A HIGH COURT RENDERING A SUPREME COURT JUDGMENT 'PER INCURIAM' AND 'SUB-SILENTIO?: A PRESSING CONCERN IN *HARIS KM V. JAHFAR*

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The doctrine of stare decisis is an essential facet of India's judicial framework. Generally, judicial precedents of the higher courts are binding on the lower courts. This is not only a constitutional mandate, but also ensures consistency, certainty, and discipline in the huge judicial system that India has. However, there are certain exceptions, such as the rules of per incuriam and sub-silentio. An interesting question which has cropped up in Indian jurisprudence is the power of the High Court to hold a Supreme Court judgment as per incuriam and sub-silentio. This has potentially disturbed the doctrine of stare decisis and might negatively impact the judicial hierarchy, creating inconsistency and uncertainty. This is precisely what the High Court of Kerala has held in Haris K.M. v. Jahfar. This note analyses the Haris K.M. case and the judicial position of the rules of per incuriam and sub-silentio in India. It argues that the High Court could not have rendered a Supreme Court judgment as per incuriam and sub-silentio.

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I. INTRODUCTION

The doctrine of stare decisis and binding precedents are "core values of our legal system" and ensure "certainty, stability and continuity in our legal system".[1] The principle of *stare decisis* results in binding precedents and the obligation on the lower courts to follow the decisions of the higher courts or

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1 Shah Faesalv. Union of India, (2020) 4 SCC 1, ¶18.

larger benches. It means "to stand by decisions and not to disturb what is settled".[2] However, there are certain exceptions to this doctrine, such as the rules of *per incuriam* and *sub-silentio*.[3] The Latin expression 'per incuriam' means "through inadvertence".[4] The rule of per incuriam states that a court is not bound to follow a decision which has been passed in ignorance of any relevant statute or any other binding authority (such as previous decisions by higher courts or co-ordinate benches).[5] Another exception to the doctrine of stare decisis is *'sub silentio'*. A decision is said to be sub silentio "when the particular point of law involved in the decision is not perceived by the court or present to its mind".[6]

For instance, both these exceptions to the doctrine of stare decisis were applied by the Supreme Court in *State of U.P.* v. *Synthetics and Chemicals Ltd*.[7] The dispute revolved around the legislative competence of the State in levying purchase tax on industrial alcohol. The High Court had held that the State was competent to levy purchase tax under Entry 54 of List II; however, it had struck down the levy imposed in this case since it would disturb the price structure regulated by the Central Government. It was held that the Parliament was controlling the alcohol industry for regulation and development by providing for price fixation under the Price Control Order issued by the government; and that the State could not tax under Entry 54 of List II. The Supreme Court allowed the appeal by the State and set aside the judgment of the High Court. While doing so, it held that the Constitution Bench judgment in *Synthetics and Chemicals Ltd* v. *State of U.P.*[8] was per incuriam and sub silentio. It held that the Supreme Court in the Constitution Bench judgment was concerned with one question: whether the States could levy excise duty or vend fee in respect of industrial alcohol.[9] While deciding this question, it also concluded that sales tax could not be charged on industrial alcohol because there were Price Control Orders. The Supreme Court noted that the Constitution Bench made an "abrupt observation without a preceding discussion, and inconsistent with the reasoning adopted by this Court in earlier decisions" by holding that the States had no power to tax industrial alcohol.[10] It was done without any discussion, reason or rationale. Further, the decision also did not follow earlier Constitution Bench precedents.[11] Hence, it was held to be per incuriam and sub-silentio.[12]

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2 Waman Raov. Union of India, (1981) 2 SCC 362, ¶42.
3 Shanti Conductors (P) Ltd. v. Assam SEB, (2016) 15 SCC 13.
4 Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189, ¶46.
5 Shah Faesal v. Union of India, (2020) 4 SCC 1, ¶28; *See* HALSBURY'S LAWS OF ENGLAND, Vol. XXII, 799-800 (3rd ed.).
6 State of U.P. v. Synthetics & Chemicals Ltd., (1991) 4 SCC 139, ¶41; *See* P.J. FITZGERALD, SALMOND ON JURISPRUDENCE, 153 (12th ed., 1966).
7 State of U.P. v. Synthetics & Chemicals Ltd., (1991) 4 SCC 139.
8 Synthetics and Chemicals Ltd. v. State of U.P., (1990) 1 SCC 109.
9 *Id*., ¶14.
10 *Id*.
11 *Id*., ¶42.
12 *Id*.

India, like many other common law countries, follows a pyramidal structure wherein the decisions of the higher courts are binding on the lower courts. The importance of the doctrine of judicial precedents and the relevance of the rule of *per incuriam* is aptly captured in the following views of the Supreme Court in *Sundeep Kumar Bafna* v. *State of Maharashtra*:[13]

> "It cannot be overemphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty."[14]

There is no ambiguity regarding the effect of this rule in cases where a co-ordinate bench has passed a decision without considering or against a previous precedent. In such a scenario, the decision of the co-ordinate bench to the extent of the ratio is binding on the subsequent bench.[15] Nor is there any uncertainty regarding a higher court holding the decision of a lower court to be per incuriam or sub silentio.

The Kerala High Court in *Haris K.M.* v. *Jahfar* has recently declared a Supreme Court's judgment as per incuriam and sub-silentio.[16] The question, therefore, is: whether such a practice of declaring an apex Court's decision as not binding on the High Court is legally sustainable and appropriate in a judicial system that maintains a pyramidal hierarchy in its functioning, follows the doctrine of *stare decisis*, and the express provision of Article 141 in the Constitution of India mandating that the law declared by the Supreme Court is binding on all the courts. This note delves into an analysis of the abovementioned situation that has recently cropped up in the Indian jurisprudence. It argues that the High Court was wrong in its judgment and could not have declared the Supreme Court judgment to be *per incuriam*. This note is divided into three parts: the *first* part undertakes a factual and legal analysis of the judgment in *Haris K.M.* v. *Jahfar*; the *second* part presents the questionable application of the principles of 'per incuriam' and 'sub-silentio', and the *third* and final part develops on the problematic application of these principles by the High Court to not follow a binding precedent of the Supreme Court by analysing the Supreme Court's views in *South Central Railway* v. *Yashodabai*.

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13 Sundeep Kumar Bafna v. State of Maharashtra, (2014) 16 SCC 623.

14 Shah Faesal v. Union of India, (2020) 4 SCC 1, ¶19.

15 Shah Faesal v. Union of India, (2020) 4 SCC 1, ¶24.; *See* P.J. Fitzgerald, Salmond on Jurisprudence 147 (12th edn., 1966).

16 Haris K.M. v. Jahfar, 2020 SCC OnLine Ker 4009.

II. THE KERALA HIGH COURT IN HARIS KM V. JAHFAR[17]

The High Court was concerned with a case wherein the Kerala Administrative Tribunal had dismissed the application of the applicants regarding the selection for appointment to the post of driver in various departments of the Government. Apart from the other issues that arose in this case, an important question before the Full Bench was: whether the review petition could have been filed before the Tribunal after the expiry of the limitation period of thirty days as per that an application for review shall not be entertained unless it is filed within thirty days from the date of the order of which the review was sought.[18]

On a holistic reading of both the statutes, the High Court was of the view that Section 5 of the Limitation Act squarely applied to the provisions of the Administrative Tribunals Act. Section 5 provides the power to admit an application after the prescribed period if "sufficient cause" exists. Even Section 21 of the Administrative Tribunals Act provides that an application can be admitted after the period of limitation if the applicant satisfies that there is sufficient cause for not making the application within the period. The High Court draws similarities between Section 5[19] and Section 21 and goes on to state that Section 21 has to be read along with Section 29[20] of the Limitation Act. This meant that any period of limitation provided in any other statute shall also be treated "as if such period were the period" prescribed under the Limitation Act. Hence, Sections 4-24 were applicable even in the case of the Administrative Tribunals Act. It further holds that Rule 21 must also be subjected to Section 29(3), hence empowering the Tribunal to admit a review petition by condoning the delay as per Section 5 of the Limitation Act.[21] While holding so, the High Court takes note of the Full Bench decisions of Calcutta High Court[22] and Orissa High Court[23] on similar lines.

The Full Bench in *Haris K.M.* held that the Division Benches in *S. Prabha* and *Rajesh* were incorrect in their observations that the Tribunal could not entertain a review petition beyond thirty days. The High Court notes that in *S. Prabha* v. *S.A. Kareem*,[24] an original petition had been filed by persons who were not parties before the Tribunal but were negatively affected by the relief granted by it. It was held that the petitioners were necessary parties, and hence, an original petition was maintainable. The Bench had taken note of Section 22(3)(f) of the Administrative Tribunals Act, 1985, which empowers the Tribunal to exercise powers vested in a civil court under the Code of Civil Procedure, 1908, while

17 *Id*.
18 *Id*., ¶17-19, ¶¶22, 27, 30.
19 The Limitation Act, 1963, §5.
20 The Limitation Act, 1963, §29(2).
21 Haris K.M. v. Jahfar, 2020 SCC OnLine Ker 4009, ¶¶17-19.
22 Union of India v. Central Administrative Tribunal, 2002 SCC OnLine Cal 597.
23 Akshaya Kumar Parida v. Union of India, 2015 SCC OnLine Ori 22.
24 S. Prabha v. S.A. Kareem, 2016 SCC OnLine Ker 11769.

reviewing its decisions. However, taking note of Rule 21 of the KAT (Procedure) Rules, 2010, the Division Bench had opined that no review[25] However, since the petitioners therein were not made parties to the suit and were not aware of the proceedings, the Court opined that there was no remedy of review that vested with the petitioners. Hence, the petitioners could not have maintained a review petition.[26] The Court held that the petition was maintainable as the petitioners were necessary parties and that there was a violation of principles of natural justice.[27] A similar view had been adopted in *Rajesh P.J.* v. *Sabu V.A.* in so far as maintainability of an original petition before the High Court by non-parties was concerned.[28]

The High Court had taken note of the decision in *Union of India* v. *Chitra Lekha Chakraborty*,[29] wherein the Supreme Court had held that Section 5 of the Limitation Act was not applicable to the Administrative Tribunals Act since there was an express rule in the form of Rule 17, providing for a specific limitation period. Rule 17(1) of Central Administrative Tribunal (Procedure) Rules, 1987, provided that no application for review was to be entertained unless it was filed within thirty days from the date of receipt of the copy of the order. The Supreme Court held that since a specific provision had been made for filing a review application before the Tribunal, Section 5 of the Limitation Act could not be made applicable to the Rule 17 application. Hence, the Tribunal had rightly rejected the review application filed beyond thirty days.[30]

It noted that the application for review was filed not under Rule 17, but under Section 22(3)(f) of the Administrative Tribunals Act. The said provision vests the Tribunal with the powers of a civil court under the Code of Civil Procedure, 1908, while reviewing its decisions. Even though a judgment by the Supreme Court had held that the Limitation Act would not apply to the Administrative Tribunals Act, the High Court held that the Supreme Court did not consider these provisions. Further, that Rule 21 of the 2010 Rules providing for specific limitation was also subject to Section 29 of the Limitation Act was also not considered by the Supreme Court.[31] Thus, it held that the Supreme Court judgment could not be treated as a binding precedent, falling under the exceptions of 'per incuriam' and 'sub-silentio'.[32]

The High Court held that the Supreme Court judgment was per incuriam since it did not consider the various statutory provisions relevant for its analysis. In such a scenario, the question is, whether the High Court was well within its constitutional power to adopt the exceptions of 'per incuriam' and 'sub-silentio'.

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25 *Id*., ¶¶14-18.
26 *Id*..
27 *Id*., ¶¶14-18.
28 Rajesh P.J. v. Sabu V.A., 2019 SCC OnLine Ker 705.
29 Union of India v. Chitra Lekha Chakraborty, Civ. App. 6213 of 2008 (S.C.) (Unreported).
30 *Id*.
31 Haris K.M. v. Jahfar, 2020 SCC OnLine Ker 4009, ¶22.
32 *Id*.

No doubt, the ratio of the Supreme Court judgment can be argued as untenable, but the precedent had not been overruled or reconsidered by the Supreme Court. It raises significant doubts regarding the use of such doctrines/and exceptions by lower courts against the higher courts.

III. THE QUESTIONABLE APPLICATION OF 'PER INCURIAM' AND 'SUB-SILENTIO'

The question is not whether the decision of the Supreme Court cited above is per incuriam or sub-silentio, but rather the High Court doing so. The significant lacuna in the analysis of the High Court as regards the application of these exceptions is that it only relies on cases where the Supreme Court has held its earlier judgment to be per incuriam and not where the High Court has adopted those rules to hold a Supreme Court judgment per incuriam or sub-silentio. Those decisions which are "rendered in ignorance or forgetfulness of some inconsistent statutory provisions, or of some authority binding on the court concerned" would very well be captured within the rule of per incuriam.[33] But here is an instance where the question concerned before the High Court and the Supreme Court was: whether the Limitation Act applies to the Administrative Tribunals Act in order to extend the limitation period beyond the period of thirty days. The High Court wrongly assumes that the provisions were not brought to notice before the Supreme Court or that the Supreme Court is incomplete in its analysis. Ideally, the Supreme Court should hold its precedent as per incuriam or sub-silentio. However, in the instant case, the High Court, proceeding with its erroneous assumption, has sought to declare the Supreme Court's judgment to be *per incuriam*, which is untenable since this would create uncertainty within the judicial hierarchy.

A former judge of the Supreme Court provided a fascinating insight in a lecture delivered in 2014.[34] According to him, a lower court should not render a higher court's judgment as per incuriam on the grounds of deference and propriety. According to him, the lower court could not ignore or assume that a decision of the Supreme Court was not binding on the grounds that different arguments had been sought to be raised before the lower court or that the apex court did not consider certain contentions. The requirement was not consideration of all possible arguments but the application of "judicial mind" by the Supreme Court or the High Court, which assumed significance insofar as binding precedents were concerned.[35]

The abovementioned views also find support in the judgment of the Supreme Court of India in *South Central Railway Employees Coop. Credit*

[33] Indore Development Authority v. Shailendra, (2018) 3 SCC 412, ¶206.
[34] R.V. Raveendran, *Precedents – Boon or Bane?*, Vol. 8, Supreme Court Cases Journal, 1 (2015).
[35] *Id*., 24.

Society Employees Union v. *B. Yashodabai*,[36] as discussed in the following part. Even otherwise, the Supreme Court has opined that a decision of the Supreme Court must not be rendered per incuriam because it was "badly argued, inadequately considered or fallaciously reasoned", that a particular issue was not agitated or that certain contentions were not raised.[37] It is not a prerequisite that all the arguments and possible contentions have to be considered by a court. A "new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent".[38] The exception of sub-silentio would be applicable in a situation where the court has passed a judgment "without any argument, without reference to the crucial words of the rule and without any citation of the authority".[39] A decision hit by sub-silentio would not qualify as the law declared by the Supreme Court under Article 141.[40] A High Court is bound to follow the law declared by the Supreme Court.[41] What is more significant is, whether the court has applied its judicial mind and if that has been done, then it acts as a valid precedent for the lower courts. The decision of the Kerala High Court in Haris K.M. seems to go against the very notions that Justice (Retd.) Raveendran highlighted in his lecture and also the observations of the Supreme Court in its various decisions. Merely because a question or a point may not have been expressly considered does not take away the binding value of a Supreme Court judgment under Article 141.[42] Even further, the Supreme Court has held that a decision of a High Court which adopts a stand contrary to the view adopted by the Supreme Court stands overruled.[43] In the present context, the decisions rendered by the other Full Benches, including the Kerala High Court, should stand impliedly overruled given the contrary stand taken against the Supreme Court judgment.

IV. HISTORY REPEATING ITSELF? – SUPREME COURT IN SOUTH CENTRAL RAILWAY V. YASHODABAI

This precarious situation was earlier faced by the Supreme Court in *South Central Railway Employees Cooperative Credit Society Employees Union* v. *B. Yashodabai*.[44] In this case, the Society had framed rules governing the service conditions of its employees. The dispute was whether the policy applied to both

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36 South Central Railway Employees Coop. Credit Society Employees Union v. B. Yashodabai, (2015) 2 SCC 727.

37 Ravinder Singh v. Sukhbir Singh, (2013) 9 SCC 245, ¶28.

38 Ambika Prasad Mishra v. State of U.P., (1980) 3 SCC 719, ¶5.

39 MCD v. Gurnam Kaur, (1989) 1 SCC 101; *See* Lancaster Motor Co. (London) Ltd. v. Bremith Ltd., (1941) 1 KB 675.

40 State of U.P. v. Synthetics & Chemicals Ltd., (1991) 4 SCC 139, ¶41.

41 Director of Settlements v. M.R. Apparao, (2002) 4 SCC 638, ¶7.

42 Somawanti v. State of Punjab, 1962 SCC OnLine SC 23; T. Govindaraja Mudaliar v. State of T.N., (1973) 1 SCC 336.

43 Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706, ¶25.

44 South Central Railway Employees Coop. Credit Society Employees Union v. B. Yashodabai, (2015) 2 SCC 727.

fresh recruitments and promotions or only fresh recruitments. After taking into account the relevant rules and regulations, the Court had decided that there was no reservation provided in any case of promotion.[45] In view of this, the Society had ordered the reversion of promotion to those who had been granted promotion. This was challenged by the promotees by way of a Writ Petition.[46] Surprisingly, the Petition was allowed, and the order of reversion was set aside.[47] The appeal was also dismissed, and eventually, the matter reached the Supreme Court.[48]

The Supreme Court had deprecated the stand adopted by the High Court since a judgment had already been rendered by the Supreme Court. The High Court's consideration of other factors could not have been the ground for not following the apex court's decision. Hence, the decision of the High Court was set aside while holding that it was not open to the High Court to hold that the judgment of the Supreme Court was per incuriam.[49] The Supreme Court aptly captures the impact of such an instance by holding that "there would be total chaos in the country" if there is no finality attached to the orders passed by it. It was further opined that "something what was correct, but was not argued earlier before the higher court" cannot be the basis for the court to adopt a different view.[50]

Here, it would be apt to refer to two cases from the United Kingdom. First, Lord Denning in *Morelle Ltd.* v. *Wakeling* sought to overcome a judgment of the House of Lords by holding it to be per incuriam.[51] However, Lord Diplock in the subsequent judgment of *Davis* v. *Jhonson* disapproved of the approach adopted by Lord Denning and reiterated that the Court of Appeal was bound by the decisions of the House of Lords, even if it considered the decision to be per incuriam.[52] Second, Lord Justice Kerr in *R.* v. *London Transport Executive,ex p Greater London Council* made pertinent observations about the treatment to be meted out to judicial precedents.[53] According to him, if a parliamentary enactment had been authoritatively interpreted by the highest court, then it was the law unless it was changed by the Parliament. These observations indicate that the highest deference should be given to the apex court's decisions by the lower courts. As analysed earlier, a similar position has also been reflected in the judgments of the Supreme Court of India.

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45 South Central Railway Employees Coop. Credit Society Employees Union v. Registrar of Coop. Societies, (1998) 2 SCC 580.

46 South Central Railway Employees Coop. Credit Society Employees Union v. B. Yashodabai, (2015) 2 SCC 727, ¶¶4-6.

47 *Id*.

48 *Id*.

49 South Central Railway Employees Coop. Credit Society Employees Union v. Registrar of Cooperative Societies, (1998) 2 SCC 580, ¶14.

50 South Central Railway Employees Coop. Credit Society Employees Union v. B. Yashodabai, (2015) 2 SCC 727, ¶15.

51 Morelle LD v. Wakeling, (1955) 2 QB 379 (Court of Appeal).

52 Davis v.Johnson, 1979 AC 264 (House of Lords); *See* Aldridge Peter, *Precedent in the Court of Appeal – Another View*, Vol. 47, MODERN LAW REV., 187 (1984).

53 R. v. London Transport Executive, exp Greater London Council, (1983) QB 484.

Such a practice as in the present case would have serious consequences: the doctrine of *stare decisis* would be unsettled, resulting in lower courts disregarding the judicial precedents laid down by the higher courts. This would result in potential violations of Article 141 of the Constitution of India. As highlighted earlier, the objective of the doctrine of stare decisis is to ensure that the legal system progresses with certainty over a period of time. Such certainty and uniformity will be missing if the lower courts are empowered to take away the binding value of the decisions of the higher courts. The rules of per incuriam and sub-silentio can be validly invoked in certain limited circumstances, which the Supreme Court has laid down in a catena of cases, for instance, if the decision is rendered without any reference to law/authorities,[54] mere observations or general directions passed without any reasons, etc. However, arbitrarily invoking these exceptions by the lower courts to not follow the apex court's judgment would lead to contradictory judgments, varied legal positions and inconsistent reasoning depending upon the particular bench that adjudicates the matter.

Interestingly, in another case, the Division Bench of the Kerala High Court in *M.M. Hakkim Sheriff* v. *State of Kerala*,[55] while considering a delay of 685 days in filing the review petition, dismissed the application in view of the decision of the Supreme Court in *Union of India*v. *Chitra Lekha Chakraborty*.[56] Therefore, this is a situation where the High Court, in one instance, has followed the Supreme Court judgment and, in another, has sought to declare it per incuriam and sub-silentio. This is the 'inconsistency' and the 'chaos' that the Supreme Court had warned against.

V. CONCLUSION

The rule of per incuriam and sub-silentio are important exceptions to the doctrine of stare decisis. Exceptions such as these prevent bad law from being followed subsequently. A delicate balance between stare decisis and its exceptions would not only ensure consistency and certainty, but also ensure that the judicial precedents are legally sustainable and valid. This note has revealed a nuanced situation where a lower court holds contrary to the highest court's judgment. As argued, the Kerala High Court rendered the Supreme Court judgment as per incuriam and sub-silentio despite the apex court's decision not being inconsistent with any statute or any previous binding authority. The High Court incorrectly assumed that the provisions of the Code of Civil Procedure and Administrative Tribunals Act were not considered and brought to the notice of the Supreme Court. Further, this note analysed the *South Central Railway* case to highlight a similar situation that was faced by the Supreme Court earlier. This note reflected on the views of a former Supreme Court and the *South Central Railway* case, which aptly applied to the problem at hand. This raises serious concerns regarding judicial discipline,

[54] D.J. Malpani v. CCE, (2019) 9 SCC 120.
[55] M.M. Hakkim Sheriff v. State of Kerala, MANU/KE/1075/2019.
[56] Union of India v. Chitra Lekha Chakraborty, Civ. App. 6213 of 2008 (S.C.) (Unreported).

hierarchy, consistency, and certainty. No doubt, the reasoning of the Supreme Court as regards the applicability of the Limitation Act to the Administrative Tribunals Act may be questionable. The binding nature of the judgments in this pyramidal structure is a constitutional feature and not just a common law practice. The doctrine of stare decisis is an essential facet of the judiciary, which is plagued with huge pendency. The law must be settled in order to ensure quick dispute resolution and an efficient judiciary. As for this case, the High Court's reasoning is questionable and cannot be supported, as argued in this note. It can only be hoped that the Supreme Court will get an opportunity to explore this issue and streamline the use of rules of per incuriam and sub-silentio by lower courts.