19
INTERPRETATION OF STATUTES

*Anurag Deep**

I INTRODUCTION

THE YEAR 2012 survey on the topic of interpretation of statutes covers a large spectrum of the subject matter. It encompasses almost all the major types of rules relevant to find out the real intention of the legislation. In view of sufficiently good number of cases present survey is confined to the decisions of the Supreme Court of India. Certain decisions though delivered in 2011 but reported in the year 2012, are also included in this survey. The other reason for such inclusion is that these decisions were not covered earlier for the purpose of interpretation as the present survey being the maiden survey on the subject of the interpretation of statutes.**

II INTERPRETATION OF STATUTES: PERSPECTIVE

Since the year 2012 annual survey ventures to include the subject of interpretation of statutes for the first time, it is beneficial as well as pertinent to lay down the proper perspective in the light of which the reviewed case law would be understood and evaluated. It will be apt to start with a very salutary remark of Justice Felix Frankfurter regarding compelling need for statutory interpretation quoted by the Supreme Court of India.[1] He observed: [2]

> Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning.

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** In the present survey all *italics* used in the text and the quotations indicate the emphasis added by the author.

1 *Regional Provident Fund Commissioner* v. *Hooghly Mills Co.Ltd* 2012 (1) SCALE 422, Decided on Jan.18, 2012, hereinafter referred as *Hooghly Mills*. The case has been unanimously decided by Asok Kumar Ganguly and T.S. Thakur JJ. The judgement was delivered by Ganguly J.

2 *See* Sixth Annual Benjamin N. Cardozo Lecture 47 *Columbia Law Review* 527 (1947). *Id.* at 430, para 31.

While construing legislation there is a tendency to pick up a particular rule of interpretation in a traditional fashion. *Hooghly Mills* [3] should stand as a caution for every judicial authority for interpreting the statutory law so as to enable it to adopt the most appropriate and rational approach. Ganguly, J. quotes Friedrich Bodmer:[4]

> Words are not passive agents meaning the same thing and carrying the same value at all times and in all contexts. They do not come in standard shapes and sizes like coins from the mint, nor do they go forth with a degree to all the world that they shall mean only so much, no more and no less. Through its own particular personality each word has a penumbra of meaning which no draftsman can entirely cut away. It refuses to be used as a mathematical symbol.

There are certain 'well settled' rules of interpretation which are part of *legal policy* ergo based on *public policy*. In the words of Francis Bennion: [5]

> A principle of statutory interpretation embodies the policy of the law, which is in turn is based on public policy. The court presumes, unless the contrary intention appears, that the legislator intended to conform to this legal policy. A principle of statutory interpretation can therefore be described as a principle of legal policy formulated as a guide to legislative intention.

Though principles of statutory interpretation are part and parcel of legal policy, they have not been elevated to the status of *rules of law*. The Supreme Court in an earlier case aptly propounds it in the following words: [6]

> The rules of interpretation are not rules of law: they are mere aids to construction and constitute some broad pointers. The interpretative criteria apposite in a given situation may, by themselves, be mutually irreconcilable. It is the task of the court to decide which one, in the light to all relevant circumstances, ought to prevail. The rules of interpretation are useful servants but quite often tend to become difficult masters.

This status has been universally recognised. A very recent work is worth

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3 *Supra* note 1.

4 Friedrich Bodmer, *The Loom of Language,* (1944) as quoted in *Hooghly Mills, id.* at 430, para 32. Also quoted in Constitution bench judgement in *S.C. Advocates-on-Record Association* v. *Union of India* 1993 (4) SCC 441 at 553. This treatise is also available on *http://archive.org/details/TheLoomOfLanguage*, last visited on Aug. 22, 2013. Bodmer, was a Swiss Philologist and a Professor in the Massachusetts Institute of Technology.

5 Francis Bennion, *Statutory Interpretation* s. 263 at 769 (Lexis Nexis, New Delhi, 8th edn. 2008). Also referred in *Aneeta Hada* v. *M/S Godfather Travels & Tours*, AIR 2012 SC 2795 at 2812 para 40, Decided on- 27 April, 2012, hereinafter referred as *Aneeta Hada*. A full bench of Dalveer Bhandari, Sudhansu Jyoti Mukhopadhaya, Dipak Misra JJ unanimously decided this criminal appeal where Dipak Misra J delivered the verdict.

6 *Keshavji Raviji & Co.* v. *CIT* 1990(2) SCC 231: 1990(1) SCR 243: 1990(1) JT 235: 1990(1) SCALE 207.

quoting:[7]

> What are the rules of interpretation? Almost all jurists and scholars resist the notion that they are "law." Instead, most contend that those tools, often called "canons" of interpretation, are "rules of thumb"-a legal category that seems to sit in between law and individual judicial philosophy.

In the light of this perspective, it is important to note that ever since independence India is passing through a phase of 'legislative explosion'. A vast amount of statutes are coming up at the central and the State legislatures. Further, there is a continuous and ever increasing demand for new legislation on the one hand and on the other hand there exists a great lacuna of expertise in the area of drafting of statutes, putting on a heavy burden on the interpreting authorities. The task is not only an arduous one but also requires a high degree of calibre in adopting the proper approach in the aforesaid perspective.

III BASIC PRINCIPLES

There are a good number of cases during the period covered under the present survey which refer to certain well recognized rules of statutory interpretation. Such rules could be conveniently categorized as basic principles and discussed hereunder in separate headings.

A. Presumptions

i. Constitutionality of a statute

Whenever there is an occasion for interpretation of statute, certain doctrines serve as condition precedent. Presumptions are one of them and an interpreter is bound to begin with certain presumptions. Presumptions are one of the most effective tools which guide the judicial reasoning at the very initial stage. Rupert Cross in an extremely pithy and apt remark has given the exact manner as to *when* and *how* legal presumptions are to be used: [8]

> When there *is a choice of meanings* there is a presumption that one which produces an absurd, unjust or inconvenient result was not intended; but it should be emphasised that when the rule is used as a justification for *ignoring or reading in words resort may only be made* to it in the most *unusual cases*. (Emphasis added)

In *Namit Sharma* v. *Union of India* [9] the court observed: [10]

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7 Abbe R. Gluck, "The Federal Common Law of statutory interpretation: *Eire* for the age of Statutes" 54 *William & Marry Law Review* 755-56(2013).

8 Sir Rupert Cross, *Statutory Interpretation*, 15 (Butterworths, London, 1976).

9 (2013)1SCC745: 2012(8)SCALE593: JT2012(9)SC166. Decided on- 13 Sept 2012, hereinafter referred as *Namit Sharma*. This case has been decided by a division bench of A.K. Patnaik and Swatanter Kumar, JJ. unanimously. The judgement was delivered by Swatanter Kumar J. *Namit Sharma* case covers various aspects of interpretation discussed in this survey under different sub heads.

10 *Id.,* para 46.

> To examine constitutionality of a statute in its *correct perspective*, we have to bear in mind certain fundamental principles as afore-recorded. There is *presumption of constitutionality in favour of legislation*. The Legislature has the power to carve out a classification which is based upon intelligible differentia and has rational nexus to the object of the Act. The burden to prove that the enacted law offends any of the Articles under Part III of the Constitution is on the one who questions the constitutionality and shows that despite *such presumption in favour of the legislation*, it is unfair, unjust and unreasonable. (Emphasis added)

Inevitably constitutionality of legislation is one of the fundamental legal presumptions. As presumptions are *evidentiary principles* they are elementary and primary instruments and therefore guiding factors in the task of interpreting the statutory provisions.[11]

ii. Words implying presumption: 'shall' or 'may'

The presence of words like 'shall' or 'may' in a provision also imply certain presumptions. For example, 'the word 'shall' raises a presumption that the particular provision is imperative' in nature. This presumption, however, is rebuttable in nature and not conclusive. In the interpretative process the courts are to be vigilant to this fact. *M/S Delhi Airtech Services Private Ltd* v *State of U.P.* [12] is an illustration where Swatanter Kumar J observed: [13]

> The word 'shall' raises a presumption that the particular provision is imperative but this prima facie inference may be rebutted by other considerations such as object and scope of the enactment and the consequences flowing from such construction.

The complexities of distinction between mandatory and directory provisions have been a perennial topic of intellectual debate. This makes the next sub head more relevant.

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11 S. 4 of the Indian Evidence Act 1872 acknowledges *three principles* of presumptions. *May presume*-Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. [S. 86-88,88A, 90,90A, 113A, 114, 118, 148(4) etc] *Shall presume*- Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. [S. 79-85, 89, 105, 111A, 113B, 114A, etc] Presumption of innocence and Presumption of sanctity, Presumption of soundness is shall presume without establishing facts.
Conclusive proof- When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.
[S. 41, 112, 113, (s. 82 IPC 1860 is also an illustration of conclusive proof)].

12 AIR 2012 SC 573, Decided on- 18 Aug. 2011. *See also* http://www.manupatrafast.in/pers/Personalized.aspx visited on Aug 20, 2013, hereinafter referred as *Delhi Airtech*. This case was decided by a division bench of Asok Kumar Ganguly and Swatanter Kumar JJ.They expressed conflicting opinions on the issue.

13 *Id.,* para 24.

B. Mandatory v. Directory

The words used in a statutory provision carries the wisdom and intention of legislature. The law makers deliberately use words like 'shall', 'must', 'may' *etc*., to convey their objective. Indeed, they are directions to executives how to implement the law and are also guiding factors to be considered by judiciary. But sometimes the words may not be sufficient to convey the intention of parliament. The case of *Delhi Airtech*[14] illustrates the difficulty where judges of the Supreme Court have conflicting opinions on the meaning of "shall". The undisputed facts in this case are that on 17th April, 2002 the governor of Uttar Pradesh had issued a notification under Land Acquisition Act, 1894 to acquire a land for the planned industrial development in district Gautam Budha Nagar through NOIDA. The possession of the land was taken on 4th February, 2003. Section 17 (3A) of the Land Acquisition Act 1894 requires 80% compensation to be paid before taking possession.[15] The 80% compensation, however, had not actually been received by the land owners/ claimants. The appellant, therefore, argued that the transaction should be declared null and void.

The nature and interpretation of the word "shall" used in sec. 17(3A) of the Land Acquisition Act 1894 was in question. The division bench, as abovementioned, was divided on the construction of "shall." Ganguly J held that the word "shall" used here is in the context of an enactment which is expropriatory in character. In his view for a valid possession, valid vesting and valid acquisition is required. Therefore, the direction in regard to *compensation is mandatory*. Non-compliance with mandatory statutory provision renders acquisition illegal and in such a situation vesting of acquired land in State cannot take place. In his own words:[16]

> ...taking over a possession of land without complying with the requirement of Section 17(3A) is clearly illegal and in clear violation of the statutory provision which automatically violates the constitutional guarantee under Article 300A.

Giving his *rationale* on this way of interpretation Ganguly J firmly stated that:[17]

> ... in all cases of emergency acquisition under Section 17, the requirement of *payment* under Section 17(3A) must be complied with. As the provision of Section 17(1) and Section 17(2) cannot be worked out without complying with requirement of payment under Section 17(3A) *which is in*

14 *Supra* note 12.

15 S.17 (3A) of Land Acquisition Act 1894-*Before taking possession* of any land under ss. (1) or ss. (2), the collector *shall*, without prejudice to the provisions of ss. (3)(a) tender payment of eighty per centum of the compensation for such land as estimated by him to the person interested entitled thereto, and (b) pay it to them, unless prevented by some one or more of the contingencies mentioned in s. 31,ss. (2),and where the collector is so prevented, the provisions of s. 31, Sub-section (2), (except the second proviso thereto), shall apply as they apply to the payment of compensation under that section.

16 *Supra* note 12 at para 165.

17 *Id.,* para 166.

> *the nature of condition precedent.* If Section 17(3A)is not complied with, the vesting under Section 17(1) and Section 17(2) cannot take place. Therefore, emergency acquisition without complying with Section 17(3A) is illegal. This is the plain *intention of the statute* which must be *strictly construed*. *Any other construction*, in my opinion, would lead to *diluting the Rule of Law*. (Emphasis added)

But Swatanter Kumar J held that the word "shall" here is not mandatory in nature. The *rationale* of his opinion is expressed in the following words: [18]

> [t]he legislative intent is very clear. Keeping the objects and reasons for amendment in mind, the Act strives for a fair balance between the rights of private individuals and the power of eminent domain of the State and also attempts to ensure expeditious disbursement of compensation, as determined in accordance with law, to the claimants. The legislature has provided for every contingency for tendering payment, *while remaining silent about consequences flowing from default under some other provisions*. Sections 11A and 17(3A) of the Act are clear illustrations of *clarity* and *purpose* in legislative intent. (Emphasis added)

Swatanter Kumar J is conscious enough that judicial interpretation should be made in the limited area and scope to 'bridge the gap left by legislature'. The following observation is worth quoting: [19]

> *When the framers of law have not provided for any penal consequences for default in compliance to Section 17(3A), then it will be uncalled for to provide such consequences by judicial interpretation.* While interpreting the provisions for compensation, the Court can provide such interpretation as would help to bridge the gaps left by the Legislature, if any, in implementation of the provisions of the Act. *But it will hardly be permissible for the Court to introduce such consequences by way of judicial dicta, like requiring lapse of acquisition proceedings. This is not a matter covered by the principles of judicial interpretation.* (Emphasis added)

One may find that the approach of Ganguly J is to protect and restore individual right while approach of Swatanter Kumar J is to appreciate the government's step towards development. This tug of war between individual right to property and state obligation towards development is natural. However, one has to concede that the approach of Swatanter Kumar J is pragmatic as in a country like India with a vast number of provisions and laws it is easy to find holes in execution of statutes. *If holes could be plugged without declaring government action illegal, that appears to be a better alternative.* This approach is also in consonance with the *presumption that ordinarily government actions are valid.* This never means that actions which are unfair in substance and illegal *per se* should be overlooked in the interpretative process.

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18 *Supra* note 12 at 606, para 109.

19 *Ibid.*

It is interesting to find that both judges referred to the principle of strict construction to explore the intention of legislature. But their reasonings are variable. This leads us to the discussion under the next sub head of Liberal v. Strict.

C. Liberal v. Strict

Another area of critical discourse is Liberal or Strict interpretation. Cases are bound to apply one or the other approaches. The earlier discussed case of *Delhi Airtech* could be a beginning point on the issue. Swatanter Kumar J has explained his view-point about strict interpretation in following words:[20]

> The doctrine of strict construction does not per se mandate that *its application excludes the simultaneous application of all other principles of interpretation. It is permissible in law to apply the rule of strict construction while reading the provisions of law contextually or even purposively.* (Emphasis added)

Finding of Ganguly J is that 'it is well-known that the provisions of the said Act [section 17 (3A) of Land Acquisition Act 1894] are expropriatory in nature and therefore, must be strictly construed.[21] Further, the plain intention of the statute should also be strictly construed.'[22] In support of his opinion Ganguly J referred to certain Supreme Court judgements.[23]

> In the case of *Gujarat Electricity Board* v. *Girdharlal Motilal*,[24] this court while dealing with the power of the State Electricity Board to purchase the property of the licensee held that right can be exercised only in the manner provided in the act and not in any other way. The court held that since this power of the Board under the law is to interfere with the property rights of the licensee, such power will have to be strictly construed. In laying down the said principle this court relied on the well-known doctrine in case of *Nazir Ahmad* v *King Emperor* [25]that when a power is to be exercised in a manner it has to be exercised in that manner alone and in no other manner. In two other recent judgments, this court reiterated the same principle, and held that expropriatory statute, as is well known, must be strictly construed.[26] The said principle has also been followed by this Court in the case of *Bharat Petroleum Corporation Ltd*. v. *Maddula Ratnavalli* [27] where learned judges relying on *Hindustan Petroleum* reiterated the same principle of *strict construction of expropriatory legislation*.

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20 *Delhi Airtech, supra* note 12, para 1 V. *http://www.manupatrafast.in/pers/Personalized.aspx.* (last visited on Aug. 13, 2013).

21 *Id.,* para 136.

22 *Id.,* para 166.

23 *Id*., para 64.

24 AIR 1969 SC 267. *Delhi Airtech, Supra* note 12 at para 156.

25 AIR 1936 PC 253. *Delhi Airtech, Ibid*.

26 *Hindustan Petroleum corpn. Ltd*. v. *Darius Shapur Chenai* (2005) 7 SCC 627.

27 (2007) 6 SCC 8.

Ganguly J carried forward his opinion with the help of an old English decision:[28]

Judicial opinion is uniformly in favour of *strict construction of an expropriatory law* which admittedly Land Acquisition Act, 1894 is. Reference in this connection can be made to the observations of Cottenham, L.C. in *Webb* v. *Manchester and Leeds Rail Co*.[29] where the Lord Chancellor held:

> The powers are so large - it may be necessary for the benefit of the people - but they are so large, and so injurious to the interests of the individuals, that I think it is the duty of every court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers; but they will get none from me by way of construction of their Act of Parliament.

Swatanter Kumar J is, however, of different opinion.[30]

In *Catholic Syrian Bank Ltd.* v. *CIT*, *Thrissur*[31] the apex court restated the established position in being that "it is a settled canon of interpretation of fiscal statutes that they need to be construed strictly and on their plain reading."[32] The court had occasion to discuss the 'effect of circulars' *vis a vis* enactment. The court observed: [33]

> Circulars can be issued by the Board [Central Board of Direct Taxes] to explain or tone down the rigours of law and to ensure fair enforcement of its provisions. These circulars have the force of law and are binding on the income tax authorities, though they cannot be enforced adversely against the assessee. Normally, these circulars cannot be ignored. A circular may not override or detract from the provisions of the Act but it can seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specified circumstances. So long as the circular is in force, it aids the uniform and proper administration and application of the provisions of the Act.

In other words circulars of a fiscal statute can never override provision of an Act because it needs strict and plain construction but could be interpreted 'to mitigate the rigour of' provisions of taxing statutes.[34]

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28 *Delhi Airtech*, *supra* note 12 at para 54.

29 (1839) 4 Myl. Cr.116.

30 *See* the text relevant to *supra* note 18 and 19. Any further discussion here would be a repetition.

31 AIR 2012 SC 1538: (2012) 3 SCC 784: Decided on-17 Feb. 2012, hereinafter referred as *Catholic Syrian Bank*. This civil appeal came against the full bench decision of Kerla High Court. The case was decided unanimously by full bench of S.H. Kapadia C.J, A.K. Patnaik, Swatanter Kumar JJ Swatanter Kumar J spoke for himself and A.K. Patnaik J,S.H. Kapadia, C.J. while agreed with the conclusions gave his own reasons in a separate judgement.

32 *Id.* at 1545, para 16.

33 *Id.,* para 18.

34 *Ibid.*

In *Aneeta Hada*[35] where section 138 and 141 of Negotiable Instruments Act 1881 were under consideration, it was observed:[36]

> We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with *penal provisions* and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act [Negotiable Instruments Act 1881] which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term as well as in the Section is of immense significance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, *therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words 'as well as' have to be understood in the context*. (Emphasis added)

The court referred to *Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd.*[37] where it has been laid down that *the entire statute must be first read as a whole*, *then section by section, clause by clause, phrase by phrase and word by word.* The same principle has been reiterated in *Deewan Singh* v. *Rajendra Prasad Ardevi*[38] and *Sarabjit Rick Singh* v. *Union of India.*[39]

Giving finality to the dispute with the assistance of rule of strict interpretation as against liberal interpretation the court held:[40]

> Applying the *doctrine of strict construction*, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.

35 *Supra* note 5.
36 *Aneeta Hada* at 2812, at para 42.
37 (1987) 1 SCC 424.
38 (2007) 10 SCC 528.
39 (2008) 2 SCC 417.
40 *Aneeta Hada*, *supra* note 5 at para 42.

The operative part of *Aneeta hada*, therefore is that for prosecution under section 141 of the Act, arraigning of a company as an accused is imperative.[41]

In *Hooghly Mills* [42] the question which falls for consideration before this court was whether the employer of an establishment which is an 'exempted establishment' under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 is subject to the provisions of section 14B whereby in cases of default in the payment of contribution to the provident fund, proceedings for recovery of damages can be initiated against the employer of such an 'exempted establishment'. In order to decide the issue that should the court follow the well known principles of liberal interpretation. The court answered the query in following words:[43]

> [i]nterpretation of the Act [EPF Act] *must not only be liberal* but it must be informed by the values of Directive Principles. Therefore, *an awareness of the social perspective of the Act must guide the interpretative process of the legislative device*.

The aforesaid discussion leads us to the next sub head of Penal v Remedial statutes.

D. Penal v. Remedial statutes

Hooghly Mills [44] is also useful to understand the concept of penal *vis-a-vis* remedial statutes. It is explained as:[45]

> The *normal canon of interpretation is that a remedial statute receives liberal construction whereas a penal statute calls for strict construction.* In the cases of remedial statutes, if there is any doubt, the same is resolved in favour of the class of persons for whose benefit the statute is enacted, but in cases of penal statutes if there is any doubt the same is normally resolved in favour of the alleged offender.

It will be seemly to quote a passage from Maxwell:[46]

> The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction.

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41 *Id.* at 43.
42 *Supra* note 1.
43 *Id.,* para 26.
44 *Supra* note 1.
45 *Id.* at 429, para 24.
46 Maxwell, *The Interpretation of Statutes* (12th edn.) as referred in *Aneeta Hada*, *Supra* note 5.

In the case of *Vinay Tyagi* v. *Irshad Ali @ Deepak* [47] the interpretation of word 'presuming' was in dispute. Section 228, CrPC 1973 opens with the words, "If, after such consideration and hearing as aforesaid, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence…." The court observed that: [48]

> Why the legislature has used the word 'presuming' is a matter which requires serious deliberation. It is *a settled rule of interpretation that the legislature does not use any expression purposelessly and without any object. Furthermore, in terms of doctrine of plain interpretation, every word should be given its ordinary meaning unless context to the contrary is specifically stipulated in the relevant provision.*

The court, therefore, rightly held that 'the expression 'presuming' cannot be said to be superfluous in the language and ambit of section 228 of the code. This is to emphasize that the court may believe that the accused had committed an offence, if its ingredients are satisfied with reference to the record before the court.'[49]

E. Cannons of interpretation

Traditionally it is found convenient to put certain fundamental rules of statutory interpretation under three categories *viz*. literal, golden and mischief rules. The categorisation, however, is neither exhaustive nor exclusive. Their fusion or overlapping with each other is an accepted fact.

1. *Literal rule: The First Principle*

In *Rohitash Kumar* v. *Om Prakash Sharma*[50] the Supreme Court applied the literal rule as it best suited to the facts of the case. In this case the proviso attached to rule 3 of the Border Security Force (Seniority, Promotion and Superannuation of Officers) rules, 1978 was in question. The court observed: [51]

> The Court, while interpreting statutory provisions, cannot add words to a Statute, or read words into it which are not part of it, *especially when a literal reading of the same, produces an intelligible result*.

Considering a number of judicial authorities the court found that[52]

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47 2013CriLJ754: 2012(12) SCALE343: MANU/SC/1101/2012: Decided on 13.12.2012 hereinafter referred as *Vinay Tyagi.* This case has been decided by division bench of A.K. Patnaik and Swatanter Kumar JJ unanimously. The judgement was delivered by Swatanter Kumar J.

48 *Id.,* para 11.

49 *Ibid*.

50 JT 2012 (11) SC 219. 6 Nov. 2012, hereinafter referred as *Rohitash Kumar.*

51 *Id.* at 228. Here the court referred to a number of judicial decisions *vide*: *Nalinakhya Bysack* v. *Shyam Sunder Haldar* AIR 1953 SC 148; *Sri Ram Ram Narain Medhi* v. *State of Bombay*, AIR 1959 SC 459; *M. Pentiah* v. *Muddala Veeramallapp* AIR 1961 SC 1107; *The Balasinor Nagrik Co- operative Bank Ltd.* v. *Babubhai Shankerlal Pandya*, AIR 1987 SC 849; and *Dadi Jagannadham* v. *Jammulu Ramulu* (2001) 7 SCC 71.

52 *Ibid.*

> it is evident that *the hardship caused to an individual, cannot be a ground for not giving effective and grammatical meaning to every word of the provision*, if the language used therein, is unequivocal.

There may be a statutory provision, which causes *great hardship or inconvenience* to either the party concerned, or to an individual, but the Court has no choice but to enforce it in full rigor. It is a well settled principle of interpretation that hardship or inconvenience caused, cannot be used as a basis to alter the meaning of the language employed by the legislature, if such meaning is clear upon a bare perusal of the Statute. If the language is plain and hence allows *only one meaning*, the same has to be given effect to, even if it causes hardship or possible injustice.[53]

The court explicitly referred the Constitution bench observation of the Supreme Court in *Bengal Immunity Co. Ltd*. v. *State of Bihar* [54] that:

> if there is any hardship, it is for the legislature to amend the law, and that the Court cannot be called upon, to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however, inequitable or unjust the result may be. The words, '*dura lex sed lex*' which mean "the law is hard but it is the law." may be used to sum up the situation. Therefore, even if a statutory provision causes hardship to some people, it is not for the Court to amend the law. *A legal enactment must be interpreted in its plain and literal sense, as that is the first principle of interpretation*. (Emphasis added)

The court also referred another decision of constitution bench in *Mysore State Electricity Board* v. *Bangalore Woolen, Cotton & Silk Mills Ltd*.[55] where it was pointed out that *inconvenience is not a decisive factor* to be considered while interpreting a statute.[56]

Referring to its earlier decision in *Martin Burn Ltd.* v. *The Corporation of Calcutta*[57] wherein the Supreme Court dealing with the similar issue observed that:[58]

> A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to *whether a Court likes the result or not.*

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53 The court referred its earlier decisions in *Commissioner of Agricultural Income Tax, West Bengal* v. *Keshab Chandra Mandal*, AIR 1950 SC 265; and *D. D. Joshi* v. *Union of India* AIR 1983 SC 420).

54 AIR 1955 SC 661 as referred in *Rohitash Kumar*, at 227, para 19.

55 AIR 1963 SC 1128.

56 *Id.* at 1139 para 27.

57 AIR 1966 SC 529.

58 *Id.* at 535 para 14. The Supreme Court also referred the cases of *The Commissioner of Income Tax, West Bengal I, Calcutta* v. *M/s Vegetables Products Ltd.*, AIR 1973 SC 927; and *Tata Power Company Ltd.* v. *Reliance Energy Limited*, (2009) 16 SCC 659.

Rohitash case[59] is also a reminder about the scope of the power of the judiciary while interpreting the statutory language. B S Chauhan J is quite unequivocal in his observation that:[60]

> ... under the garb of interpreting the provision, the Court does not have the power to add or subtract even a single word, as *it would not amount to interpretation, but legislation.*

The learned judge is explicit in his remark:[61]

> The Statute is not to be construed in light of certain notions that the *legislature might have had in mind, or what the legislature is expected to have said, or what the legislature might have done, or what the duty of the legislature to have said or done was.* The Courts have to administer the law as they find it, and it is not permissible for the Court to twist the clear language of the enactment, in order to avoid any real or imaginary hardship which such literal interpretation may cause. (Emphasis added)

In the case of *CCE* v. *Fiat India Pvt. Ltd.,*[62] the wholesale price of four wheelers (cars) declared by the assesses was much less than the cost of production. The marketing strategy of the assesses company was to make their presence effective in the market. The dispute between Commissioner of Central Excise and Fiat India was regarding declared price and normal price. The issue before the court was how to interpret the words "normal price" with the help of section 4(1)(a)[63] and section 4(1)(b) of the Central Excise Act, 1944 read with relevant Central Excise (Valuation) Rules, 1975. Section 4(1) (a) uses the words "normal price". A number of questions do arise on this issue. What is the meaning of words "normal price"? 'Whether the Price declared by assesses for their cars which is admittedly below the cost of manufacture can be regarded as "normal price"'[64] or 'should normal price be interpreted as if it always reflect the manufacturing cost and profits ?'. When declared price is available then recourse to any other method of valuation is improper?.[65] Section 4 of the Act nowhere mandates that price should always reflect the

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59 *Supra* note 50.

60 *Id.* at 228.

61 *Ibid.*

62 (2012) 9 SCC332: 2012-TIOL-58- SC-CX, hereinafter referred as *Fiat India.* The case has been decided by division bench of H. L. Dattu and Anil R. Dave JJ.

63 Central Excise Act, 1944 S. 4. Valuation of excisable goods for purposes of charging of duty of excise - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section be deemed to be -
(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:
Provided that -….

64 *Fiat India*, *supra* note 62 at para 20.

65 *Id.,* para 8.

manufacturing cost and profits. Certain ticklish questions before the court were: should normal price be interpreted as declared price? or, should it be interpreted to cover manufacturing cost and profits also?[66] Further, if certain interpretation of section 4(1) (b) leads serious hardship to the respondent, should the court change the course of interpretation?

The court begins with the observation of Lord Reid that: [67]

> ...no principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act.

The court pointed out that this rule has been applied in *S. Narayanaswami* v. *G. Pannerselvam*[68] where this court observed that 'where the statute's meaning is clear and explicit, *words cannot be interpolated*.' In view of the aforesaid remarks the Supreme Court in the instant case rejecting the argument of the senior counsel of the respondent assessee rightly observed:[69]

> as we are concerned with interpretation of a statutory provision, the mere fact that a correct interpretation may lead to *hardship would not be a valid consideration* for distorting the language of the statutory provisions.

Regarding interpretation of 'normal price' the court held that:[70]

> What can be construed from the plain reading of Section 4 of the Act and the interpretation that is given by this Court on the expression 'normal value' is, where excise duty is chargeable on any excisable goods with reference to value, such value shall be deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal and where the assessee and the buyer have no interest directly or indirectly in the business of each other and the price is the sole consideration for the sale. Normal price, therefore, is the amount paid by the buyer for the purchase of goods.

The court, however, declined to accept the argument that selling price in this case is normal price. The court found two reasons for this construction-

i. Popular sense interpretation –The court observed:[71]

> It is *well settled* that whenever the legislature uses certain terms or expressions of well-known legal significance or connotations, the courts

66 *Ibid.*
67 *Westminster Bank Ltd*. v. *Zang* [(1966) A.C. 182 as quoted in *Fiat India, Supra* note 62 at para 28.
68 (1972) 3 SCC 717 at 726: (1973) 1 SCR 172.
69 *Supra* note 62.
70 *Id.,* at para 43.
71 *Id.,* at para 27.

> must interpret them as used or understood in the *popular sense* if they are not defined under the Act or the Rules framed thereunder. Popular sense means "that sense which people conversant with the subject matter, with which the statute is dealing, would attribute to it."

Considering the above interpretation of 'normal price' in this case the court rightly observed that: [72]

> the 'loss making price' continuously for a period of more than five years while selling more than 29000 cars, cannot be the normal price. … the circumstance that no prudent businessman would continuously suffer huge loss only to penetrate the market and compete with other manufacturer of more or less similar cars. A prudent businessman or woman and in the present case, a company is expected to act with discretion to seek reasonable income, preserve capital and, in general, avoid speculative investments.

ii. Normal price in context- As the normal price was doubtful the court referring its earlier decision in *Union of India* v. *Hindalco Industries*[73] observed that, 'if there is anything to suggest to doubt the normal price of the wholesale trade, then recourse to clause (b) of sub-section(1) of Section 4 of the Act could be made.'[74]

In other words for the interpretation of normal price in this case the court held that the interpretation has to be based not only on section 4(1)(a) but also taking into consideration section 4(1)(b). The declared selling price by assessees, therefore, cannot be accepted as 'normal price' for the sale of cars.

The argument of hardship was also under consideration in *Delhi Airtech*[75] where the court observed that: [76]

> Where a statute imposes a public duty and proceeds to lay down the manner and timeframe within which the duty shall be performed, the *injustice or inconvenience resulting from a rigid adherence to the statutory prescriptions may not be a relevant* factor in holding such prescription to be only directory. For example, when dealing with the provisions relating to criminal law, legislative purpose is to be borne in mind for its proper interpretation. It is said that the purpose of criminal law is to permit everyone to go about their daily lives without fear of harm to person or property and it is in the interests of everyone that serious crime be effectively investigated

72 *Id.,* at para 43.

73 2003 (153) ELT 481.

74 S. 4(1) (b) where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

75 *Supra* note 12. *http://lobis.nic.in/dhc/RSE/judgement/272013/ RSE27022013 LPA5642012. pdf* last visited on Aug. 20, 2013.

76 *Id., at* para 24, *http://www.manupatrafast.in/pers/ Personalized. aspx* (last visited on Aug. 20, 2013).

> and prosecuted. There must be fairness to all sides.[77] In a criminal case, *the court is required to consider the triangulation of interests taking into consideration the position of the accused, the victim and his or her family and the public.* (Emphasis added)

The division bench in *Delhi Airtech*[78] disagreed on findings and conclusion and therefore it has been referred to a larger Bench. It has been rightly observed that 'that does not affect the efficacy of the aforesaid' reasoning.[79]

The plain reading rule is not helpful only for the judiciary *Girish Vyas* v. *State of Maharashtra*,[80] is illustration of the fact that *even the executive officers* are expected and obliged to *observe literal rule*.

The Supreme Court in *Catholic Syrian Bank* [81] is concerned with interpretation of provisions of Income Tax Act. It was held that taxing statutes need to be construed strictly and on their plain reading the statute is normally not construed to provide for a double benefit unless it is specifically so stipulated or is clear from scheme of the Act.

2. Golden rule

The golden rule simply serves as a guide to the court where there is doubt as to the true import of the statutory words in their ordinary sense. 'When there are two meanings the court generally selects the meaning which is just and convenient and that which avoids absurd result.'[82]

Certain fundamental rules of interpretation always remain in the sub conscious mind of the judges. They are spelled out naturally while writing the judgements. They are rational, logical and therefore convincing. They provide the very foundation upon which the super structure of the judgement is build. The example is *Catholic Syrian Bank*[83] where Swatanter Kumar J pointed out that "this Court would be more inclined to give an interpretation ... which would serve the *legislative object and intent*, rather than to subvert the same."[84]

In *Namit Sharma*[85] the constitutional validity of certain provisions were challenged. The court observed: [86]

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77 *Attorney General's Reference (No. 3 of 1999)* (2001) 1 All ER 577 referred in G.P. Singh, J. on *Principles of Statutory Interpretation*, (11th edn. 2008) as quoted in *Delhi Airtech*, *supra* note 12 at para 24, *http://www.manupatrafast.in/pers/Personalized.aspx* (last visited on Aug. 20, 2013).

78 *Supra* note 12.

79 A division bench of high court, Delhi made this observation in the case of *Union of India* v. *Malhotra Book Depot* decided on Feb. 27, 2013. http://lobis.nic.in/dhc/RSE/judgement/27-02-2013/RSE27022013LPA5642012.pdf last visited on Aug. 20, 2013.

80 AIR 2012 SC 2043: Decided on- 12 Oct. 2011, hereinafter referred as *Girish Vyas*. This civil appeal containing six petitions has been unanimously decided by division bench of R.V. Raveendran and H.L. Gokhale JJ. H.L. Gokhale J delivered the judgement.

81 *Supra* note 31. *See also* discussion under the head Taxing Statutes, *infra.*

82 See the quotation of Rupert Cross at the relevant text to *supra* note 8.

83 *Supra* note 31.

84 *Id.,* at 1548, para 24.

85 *Supra* note 9.

86 *Id.,* para 20.

> In order to examine the constitutionality or otherwise of a statute or any of its provisions, one of the most relevant considerations is the *object and reasons* as well as the *legislative history of the statute*. *It would help the court in arriving at a more objective and justful approach*. It would be necessary for the Court to *examine the reasons of enactment of a particular provision so as to find out its ultimate impact vis-a-vis the constitutional provisions. Therefore, we must examine the contemplations leading to the enactment of the Act of 2005*. (Emphasis added)

It further observed: [87]

> It is a settled principle of law, as stated earlier, that courts would generally adopt an interpretation *which is favourable to and tilts towards the constitutionality of a statute*, with the aid of the principles like 'reading into' and/or 'reading down' the relevant provisions, as opposed to declaring a provision unconstitutional.

In the case of *Girish Vyas*,[88] the issue before the court was relating to the competing statutory provisions regarding Town Planning Scheme and Development Plan in Maharastra. A residential tower was constructed for commercial sale on a plot which was duly reserved and acquired for a primary school. The then chief minister of Maharastra took interest in releasing that plot only for the benefit of his builder son-in-law flouting all norms and mandatory legal provisions.[89]

Rejecting the argument that Development Plan and the town planning [T.P. scheme] operate independent of each other the court observed that if *an interpretation renders certain provisions meaningless* that has to be avoided. In the words of the court: [90]

> It is then submitted by the appellant that the Development Plan and the T.P. scheme operate independent of each other, and, until the State Government exercises its power of eminent domain under the Development Plan, and acquire the land, the landowner can develop his property as per the user permitted under the T.P. scheme. In view of the scheme of the relevant sections and particularly Section 46 which we have noted above, this submission cannot be accepted. It will mean permitting a development contrary to the provisions of the Development Plan, knowing fully well that the user under the T.P. scheme is at variance with the Development Plan. Any such interpretation will make provisions of Section 39, 42, 46 and 52 meaningless.

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87 *Id.,* para 58.

88 *Supra* note 80.

89 *Id.,* para 156 where the court observed "It is rather unfortunate that the then Chief Minister who claims to be an educationist took interest in releasing a plot duly reserved and acquired for a primary school only for the benefit of his son-in-law. It also gives a dismal picture of his deputy, the Minister of State acting to please his superior, and so also of the Municipal Commissioner ignoring his statutory responsibilities."

90 *Id.,* para 69.

The court emphasised on the need for *holistic interpretation* in following words:[91]

> The provision of a statute are required to be read together after noting the *purpose of the Act*, namely that there should be an orderly development in the region, local authority as well as in the town area. The MRTP Act [Maharashtra Regional and Town Planning Act, 1966] does not envisage a situation of conflict. Therefore *one will have to iron out the edges to read those provisions of the Act which are slightly incongruous, so that all of them are read in consonance with the object of the Act, which is to bring about an orderly and planned development.* (Emphasis added)

Applying this principle the court observed that in case of interpretation of various provisions of enactment, conflict situation has to be avoided. After the interpretation of various statutory provisions the court declared the construction of a ten story building 'Sundew Apartments' as unauthorised.

In the case of *E.P.F.Commissioner* v. *O.L. of Esskay Pharmaceuticals* [92] the court observed that "[i]t is a well recognized rule of interpretation that *every part of the statute must be interpreted keeping in view the context in which it appears and the purpose of legislation.*"

The court referred *RBI* v. *Peerless General Finance and Investment Co. Ltd.*,[93] where Chinnappa Reddy J highlighted the importance of the rule of contextual interpretation in the following words:

> *Interpretation must depend on the text and the context. They are the bases of interpretation.* One may well say if the text is the texture, context is what gives the colour. *Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual*. A statute is best interpreted when we know *why* it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute- maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we *must look at the Act as a whole and discover what each*

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91 *Id.* at 2076, para 73.

92 *E.P.F.Commissioner* v. *O.L. of Esskay Pharmaceuticals* AIR 2012 SC 11, decided on-8 Nov. 2011, hereinafter referred as *Esskay Pharmaceuticals*. The case has been decided by division bench of H. L. Dattu and, G. S. Singhvi JJ. The decision was unanimous and delivered by Singhvi J. The question which arises for consideration in these appeals is whether priority given to the dues payable by an employer under s. 11 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 is subject to s. 529A of the Companies Act, 1956 in terms of which the workmen's dues and debts due to secured creditors are required to be paid in priority to all other debts.

93 (1987) 1 SCC 424, as quoted in *Esskay Pharmaceuticals, id.* at 29, para 37-38.

> *section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.* (Emphasis added)

In this case interpretation of two competing provisions; section 11 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and section 529A of the Companies Act, 1956 were in question.[94] Both the statutes provided for priority given to the dues payable by an employer. In other words *both contained a non obstante clause*. The issue was as to how to interpret the phrase 'in priority to all other debts' used in both enactments? Whether EPF Act 1952, being a special and social welfare enactment, would override the Companies Act 1956? or, provisions of Companies Act 1956 will dominate as section 529A was a new provision incorporated in 1988? Reconciling these statutes the court observed: [95]

> The EPF Act is a social welfare legislation intended to protect the interest of a weaker section of the society, i.e. the workers employed in factories and other establishments,... Therefore, a legislation made for their benefit must receive a *liberal and purposive interpretation* keeping in view the Directive Principles of State Policy contained in Articles 38 and 43 of the Constitution.

The court referred with approval the observation of A. P. Sen J in the case of *Organo Chemical Industries* v. *Union of India*:[96]

> Each word, phrase or sentence is *to be considered in the light of general purpose of the Act itself. A bare mechanical interpretation of the words devoid of concept or purpose will reduce ... legislation to futility.* It is a salutary rule, well established, that the intention of the legislature must be

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94 EPF Act 1952
11. Priority of payment of contributions over other debts.-
(2) Without prejudice to the provisions of sub-section (1), if any amount is due from an employer whether in respect of the employee's contribution (deducted from the wages of the employee) or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts
Companies Act 1956
529A.Overriding preferential payment.—(1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company—
(a) workmen's dues; and
(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 *pari passu* with such dues, shall be paid in priority to all other debts.

95 *Supra* note 92 at 20, para 22.

96 (1979) 4 SCC 573. *Ibid.*

found by *reading the statute as a whole.* (Emphasis added)

The court also recollected the concurring observation of Krishna Iyer J in the same case that "judicial interpretation must further the purpose of a statute." Krishna Iyer J taking support from the European Court of Human Rights, in the *Sunday Times* Case where the ECHR in a different context observed: [97]

> The Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty. *A policy-oriented interpretation*, when a welfare legislation falls for determination, especially in the context of a developing country, is sanctioned by principle and precedent and is implicit in Article 37 of the Constitution since the judicial branch is, in a sense, part of the State. So it is reasonable to assign to 'damages' a larger, fulfilling meaning....

For determining the 'priority' the court referred to various earlier judgements of the Supreme Court and the Kerala High Court[98] where it was held that Parliament did not intend to give priority to the dues of private creditors over debt of the state.[99]

The court then examined the judgments which have 'bearing on the interpretation of sections 529 or 529A of the Companies Act.' In 1985, sections 529 and 530 of Companies Act 1956 were amended and section 529A was inserted. Dealing with implication of these amendments the court in *UCO Bank* v. *Official Liquidator, High Court, Bombay* [100] observed:

> The clear object of the amendment is that the legitimate dues of workers must rank *pari passu* with those of secured creditors and above even the dues of the Government. This literal construction of the proviso is in consonance with, and promotes, the avowed object of the amendment made. On the contrary, the construction of the proviso suggested by the learned counsel for the appellant, apart from being in conflict with the plain language of the proviso also defeats the object of the legislation.

Section 11 of Employees' Provident Fund and Miscellaneous Provisions Act 1952 besides using the words 'in priority to all other debts' also uses the phrase 'the amount so due shall be deemed to be the first charge on the assets of the establishment'. The court noticed these words in the course of interpretation which is evident from following words:[101]

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97 *Ibid*.

98 *Builders Supply Corporation* v. *Union of India* (1965) 2 SCR 289, *State Bank of Bikaner and Jaipur* v. *National Iron and Steel Rolling Corporation* (1995) 2 SCC 19, *Dena Bank* v. *Bhikhabhai Prabhudas Parekh & Co* (2000) 5 SCC 694*, State of M.P.* v. *State Bank of Indore* (2002) 10 SCC 441, *Allahabad Bank* v. *Canara Bank* (2000) 4 SCC 406, *Kerala High Court Recovery Officer and Asstt. Provident Fund Commissioner* v. *Kerala Financial Corporation*, ILR (2002) 3 Kerala 4.

99 *Supra* note 92 at para 28.

100 (1994) 5 SCC 1, *id.,* para 31.

101 *Esskay Pharmaceuticals, supra* note 92 at para 43.

> while inserting Section 529A in the Companies Act by Act No.35 of 1985 Parliament, in its wisdom, did not declare the workmen's dues (this expression includes various dues including provident fund) as first charge.

The court, therefore, reached at the conclusion that:[102]

> The effect of the amendment made in the Companies Act in 1985 is only to expand the scope of the dues of workmen and place them at par with the debts due to secured creditors and there is no reason to interpret this amendment as giving priority to the debts due to secured creditor over the dues of provident fund payable by an employer.

Presence of non obstante clause[103]does not automatically give an overriding power. The court rightly interpreted that:[104]

> Section 529-A of the Companies Act no doubt contains a non obstante clause but in construing the provisions thereof, it is necessary *to determine the purport and object for which the same was enacted.*

The court inquired the *mischief before 1988* amendments under the Companies Act 1956 and highlighted the object of incorporation of section 529A in following words:[105]

> In terms of Section 529 of the Companies Act, as it stood prior to its amendment, the dues of the workmen were not treated *pari passu* with the secured creditors as a result whereof innumerable instances came to the notice of the Court that the workers may not get anything after discharging the debts of the secured creditors. *It is only with a view to bring the workmen's dues pari passu with the secured creditors, that Section 529-A was enacted.* (Emphasis added)

As regards the effect of amendments in the two statutes the court observed:[106]

> However, these amendments, though subsequent in point of time, cannot be interpreted in a manner which would result in diluting the mandate of Section 11 of the EPF Act, sub-section (2) whereof declares that the amount due from an employer shall be the first charge on the assets of the establishment and shall be paid in priority to all other debts. The words 'all other debts' used in Section 11(2) would necessarily include the debts due to secured creditors like banks, financial institutions etc. The mere ranking of the dues of workers at par with debts due to secured creditors cannot lead to an inference that Parliament intended to create first charge

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102 *Ibid*.

103 A separate discussion on its implications could be found under the miscellaneous head, *infra*.

104 *Supra* note 92 at para 33.

105 *Ibid.*

106 *Id*., para 42.

> in favour of the secured creditors and give priority to the debts due to secured creditors over the amount due from the employer under the EPF Act.

The judgement *endorses the idea of the welfare state by protecting the interest of employees*. It is against the interest of creditors. The government priority after new economic policy is to promote business and protect the interest of investors and creditors. The judgement will make the creditors more cautious as they are now more vulnerable to risk factor. In the age of liberalisation, privatisation and globalisation the labour movement has weakened. After 2005 the government of India has modified the pension policy which has made the employees more dependent on private sector. This judgement will give some strength to the idea of social security because the law has been interpreted to give priority to interest of employees *vis-a- vis* secured creditors.

In *Union of India* v. *Brigadier P.S.Gill*[107] the question before the court was whether an aggrieved party can file an appeal to the Supreme Court under section 30 Armed Forces Tribunal Act 2007 without taking resort to the procedure prescribed under section 31 thereof. The court rejected the argument of the appellant and held that though the orders under challenge are final order of the tribunal, an appeal against the same lies to the Supreme Court *as a matter of right, no matter the right to file* such an appeal under section 30 of the Act *is subject to the provisions of section 31 thereof.*

The court observed that: [108]

> The expression "subject to the provisions of Section 31"cannot be rendered a surplusage for *one of the salutary rules of interpretation is that the legislature does not waste words*. Each word used in the enactment must be allowed to play its role howsoever significant or insignificant the same may be in achieving the legislative intent and promoting legislative object. (Emphasis Added)

Although the court *itself considered it unnecessary to refer to any decisions* on the subject, it recollected some of the pronouncements of the court in which the expression "subject to" has been interpreted.[109]

In the light of the aforesaid and considering the statute *para materia* the court concludes:[110]

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107 JT 2012(3) SC 519. Decided on- 23 March, 2012, hereinafter referred as *Brigadier P.S. Gill*. The case was before a division bench of T.S. Thakur and Dipak Misra JJ. The unanimous judgement was delivered by T Thakur J. This is a joint decision in two cases. The other case being *Krite Kumar Awasthi* v. *Union of India* JT 2012(3) SC 519.

108 *Id., at* 525, para 8.

109 *K.R.C.S. Balakrishna Chetty Sons Co.* v. *State of Madras* (1961) 2 SCR 736, *South India Corporation (P) Ltd.* v. *The Secretary, Board of Revenue* (1964) 4 SCR 280*, State of Bihar* v. *Bal Mukund Sah* (2000) 4 SCC 640. *B.S. Vadera* v. *Union of India* (1968) 3 SCR 575, *Chandavarkar S.R. Rao* v. *Ashalata S. Guram* (1986) 4 SCC 447.

110 *Brigadier P.S.Gill*, *Supra* note 107 at 526, para 15. The Supreme Court also referred *M. Pentiah* v. *Muddala Veeramallapa* (1961) 2 SCR 295.

> ...that the question whether an appeal lies to the Supreme Court and, if so, in what circumstances and against which orders and on what conditions is a matter that would have to be seen in the light of the provisions of each such enactment *having regard to the context and the other clauses appearing in the Act.* It is one of the settled canons of interpretation of statutes that every clause of a statute should be construed with respect to the context and the other clauses of the Act, so far as possible to make a consistent enactment of the whole statute or series relating to the subject.

The court recollected its earlier observation in *Gammon India Ltd*. where it observed: [111]

> Every clause of a statute is to be construed with reference to the context and other provisions of the Act to make a consistent and harmonious meaning of the statute relating to the subject-matter. The interpretation of the words will be by looking at the context, the collocation of the words and the object of the words relating to the matters.

It may also be beneficial to consider the following passage from *V. Tulasamma* v. *Sesha Reddy* where the court observed: [112]

> It is an *elementary rule of construction* that no provision of a statute should be construed in isolation but it should be construed with reference to the context and in the light of other provisions of the Statute so as, as far as possible, to make a consistent enactment of the whole statute...

In *Dr. Subramanian Swamy* v. *Dr. Manmohan Singh*,[113] being one of the series of *2G spectrum* cases the issue before the court was whether a citizen can file a complaint for prosecuting a public servant for an offence under the Prevention of Corruption Act, 1988?. The other question raised was whether the authority competent to sanction prosecution of a public servant for offences under this Act is required to take an appropriate decision within specified time? The court made following remarks:[114]

> Today, corruption in our country not only poses a grave danger to the concept of constitutional governance, it also threatens the very foundation of Indian democracy and the Rule of Law. The magnitude of corruption in our public life is incompatible with the concept of a socialist, secular democratic republic. It cannot be disputed that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values in our preambular vision. Therefore, any anti-*corruption law has to be*

111 *Gammon India Ltd.* v. *Union of India* (1974) 1 SCC 596. *Id.,* 527 at para 15.

112 (1977) 3 SCC 99. *Id* at 527.

113 AIR 2012 SC 1185: decided on 31 Jan. 2012, hereinafter referred as *Dr. Swamy*. The unanimous decision has been given by division bench of G. S. Singhvi and Asok Kumar Ganguly JJ. However, two separate judgements were delivered.

114 *Id.*, para 11, *per se* Ganguly J.

> *interpreted* and worked out in such a fashion as *to strengthen the fight against corruption*. That is to say in a situation *where two constructions are eminently reasonable*, the Court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it. (Emphasis added)

Indeed, a provision in a statute could not properly be interpreted in isolation. In order to gather the intention of legislature the context has to be seen. *Delhi Airtech*[115] follows the aforesaid principle quoting Lord Normand in following words:[116]

Lord Normand expressed the same view differently and which is equally pertinent and worth remembering and parts of which are excerpted below:

> The key to the opening of every law is *the reason and spirit of the law* - it is the *animus imponentis*, the intention of the law maker, expressed in the law itself, *taken as a whole*. Hence to arrive at the true meaning of any particular phrase in a statute, that particular phrase is *not to be viewed detached from its context* ... meaning by this as well the *title and the preamble as the purview or enacting part of the statute.* (Emphasis added)

However, in *Princl. Chief Conservator of Forest* v. *J. K. Johnson*,[117] the court points out that the statement of the reasons and object appended to the Bill are *not ordinarily* used to determine the true meaning of the statute. They are not admissible to explain the true meaning of the substantive provision of the statute. They do not control the actual words. They should be *ordinarily avoided* as an *aid to the construction of the statute*.[118] These remarks are better to be appreciated only in the context of the facts involved in this particular case.

In the case of *JIK Industries Ltd*. v. *Amarlal V. Jumani*[119] interpretation of section 147 of Negotiable Instruments Act, 1881 and section 320(9) of CrPC, 1973 was the subject matter of debate.[120] The court aptly balanced the implications of the

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115 *Supra* note 12.

116 *Id.* at 589, para 50.

117 AIR 2012 SC 61. Decided on-17 Oct., 2011. Issue before the court was whether a specified officer empowered under Section 54(1) of the Wild Life (Protection) Act, 1972 as amended by the Wild Life (Protection) Amendment Act, 2002 (Act 16 of 2003) to compound offences has power, competence and authority, on payment of a sum of money by way of composition of the offence by a person who is suspected to have committed offence against the Act, to order also *forfeiture of the seized items*?

118 *Id.* at 71, para 38.

119 2012 (2) SCALE 97 at 109. Decided on- 1 Feb., 2012 hereinafter referred as *JIK Industries Ltd*. The division bench comprising Asok Kumar Ganguly and Jagdish Singh Khehar JJ unanimously decided the case. The judgement was delivered by Asok Kumar Ganguly J.

120 Negotiable Instruments Act, 1881: Section 147- Offences to be compoundable. - Notwithstanding anything contained in the code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable.
Cr PC 1973 sub-s.(9) of s. 320 says:
No offence shall be compounded except as provided by this section.

two possible interpretations and observed [121]

> A perusal of Section 320 makes it clear that the provisions contained in Section 320 and the various sub-sections is a Code by itself relating to compounding of offence. It provides for the *various parameters and procedures and guidelines in the matter of compounding.* If this Court upholds the contention of the appellant that as a result of incorporation of Section 147 in the N.I. Act, the entire gamut of procedure of Section 320 of the Code are made inapplicable to compounding of an offence under the N.I. Act, in that case the compounding of offence under N.I. Act *will be left totally unguided or uncontrolled*. *Such an interpretation apart from being an absurd or unreasonable* one will also be contrary to the provisions of Section 4(2) of the Code, which has been discussed above. There is no other statutory procedure for compounding of offence under N.I. Act. Therefore, Section 147 of the N.I. Act must be *reasonably construed* to mean that as a result of the said Section the offences under N.I. Act are made compoundable, but the main principle of such compounding, namely, the consent of the person aggrieved or the person injured or the complainant cannot be wished away nor can the same be substituted by virtue of Section 147 of N.I. Act. (Emphasis added)

In *Avishek Goenka* v. *Union of India*[122] (popularly known as *Black films on wind screen* case) the interpretation of Rule 100 made under Motor Vehicles Act 1988 was in question. The court observed:[123]

> The *legislative intent* attaching due significance to the 'public safety' is evident from the *object and reasons* of the Act, the provisions of the Act and more particularly, the Rules framed thereunder. Even if we assume, for the sake of argument, that *Rule 100 is capable of any interpretation*, then this *Court should give it an interpretation which would serve the legislative intent and the object of framing* such rules, in preference to one which would frustrate the very purpose of enacting the Rules as well as undermining the public safety and interest. Uses of these black films have been proved to be criminal's paradise and a social evil. (Emphasis added)

3. *Mischief: Heydon's rule*

Heydon's Case[124] is, probably, the oldest authority in the area of interpretation. It propounds the rule as under:

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121 *JIK Industries Ltd*, *Supra* note 119 at para 73.

122 *Available at:* judis.nic.in, Decided on-27 April 2012, (2012) 5 SCC. 321; JT 2012 (4) SC 419; 2012(4) SCALE 602 hereinafter referred as *Avishek Goenka first.* The case was decided by a full bench comprised of S.H. Kapadia C.J. and A.K. Patnaik and Swatanter Kumar JJ unanimously. The judgement was delivered by Swatanter Kumar, J.

123 *Id., para* 19.

124 [1584] EWHC Exch J36 (01 Jan. 1584).

For the sure and true interpretation of *all* statutes in general (be they *penal or beneficial, restrictive or enlarging* of the common law,) four things are to be discerned and considered:

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

In the case of *Delhi Airtech*[125] one can find reference to *mischief rule* in following paragraph:[126]

> It is well settled as a canon of construction that *a statute has to be read as a whole and in its context*. In *Attorney General* v. *HRH Prince Earnest Augustus of Hanover*, reported in (1957) 1 AER 49, Lord Viscount Simonds very elegantly stated the principle that it is the duty of Court to examine every word of a statute in its context. The learned Law Lord further said that in understanding the meaning of the provision, the Court must take into consideration not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari material, and *the mischief* which I can, by those and other legitimate means, discern that *the statute was intended to remedy*.

In the case of *Esskay Pharmaceuticals*[127] the question was how to interpret two competing provisions.[128] The court enquired the *mischief* before 1988 amendments in Companies Act 1956 and highlighted the object of incorporation of section 529A in following words: [129]

> In terms of Section 529 of the Companies Act, as it stood prior to its amendment, the dues of the workmen were not treated *pari passu* with the secured creditors as a result whereof innumerable instances came to the notice of the Court that the workers may not get anything after discharging the debts of the secured creditors. It is only with a view to bring the workmen's dues *pari passu* with the secured creditors, that Section 529-A was enacted.

Without referring to *Heydon's* rule the court found it convenient to investigate what was the law before the incorporation of section 529A of the Companies Act

125 *Supra* note 12.
126 *Id.* at 589 para 49.
127 *Supra* note 92.
128 *See, supra* note 94 for both the statutory provisions.
129 *Supra* note 92 at para 33.

1956 and what was the *mischief and defect* for which section 529 did not provide. A "modern version" of *mischief rule is purposive construction*.[130]

4. *Purposivistic interpretation*

The year under survey begins with a very strong opinion in favour of adopting purposive approach for construction of welfare legislative enactments. In *Hooghly* Mills,[131] Ganguly J considered the views of Justice Frankfurter,[132] Lord Green[133] and Sinha CJ[134] of the Supreme Court and came to the conclusion that[135]

> …what is required to be done in the instant case for construing the provisions of Section 14B and 17(1A)(a) is *to adopt a purposive approach*, an approach which promotes the purposes of the Act…

As regards the origin and devolepment of purpusive approach he quotes Benion's remark:[136]

> General judicial adoption of the term '*purposive construction' is recent*, but the concept is not new. Viscount Dilhorne, citing Coke, said that while it is now fashionable to talk of a purposive construction of a statute *the need for such a construction has been recognised since the seventeenth century.* In fact the recognition goes considerably further back than that. (Emphasis added)

Ganguly J further refers to a very pertinent remark of Diplock: [137]

> I am *not reluctant to adopt a purposive construction* where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction, *even where this involves reading into* the Act *words which are not expressly included in it.*

He also quotes with approval from the decision in *N.K.Jain* v. *C.K.Shah*[138]wherein it was observed that:[139]

> …*legislative purpose must be noted* and the statute must be read as a whole. In our view taking into consideration the object underlying the Act … which is a welfare legislation are meant to ensure the employees the

130 *Bennion*, *supra* note 5 at 943.
131 *Supra* note 1. For the facts of this case *see* the text relevant to *supra* note 42.
132 *Hooghly Mills, supra* note 1 at para 34.
133 *Id*., para 36, Lord Greene, Master of Rolls in *Re, Bidie* (deceased), [(1948) 2 All ER 995, page 998].
134 *Id*., para 35, AIR 1963 SC 1241 at 1245.
135 *Id*. at 37, Bennion on *Statutory Interpretation* (5th edn.).
136 *Ibid*.
137 *Id.* at 38. *Jones* v. *Wrotham Park Settled Estates* [(1980) AC 74] at 105.
138 *Id.* at 39. (1991) 2SCC 495.
139 *Id*., para 41.

> continuance of the benefits of the provident fund. They should be interpreted in such a way so that *the purpose of the legislation is allowed to be achieved.*

In *Namit Sharma*[140] the court was confronted with the interpretation of the phrase 'wide knowledge and experience' used in section 12(5) of Right to Information Act, 2005.[141] The Act nowhere clearly specifies the basic qualifications for appointment of Information Commissioners at centre or state levels. The two important questions before the court were firstly, whether the phrase implies some *basic qualifications*?. Secondly, whether this phrase is too vague to provide any clear guidelines? Following the purposivistic interpretation the court found that the statute was clear enough to determine the qualifications for the appointment of the Information Commissioners.
The court held: [142]

> On a reasonable and *purposive interpretation*, it will be appropriate *to interpret* and *read into* Section12(5) that the 'knowledge and experience' in a particular subject would be deemed to include the basic qualification in that subject. We would prefer such an approach than to hold it to be violative of Article 14 of the Constitution. *Section 12(5) has inbuilt guidelines to the effect that knowledge and experience, being two distinct concepts, should be construed in their correct perspective.* (Emphasis added)

The court further emphasised that:[143]

> The provisions of Sections 12(5) and 15(5) of the Act of 2005 are held to be constitutionally valid, but with the rider that, *to give it a meaningful and purposive interpretation, it is necessary for the Court to 'read into' these provisions some aspects without which these provisions are bound to offend the doctrine of equality.* Thus, we hold and declare that the expression 'knowledge and experience' appearing in these provisions would mean and include a basic degree in the respective field and the experience gained thereafter. Further, without any peradventure and veritably, we state that appointments of legally qualified, judicially trained and experienced persons would certainly manifest in more effective serving of the ends of justice as well as *ensuring better administration of justice by the Commission*. It would render the adjudicatory process which involves critical legal questions and nuances of law, more adherent to justice and shall enhance the public confidence in the working of the Commission. *This is the obvious interpretation of the language of these provisions and, in fact, is the essence thereof.* (Emphasis added)

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140 *Supra* note 9.

141 RTI Act 2005, S. 12 (5) The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life *with wide knowledge and experience* in law, science and technology, social service, management, journalism, mass media or administration and governance.

142 *Namit Sharma*, *supra* note 9 at para 57.

143 *Id.,* para 106. 2.

Esskay Pharmaceuticals[144]also considers 'purpose of enactment' as very important in decision making. It observes: [145]

> Another rule of interpretation of Statutes is that if two special enactments contain provisions which give overriding effect to the provisions contained therein, then the Court is required to consider *the purpose and the policy* underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions. (Emphasis added)

The court referred to *Shri Ram Narain* v. *Simla Banking and Industrial Co. Ltd*.[146] where the court was considering the provisions contained in the Banking Companies Act, 1949 and the Displaced Persons (Debts Adjustment) Act, 1951. Both these enactments contained *competing provisions* giving overriding effect to the provisions of the enactment over any other law. After noticing the relevant provisions, the court observed: [147]

> Each enactment being a special Act, the ordinary principle that a special law overrides a general law does not afford any clear solution in this case.
>
> It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, *on much broader considerations of the purpose and policy underlying* the two Acts and the clear intendment conveyed by the language of the relevant provisions therein.

The court also referred *Kumaon Motor Owners' Union Ltd*. v. *State of Uttar Prades*h,[148] where there was conflict between the provisions contained in rule 131(2) (g) and (i) of the Defence of India Rules, 1962 and chapter IV-A of the Motor Vehicles Act, 1939. Section 68-B gave overriding effect to the provisions of chapter IV-A of the Motor Vehicles Act whereas section 43 of the Defence of India Act, 1962, gave overriding effect to the provisions contained in the Defence of India Rules. This court held that the Defence of India Act was later than the Motor Vehicles Act and, therefore, if there was anything repugnant, the provisions of the later Act should prevail. This court also looked into *object behind the two statutes*, namely, Defence of India Act and Motor Vehicles Act and on that basis also it was held that the provisions contained in the Defence of India Rules would have an overriding effect over the provisions of the Motor Vehicles Act.[149]

The court also took support from *Ashok Marketing Limited* v. *Punjab National Bank*,[150] wherein the constitution bench considered some of the precedents on the

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144 *Supra* note 92.
145 *Id.* at 30, para 38.
146 1956 SCR 603, *supra* note 92 at 30, para 39.
147 *Ibid.*
148 (1966) 2 SCR 121, *Esskay Pharmaceuticals, supra* note 92 at 30, para 40.
149 *Id.* at 30.
150 (1990) 4 SCC 406.

interpretation of statutes and concludes that: [151]

> *The principle which emerges from these decisions is that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein*. (Emphasis added)

In *Ritesh Sinha* v. *The State of Uttar Pradesh*[152] where an order for taking the voice sample was challenged as violative of article 20(3) of Constitution of India. Ranjana Prakash Desai J applied the *purposive interpretation* to the term "measurement" as defined in section 2(a) of the Prisoners Act. Desai J is quite explicit to hold that:[153]

> voice sample can be included in the inclusive definition of the term "measurements" appearing in Section 2(a) of the Prisoners Act is supported by the above-quoted observation that voice prints are like finger prints. Section 2(a) states that measurements include finger impressions and foot impressions. If voice prints are like finger prints, they would be covered by the term 'measurements'. I must note that the Law Commission of India in its 87th Report referred to the book "*Law Enforcement and Criminal Justice - an introduction*". The Law commission observed that voice prints resemble finger prints and made a recommendation that the Prisoners Act needs to be amended. I am, therefore, of the opinion that a Magistrate acting under Section 5 of the Prisoners Act can give a direction to any person to give his voice sample for the purposes of any investigation or proceeding under the Code.

Desai J after going through a good number of authorities further pointed out that:[154]

> in order to strengthen the hands of investigating agencies, I am inclined to give *purposive interpretation to the provisions of the Prisoners Act* and Section 53 of the Code *instead of giving a narrow interpretation* to them.

Desai J strongly expressed the feeling that:[155]

> Parliament needs to bring in more clarity and precision by amending the Prisoners Act. The Code also needs to be suitably amended. Crime has changed its face. There are new challenges faced by the investigating

151 As quoted in *E.P.F. Commissioner Supra* note 92 at 30, para 41.

152 AIR 2013 SC 1132: (2013) 2 SCC 357: MANU/SC/1072/2012, hereinafter referred as *Ritesh Sinha*. The case was decided by Ranjana Prakash Desai and Aftab Alam, JJ. Due to divergence of opinion the case has been referred to higher bench.

153 *Id.,* para 31.

154 *Id.,* para 48.

155 *Ibid.*

> agency....Technological and scientific advance in the investigative process could be more effectively used if required amendments are introduced by Parliament. This is necessary to *strike a balance between the need to preserve the right against self incrimination guaranteed* under Article 20(3) of the Constitution and the need to strengthen the hands of the investigating agency to bring criminals to book.

Aftab Aalam J disagreed pointing out that the 87th Report of the Law Commission:[156]

was submitted in 1980. The Code of Criminal Procedure was amended in 2005 when the Explanation was added to Section 53 and Sections 53A and 311A were inserted into the Code. Voice sample was not included either in the Explanation to Section 53 or Section 311A.

The learned judge however, observed that:[157]

> Let copies of this judgment be sent to the Union Law Minister and the Attorney General and their attention be drawn to the issue involved in the case.

He further adds that [158]

> In view of the difference of opinion between us, let this case be listed for hearing before a bench of three Judges after obtaining the necessary direction from the Honourable the Chief Justice of India.

The case of *Aneeta Hada*[159] had emphasised the logical reasoning for adopting *the purposive interpretation*. The court was concerned with the interpretation of section 141 of Negotiable Instrument Act 1881 regarding the use of the term 'deemed'. The court held that *the term 'deemed' has 'manifold purposes' in modern legislation and therefore, to be read in its context and further the fullest logical purpose and import are to be understood*.[160] In other words *purposive interpretation* needs to be given scope for full implementation of the legal fiction.

IV JUDICIAL LEGISLATION

The controversy whether judges do legislate or not came into the fore in *Ritesh Sinha* [161] where the two judges of the apex court were elaborate enough to express their conflicting views. Ever since Montesquieu classified the functions of governance in a democratic set up into the legislature, executive and judiciary, one of the chief purpose of interpretation is judicial legislation because litigants go to

156 *Id.,* para 92.
157 *Id.,* para 95.
158 *Id.,* para 96.
159 *Aneeta Hada, Supra* note 5.
160 *Id.* at 2807, para 32.
161 *Supra* note 152 at 1154-55.

court with the demand to *fill in the gaps in law*. It is very often observed that judiciary should not legislate and it legislates under the guise of interpretation.

The separation of powers of governance between executive, legislature and judiciary in a democratic form of government is primarily made for the sake of administrative convenience. They are the three wings of government. They are made to establish rule of law *vis- a-vis* rule of men. Normally they are supposed to remain independent. But this arrangement cannot be considered as a water tight compartment for each other. At times executive and judiciary do legislate and the legislature has all the power to change those laws. Judiciary has *only to fill in the gaps* in legislative commands of the statutes. If this flexibility is not maintained in between these three wings, there will be anarchy and the Constitution of India would not allow the situation of anarchy and chaos to raise their head. There is no supremacy of any wing over each other. This idea of flexibility is also true for country like Britain where parliament is supreme and judiciary is subordinate. Judicial legislation is an established fact as the whole of common law and the law of tort is judge made law.[162] Friedman has expressed his conviction that:[163]

> the law must, especially in contemporary conditions of articulate law making by legislators, courts and others, respond to social change if it is to fulfil its function as paramount instrument of social order.

It is beyond doubt that it is the duty of the courts to ascertain and give effect to the will of parliament as expressed in its enactment. However:[164]

> [I]n the performance of this duty the *Judges do not act as computers* into which are fed the statutes and the rules for the construction of statutes and from whom issue forth the mathematically correct answer … *They are not legislators, but finishers, refiners and polishers of legislation* which comes to them in a state requiring varying degrees of further processing.

But *Namit Sharma*[165]case openly talks about the *legislative activity of the judiciary* when Swatanter Kumar J observes:[166]

> Despite the absence of any express mention of the word 'information' in our constitution under Article 19(1)(a*), this right has stood incorporated therein by the interpretative process* by this Court laying the unequivocal statement of law by this Court that there was a definite right to information of the citizens of this country. Before the Supreme Court spelt out with clarity the right to information as a right in built in the constitutional framework, there existed no provision giving this right in absolute terms or otherwise.

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162 Dicey, *Law and Public Opinion in England*, (2nd edn. with preface by ECS Wade, Macmillon, 1962).

163 W.Friedman, *Law in a Changing Society*, 10, [preface].

164 Donaldson J, *Corocraft Ltd* v *Pan American Airways Inc.* [1968] 3 WLR 714 at 732.

165 *Supra* note 9.

166 *Id.* para 24, *manupatra.*

The learned judge has meticulously traced the background of the Right to Information Act 2005.The issue regarding qualification and appointment of Central and the State Information Commissioner has come for the consideration of the division bench.

Namit Sharma judgement has made following directions in operative part of its judgement which illustrates how interpretation can lead to legislation:[167]

> 7. It will be just, fair and proper that the first appellate authority (*i.e*., the senior officers to be nominated in terms of Section 5 of the Act of 2005) preferably should be the persons possessing a degree in law or having adequate knowledge and experience in the field of law.
>
> 8. The Information Commissions at the respective levels shall henceforth work in Benches of two members each. One of them being a 'judicial member', while the other an 'expert member'. The judicial member should be a person possessing a degree in law, having a judicially trained mind and experience in performing judicial functions. A law officer or a lawyer may also be eligible provided he is a person who has practiced law at least for a period of twenty years as on the date of the advertisement. Such lawyer should also have experience in social work. We are of the considered view that the competent authority should prefer a person who is or has been a Judge of the High Court for appointment as Information Commissioners. Chief Information Commissioner at the Centre or State level shall only be a person who is or has been a Chief Justice of the High Court or a Judge of the Supreme Court of India.
>
> 9. The appointment of the judicial members to any of these posts shall be made 'in consultation' with the Chief Justice of India and Chief Justices of the High Courts of the respective States, as the case may be.
>
> 10. The appointment of the Information Commissioners at both levels should be made from amongst the persons empanelled by the DoPT in the case of Centre and the concerned Ministry in the case of a State. The panel has to be prepared upon due advertisement and on a rational basis as afore-recorded.
>
> 11. The panel so prepared by the DoPT or the concerned Ministry ought to be placed before the High-powered Committee in terms of Section 12(3), for final recommendation to the President of India. Needless to repeat that the High Powered Committee at the Centre and the State levels is expected

167 *Id.,* para 106. A review petition R.P. (C) No. 2309 of 2012 has been filed on which the division bench of Supreme Court of India comprising A.K. Patnaik and Arjan Kumar Sikri JJ passed a partial stay order on 16/04/2013. According to this order sub-paras 106.8 and 106.9 (as published in judis.nic.in and *manupatra.com*) or 108.8 and 108.9 [as published in 2013 (1) SCC 745] has been stayed. The judgement has been recalled on Sep. 3, 2013. However, the views expressed here about judicial legislation are quite reasonable and logical.

to adopt a fair and transparent method of recommending the names for appointment to the competent authority.

Giving his *rationale* for the direction the court observed:[168]

The courts can also bridge the gaps that have been left by the legislature inadvertently. We are of the considered view that both these principles have to be applied while interpreting section 12(5). It is the application of these principles that would render the provision constitutional and not opposed to the doctrine of equality. Rather the application of the provision would become more effective.

Though judicial legislation cannot be avoided absolutely the court under the pretext of absence of clear guideline should neither jump to declare a provision void for want of arbitrariness nor should rush to fill in the gap. *Namit Sharma* is also a good illustration of self restraint by judiciary:[169]

The legislature in its wisdom has chosen not to provide any specific qualification, but has primarily prescribed 'wide knowledge and experience' in the cited subjects as the criteria for selection. It is not *for the courts to spell out* what ought to be the qualifications or experience for appointment to a particular post.

In *Ranjan Dwevedi* v. *CBI, through Director*[170] the case was pending in trial court itself for more than 37 years. The petitioners presented a writ petition praying

168 *Id.*, para 57.

169 *Ibid.*

170 AIR 2012 SC 3217. Decided on- 17 Aug. 2012 hereinafter referred as *Ranjan Dwevedi.* The bench comprised of H L Dattu and Chandramauli Prasad JJ unanimously decided the case. The main judgement was delivered by H L Dattu and Chandramauli Prasad JJ concurred though he also gave his brief observation. Chandramauli Prasad J held that he was willing to give a fresh look but 'judicial discipline expects us to follow the ratio and prohibits laying down any principle in derogation of the ratio laid down' in Seven-Judge Constitution Bench judgement in *P. Ramachandra Rao* v. *State of Karnataka* (2002) 4 SCC 578.

171 *Id.,* para 23. The court followed the ratio of the Seven Judges Bench *Ramchandra Rao P*. v. *State of Karnataka*, (2002) 4 SCC 578. The Seven Judges Bench overruled earlier decision of this Court on this point: *Raj Deo (II)* v. *State of Bihar*, (1999) 7 SCC 604, *Raj Deo Sharma* v. *State of Bihar* (1998) 7 SCC 507; *Common Cause, A Registered Society* v. *Union of India*, (1996) 4 SCC 33. The time limit in these cases was contrary to the observations of the Five Judges Bench in *A.R. Antulay* (1992) 1 SCC 225. The Seven Judges Bench in *Ramchandra Rao P* has been followed in *State through CBI* v. *Dr. Narayan Waman Nerukar* (2002) 7 SCC 6 and *State of Rajasthan* v. *Ikbal Hussen* (2004) 12 SCC 499. It was further observed that it is neither advisable, feasible nor judicially permissible to prescribe an outer limit for the conclusion of all criminal proceedings. It is for the criminal court to exercise powers under ss. 258, 309 and 311 of the Cr PC. to effectuate the right to a speedy trial. In an appropriate case, directions from the high court under s.482 Cr PC. and art. 226/227 can be invoked to seek appropriate relief.

for quashing of the charges and trial because of violation of his fundamental right of speedy trial. Rejecting the contention the court laid down that:[171]

> Prescribing a time limit for the trial court to terminate the proceedings or, at the end thereof, to acquit or discharge the accused in all cases *will amount to legislation, which cannot be done by judicial directives within the arena of judicial law making power available to constitutional courts*; however, liberally the courts may interpret Articles 21, 32, 141 and 142.

Similarly in *Rohitash Kumar*[172] the court reminded that '... under the garb of interpreting the provision, the Court does not have the power to add or subtract even a single word, as it would not amount to interpretation, but legislation.

It needs, however, to be realised that through interpretative process courts have power and duty to fill in the gap. Judicial legislation, in the modern world is a hard reality. It is a pressing necessity in India where the two other wings have either forgotten their primary responsibility or at least changed their priorities. Needless to say that this era of judicial legislation through judicial activism has to be a temporary phenomenon.

V CONSTITUTIONALITY OF STATUTORY PROVISIONS

Namit Sharma[173] should be considered as a good authority where after referring its earlier judgements[174] the court quoted with approval the *six basic principles* to be borne in mind as laid down by Jagdish Swarup in his book *Constitution of India* for 'adjudicating the constitutionality of a provision'. These principles are detailed as follows:

(a) that a law may be constitutional *even though it relates to a single individual* if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
(b) that there is *always a presumption in favour of the constitutionality of an enactment* and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
(c) that it must be presumed that the *Legislature understands and correctly appreciates the need of its own people*, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
(d) that the legislature is free to recognize decrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
(e) that in order to sustain the presumption of constitutionality the Court may take into consideration *matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation*; and

172 *Supra* note 50 at 228, para 24.
173 *Supra* note 9. *See also* certain points discussed earlier under the head "presumptions"
174 *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar* AIR 1958 SC 538 and *Budhan Chodhry* v. *State of Bihar* AIR 1955 SC 191.

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of *the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.*

The Supreme Court observed that the aforesaid principles have, often been reiterated by the court while dealing with the constitutionality of a provision or a statute.The court also referred the case of *Atam Prakash* [175] where it was held that 'a cardinal rule is to look to the *Preamble of the Constitution as the guiding light and to the Directive Principles of State Policy as the Book of Interpretation.* The Constitution being *sui generis*, these are the factors of distant vision that help in the determination of the constitutional issues'. In that case referring to the object of such adjudicatory process, the court emphatically observed:

> ....we must strive to give such an interpretation as will promote the march and progress towards a Socialistic Democratic State. For example, when we consider the question whether a statute offends Article 14 of the Constitution we must also consider whether a classification that the legislature may have made is consistent with the socialist goals set out in the Preamble and the Directive Principles enumerated in Part IV of the Constitution.

Reference was also made to the *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kuresh Jamat*[176] wherein referring to another Supreme Court case of *Government of Andhra Pradesh* v. *Smt. P. Laxmi Devi*[177] the court introduced a rule for exercise of such jurisdiction by the courts stating that the Court should exercise judicial restraint while judging the constitutional validity of the statute or even that of a delegated legislation and *it is only when there is clear violation of a constitutional provision beyond reasonable doubt that the Court should declare a provision to be unconstitutional.*

In the latter case of *P. Laxmi Devi*[178] the court observed that even if two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must prevail and the Court must make efforts to uphold the constitutional validity of a statute, unlike a policy decision, where the executive decision could be rendered invalid on the ground of *malafide*, unreasonableness and arbitrariness alone.

Nature of ambiguity

What is the role of ambiguity in deciding constitutionality of legislation? Is

175 *Atam Prakash* v. *State of Haryana* (1986) 2 SCC 249.
176 (2008) 5 SCC 33.
177 (2008) 4 SCC 720.
178 *Ibid.*
179 *Supra* note 9.

every ambiguity needs the tool of interpretation? *Namit Sharma*[179] considers this issue and gives a logical answer to these questions. Before we discuss *Namit Sharma* it is befitting to remember what Simonds observed in this regard:[180]

> The general proposition that it is the duty of the court to find out the intention of Parliament – and not only of Parliament but of ministers also – cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used; *those words may be ambiguous*, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are *strictly limited*.

The guideline that even if words are ambiguous the provinces of interpretation are strictly limited. In this case section 12(5) of Right To Information Act 2005 uses 'wide knowledge and experience ...in social service, mass media or administration and governance' as the decisive criteria for selection as members of information commissions. The petitioner argued that these words are vague and ambiguous. Absence of clarity and presence of ambiguity brings the vice of arbitrariness. *Every ambiguity requires clarity through interpretation.* It is correct to say that there is scope for interpretation, if the language of a provision is ambiguous. Courts should not, however, jump to remove every ambiguity. The court makes it clear in following words: [181]

> Ambiguity, if any, resulting from the language of the provision is insignificant, being merely linguistic in nature and, ..., the same is capable of being clarified by framing appropriate rules in exercise of powers of the Central Government under Section 27 of the Act of 2005.

While accepting that some words in section 12(5) are vague in nature, the court observed: [182]

> The vagueness in the expression 'social service', 'mass media'or 'administration and governance' does create some doubt. But, certainly, this vagueness or doubt does not introduce the element of discrimination in the provision.

It added:[183]

> We are unable to find that the provisions of Section 12(5) suffer from the vice of arbitrariness or discrimination. However, without hesitation, *we would hasten to add that certain requirements of law and procedure would have to be read into this provision to sustain its constitutionality.*(Emphasis added)

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180 *Magor and St Mellons Rural District Council* v. *Newport Corporation* [1952] AC 189 at 191.

181 *Supra* note 9 at para 57.

182 *Id.,* para 48.

183 *Namit Sharma, Supra* note 9 at para 57.

VI INTERNAL AIDS

In the course of interpretation the court has to take resort to internal and external aids. The internal aids to construction are the parts of the enactment itself *eg.,* preamble, long and short titles, headings, marginal-notes, proviso, exceptions *etc*. However, in *Princl. Chief Conservator of Forest* v *J. K. Johnson*[184] it was held that as an aid to the construction of a statute, the Statement of Objects and Reasons appended to the Bill ordinarily must be avoided.[185]

In *Rohitash Kumar*[186] the court was concerned with the interpretation of the *proviso* attached to rule 3 of the Border Security Force (Seniority, Promotion and Superannuation of Officers) Rules, 1978. The court observed:[187]

> The normal function of a proviso is generally, to *provide for an exception* i.e. exception of something that is outside the ambit of the usual intention of the enactment, or to qualify something enacted therein, which, but for the proviso would be within the purview of such enactment. Thus, its purpose is to exclude something which would otherwise fall squarely within the general language of the main enactment. Usually, *a proviso cannot be interpreted as a general rule* that has been provided for. *Nor it can be interpreted in a manner that would nullify the enactment,* or take away in entirety, a right that has been conferred by the statute. In case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as *to exclude by implication, what clearly falls within its expressed terms*. If, upon plain and fair construction, the main provision is clear, a *proviso cannot expand or limit its ambit and scope*.

The court delineated the limits of 'proviso' as under: [188]

> The proviso to a particular provision of a statute, only embraces the field

184 AIR 2012 SC 6: 17 Oct., 2011.This civil appeal was decided by division bench of R.M. Lodha and Jagdish Singh Khehar, JJ..The unanimous judgement was delivered by R. M. Lodha, J. Issue before court was whether a specified officer empowered under Section 54(1) of the Wild Life (Protection) Act, 1972 as amended by the Wild Life (Protection) Amendment Act, 2002 (Act 16 of 2003) to compound offences has power, competence and authority, on payment of a sum of money by way of composition of the offence by a person who is suspected to have committed offence against the Act, *to order forfeiture of the seized items?*

185 *Id.* at 71, para 38.

186 *Rohitash Kumar Supra* note 50.

187 The apex court endorsed its observation with the help of *CIT, Mysore etc. v. Indo Mercantile Bank Ltd*., AIR 1959 SC 713; *Kush Sahgal* v. *M.C. Mitter*, AIR 2000 SC 1390; *Haryana State Cooperative Land Development Bank Ltd*. v. *Haryana State Cooperative Land Development Bank Employees Union* (2004) 1 SCC 574; *Nagar Palika Nigam* v. Krishi Upaj Mandi Samiti , AIR 2009 SC 187; and *State of Kerala* v *B. Six Holiday Resorts Private Limited*, (2010) 5 SCC 186.

188 The court also referred *Ram Narain Sons Ltd*. v. *Assistant Commissioner of Sales Tax*, AIR 1955 SC 765; and *A.N. Sehgal* v. *Rajeram Sheoram*, AIR 1991 SC 1406.

which is covered by the main provision, by carving out an exception to the said main provision.

VII EXTERNAL AIDS

A. Legal maxims

In *Rohitash*[189] the court was also called upon to examine the applicability of the maxim of *Contemporanea Expositio.* The court observed:[190]

> This Court applied the rule of *contemporanea expositio*, as the Court found that the same is a well established rule of the interpretation of a statute, with reference to the exposition that it has received from contemporary authorities. However, while doing so, the Court added words of caution to the effect that such a rule must give way, where the language of the statute is plain and unambiguous., This Court *applied the said rule of interpretation* by holding that *contemporanea expositio* as expounded by administrative authorities, *is a very useful and relevant guide to the interpretation* of the expressions used in a statutory instrument. The words used in a statutory provision must be understood in the same way, in which they are usually understood, in ordinary common parlance with respect to the area in which, the said law is in force or, by the people who ordinarily deal with them.(Emphasis added)

The court referred to its earlier judgements *N. Suresh Nathan* v. *Union of India*,[191] and *M.B. Joshi* v. *Satish Kumar Pandey*,[192] where this court observed that 'such construction, which is in consonance with long-standing practice prevailing in the concerned department in relation to which the law has been made, should be preferred.'

The court further took the assistance of *Senior Electric Inspector* v. *Laxminarayan Chopra*,[193] and *M/s. J.K. Cotton Spinning & Weaving Mills Ltd*. v. *Union of India*,[194] where it was held that:[195]

> while a maxim was applicable with respect to construing an ancient statute, the same could not be used to interpret Acts which are comparatively modern, and in relation to such Acts, interpretation should be given to the words used therein, *in the context of new facts and the present situation*, if the said words are in fact, capable of comprehending them.

The principle of *contemporenea expositio* was further explained by the court with the help of *Desh Bandhu Gupta and Co.* v. *Delhi Stock Exchange Association*

189 *Rohitash Kumar supra* note 50.
190 *Id.* at 225, para 7.
191 1992 Supp (1) SCC 584, as quoted in *Rohitash* 225, para 8.
192 1993 Supp (2) SCC 419, *Ibid.*
193 AIR 1962 SC 159,
194 AIR 1988 SC 191.
195 *Id.* as quoted in *Rohitash* 225, para 9.

Ltd.,[196] where this court observed:

> that the principle of *contemporenea expositio*, i.e. interpreting a document with reference to the exposition that it has received from the Competent Authority, can be invoked though the same will not always be decisive with respect to questions of construction. Administrative construction, i.e., contemporaneous construction that is provided by administrative or executive officers who are responsible for the execution of the Act/Rules etc., should generally be clearly erroneous, before the same is over-turned. Such a construction, commonly referred to as practical construction although not controlling, is nevertheless entitled to be given considerable weightage and is also, highly persuasive. It may however, be disregarded for certain cogent reasons. In a clear case of error, the Court should, without hesitation, refuse to follow such a construction for the reason that, "wrong practice does not make the law.[197]

The court referred *D. Stephen Joseph* v. *Union of India*,[198] where the court held that, "past practice should not be upset provided such practice conforms to the rules" but must be ignored if it is found to be *de hors* the rules. It further referred *Laxminarayan R. Bhattad* v. *State of Maharashtra*,[199] where this Court held that, "the manner in which a statutory authority understands the application of a statute, would not confer any legal right upon a party unless the same finds favour with the Court of law, dealing with the matter". 'This principle has also been applied in judicial decisions, as it has been held consistently, that long standing settled practice of the competent authority should not normally be disturbed, unless the same is found to be manifestly wrong, 'unfair'.[200] 'The rules of administrative interpretation/ executive construction, may be applied, either where a representation is made by the maker of a legislation, at the time of the introduction of the Bill itself, or if construction thereupon, is provided for by the executive, upon its coming into force, then also, the same carries great weightage.'[201] After discussing various judicial authorities the court made following inferences:[202]

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196 AIR 1979 SC 1049.

197 The apex court also referred *Municipal Corporation for City of Pune* v. *Bharat Forge Co. Ltd*. , AIR 1996 SC 2856; *State of Rajasthan* v. *Dev Ganga Enterprises,* (2010) 1 SCC 505; and *Shiba Shankar Mohapatra* v. *State of Orissa* (2010) 12 SCC 471.

198 (1997) 4 SCC 753 as quoted in *Rohitash*, *Supra* note 50 at 226, para 10.

199 AIR 2003 SC 3502.

200 Reference was also made to *Thamma Venkata Subbamma (dead) by LR*. v. *Thamma Rattamma* AIR 1987 SC 1775; *Assistant District Registrar, Co-operative Housing Society Ltd.* v. *Vikrambhai Ratilal Dalal* 1987 (Supp) SCC 27; *Ajitsinh C. Gaekwad* v. *Dileepsinh D. Gaekwad,* 1987 (Supp) SCC 439; *Collector of Central Excise, Madras* v. *M/s. Standard Motor Products* etc., AIR 1989 SC 1298; *Kattite Valappil Pathumma* v. *Taluk Land Board*, AIR 1997 SC 1115; and *Hemalatha Gargya* v. *Commissioner of Income-tax, A.P*. (2003) 9 SCC 510.

201 *Mahalakshmi Sugar Mills Co. Ltd*. v. *Union of India*, AIR 2009 SC 792, as quoted in *Rohitash* 226, para 13.

202 *Rohitash* 226, para 14.

> In view of the above, one may reach to the conclusion that administrative interpretation may often provide the guidelines for interpreting a particular Rule or executive instruction, and the same may be accepted unless, of course, it is found to be in violation of the Rule itself.

The court also applied the legal maxim "*A Verbis Legis Non Est Recedendum*" meaning "From the words of law, there must be no departure". It observed: [203]

> A section is to be interpreted by reading all of its parts together, and it is not permissible, to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the Statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to add and amend, or by construction, make up for the deficiencies, which have been left in the Act. The Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven.

In *State of Gujarat* v *Essar Oil Ltd*.[204] the court observed that "in the case of a mere erroneous judgment of a Court the principle of *actus curiae neminem gravabit* cannot be invoked."

In *Avishek Goenka first* the prohibition on black or tinted films on windows/ windshields of four-wheeler vehicles was in issue. Privacy of passengers in four wheeler *vis-a-vis* public good was in issue. The court referring to various judgements observed:[205]

This Court in the case of *Hira Tikoo* v. *Union Territory of Chandigarh*,[206] while dealing with the provisions of town planning and the land allotted to the allottees, upon which the allotees had made full payment, held that such allotment was found to be contravening other statutory provisions and the allotted area was situated under the reserved forest land and land in periphery of 900 meters of Air Force Base. The Court held that there was no vested right and public welfare should prevail as the highest law. Thus, this Court, while relying upon the maxim "*salus populi est suprema lex*", modified the order of the High Court holding that the allottees had no vested right and the land forming part of the forest area could not be taken away for other purposes. Reference can also be made to the judgment of this Court in *Friends Colony Development Committee* v. *State of Orissa*,[207]where this Court, while referring to construction activity violative of the regulations and control orders, held that the regulations made under Orissa Development Authorities Act, 1982 may meddle with private rights but still they cannot be termed arbitrary or unreasonable. The private interest would stand subordinate to public good.

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203 *Rohitash,* 228, para 22.

204 AIR 2012 SC 1146 at 1157: Decided on-17 Jan., 2012. The division bench comprising Asok Kumar Ganguly and Jagdish Singh Khehar JJ unanimously decided the case.

205 *Avishek Goenka first, Supra* note 122 at para 20.

206 (2004) 6 SCC 765, *Id.,* para 20.

207 AIR 2005 SC 1, as quoted in *Avishek Goenka first, Ibid.*

Public good, right and power of State to ensure security and safety of individual and precautionary measures here became synonymous to each other.

Ejusdem Generis- In *Avishek Goenka second* [208] the rule 100(2) made under Motor Vehicle Act, 1988 was under consideration. The word used in the rule 'maintained' was in controversy. The court applied the rule of *ejusdem generis* to realise the object and intent of the Motor Vehicle Act, 1988. The division bench held:[209]

> The expression 'maintained' has to be construed to say that, what is required to be manufactured in accordance with law should be continued to be maintained as such. 'Maintenance' has to be construed *ejusdem generis* to manufacture and cannot be interpreted in a manner that alterations to motor vehicles in violation of the specific rules have been impliedly permitted under the language of the Rule itself. The basic features and requirements of safety glass are not subject to any alteration. If the interpretation given by the applicants is accepted, it would *frustrate the very purpose of enacting Rule 100* and would also hurt the safety requirements of a motor vehicle as required under the Act.

The judgement was enforced with full vigour after the *16 December Delhi Gang Rape* case. Whether a judicial pronouncement was really required to remove black films from wind screen? The executives had enough power in the Motor Vehicle Act, 1988 and rules to do it. But a public spirited citizen *Avishek Goenka* brought this violation in the notice of Supreme Court of India. This shows the executive both political and civil are abdicating their responsibility and giving opportunity to judiciary to interfere with the help of common people.

In the case of *Vinay Tyagi* [210] the meaning of 'presuming' was in question. This word is used in section 228, Cr PC 1973 which opens with the words, 'if after such consideration and hearing as aforesaid, the judge is of the opinion that there is ground for presuming that the accused has committed an offence'. The court observed that:[211]

> … the word 'presuming' must be read *ejusdem generis* to the opinion that there is a ground. The ground must exist for forming the opinion that the accused had committed an offence. Such opinion has to be formed on the basis of the record of the case and the documents submitted therewith. To a limited extent, the plea of defence also has to be considered by the Court at this stage.

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208 *Avishek Goenka* v *Union of India*, AIR 2012 SC 3230: Decided on-Aug. 08, 2012 hereinafter referred as *Avishek Goenka second*. This was another case with same parties. It was decided three months after the previous one. The second case was also decided unanimously.

209 *Id.* at 3234 para 21.

210 *Supra* note 47.

211 *Id.,* para 11.

B. Use of dictionaries

In *Delhi Airtech* [212] the use of phrases and words like '*condition precedent*', 'shall' *etc*., was in dispute. The court resorted to the help of *dictionary to get the literal meaning* of *condition precedent* which is as under:[213]

> The expression *condition precedent* has been defined in Words and Phrases as those which 'must be punctually performed before the estate can vest'.[214] Similarly, in Bouvier's Law Dictionary, virtually the same principles have been followed.[215] The author expressed this even more strongly by explaining that:
>
> The effect of a Condition precedent is, when performed, to vest an estate, give rise to an obligation, or enlarge an estate already vested; [...]. Unless a condition precedent be performed, no estate will vest; and this even where the performance is prevented by the act of God or of the law;
>
> In Wharton's Law Lexicon, it has been held that *conditions precedent* in their primary meaning are those events, but for the happenings of which rights will not arise.[216]

VIII TAXING STATUTES

Taxing statutes have special feature and peculiar status in law. In this regard it is observed that:[217]

> The taxing statutes are a woven structure of an especial code of principles, which include norms not common to other legislative enactments, and are based on conceptual perspectives sometimes at variance with the accepted norms of general law. There are unwritten concepts that form part of the tax law and they are implied by its fundamental features. It required the superior courts of the land to lay down that a partnership firm was a distinct taxable entity from its individual partners. Likewise, the legislative arrangements of the provisions in a taxing statute may well indicate that no construction of the charging section would place the case outside the scope altogether of the machinery provisions. There are other instances that demonstrate the peculiarity of taxing statutes in the matter of their interpretation. A lawyer or a judge, not familiar with the tax laws, quite often finds himself in a somewhat strange world on his first contact with them.

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212 *Supra* note 12.

213 *Id.,* para 62.

214 *Id*. at 629, 8. St. Paul, Minn, permanent edn. (West Publishing Co., 1951).

215 Rawle's *A Concise encyclopedia of the Law*, Third Revision,' 584 1 (Vernon Law Book Company, 1914).

216 *Wharton's Law Lexicon*, 1976, reprint, 228; *Id.*, at para 63.

217 R S Pathak, in Foreword to Markandey Katju, *Interpretation of Taxing Statutes*, (New Delhi, Butterworths, 2nd edn.).

Catholic Syrian Bank [218] dealt with interpretation of provisions of Income Tax Act. It was held that taxing statutes need to be construed strictly and on their plain reading the Statute is normally not construed to provide for a double benefit unless it is specifically so stipulated or is clear from scheme of the Act.

In *M/S Grasim Industries Ltd*. v *Union of India*,[219] the question was whether the metal scrap or waste generated whilst repairing of worn out machineries or parts of cement manufacturing plant amounts to manufacture, and thereby, is excisable to excise duty?. It was held that there are no deeming effects in relation to process of manufacture.[220]

Fiat India[221] is also a very significant case on the interpretation of taxing statute. The case has been elaborately discussed under the head literal rule.

IX MISCELLANEOUS

A. Non obstante clause

'Notwithstanding anything' called as non obstante clause is an integral part of most of the legislative drafting. It connotes an overriding power. Time and again, however, it raises controversy as to its exact nature. Like every year this clause was subject to interpretation by various benches of judiciary.

i. One non obstante clause

JIK Industries Ltd.[222] can be a good starting point because it not only discusses the significance of a 'non-obstante clause' but also makes a brief comparative study of ancient with modern 'non-obstante clause' which is as follows:[223]

> The insertion of a non-obstante clause is a well known legislative device and in olden times it had the effect of non obstante *aliquo statuto in contrarium* (notwithstanding any statute to the contrary).

Referring to Bennion on *Statutory Interpretation* it quoted:[224]

> Under the Stuart reign in England the Judges then sitting in Westminster Hall accepted that the statutes were overridden by the process but this device of judicial surrender did not last long. On the device of non-obstante clause, William Blackstone in his Commentaries on the Laws of England (Oxford: The Claredon Press, 1st Edn. 1765- 1769) observed that the devise was ....effectually demolished by the Bill of Rights at the revolution, and abdicated Westminster Hall when James II abdicated the Kingdom.

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218 *Supra* note 31.

219 AIR 2012 SC 161: Decided on-13 Oct., 2011. This civil appeal was decided unanimously by division bench of H.L. Dattu and Chandramauli Kr. Prasad, JJ. The judgement was delivered by H.L. Dattu J.

220 *Id.* at 164-165, para 7.

221 *Supra* note 62.

222 *Supra* note 119.

223 *Id.,* para 48.

224 5th edn., s. 48, as quoted in *JIK Industries Ltd*, *supra* note 119 at para 49.

Finding of the court was that 'under the Scheme of modern legislation, non-obstante clause has a contextual and limited application'.[225] To support this finding in the court referred to ICICI Bank Ltd. v. Sidco Leathers Ltd.[226] where it held:[227]

> The impact of a 'non-obstante clause' on the concerned act[Act] was considered by this Court in many cases and it was held that the same must be kept measured by the legislative policy and it has to be limited to the extent it is intended by the Parliament and not beyond that.

Tracing the limit of non obstante clause of section 147, NI Act 1881, the court held that this will not override sub section 9 of section 320 Cr PC 1973, otherwise section 147 would be a provision without any rider regarding procedure of compounding. Indeed confusion generated because of casual reading of a previous judgement of Supreme Court of India in *Damodar S. Prabhu* v. *Sayed Babalal H*[228] where it was held that 'Section 147 of N.I. Act will override section 320 sub-section 9 of the Code since Section 147 of N.I. Act carries a non- obstante clause'.[229] In *Damodar S. Prabhu* the court made the observation in a different context because 'this Court harmonised the provision of Section 320 of the Code along with Section 147 of N.I. Act by saying that an offence which is not otherwise compoundable in view of the provisions of Section 320 sub-section 9 of the Code has become compoundable in view of Section 147 of N.I. Act and to that extent' section 147 was held to be overriding over section 320(9) of Cr PC 1973 because of non obstinate clause. *JIK Industries Ltd* should be appreciated to notice this thin but very important line of distinction, which is clear for following observation:[230]

> It is well settled that a judgment is always an authority for what it decides. It is equally well settled that a judgment cannot be read as a statute. It has to be read in the context of the facts discussed in it. Following the aforesaid well settled principles, we hold that the basic mode and manner of effecting the compounding of an offence under Section 320 of the Code cannot be said to be not attracted in case of compounding of an offence under N.I. Act in view of Section 147 of the same.

In both cases ie *Damodar S. Prabhu*[231] and *JIK Industries Ltd*,[232] non obstinate clause of section 147, Negotiable Instrument Act 1881, and sub section 9 of section 320 Cr PC 1973 was considered but the observation is different. This different interpretation is not only correct version of law but also shows that interpretation cannot be made on the basis of mathematical formula.

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225 *Id.,* para 50.
226 (2006) 10 SCC 452.
227 *Id.,* para 37 at page 466, as quoted in at *JIK Industries Ltd, supra* note 119 at para 50-51.
228 (2010) 5 SCC 663, as quoted in *id.*, at para 26.
229 *Id.*, para 12 as quoted in *JIK Industries Ltd, supra* note 119 at para 26.
230 *JIK Industries Ltd*, *Supra* note 119 at para 69.
231 *Supra* note 227.
232 *Supra* note 119.

ii. Two non obstante clauses

In the case of *Esskay Pharmaceuticals* [233] the court dealt with the effect of two non-obstante clause in two special enactments (EPF Act, 1952 and Companies Act, 1956). The observation of the court is worth mentioning:

> The non obstante nature of a provision although may be of wide amplitude, the interpretative process thereof must be kept confined to the legislative policy. A non obstante clause must be given effect to, to the extent Parliament intended and not beyond the same.

It further observed:[234]

> Only because the dues of the workmen and the debts due to the secured creditors are treated *pari passu* with each other, the same by itself, in our considered view, would not lead to the conclusion that the concept of *inter se* priorities amongst the secured creditors had thereby been intended to be given a total go-by.

The court added:[235]

> A non obstante clause must be given effect to, to the extent Parliament intended and not beyond the same....Section 529-A of the Companies Act does not *ex facie* contain a provision (on the aspect of priority) amongst the secured creditors and, hence, it would not be proper to read there into things, which Parliament did not comprehend..

The *ratio decidendi* through interpretative method of this case has been discussed at length under the head Golden Rule and any further reference would be repetition.

iii. Non Obstante Clause And 'Subject to the Provisions'

For conceptual clarity some time it is useful to make a comparison between two phrases. In *Brigadier P.S.Gill* [236] the issue was the interpretation of the phrase "Subject to the provisions of section 31" of Armed Forces Tribunal Act 2007. The court made a contrast between "subject to" and "notwithstanding". Using *Chandavarkar S.R. Rao* v. *Ashalata S. Guram,*[237] previous judgement of the Supreme Court as authority this court recollected: [238]

> this Court declared that the words notwithstanding is in contradistinction to the phrase 'subject to' the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject.

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233 *Supra* note 95.
234 *Ibid*.
235 *Ibid*.
236 *Supra* note 107.
237 (1986) 4 SCC 447.
238 *Chandavarkar S.R. Rao* v. *Ashalata S. Guram* (1986) 4 SCC 447, as quoted in *Brigadier P.S.Gill*, *supra* note 107 at para 10.

The use of certain words, therefore, does not necessary lead to a particular meaning because that 'is a matter that would have to be seen in the light of the provisions of each such enactment having regard to the context and the other clauses appearing in the Act.' The court referred a number of enactments to support its finding: [239]

> Even the Terrorists Affected Areas (Special Courts) Act, 1984 providing for an appeal to the Supreme Court under Section 14, starts with a non obstante clause and creates an indefeasible right of appeal against any judgment, sentence or order passed by such Court both on facts and law. Similar was the case with Terrorist and Disruptive Activities (Prevention) Act, 1987 which provided an appeal to the Supreme Court against any judgment, sentence or order not being an interlocutory order of a Designated Court both on facts and law. Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969 also provided an appeal to this Court on one of the grounds specified in Section 100 of the Code of Civil Procedure, 1908. The Advocates Act, 1961, The Customs Act, 1962 and the Central Excise Act, 1944 provide that an appeal shall lie to this Court using words different from those that have been used in Sections 30 and 31 of the Armed Forces Tribunal Act.

Legal Fiction: *Deeming clause*

In the case of *Fiat India Pvt. Ltd.*[240] it was observed:[241]

> To determine the value, the legislature has created a legal fiction to equate the value of the goods to the price which is actually obtained by the assessee, when such goods are sold in the market, or the nearest equivalent thereof. In other words, the legal fiction so created by Section 4 makes excise duty leviable on the actual market value of the goods or the nearest equivalent thereof. In *Bangaru Laxman* v. *State (through CBI)*[242], this Court relying on *J.K. Cotton Spinning and Weaving Mills Ltd.* v. *U.O.I*, [243] observed that a deeming provision creates a legal fiction and something that is in fact not true or in existence, shall be considered to be true or in existence. Therefore, though the price at which the assessee sells the excisable goods to a buyer or the nearest ascertainable price may not reflect the actual value of the goods, for the purpose of valuation of excise duty, by the deeming fiction created in Section 4(1), such selling price or nearest ascertainable price in the market, as the case may be, is considered to be the value of goods.

In *Aneeta Hada* [244] meaning and impact of a deeming clause has been discussed elaborately. The central issue was moving around the criminal liability of a

239 *Brigadier P.S.Gill, supra* note 107 at para 14.
240 *Supra* note 62. The other details are not discussed here to avoid repetition.
241 *Judis.nic.in* para 26: (2012) 9 SCC332 at 350-351.
242 (2012) 1 SCC 500.
243 (1987) Supp. (1) SCC 350.
244 *Supra* note 5.

corporation. The question to be decided was in case of offence of dishonour of cheque committed under Negotiable Instrument Act 1881(section 138 read with section 141) , can the directors and other officers of a company be prosecuted alone ? Whether arraigning that company as an accused is condition precedent for prosecution of directors etc? Section 141 makes person in charge "as well as" company "deem to be liable for the offence under section 138"[245] 'As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own signification.'[246]

Tracing the signification of a deeming fiction the court referred various foreign and Indian authorities. The court quoted Lord Justice James in *Ex Parte Walton*, *In re, Levy*,[247]which is as follows:

> When a statute enacts that something shall be deemed to have been done, which, in fact and truth was not done, *the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.*

The court also found relevant the statement of Lord Asquith, in *East end Dwellings Co. Ltd*. v. *Finsbury Borough Council*,[248] which is as follows:

> If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents, which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

Among the Indian authorities the full bench in *Aneeta Hada,* took notice of three judgements of apex court. In *Hira H. Advani Etc.* v. *State of Maharashtra*, [249] where 'the meaning to be attached to the word deemed must depend upon the context in which it is used' found mentioned by the court.[250] The two Constitution Bench judgements were also referred. In the Constitution Bench in *The Bengal Immunity Co. Ltd*. v. *State of Bihar*,[251] 'the majority have opined that legal fictions are created only for some definite purpose'.[252] It was followed by another Constitution Bench observation of *State of Tamil Nadu* v. *Arooran Sugars Ltd*,[253] where the court 'while dealing with the deeming provision in a statute, ruled that the role of a provision in

245 *Id.* at 2806, para 25.
246 *Id.* at 2806 para 26.
247 1881 (17) Ch D 746, as quoted in *Aneeta Hada, id.* at 2807, para 27.
248 1952 AC 109, quoted in *Aneeta Hada, id.* at 2807, para 28.
249 AIR 1971 SC 44.
250 *Aneeta Hada, supra* note 5 at 2807, para 30.
251 AIR 1955 SC 661.
252 *Supra* note 237 at para 29.
253 AIR 1997 SC 1815.

a statute creating legal fiction is *well settled*' held:[254]

> when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain *as to for what purpose and between which persons such a statutory fiction is to be resorted to and thereafter*, the courts have to *give full effect to such a statutory fiction* and it has to be *carried to its logical conclusion*.

After an elaborate discussion the three judge bench in *Aneeta Hada* laid down the principle to interpret the word 'deemed' in following words: [255]

> From the aforesaid pronouncements, *the principle* that can be culled out is that it is the bounden duty of the court to ascertain *for what purpose the legal fiction has been created*. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term 'deemed' has *to be read in its context and further the fullest logical purpose and import are to be understood. It is because in modern legislation, the term 'deemed' has been used for manifold purposes. The object of the legislature has to be kept in mind.*

The judgment laid down that in cases where an offence under section 138 of the Negotiable Instrument Act 1882 has been committed by a company *ie* where a cheque has been drawn on behalf of a company, arraigning the company as an accused is imperative. Section 138 uses the term 'person', and a company being a juristic person, has certain rights including the right to defend itself. Unless it is arrayed as a party, it cannot exercise this right.

The concept of deeming fiction implicit in section 141 of the Act has been expounded to mean that the liability of the persons in charge of, and responsible for the conduct of the business of the company arises only when the contravention is by the company itself. An exception has been carved out where the maxim *lex cogit non ad impossibilia* is applicable, (winding up of the company would be one such instance) *to prevent* unscrupulous and fraudulent Directors, Officers *etc*. to escape from their liabilities.

Further, a distinction has been made between cases where a company has not been made an accused and where, despite making it an accused, it cannot be proceeded against because of a legal bar or snag. [256]

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254 The Constitution Bench in *State of Tamil Nadu* v. *Arooran Sugars Ltd*. also referred *The Chief Inspector of Mines* v. *Lala Karam Chand Thapar Etc*. AIR 1961 SC 838-39; *J.K. Cotton Spinning and Weaving Mills Ltd*. v. *Union of India*, AIR 1988 SC 191; *M. Venugopal* v. *Divisional Manager, Life Insurance Corporation of India* (1994) 2 SCC 323 ; and *Harish Tandon* v. *Addl. District Magistrate, Allahabad* (1995) 1 SCC 537.

255 *Aneeta Hada, Supra* note 5 at 2807-*8,* para 32.

256 A part of the discussion here on *Anita Hada*, has been contributed by Mr Aarul Verma, who is an ex-student of The Indian Law Institute, New Delhi and submitted his LL.M. dissertation under this surveyor in 2013 on *Trial by Magistrate*: *A Critical Appraisal*. Mr Aarul Verma is presently in judicial services in Delhi.

X CONCLUSION AND SUGGESTIONS

The task of statutory interpretation has been a matter of considerable judicial debate in almost all over English speaking world. Present survey shows that the Supreme Court of India in 2012 has reviewed a number of its past judicial decisions and authorities on the point of interpretation. But the court had not (and indeed could not) stick to any particular cannon of interpretation. In certain judgements more than one rule of interpretation had been beneficially applied to arrive at the proper meaning. In this context *Hooghly Mills*[257] has rightly referred the very apt remark of Justice Felix Frankfurter as under:

> The process of construction... is not an exercise in logic or dialetic: The aids of formal reasoning are not irrelevant; they may simply be inadequate. The purpose of construction being the ascertainment of meaning, *every consideration brought to bear for the solution of that problem must be devoted to that end alone*...

Justice Holmes in *Towne* v. *Eisner*[258] thought in the same way by saying:

> a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.

The year under survey reveals the issue of continuing struggle to dig out the implication of 'shall' used in statutes. The effect of 'shall' is mandatory or directory is an evergreen area for hot debate. The judiciary continues to reel under the controversy relating to 'liberal' or 'strict', 'mandatory' or 'directory'. The court has emphasised that while interpreting the statutes '*awareness of the social perspective'* and Directive Principles embodied in constitution of India should be used as the guiding factor.

The 2012 survey reflects the trend that the court is relying on purposive rule as and when required. This approach in effect enlarges the scope of power of judiciary to exercise its discretion. *Hooghly Mills, Delhi Airtech, Namit Sharma, Ritesh Sinha* and *Dr Swamy* are quite evident in this respect. However, three of these decisions have to face rough weather. This trend might gather further strength in future as it seems more logical in view of the changing needs of modern socio economic developments and to take pace with technological advancement. However, it should not be counted a step towards minimising the importance of literal interpretation which still rules the roost. *Rohitash, Ritesh* and *Namit Sharma* are quite a good example for establishing that literal rule retains its status as first and primary step towards interpretation of statutory provisions. The emphasis of the Supreme court on 'context', 'object and reasons of enactment', and remarks about the 'holistic approach', and reading the 'enactments as a whole' were all steps towards adopting purposivistic interpretation. The 'purposive' and policy oriented' approaches are

257 *Supra* note 1. 47 *Columbia Law Review* 527 (1947), as quoted in *Hooghly Mills,* at 430, para 34.

actually concretisation and refinement of golden and mischief rule. *Esskay Pharmaceuticals* is the best example in this context. It appears that in future so called cannons of interpretation would suffice to be classified into two categories *ie* 'literal' and 'purposive'.

In various countries there are separate statutes on interpretation. This brings clarity and certainty to a considerable extent. Various enactments like Interpretation Act 1901 of Australia, The Interpretation Act 1978 of the United Kingdom, Interpretation Act 1985 of Canada,[259] Interpretation Act 1987 of New South Wales,[260] Interpretation Act 2005 for Republic of Ireland,[261] are some of the examples. Though India has a General Clauses Act 1897 and various statutes do contain definition (or interpretation) part in themselves, it is desirable that a distinct comprehensive enactment on interpretation be considered. This task can be given to the Law Commission of India or the commission may take notice of this itself. In the survey we have seen that a few division benches have conflicting opinions on the meaning and construction of words, phrases *etc*. True an enactment could not address all the difficulties in interpretation of statutes but would certainly reduce the element of uncertainty, divergence of opinion and judicial discretion. The conflict on issues of interpretation should be a focal point in the scope of National Judicial Academy *etc*. where members of higher judiciary are being trained.

258 245 US 418.

259 *Available at:* http://laws-lois.justice.gc.ca/eng/acts/I-21/page-1.html#h-1 last visited on Aug. 27, 2013.

260 *Available at:* http://www.austlii.edu.au/au/legis/nsw/consol_act/ia1987191/ last visited on Aug. 27, 2013.

261 *Available at:* www.irishstatutebook.ie/.../2005/en. act last visited on Aug. 27, 2013.