JMVD LEGAL UPDATES

ON *"LAWS LAID DOWN BY A HIGH COURT VIS-À-VIS ITS IMPACT OVER OTHER STATES"*

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Whenever a central enactment has been read down by a High Court, few questions come in our mind as to the bindingness of the same over other high courts and its impact on the enforcement of said central enactment in other states.

The relevant constitutional provisions to be dealt with in this regard, are Article 226(1) and Article 226(2) of the Constitution of India, 1950 ("Constitution"). Article 226(1) confers power on the High Courts to issue writs for enforcing fundamental rights, or for any other purposes. Such power can be exercised by the High Court '*throughout the territories in relation to which it exercises jurisdiction*'. Article 226(1) further provides that the writs can be issued to '*any person or authority, including in appropriate cases, any Government, within those territories*'. Article 226(2) states that the power conferred by Article 226(1) may be exercised by any High Court under whose territorial jurisdiction the whole or part of cause of action arises.

Article 226 is for exercise of the **original jurisdiction** of the High Court while proceedings under **Article 227** of the Constitution are not original but only **supervisory**. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915, excepting that the power of superintendence has been extended by this Article to tribunals as well. Though the power is akin to that of an ordinary court of appeal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority.

Article 13 (2) also plays a great role in the process of judicial review by stating that:

"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

The Moot Question for consideration are:

A. *Whether decision of a High Court on the constitutionality of a Central Legislation is applicable only to the relevant state or throughout the country.*
B. *Whether decision of a High Court on the constitutionality of a Central Legislation is binding on the other High Courts.*
C. *What will be the precedent value in the following cases:*

(1). When a central enactment is struck down by a High Court,

(2). When a ambiguity in a central enactment is settled down by a High Court,

(3). When the Ratio Decidendi of a High Court's judgement is of nature capable of guiding the manner in which the rights and liabilities under a central enactment would be determined in general parlance.

Hence, this research note puts forth a synopsis of various judicial decisions on the captioned issue.

EXTENT OF BINDINGNESS OF A JUDGMENT PASSED BY A HIGH COURT

Supreme Court **in East India Commercial Co. Ltd. v. Collector of Customs, [1963 SCR (3) 338]** expressed its view on the bindingness of the judgment of a High Court, in the following manner:

"We, therefore, hold that the law declared by the highest court in the State is binding on authorities or Tribunals under its superintendence, and they cannot ignore it."

The Supreme Court in **Valliama Champaka Pillai v. Sivathanu Pillai [1980 SCR (1) 354],** 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. Referring to the States Reorganisation Act, it was observed that there was nothing in the said Act or any other law which exalts the ratio of those decisions to the status of a binding law nor could the ratio decidendi of those decisions be perpetuated by invoking the doctrine of stare decisis. The doctrine of stare decisis cannot be stretched that 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.

In **Commissioner of Income Tax v. Thana Electricity Supply Limited, [1993 SCC Online Bom 591]**, the Bombay High Court while considering an Income Tax issue of development rebate in supply of electrical energy, despite of there being a Calcutta High Court judgment on identical facts, considered it to have only a persuasive effect, and felt it a duty to freshly decide the matter.

In the case of **Ambica Industries v. Commissioner of Central Excise, [(2007) 6 SCC 769]:**

The Appellant herein carried on business at Lucknow and was assessed at the same place. A central excise matter of the Appellant ultimately came up before Central Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi as the said Tribunal exercised its jurisdiction in respect of cases arising within the territorial limits of the State of Uttar Pradesh, National Capital Territory of Delhi and the State of Maharashtra. Having regard to the situs of the Tribunal, an appeal in terms of Section 35G of the Central Excise Act, 1944 was filed before the Delhi High Court. A Division Bench of the Delhi High Court relying on or on the basis of an earlier Division Bench judgment in **Bombay Snuff Pvt. Ltd. v. Union of India 2006 [(194) ELT 264]** opined that it had no territorial jurisdiction in the matter. In the appeal before the Supreme Court, it was held that a High Court exercises its power to issue writ of *certiorari* and its power of superintendence only over subordinate courts located, within the territorial jurisdiction of that High Court or if any cause of action has arisen within such territorial jurisdiction.

In the case of **Durgesh Sharma v. Jayshree, [(2008) 9 SCC 648]:**

The case was of marital dispute, an interesting question of law was raised before the Court as to the power, authority and jurisdiction to transfer suits/appeals/other proceedings by a High Court from one Court subordinate to it to another Court subordinate to another High Court. It was observed that the writs issued by a High Court cannot run beyond the territory subject to its jurisdiction and the person or authority to whom the High Court is empowered to issue such writs must be within those territories.

The captioned issue of bindingness, was once discussed at strength by the Bombay High Court in, **Commissioner Of Income-Tax v. Thana Electricity Supply Ltd**., (**1994 206 ITR 727 Bom):**

> *"21. From the foregoing discussion, the following propositions emerge:*
>
> *(a) The law declared by the Supreme Court being binding on all courts in India, the decisions of the Supreme Court are binding on all courts, except, however, the Supreme Court itself which is free to review the same and depart from its earlier opinion if the situation so warrants. What is binding is, of course, the ratio of the decision and not every expression found therein.*
>
> *(b) The decisions of the High Court are binding on the subordinate courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. It does not extend beyond its territorial jurisdiction.*

(c) The position in regard to the binding nature of the decisions of a High Court on different Benches of the same court may be summed up as follows:

> *(i) A single judge of a High Court is bound by the decision of another single judge or a Division Bench of the same High Court. It would be judicial impropriety to ignore that decision. Judicial comity demands that a binding decision to which his attention had been drawn should neither be ignored nor overlooked. If he does not find himself in agreement with the same, the proper procedure is to refer the binding decision and direct the papers to be placed before the Chief Justice to enable him to constitute a larger Bench to examine the question (see Food Corporation of India v. Yadav Engineer and Contractor,).*
>
> *(ii) A Division Bench of a High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court. If one Division Bench differs from another Division Bench of the same High Court, it should refer the case to a larger Bench.*
>
> *(iii) Where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred it reached after full consideration of the earlier decisions.*

(d) The decision of one High Court is neither binding precedent for another High Court nor for courts or Tribunals outside its own territorial

jurisdiction. It is well settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect. By no amount of stretching of the doctrine of stare decisis, can judgments of one High Court be given the status of a binding precedent so far as other High Courts or Tribunal within their territorial jurisdiction are concerned. Any such attempt will go counter to the very doctrine of stare decisis and also the various decisions of the Supreme Court which have interpreted the scope and ambit thereof. The fact that there is only one decision of any one High Court on a particular point or that a number of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Courts or on any subordinate courts or Tribunals within their jurisdiction. That status is reserved only for the decisions of the Supreme Court which are binding on all courts in the country by virtue of article 141 of the Constitution."

AN INTERESTING ISSUE OF DIFFERENCES BETWEEN THE JUDICIAL MINDS

In **Mahadeolal Kanodia v. Administrator General of West Bengal, (1960 SCR (3) 578)**, the court discussed upon the quality of certainty in the decisions of the same High Court:

"Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view, the result would be utter confusion. The position would be equally bad where a judge sitting singly in the High Court is of opinion that the previous decision of another single judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench."

WHAT PART OF JUDGMENT ACTUALY HOLDS VALUE OF A PRECEDENT

Now, having been looked upon the extent of bindingness of a judgment passed by a High Court, we now move upon understanding what part of judgment actually holds value of a precedent.

In **S. P. Gupta v. President of India, (AIR 1982 SC 149),** the Supreme Court was of view that, *"It is elementary that what is binding on the court in a subsequent case is not the conclusion arrived at in a previous decision, but the ratio of that decision, for it is the ratio which binds as a precedent and not the conclusion."*

In **Amar Nath Om Parkash v. State of Punjab, (AIR 1985 SC 218),** wherein certain provisions of Punjab Agricultural Products Markets Act was challenged on ground of Excess fee been collected from dealers by Market Committee. The Supreme Court was of view that *"A case is only an authority for what it actually decides and not what may come to follow logically from it. Judgments of courts are not to be construed as statutes."*

In **Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India, (1971 SCR (3) 9),** the Supreme Court was of view that, *"It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.".*

With this it is clear that it is only the *"ratio decidendi"* of a case which can be binding and not the *"obiter dictum"*. An obiter dictum at best, may have some persuasive efficacy.

At this juncture it also becomes important to look into certain observations of the Supreme Court of India, on precedentary value of an obiter dictum contained in a judgment of the Supreme Court. In **Oriental Insurance Company v. Meena Variyal & Ors (Appeal (civil) 5825 of 2006),** it was held that**,** *"An obiter dictum of this Court may be binding only on the High Courts in the absence of a direct pronouncement on that question elsewhere by this Court. But as far as this Court is concerned, though not binding, it does have clear persuasive authority."*

Also, in Municipal Committee, Amritsar v. Hazara Singh, (AIR 1975 SC 1087), it was held that:

"However, although obiter dictum of Supreme Court should be accepted as binding by High Courts, it does not mean that every statement contained in a judgment of the Supreme Court would be attracted by Article 141. It was further held that 'Statements on matters other than law have no binding force."

KUSUM INGOTS AND ALLOYS LTD. V. UNION OF INDIA, AIR 2004 SC 2321

The observations of the Supreme Court in Kusum Ingots, squarely covers up the issue of bindingness of a High Court judgment on constitutionality of a Central enactment.

The facts of the case being, the appellant being a company was registered in Mumbai, had principal place of business in Indore and had raised loan from Bhopal branch of SBI. When a SARFAESI action was being initiated against the Appellant, it challenged the constitutional validity of the Act at the Delhi High Court attracting jurisdiction only on the ground of the seat of parliament being at New Delhi. The Delhi High Court dismissed the petition on ground of lack of jurisdiction.

The only issue for consideration before the Hon'ble Supreme Court was "*Whether the seat of the Parliament or the Legislature of a State would be a relevant factor for determining the territorial jurisdiction of a High Court to entertain a writ petition under Article 226 of the Constitution of India?*"

The most relevant paragraphs of the said judgement are as follows:

"18. The facts pleaded in the writ petition must have a nexus on the basis whereof a prayer can be granted. Those facts which have nothing to do with the prayer made therein cannot be said to give rise to a cause of action which would confer jurisdiction on the court.

19. Passing of a legislation by itself in our opinion do not confer any such right to file a writ petition unless a cause of action arises therefor.

20. A distinction between a legislation and executive action should be borne in mind while determining the said question.

21. A parliamentary legislation when receives the assent of the President of India and published in an Official Gazette, unless specifically excluded, will apply to the entire territory of India. If passing of a legislation gives rise to a cause of action, a writ petition questioning the constitutionality thereof can be filed in any High Court of the country. It is not so done because a cause of action will arise only when the provisions of the Act or some of them which were implemented shall give rise to civil or evil consequences to the petitioner. A writ court, it is well settled would not determine a constitutional question in vacuum.

22. The court must have the requisite territorial jurisdiction. An order passed on writ petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act.

23. Situs of office of the Respondents - whether relevant? A writ petition, however, questioning the constitutionality of a Parliamentary Act shall not be maintainable in the High Court of Delhi only because the seat of the Union of India is in Delhi."

CERTAIN INSTANCES OF HIGH COURTS DEALING WITH CONSTITUTIONAL VALIDITY OF CENTRAL ENACTMENTS

The Kerala High Court read down Section 10A (1) of Indian Divorce Act, 1869 in **Saumya Ann Thomas v. Union of India (2010 (1) KLJ 449)**.

The said provision prescribed a minimum of 'two years' of separate residence by the spouses for granting divorce by mutual consent. The Kerala HC read down this 'two year' period to mean 'one year' so that the provision is not violative of Article 14 and 21 of Constitution (since identical provisions in Hindu Marriage Act, 1955 and Parsi Marriage and Divorce Act, 1936 prescribed only a one year period).

The Karnataka High Court was adjudicating a Public Interest Litigation filed seeking the two year period in Section 10A(1) of Indian Divorce Act, 1869 to be read down to one year, in the case of **Shiv Kumar v. Union of India (AIR 2014 Kant 73)**. The Karnataka HC relied on Kusum Ingots to hold that the applicability of the Saumya Ann judgment would extend throughout India. It was thus concluded that the provision under challenge had already been struck down with respect to State of Karnataka also, and no further orders were required in this regard.

The Andhra Pradesh High Court struck down as unconstitutional Section 17A of the Industrial Disputes Act, 1947, in the case of **Telugunadu Workcharged Employees State Federation v. Government of India (1997 (3) ALT 492)**. It was held that the impugned provision by which the executive could reject or modify an Award passed by a Labour Court or National Tribunal, violated the democratic pattern envisaged in the constitutional scheme.

Constitutionality of Section 17A of the Industrial Disputes Act, 1947 was also challenged before a Single Judge of the Madras High Court in the case of **Textile Technical Tradesmen Association v. Union of India ((2011) I LLJ 297 Mad).**

The fact that AP HC had struck down the impugned provision in Telugunadu Workcharged case was pointed out to the Court. It was however contended by the Puducherry Government that the judgment of the AP HC is not binding and would not have extra territorial application. The Single Bench, on analysing the legal precedents involved held Section 17A as unconstitutional on merits. Curiously enough, the Court then went on to hold that on application of the law laid down by Kusum Ingots, the impugned provision was no more in force since it was struck down by AP HC in Telugunadu Workcharged case, a judgment which has effect throughout the territory of India.

When the Single Bench decision was appealed by Union of India, the Division Bench of Madras HC in **Union of India v. Textile Technical Tradesmen Association ((2014) 4 LLJ 683),** dismissed the appeal. It was again contended, this time by Union of India, that Telugunadu Workcharged judgment has no applicability in the Union Territory of Puducherry. However, the Division Bench reiterated the view propounded by the Single Bench and reference was also made to the Shiv Kumar case of Karnataka HC to hold that the pronouncement on the constitutionality of a provision of a Central Act by a High Court would be applicable throughout India.

The Delhi High Court had struck down Section 2(p) of Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, and consequently Rule 3(3)(1)(b) of Pre-natal Diagnostic Techniques Rules in the case of **Indian Radiological and Imaging Association v. Union of India (AIR 2016 Del 78)**.

The judgment was challenged in the Supreme Court by way of Special Leave Petition, but no stay of the judgment was granted.

Thereafter the question of constitutional validity of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) (Six Months Training) Rules 2014, came up before the Madras High Court. In these proceedings, **Dr. T. Rajakumari v. Government of Tamil Nadu (AIR 2016 Mad 177)**, the Court observed that the Delhi High Court had already struck down the provisions and no stay was granted against the judgment by the Supreme Court. It was therefore held that "*it is trite to say that once a High Court has struck down the provisions of a Central Act, it cannot be said that it would be selectively applied in other States"*. It was further held that the provisions held unconstitutional were applicable in the country unless Supreme Court stayed or overruled the Delhi High Court judgment.

The Calcutta High Court was dealing with a challenge to a notification issued by the Ministry of Environment, Forest and Climate Change, Government of India, in the case of **Partha Protim Datta v. Union of India (2016 SCC Online Cal 8511)**. Relying on Kusum Ingots, it was held that since the notification has already been deferred due to orders passed by the Karnataka HC and the Gujarat High Court, no further interim order was required in the writ petition.

The Calcutta HC in **Durgapur Steel Town Cable TV Operators' Association v. the Union of India (2016 SCC Online Cal 3025)**, referring to Kusum Ingots held that '*It is trite that if the vires of a Central Act or any provision of a Central Act is challenged and such challenge succeeds, the Act in question or any provision*

thereof which was questioned and interdicted may not have applicability in the rest of the country.' However, the Calcutta HC also laid a note of caution against other High Courts blindly applying the Para 22 observation of Kusum Ingots. It was observed in this case that a status quo order granted by Sikkim High Court taking into account the special circumstances portrayed in the writ petition ought not to have been relied upon by other High Courts to hold that status quo against the Central Government notification was automatically granted for the rest of the country. The Calcutta HC accordingly dismissed the writ petition and refused the grant of status quo prayed for.

All India Jamiatul Quresh Action v. Union of India (Supreme Court-Writ Petition (C) No. 422 of 2017) The challenge was to the constitutional validity of the Prevention of Cruelty to Animal (Regulation of Live Stocks, Markets) Rules, 2017, and the Prevention of Cruelty to Animals (Care and Maintenance of Case Property Animals) Rules, 2017. Court held that, *"the above rules, we are informed, were challenged before the Madurai Bench of the Madras High Court, which has stayed the operation of the said Rules…We understand the position to be that the interim order shall apply across the whole country".*

In **Naz Foundation v. Government of NCT, (2009) 160 DLT 277,** while dealing with the constitutional validity of Section 377 of IPC, it was held that:

"We declare that Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution."

THE REPEALED ARTICLES OF THE CONSTITUTION- 32A, 131A, 144A & 226A, Rep. by the Constitution (Forty-third Amendment) Act, 1977, § 4 (w.e.f. 13-4-1978)	
32A	*Constitutional validity of State laws not to be considered in proceedings under article 32.- Notwithstanding anything in article 32, the Supreme Court shall not consider the constitutional validity of any State law in any proceedings under that article unless the constitutional validity of any Central law is also in issue in such proceedings.*
131A	*(Exclusive jurisdiction of the Supreme Court in regard to questions as to Constitutional validity of Central laws.- (1) Notwithstanding anything contained in any other provision of this Constitution, the Supreme Court shall, to the xclusion of any other court, have jurisdiction to determine all questions relating to the constitutional validity of any Central law.*
144A	*Special provisions as to disposal of questions relating to constitutional validity of laws.*
226A	*Constitutional validity of Central laws not to be considered in proceedings under article 226.- Notwithstanding anything in article 226, the High Court shall not consider the constitutional validity of any Central law in any proceedings under that article.*

Statement of Objects and Purpose of Constitution (Forty-third Amendment) Act, 1977:

"The Constitution (Forty-second Amendment) Act, 1976, inserted various articles in the Constitution to curtail, both directly and indirectly, the jurisdiction of the Supreme Court and the High Courts to review the constitutionality of laws. Article 32A barred the Supreme Court from considering the constitutional validity of any State law in proceedings for the enforcement of fundamental rights unless the constitutional validity of any Central law was also in issue in such proceedings. Article 131A gave to the Supreme Court exclusive jurisdiction to decide the constitutional validity of a Central law and thus deprived the High Courts of their jurisdiction in respect of the same. Article 144A provided that the minimum number of Judges of the Supreme Court who shall sit for the purpose of determining the constitutional validity of any Central law or State law shall be seven and required a special majority of two-thirds for the invalidation of such law. Article 226A barred the High Courts from deciding the validity of any Central law and article 228A required that there should be a Bench of at least five Judges for determining the constitutional validity of any State law and prescribed a special majority for a judgment invalidating such a law.2. It is considered that articles 32A, 131A and 228A cause, hardship to persons living in distant parts in India. Further, article 32A would lead to multiplicity of proceedings as cases relating to the validity of a State law which could be disposed of by the Supreme Court itself have to be heard first by the High Court. The minimum number of Judges in every case wherein the constitutional validity of a law is involved, however unsubstantial the challenge might be, results in valuable judicial time being lost in hearing and rejecting submissions that have no substance. The Supreme Court has, in M/s. Misrilal Jain vs. the State of Orissa and Others (AIR 1977 SC 1686)

expressed the hope that article 144A would engage the prompt attention of Parliament and would be amended so as to leave to the court itself the duty to decide how large a Bench should decide any particular case. In fact, a number of cases have been held up in the Supreme Court and High Courts as a result of the aforementioned articles"

LAW COMMISSION OF INDIA, 136TH REPORT & 144TH REPORT

136th Report: "Conflicts in High Court Decisions on Central Laws, How to Foreclose and How to Resolve"

144th Report: "Conflicting Judicial Decisions Pertaining to the Code of Civil Procedure, 1908"

The Law Commission of India has devoted its above two reports to study this problem. It has mapped the existing mechanisms of resolution and evaluated the worth of each. The proposed methods of resolution are twofold; judicial pronouncement by the Supreme Court and legislative clarification. The indication is that there should either be an intervention by the Supreme Court in an appropriate proceeding or by the legislature. The Supreme Court by its order would determine the differences and handout the correct position of law. The legislative intervention, on the same line, would sort out the confusion by the legislative action of amendment, repeal or explanation.

In view of the above, it can be easily said that the decision on constitutionality of a central enactment if given by a High Court it shall have binding impact within the territorial jurisdiction of the High Court and would gain a persuasive value in other states. But here comes an issue as to equal enforcement/applicability of a central law in all the states of the country, as when a central enactment has been struck down in a state that would result in discriminatory treatment among the people within the state and outside that state. This issue can be resolved only by multiple decisions by High Courts of each states, or a decision by the Supreme Court or a clarification/amendment by the Parliament.

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