee payable in appeals to the High Court under Land Acquisition Act against awards of civil courts in Land Acquisition references. The matters had been placed before the Full Bench as directed by the Chief Justice at the instance of the learned Single Judge. The Full Bench in Peter’s case has held that the references in the cases before the Full Bench were ‘incompetent since there were binding Full Bench and Division Bench decisions on all the points in the order of reference’. The Full Bench also held that ‘only in limited circumstances and that too stating reasons thereof, a reference is competent to the Division Bench’ and that ‘except in such a situation, Single Bench is normally bound by the decision of another single Bench and definitely bound by the Division Bench and Larger Bench decisions of the same court.’ The Full Bench quoted Benjamin Cardozo and said that ‘adherence to precedent should be the rule and not the exception’.

‘Horizontal stare decisis’ is a rule of practice. It does not find place any where in the Constitution of India. There is no constitutional or legal provision that High Court is bound by its own decision. But for the rule of ‘stare decisis’ the High Court would not be bound by its own previous decision. However, the doctrine of binding precedent has been
evolved by the Court to promote certainty and consistency in judicial decision. As pointed by the Supreme Court in Raghubir Singh’s case the question is not whether the Court is bound by its own previous decisions but the question is under what circumstances and within what limits should the Court overturn its own pronouncements. Neither the Kerala High Court Act nor any Rule framed there under stipulates that Full Bench shall consist of three or more judges. What should be the quorum of the Full Bench, as a rule of practice, is a matter left to the Chief Justice, who is the master of the roster. As held by the Constitution Bench of the Supreme Court in Dawoodi Bohra Community case it is not improper for a bench of a lesser quorum to doubt the decision of a larger quorum and invite the attention of the Chief Justice and request the Chief Justice to place the matter before a Bench of larger quorum than the Bench whose decision has been held in doubt by the Bench of lesser quorum. As regards the High Court, it has been held by the Supreme Court in Tribhovandas v. Ratilal (11) that ‘when it appears to a Single Judge or Division Bench that there are conflicting decisions of the same Court or there are decisions of other High Courts in India which are strongly persuasive and take a different view from the view which prevails in his or their High Courts, or that a question of law of importance arises in the trial of a case, the Judge or the Bench passes an order that the papers be placed before the Chief Justice of the High Court with a request to form a special or Full Bench to hear and dispose of the case or the question raised in the case’ and that ‘for making such a request to the Chief Justice no authority of the Constitution or Charter of the High Court is needed, and by making such a request a Judge does not assume to himself the power of the Chief Justice’. The Supreme Court also held that ‘a Single Judge does not………………………………………………………………………………...
(11) AIR 1968 SC 372
by himself refer the matter to the Full Bench; he only requests the Chief Justice to Constitute a Full Bench for hearing the matter’ and that while constituting the Full Bench if the Chief Justice referred to the case that did not mean that the source of authority is in the order of reference. The law laid down by the Supreme Court gives sufficient freedom to a Single Judge not to feel bound by the decision of a Bench of larger quorum and to request the Chief Justice to place the matter before a larger Bench. The effect of the Full Bench decision in Peter’s case is in fact, to take that freedom away and
to make Single Judge bound by the decisions Division Benches and Full Benches so much so that the Single Bench has no other alternative than to follow the decision however manifestly erroneous the decision of the Division Bench or the Full Bench may appear.

“Law must be stable and yet it cannot stand still’ is the universal rule (12). According to Cardozo, application of stare decisis does not involve matching ‘the colours of the case at hand against the colours of many sample cases spread out upon the desk’. It primary involves the duty to ‘extract from the precedents the underlying principle, the ‘ratio decidendi’. There is also a duty, thereafter, to determine ‘the path or direction along which the principle is to move and develop, if it is not to wither and die’ (13). Law laid down by a Full Bench may become redundant by passage of time and if Single Judges from whose decision no intra court appeal is provided, are made absolutely bound by the decision of Full Bench with no freedom to doubt the principle or to refer the matter to Division Bench or to the Chief Justice, in the bargain, theory and practice of ‘horizontal stare decisis’ itself will get defeated putting the growth of law in jeopardy. With due respect, it is submitted that the view taken by the Full Bench in Peter’s case that the Single Bench is definitely bound by the previous decisions of earlier Full Benches and Division Benches does not appear to keep with the well laid down principles of ‘stare decisis’.

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(12) Dean Roscoe Pound: Interpretation of Legal History
(13) Benjamin N. Cardozo: The Nature of Judicial Process
Of the two legal questions placed before the Full Bench one related to procedure before Family Court in a proceedings under Section 125 Cr.P.C and the other related to payment of court on Land Acquisition Appeals. On the first issue, having found that there are conflicting views of the same Court and other High Courts, the learned Single Judge felt that the important question of law needed an authoritative pronouncement by a larger Bench and ordered that the matter be placed ‘before the Hon’ble Chief Justice for appropriate orders of posting’. The order of the learned Single Judge, obviously, was not an order referring the matter to Full Bench which, of course, could have been done only by a Division Bench under Section 4 of the Kerala High Court Act. The order of the learned Single Judge was only to invite the attention of the Chief Justice to the legal issue and to request the Chief Justice to place the matter before a larger Bench, a course which was perfectly open to the learned Single Judge to adopt going by the principles laid down by the Supreme Court in Tribhovandas case and Dawoodi Bohra Community case. In fact, it is apparent that the Chief Justice did accede to the request of the learned Single Judge and constituted Full Bench to hear the matters. Going by the law laid down by the Supreme Court in Tribhovandas case it is apparent that the power of the Chief Justice under Section 6 of the Kerala High Court cannot be restricted to any particular category of cases like ‘public interest, the interest of administration of justice, the exigencies of administration of institution etc.’ as held by the Full Bench in Peter’s case. Section 6 could only be clarificatory in nature and is meant to save the power of the Chief Justice which was available, as Supreme Court said, even without any constitutional or statutory provisions in that regard. With due respect it may be submitted that the validity of the orders of the learned Single Judge to place the matter before the Chief Justice and the order of the Chief Justice constituting Full Bench as requested by the learned Single Judge having not been under challenge before the Full Bench, the proper course open to the Full Bench in Peter’s case was to consider the matters paced before it on merit.
In Peter’s case the Full Bench noted that another Full Bench in *Sathyabhamma v. Ramachandran* (14) had held that proceeding for maintenance before the Family Court is criminal in nature and therefore the subsequent decision in *Kunhimohammed v. Nafeesa* (15) had been rendered *per incuriam*. However, the Full Bench decision in Sathyabhamma’s case had been rendered contrary to an earlier Full Bench decision in *Balan Nair v. Valsamma* (16). In Balan Nair’s case the Full Bench had held that the proceedings for maintenance under Section 125 Cr.P.C was civil in nature. Full Bench in Balan Nair’s case said so relying on a decision of the Supreme Court Court in *Nanda Lal v. Krishna Lal* (17) wherein the Supreme Court had categorically held that proceedings for maintenance under the Code of Criminal Procedure is civil in nature. The Full Bench in Sathyabhamma’s case noticed Balan Nair’s case but did not follow it stating that Balan Nair’s case could not be accepted as an authority wherein the nature of the proceedings under Section 125 of Cr.P.C. had been correctly understood and laid down authoritatively. Sathyabhamma’s case and Balan Nair’s case were decided by co-equal Benches. In the ordinary course the Full Bench in Sathyabhamma’s ought to have followed Balan Nair’s case. Had the Bench in Sathyabhamma’s case had felt that Balan Nair’s case had not been correctly decided it was open to the Bench which heard Sathyabhamma’s case to refer the matter to Larger Bench. But to strike a different note and lay down a principle contrary to the decision in Balan Nair’s case was not in accord with the principles of ‘*stare decisis*’ laid down by the Constitution Bench of the Supreme Court in Raghubur Singh’s case. Kunjimohammed’s case which says that the proceedings for maintenance under Section 125 Cr.P.C. before the Family Court is a civil procedure lays down the correct position in law going by the Full Bench decision in Balan Nair’s case and Supreme Court decision in Nanda Lal’s case. It was only proper, therefore, to have an authoritative pronouncement by a Larger Bench on the legal issue involved.

(14) 1997 (2) KLT 503
(15) 2003 (1) KLT 364
(16) 1986 KLT 1378
(17) AIR 1960 SC 882
The question regarding payment of Court fee on Land Acquisition Appeal is also not free from doubt. Levy and collection of fee is essentially a legislative function. Clear statutory indication is necessary to levy and collect fee lest it shall not fall foul of Article 265 of the Constitution of India. Levy and collection of fee cannot be held to be a matter of mere statutory inference. The Full Bench in Balakrishnan Nambiar v. Madhavan & ors (18) interpreted Section 51 of the Kerala Court Fees & Suit Valuation Act and held that ad valorem court fee could be levied on land acquisition appeals. Section 51, however, does not authorize levy and collection of Court fee. Section 51 only deals with mode of computation of Court fee. Section 52 of the Act authorises levy of fee on appeal ‘same as the fee that would be payable in the court of first instance on the subject matter of the appeal’. No fee is payable in the court of first instance on a land acquisition reference. There is also no specific provision in the Act or in the Schedule to the Act authorizing levy of Court fee on land acquisition appeal. The learned Single found that, in spite of the Full Bench decision and a subsequent Division Bench decision, the levy of Court fee on land acquisition appeal could not be said to be authorized. Persuaded by judicial pronouncements of other High Courts on the issue the learned Single Judge referred the matter ‘for consideration of the Honourable the Chief Justice, for placing before a Larger Bench’, a course approved by the Supreme Court in Tribhovandas’s case. Obviously, thereby, the Single Judge was not adjourning or referring the matter for being heard by a Larger Bench, but was only requesting the Chief Justice to place the matter before a larger Bench for authoritative pronouncement on the legal issue involved. As held by the Supreme Court in United Motor’s case ‘the issue did not relate to ‘ordinary pronouncement declaring the rights of two private individuals’

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(18) 1978 KLT 843
but adjudication on the taxing power of the State as against the consuming general public and therefore ‘if the decision was erroneous the Court ‘owed it to the public to protect them against the illegal tax burdens’ which the State was seeking to impose on the strength of an erroneous decision. Obviously, the question of ‘judicial hands off’ theory based on the rule of ‘stare decisis’ did not, therefore, apply to an erroneous decision regarding payment of Court fee.

It is respectfully submitted that in the light of the Supreme Court decisions in Tribhovandas’s case, Raghubir Singh’s case and Dawoodi Bohra Community case, the decision of the Full Bench in Peter’s case does not appear to lay down the correct position in law and needs reconsideration.

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