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INTERPRETATION OF STATUTES

Anurag Deep[*]

I INTRODUCTION

RULES OF interpretation provide strong base for the super structure of judicial reasoning. Reasoned judgements very often need the logical support of certain well settled principles generally applied by judges to arrive at convincing decisions. The survey of the Supreme Court judgements during the year 2013 proved this fact. The presumption of constitutionality of statute is elaborately analysed, discussed and applied in various decisions. Resort to literary and purposive interpretation has also helped the court at appropriate occasions. Internal aids of preamble, titles, object clause, proviso *etc*., are also beneficially utilized. External aids for example maxim, books, reports, *etc*., are also found useful. Out of various decisions which were discussed in last survey[1] two were referred for higher bench as the judges of division bench had difference of opinion. It is a natural curiosity as to the final outcome of these two judgements.[2] The Supreme Court of India in the search of 'legislative intent' had discussed almost all settled "rules of thumb". Due to presence of huge number of cases the present survey has avoided surveying high court judgments and confined only to some important decisions of the Supreme Court.[3]

In view of the legislative explosion and a responsive judiciary in India, challenges regarding interpretation need no special explanation. A very recent

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1 Anurag Deep, "Interpretation of Statutes" XL VIII *ASIL* 551-601 (2012).

2 *M/S Delhi Airtech Services Private Ltd* v *State of U.P.* AIR 2012 SC 573 and *Ritesh Sinha* v. *The State of Uttar Pradesh* AIR 2013 SC 1132: (2013) 2 SCC 357. Both could not reach finality in 2013.

3 Various software and search engine show almost more than two hundred cases where the Supreme Court might have used the word interpretation in the year 2013.

work correctly reiterates that "one point should be uncontroversial: interpretation is relative to the document being interpreted."[4] Divergent interpretation of the court, therefore, is some time natural. The Supreme court, in the case of *State of Gujarat* v. *Hon'Ble Mr. Justice R.A. Mehta (Retd)*[5] however, started with reiterating the warning which it gave fifty years back in a seven judges bench judgement. It extracted from *The Keshav Mills Co. Ltd., Petlad* v. *The Commissioner of Income-tax, Bombay North, Ahmedabad*,[6] where this court held:[7]

> When this Court decides questions of law, its decisions are, under Art. 141, binding on all Courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and *maintain an element of certainty and continuity in the interpretation of law* in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. [Emphasis added]

It has been rightly said that 'words are not passive agents meaning the same thing and carrying the same value at all times and in all contexts.' [8] Though words are relative in nature, it is difficult but desirable that certainty in law is not disturbed and basic principles of interpretation are followed.

II BASIC PRINCIPLES

To begin with it would be appropriate to discuss certain basic principles hereunder in separate headings.

Presumptions

Constitutionality of a statute

There are various interpretative tools for the determination of legal validity of a provision. They are presumption of constitutionality, rule of severability,

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4 Richard A Posner, *Reflections on Judging*, 232 (Harvard University Press, 2013).

5 (2013) 3 SCC 1; AIR 2013 SC 693. Division bench judgement is delivered by Balbir Singh Chauhan J. The other member of the bench was Fakkir Mohamed Ibrahim Kalifulla , *hereinafter* referred as *Gujarat Lokayukta case.* In this case paragraphs cited are from manupatra.

6 AIR 1965 SC 1636, it was a seven judges bench opinion.

7 *Ibid.* Also see, *Gujarat Lokayukta case*, para 6.

8 Friedrich Bodmer, *The Loom of Language*, (1944) as quoted in *Regional Provident Fund Commissioner* v. *Hooghly Mills Co. Ltd* 2012 (1) SCALE 422, *id.* at 430. Also in Constitution bench judgement in *Supreme Court 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).

reading down *etc*., *State of Maharashtra* v. *Indian Hotel & Retaurants Assn*,[9] *Namit Sharma second*,[10] *Lalita Kumari* v. *Govt. of U.P*,[11] *Suresh Kumar Kaushal* v. *Naz Foundation*,[12] *Manohar Lal Sharma* v. *The Principal Secretary*[13] is some illustrations. *Kaushal* is intellectually very rich in considering all these means of constitutionality. Tracing the importance of principle of constitutionality the court extracted six points of Constitutional bench judgement in *Ram Krishna Dalmia* v. *Shri Justice S.R. Tendolkar*[14] in the following words:[15]

> .. … [T]hat 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;
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> (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;
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> (d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
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> (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

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9 AIR 2013 SC 2582; 2013 (9) SCALE 47, delivered by Surinder Singh Nijjar J and concurring separate opinion by CJI Altamas Kabir, *hereinafter* referred as *Bombay Bar Dancer case*. The paragraph of this case cited in this work is from PDF of the judgement available at *judis.nic.in*.

10 *Union of India* v. *Namit Sharma*, AIR 2014 SC 122; 2013(11) SCALE 85, *hereinafter* referred as *Namit Sharma second.* It was a review petition decided by A.K. Patnaik (who delivered the unanimous verdict) and Arjan Kumar Sikri JJ. Previous case *Union of India* v *Namit Sharma* (2013) 1 SCC 745 (*hereinafter* referred as *Namit Sharma First*) was decided by the division bench of A.K. Patnaik J and Swatanter Kumar J unanimously. Patnaik J was present in both *Namit Sharma first* and *second*. First was over ruled by second. This is a peculiar case in last various years where on the same issue between the same party, the same judge has two different opposite view. (In this case the paragraph are cited from manupatra).

11 AIR 2014 SC 187; 2013 (13) SCALE 559. For details see *infra*. In a very brief para the read down argument has been raised and rejected for interpretation of s.154 Cr PC.

12 (2014) 1SCC 1. G.S. Singhvi J delivered the unanimous verdict and Sudhansu Jyoti Mukhopadhaya J was member of the bench, *hereinafter* referred as *Kaushal*. Paras referred are from manupatra.

13 (2014) 2 SCC 532. The case has been unanimously decided by R.M. Lodha and Kurian Joseph JJ. Madan B. Lokur J has different reasoning but concurrent opinion, *hereinafter* referred as *Manohar Lal Sharma*. Paras referred are from Indlaw.

14 AIR 1958 SC 538, as cited in *Kaushal* para 26.

15 *Id.*, para 27.

> (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.

On the question of whether principle of constitutionality is applicable to a law which existed prior to the constitution *Kaushal* discussed article 13(1) and article 372 of the constitution of India. The court took support from *Ram Krishna Dalmia*,[16] *Keshavan Madhava Menon* v. *The State of Bombay*,[17] *Anuj Garg* v. *Hotel Association of India*,[18] *John Vallamattom* v. *Union of India* [19] and held:[20]

> Every legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality. This is founded on the premise that the legislature, being a representative body of the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution. *There is nothing to suggest that this principle would not apply to pre-Constitutional laws which have been adopted by the Parliament and used with or without amendmen*t. If no amendment is made to a particular law it may represent a decision that the Legislature has taken to leave the law as it is and *this decision is no different from a decision to amend and change the law or enact a new law*. In light of this, *both pre and post Constitutional laws* are manifestations of the will of the people of India through the Parliament and are *presumed to be constitutional*. [Emphasis Added]

Self restraint, therefore, must be exercised and the analysis must be guided by the implications of presumption of constitutionality.[21] The court finally concluded that:[22]

> There is a presumption of constitutionality in favour of all laws, including pre-Constitutional laws as the Parliament, in its

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16 *Supra* note 14 at para 18.

17 1951 CriLJ 680.

18 (2008) 3 SCC 1.

19 AIR 2003 SC 2902.

20 *Supra* note 12 at para 28.

21 *Id*. at para 32.

22 *Id.,* para 31.

> capacity as the representative of the people, is deemed to act for the benefit of the people in light of their needs and the constraints of the Constitution.

According to Kaushal[23] doctrine of severability and the practice of reading down are the other two important steps of interpretation. Kaushal can be used as one of the most comprehensive modern authority on this point.[24]

Doctrine of severability

The court in Kaushal referred a passage from R.M.D. Chamarbaugwalla v. *The Union of India* (UOI)[25] where a Constitution Bench explained this doctrine as follows:[26]

> The doctrine of severability rests, as will presently be shown, on a presumed intention of the legislature that if a part of a statute turns out to be void that should not affect the validity of the rest of it, and that that intention is to be ascertained from the terms of the statute. *It is the true nature of the subject-matter of the legislation that is the determining factor*, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it.[27]

A statute could be unconstitutional because of two reasons one, the subject-matter being outside the competence of the legislature and two, provisions of statute contravening constitutional prohibitions like part III, or Basic Structure Theory. This is not material for what reason invalidity exists. When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid.[28]

Basis of severability

R.M.D. Chamarbaugwalla summarised seven points from American case law which was quoted with approval by Supreme Court in *Kauhal* as follows:[29]

> i. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to

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23 *Supra* note 12 at para 29.

24 Criticism of *Kaushal* is on final finding and not on this aspect.

25 AIR 1957 SC 628. In this case competitions of a gambling character were in question, whether definition of 'prize competition' is wide enough to include also competitions involving skill to a substantial degree.

26 *Id.*, para *25.*

27 *Supra* note 23.

28 AIR 1957 SC 628, para 25.

29 *Supra* note 23.

be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. [30]

ii. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable.[31]

iii. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. [32]

iv. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

v. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections;[33]; it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

vi. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation.[34]

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30 *Corpus Juris Secundum*, Vol. 82, at 156; Sutherland on *Statutory Construction*, Vol. 2, at 176-177.

31 *Cooley's Constitutional Limitations*, Vol. 1 at 360-361; Crawford on *Statutory Construction*, at 217-218.

32 Crawford at 218-219.

33 *Cooley Vol. 1*, at 361-362.

34 Sutherland *on Statutory Construction*, Vol. 2, at 194.

> vii. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it.[35]

With the help of various authorities as discussed above the court made following observation for the exercise or application of severability as interpretative means:[36]

> The doctrine of severability seeks to ensure that only that portion of the law which is unconstitutional is so declared and the remainder is saved. This doctrine should be applied keeping in mind the scheme and purpose of the law and the intention of the Legislature and should be avoided where the two portions are inextricably mixed with one another.

In *Bombay Bar Dancer* case the argument to apply this doctrine has been rejected which lead to declare section 33A and 33B of the Bombay Police Act, 1951 as unconstitutional. The court held as follows:[37]

> We are also unable to accept the submission of Mr. Subramanium that the provisions contained in *Section 33A can be declared constitutional by applying the doctrine of severability*. Even if Section 33B is declared unconstitutional, it would still retain the provision contained in Section 33A which prohibits any kind of dance by any person in the establishments covered under Section 33A. [Emphasis added]

In *Kaushal* the severability rule was rejected and section 377 IPC was held constitutional while in *Bombay Bar Dancer* case it was rejected to declare provisions under question as unconstitutional.

In this context it is pertinent to note that Supreme Court being guardian of the constitution has to act in two different ways. It has to be active, take interest in protection of individual liberty. For example, it should declare any executive action unconstitutional at the earliest if it violates fundamental right. But in some cases it has to be reluctant and slow. For example if any provision of an enactment is in question. *Kaushal* puts it this way:[38]

> Another significant canon of determination of constitutionality is that the Courts would be reluctant to declare a law invalid or *ultra vires* on account of unconstitutionality. The Courts would *accept an interpretation, which would be in favour of*

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35 *Id.*, Vol. 2, at 177-178.

36 *Supra* note 12, para 31.

37 *Supra* note 9 at para 122.

38 *Supra* note 12, para 20.

> *constitutionality rather than the one which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts* taken by the Courts. [Emphasis added]

Reading down and reading into

Reading down is one of the tools used in the interpretative process to save the provision from being turned down as violative of fundamental rights *etc*. This tool has been widely discussed in *Kaushal*. A passing reference may be found in *Namit Sharma Second*, *Bombay Bar Dancer* case and *Manohar Lal Sharma.* In first three cases the court rejected the application of this tool while in last *Manohar Lal Sharma*; it seems the court has accepted the argument of 'read down.' The court in *Kaushal* has thoroughly discussed the rule of reading down and its limitations in following words:[39]

> The Courts would preferably put into service the principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. These are the principles which clearly emerge from the consistent view taken by this Court in its various pronouncements including the recent judgment in *Namit Sharma*.

Kaushal takes support from *Namit Sharma First* which has been overruled by *Namit Sharma Second* in a review petition. This overruling does not dilute the logic of reading down because *Kaushal* relied upon constitution bench judgement of *D.S. Nakara* v. *Union of India (UOI)*[40] where it observed:[41]

> If from the impugned memoranda the event of being in service and retiring subsequent to specified date is severed, all pensioners would be governed by the liberalised pension scheme. …It does therefore appear that the reading down of impugned memoranda by severing the objectionable portion would not render the liberalised pension scheme vague, unenforceable or unworkable.

The technique of reading down was applied in *Namit Sharma first* which was decided last year. It invited severe criticism from all quarters. Sections 12(5) and 15(5) of the RTI Act, 2005 does not prescribe any basic qualification for commissioners under RTI. *Namit Sharma first* conceived it as missing words and held that such persons must have a basic degree in the respective field as otherwise sections 12(5) and 15(5) of the Act are bound to offend the doctrine of equality.

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39 *Ibid.*

40 (1983) 1 SCC 305. A Constitution bench of this court elucidated upon the practice of reading down statutes as an application of the doctrine of severability while answering in affirmative the question whether differential treatment to pensioners related to the date of retirement qua the revised formula for computation of pension attracts Article 14 of the Constitution.

41 *Id.* at para 66.

Therefore the court incorporated the doctrine of "reading into" to avoid turning down the provisions for the violation of article 14.[42]

Responding to the above argument *Namit Sharma second* says that parliament never missed anything because they were clear in mind that the information commission is going to be an administrative body. It observed:[43]

> This "reading into" the provisions of Sections 12(5) and 15(5) of the Act, words which Parliament has not intended is contrary to the principles of statutory interpretation recognised by this Court.

Another pertinent question is whether the interpretative seizure of severability 'augment the class' or 'severance always cuts down the scope, never enlarges it'. *Kaushal* also discusses this question with the help of *D.S. Nakara*, where the Constitution bench observed: [44]

> …[W]e are not sure whether there is any principle which inhibits the Court from striking down an unconstitutional part of a legislative action which may have the tendency to enlarge the width and coverage of the measure. Whenever classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the resultant effect may be of enlarging the class. In such a situation, the Court can strike down the words of limitation in an enactment. That is what is called reading down the measure. We know of no principle that 'severance' limits the scope of legislation and can never enlarge it.

Kaushal also deliberates on the burden of proof, the matter of judicial notice and belief in wisdom of state regarding rationale of discrimination. For these issues the court extracted from *Commissioner of Sales Tax, Madhya Pradesh, Indore* v. *Radhakrishan*[45] in the following words:[46]

> …the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles. *For sustaining the presumption of constitutionality the Court may*

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42 *Namit Sharma* first para, 106.2.

43 *Namit Sharma* Second, para 26. The court referred three judge bench judgement of *Union of India* v. *Deoki Nandan Aggarwal* 1992 Supp. (1) SCC 323 where it was held that the court could not correct or make up for any deficiencies or omissions in the language of the statute. Courts cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate.

44 *D.S. Nakara*, para 68.

45 (1979) 2 SCC 249.

46 *Ibid.*

> *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 *it must always be presumed that the Legislature understands and correctly appreciates the need of its own people* and that discrimination, if any, is based on adequate grounds. It is well settled that *courts will be justified in giving a liberal interpretation* to the section in order to avoid constitutional invalidity. These principles have given rise to rule of reading down the section if it becomes necessary to uphold the validity of the sections.

In the case of *Lalita Kumari* it was argued that in the light of article 21, provisions of section 154 of the Cr PC must be read down to mean that before registering an FIR, the police officer must be satisfied that there is a *prima facie* case for investigation. The constitution bench, however, declined to oblige this argument.[47]

In the case of *Manohar Lal Sharma*[48] the senior counsel for CBI has argued that section 6A [of Delhi Special Police Establishment Act, 1946] must be read down to mean that prior approval is not necessary in cases where investigation is monitored by the Constitutional court.[49] Though the court did not directly address this argument of 'read down' but the three judges bench held that the prior approval of investigation required in section 6A is for the cases monitored by state. As the case is monitored by constitutional courts like Supreme Court, this requirement is not necessary. In other words the court allowed this argument of 'read down.'[50]

Limits of reading down

Kaushal extracted a passage from *Minerva Mills Ltd.* v. *Union of India (UOI)*[51] where the Court identified the limitations upon the practice of reading down:[52]

> … The device of reading down is not to be resorted to in order to save the susceptibilities of the law makers, nor indeed to imagine a law of one's liking to have been passed. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment.

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47 *Lalita Kumari*,para 19.

48 (2014) 2 SCC 532.

49 *Manohar Lal Sharma,* at para 27.

50 *Id.* at para 65 and para 105.

51 (1980) 3 SCC 625.

52 *Id.* at para 69. In *Minerva Mills* the UOI argued that 'Article 31C should be read down so as to save it from the challenge of unconstitutionality.' It suggested that 'it would be legitimate to read into that Article the intendment that only such laws would be immunized from the challenge under articles 14 and 19 as do not damage or destroy the basic structure of the Constitution.' The court refused to apply the rule of reading down.

The idea of reading down cannot be advanced if the provision empowers nothing but arbitrariness. *Kaushal* illustrated it from *Delhi Transport Corporation* v. *D.T.C. Mazdoor Congress*[53] where in his concurring opinion, Ray J observed:[54]

> This, however, does not under any circumstances mean that *where the plain and literal meaning that follows from a bare reading of the provisions of the Act, Rule or Regulation that it confers arbitrary, uncancalised, unbridled, unrestricted power* to terminate the services of a permanent employee without recording any reasons for the same and without adhering to the principles of natural justice and equality before the law as envisaged in Article 14 of the Constitution, *cannot be read down to save the said provision from constitutional invalidity* by bringing or adding words in the said legislation such as saying that it implies that reasons for the order of termination have to be recorded. In interpreting the provisions of an Act, it is not permissible where the plain language of the provision gives a clear and unambiguous meaning can be interpreted by reading down and presuming certain expressions in order to save it from constitutional invalidity.

The court in *Kaushal* finally concluded that:[55]

> The court can resort to reading down a law in order to save it from being rendered unconstitutional. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable.

In the *Bombay Bar Dancer* case the court reiterated that rule of reading down can be applied "provided it does not clearly and flagrantly violate its constitutional limits". It, however, declined to do so in following words:

> It is not possible to read down the expression any kind or type of dance by any person to mean dances which are obscene and derogatory to the dignity of women. Such reading down cannot be permitted so long as any kind of dance is permitted in establishments covered under Section 33 B[of Bombay Police Act 1952].

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53 1991 Supp (1) SCC 600.

54 In *Delhi Transport Corporation* v. *D.T.C. Mazdoor Congress* 1991 Supp (1) SCC 600 Ray J also took note of Seervai *Constitutional Law of India* and Coin Howard, *Australian Federal Constitutional Law*.

55 *Supra* note 12, para 31.

Bombay Bar Dancer case,[56] as submitted earlier the presumption of constitutionality[57] and reading down[58] has been argued by the State counsel. On the controversial question of burden of proof the State argued as follows:[59]

> On the basis of the above, it was submitted that the burden of proof is upon the Respondents herein to prove that the enactment/ amendment is unconstitutional. *Once the respondents prima facie convince the Court that the enactment is unconstitutional then the burden shifts upon the State to satisfy that the restrictions imposed on the fundamental rights satisfy the test of reasonableness.* The High Court, according to the appellants, failed to apply the aforesaid tests. [Emphasis added]

Exceptions of presumption of constitutionality

The general rule is that "…the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles." The exception to presumption of constitutionality is a grey area because of lack of any legislative direction and divergent opinion of Supreme Court of India. *Kaushal* judgement has been severely criticized for not accepting the argument of exception. However *Bombay Bar Dancer* case throws some light on it in following words:[60]

> The Preamble of the Constitution of India as also Articles 14 to 21, as rightly observed in the Constitutional Bench Judgment of this Court in *I.R. Coelho*[61] form the heart and soul of the Constitution. Taking away of these rights of equality by any legislation *would require clear proof of the justification for such abridgment. Once the respondents had given prima facie proof of the arbitrary classification of the establishments under Sections 33A and 33B,*[of Bombay Police Act, 1951] *it was duty of the State to justify the reasonableness of the classification.* [Emphasis added]

For this conclusion the division bench further relied on *M/s. Laxmi Khandsari*,[62] where this Court observed as follow:[63]

> We, therefore, fully agree with the contention advanced by the petitioners that where there *is a clear violation of Article*

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56 *Supra* note 9.

57 *Bombay Bar Dancer* case, *Id.* at para 65-69.

58 *Id.* at para 70.

59 *Id.* at para 67.

60 *Id.* at para 100.

61 *I.R. Coelho (Dead) by LRs.* v. *State of T.N.* (2007) 2 SCC 1.

62 *M/s. Laxmi Khandsari* v. *State of U.P.* (1981) 2 SCC 600.

63 *Id.* at para 14.

> *19(1)(g), the State has to justify by acceptable evidence, inevitable consequences or sufficient materials that the restriction, whether partial or complete, is in public interest and contains the quality of reasonableness.* This proposition has not been disputed by the counsel for the respondents, who have, however, submitted that from the circumstances and materials produced by them the onus of proving that the restrictions are in public interest and are reasonable has been amply discharged by them. [Emphasis added]

The court in *Bombay Bar Dancer*[64]case finally concluded that doctrine of presumption of constitutionality has been rebutted by *prima facie* proving that fundamental rights are violated and the state "herein have failed to satisfy the aforesaid test laid down by this court." [65] Establishing the rule of strict scrutiny which negates presumption of constitutionality the court observed:[66]

> ….. [T]he State has failed to establish that the restriction is reasonable or that it is in the interest of general public. The High Court rightly scrutinized the impugned legislation in the light of observations of this Court made in *Narendra Kumar*,[67] wherein it was held that *greater the restriction, the more the need for scrutiny*. The High Court noticed that in the guise of regulation, the legislation has imposed a total ban on dancing in the establishments covered under Section 33A [of Bombay Police Act, 1951]. The High Court has also concluded that the legislation has failed to satisfy the doctrine of direct and inevitable effect.[68]

Other presumptions

Bombay Bar Dancer[69]case can also be highlighted for rejection of an irrational presumption. The court observed in following words:[70]

> The so called distinction is based purely on the basis of the class of the performer and the so called superior class of audience. *Our judicial conscience would not permit us to presume that the class to which an individual or the audience belongs brings with him as a necessary concomitant a particular*

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64 2013 (9) SCALE 47.

65 *Bombay Bar Dancer* case, para 101.

66 *Id.* at para 110.

67 *Narendra Kumar* v. *Union of India*, (1960) 2 SCR 375.

68 The court admitted the argument of Dr Rajiv Dhavan at para 79 and referred *Maneka Gandhi's* case (1978) 1 SCC 248.

69 (2013) 8 SCC 519.

70 *Id.* at para 102.

> *kind of morality or decency. We are unable to accept the presumption which runs through Sections 33A and 33B* [Bombay Police Act, 1951] *that the enjoyment of same kind* of entertainment by the upper classes leads only to mere enjoyment and in the case of poor classes; it would lead to immorality, decadence and depravity. [Emphasis added]
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> On presumption it further added:[71]
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> Morality and depravity cannot be pigeon-holed by degrees depending upon the classes of the audience. *The aforesaid presumption is also perplexing on the ground that in the banned establishments even a non-obscene dance would be treated as vulgar. On the other hand, it would be presumed that in the exempted establishments any dance is non-obscene. The underlying presumption at once puts the prohibited establishments in a precarious position,* in comparison to the exempted class for the grant of a licence to hold a dance performance. Yet at the same time, both kinds of establishments are to be granted licenses and regulated by the same restrictions, regulations and standing provisions. [Emphasis added]

In the opinion of the court the "presumption is elitist, which cannot be countenanced under the egalitarian philosophy of our Constitution."[72] In the same flow the court observed:[73]

> ..... the classification between the exempted establishments and prohibited establishments on the basis the legislation is based on an *unacceptable presumption that the so called elite i.e. rich and the famous would have higher standards of decency*, morality or strength of character than their counter parts who have to content themselves with lesser facilities of inferior quality in the dance bars. *Such a presumption is abhorrent to the resolve in the Preamble of the Constitution to secure the citizens of India.* Equality of status and opportunity and dignity of the individual. The State *Government presumed that the performance of an identical dance item* in the establishments having facilities less than 3 stars would be derogative to the dignity of women and would be likely to deprave, corrupt or injure public morality or morals; but would not be so in the exempted establishments. [Emphasis Added]

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71 *Ibid.*

72 *Id.* at para 103.

73 *Id.* at para 107.

The court in very strong words again rejected the presumption as under:

> …the activities which are obscene or which are likely to deprave and corrupt those whose minds are open to such immoral influences, cannot be distinguished on the basis as to whether they are performing in 5 star hotels or in dance bars. The judicial conscience of this Court would not give credence to a notion that high morals and decent behaviour is the exclusive domain of the upper classes; whereas vulgarity and depravity is limited to the lower classes. *Any classification made on the basis of such invidious presumption is liable to be struck down being wholly unconstitutional and particularly contrary to Article 14* of the Constitution of India. [Emphasis added]

Badshah v. *Sou. Urmila Badshah Godse*[74] discusses the scope and limitation of the phrase "wife". In this case a lady married the petitioner as per Hindu Rites and customs. After three month of marriage the lady came to know that the petitioner was already married which he did not disclose to the lady while marrying. The lady claimed maintenance for her and her daughter. The issue was whether a lady who is not "legally wedded wife" may claim for maintenance under section 125, Cr PC 1973 or not?

The court followed *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit*[75] where it was held that:[76]

> If the claimant in proceedings under Section 125 of the Code succeeds in showing that she and the Respondent have lived together as husband and wife, *the court can presume that they are legally wedded spouse*, and in such a situation, the party who denies the marital status *can rebut the presumption'*.[77] [Emphasis Added]

The court considered a recent decision as under:[78]

> No doubt, in *Chanmuniya* v. *Virendra Kumar Singh Kushwaha,*[79] the Division Bench of this Court took the view that the matter needs to be considered with respect to Section 125, Code of Criminal Procedure, by larger bench and in para 41, three questions are formulated for determination by a larger bench…

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74 AIR 2014 SC 869, 2014 CriLJ 1076, *hereinafter* referred as *Badshah* v *Badshah*. It was unanimously decided on 18.10.2013, by Ranjana Prakash Desai and Arjan Kumar Sikri, JJ. and delivered by Ranjana Prakash Desai. The paragraph of this case cited in this work is from PDF of judgement available at *judis.nic.in*.

75 MANU/SC/0673/1999 : (1999) 7 SCC 675. *Badshah* v *Badshah,* para 10.

76 *Supra* note 74, para 10.

77 *Ibid.*

78 *Id.* at para 13.

79 (2011) 1 SCC 141.

Out of the three questions, the first one is relevant for our consideration which is as follows:[80]

> Whether the living together of a man and woman as husband and wife for a considerable period of time *would raise the presumption of a valid marriage* between them and whether such a presumption would entitle the woman to maintenance under Section 125, Code of Criminal Procedure?

Objective of section 125 is to provide financial relief to wife. A couple starts living together in a traditional society; the community presumes that they must be married. This is a social presumption. This social presumption becomes conclusive for the purpose of law if the couple stays together for various years. Any other presumption will always give benefit to male and will always be detrimental to the interest of female. The court therefore held:[81]

> We are of the opinion that *there is a non-rebuttable presumption* that the Legislature while making a provision like Section 125 Code of Criminal Procedure, to fulfill its Constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances.

Similar question of presumption of marriage was raised in the case of *Indra Sarma* v. *V.K.V Sarma.*[82] The issue was if a female lives with a male knowing the fact that the male is married, and is father of children and all family members of male are opposed of her living together with male, can she argue this "relationship in the nature of marriage" because she lived in for a long period of time. Will the 'law presumes that they are living together in consequence of a valid marriage'[83]

The court, taking clues from *Gokal Chand* v. *Parvin Kumari* [84]held that:[85]

> …the continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the

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80 Other two questions were—Whether strict proof of marriage is essential for a claim of maintenance under s.125 Cr PC having regard to the provisions of the Domestic Violence Act, 2005? Whether a marriage performed according to the customary rites and ceremonies, without strictly fulfilling the requisites of s. 7(1) of the Hindu Marriage Act, 1955, or any other personal law would entitle the woman to maintenance under s. 125 Cr PC.?

81 *Badshah* v *Badshah,* para 22.

82 AIR 2014 SC 309. The judgement is delivered by K.S. Panicker Radhakrishnan J. The other member of the bench was Pinaki Chandra Ghose J, *hereinafter* referred as *Indra Sharma.*

83 *Indra Sharma,* para 56. In the case of *Andrahennedige Dinohamy* v. *Wiketunge Liyanapatabendage Balshamy,* AIR 1927 PC 185 the Privy Council laid down a generic proposition, that where a man and a woman are proved to have lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage.

84 AIR 1952 SC 231.

85 *Supra* note 82 at para 56.

> presumption which may be drawn from long cohabition is a rebuttable one and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.

In this case the appellant lady knew the male is married. Therefore the court held that:[86]

> ….[I]n the instant case, *there is no necessity to rebut the presumption*, since the Appellant was aware that the Respondent was a married person even before the commencement of their relationship, hence the status of the Appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage.

In these type of cases the legislature should step in. It is correct that the female partners are involved in those activities which the conservative societies find immoral. This does not deprive of the female partner their claim for maintenance. The incidents of living in, bigamous marriage are increasing because of departure in social norms. Law should endeavour to check the departure but should not leave the female on the mercy of males. Not providing maintenance will invite further complications to these female. Such maintenance should also be made mandatory and law should be changed accordingly.

Mandatory v. *Directory*

Whether a provision is non optional or optional is generally decided by the words used in the provision. General understanding is that "shall" makes the provision non optional while "may' makes is optional. This 'complexities of distinction between mandatory and directory provisions have been a perennial topic of intellectual debate.'

Shall and may

Namit Sharma second, observed that due to use of word 'may' in sections 27[87]and 28 of RTI mandatory directions cannot be given by court. The court held as under: [88]

> The use of word "may" in Sections 27 and 28 of the Act make it clear that Parliament has left it to the discretion of the rule making authority to make rules to carry out the provisions of the Act. Hence, no mandamus can be issued to the rule making authority to make the rules either within a specific time or in a particular

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86 *Id* at para 57.

87 RTI, 2005 s. 27- Power to make rules by competent authority- (1) The competent authority may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

88 *Namit Sharma* second, para 28.

> manner. If, however, the rules are made by the rule making authority and the rules are not in accordance with the provisions of the Act, the Court can strike down such rules as ultra vires the Act, but the Court cannot direct the rule making authority to make the rules where the Legislature confers discretion on the rule making authority to make rules. In the judgment under review, therefore, this Court made a patent error in directing the rule making authority to make rules within a period of six months.

This seems a literal meaning and literal use of word 'may'. In various cases the government and parliament misuse the word for small gains. The court here agreed that a judicial member could have been a better option which is 'ought law' not 'is law' that is out of the province of judiciary.

Shall: ordinary meaning

In the case of *Lalita Kumari* v. *Govt. of UP*,[89] the question was how to interpret "shall" used in section 154 of Cr PC 1973. The court rejected the argument that shall should be like "may" and observed that 'if a discretion, option or latitude is allowed to the police in the matter of registration of FIRs, it can have serious consequences on the public order situation and can also adversely affect the rights of the victims including violating their fundamental right to equality.'[90] Examining three things, context, object and consequence of Cr PC 1973 it held as under:[91]

> Therefore, the context in which the word "shall" appears in Section 154(1) of the Code, the object for which it has been used and the consequences that will follow from the infringement of the direction to register FIRs, all these factors clearly show that the word "shall" used in Section 154(1) needs to be given its ordinary meaning of being of "mandatory" character. The

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89 AIR 2014 SC 187, The constitution bench judgement was unanimously delivered by P.Sathasivam CJI Other members were B.S.Chauhan, Ranjana Prakash Desai, Ranjan Gogoi and S.A.Bobde, JJ *hereinafter* referred as *Lalita Kumari*. This case refers three cases with same parties. First two are division bench while third is full bench of three judges. *Lalita Kumari* v. *Government of Uttar Pradesh* (2008) 7 SCC 164; *Lalita Kumari* v. *Government of Uttar Pradesh* (2008) 14 SCC 337. *Lalita Kumari* v. *Government of Uttar Pradesh* (2012) 4 SCC 1. The last culminated into constitution bench direction. On 05.03.14 five judges judgement in *Lalita Kumari* (12.11.13) has been modified by three judges bench and clause (vii) of paragraph 111 has been replaced in following manner: (vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed *fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks time is provided.* The fact of such delay and the causes of it must be reflected in the General Diary entry.

90 *Lalita Kumari*, at para 43.

91 *Id.* at para 44.

> provisions of Section 154(1) of the Code, read in the light of the statutory scheme, do not admit of conferring any discretion on the officer in-charge of the police station for embarking upon a preliminary inquiry prior to the registration of an FIR. It is settled position of law that if the provision is unambiguous and the legislative intent is clear, the court need not call into it any other rules of construction.

Legislative intent, natural meaning and scheme of the statute all lead to one conclusion that "shall" in the section is mandatory in nature. In the words of court:[92]

> In view of the above, the use of the word 'shall' coupled with the Scheme of the Act lead to the conclusion that the legislators intended that if an information relating to commission of a cognizable offence is given, then it would mandatorily be registered by the officer in-charge of the police station. *Reading 'shall' as 'may', as contended by some counsel, would be against the Scheme of the Code. Section 154 of the Code should be strictly construed and the word 'shall' should be given its natural meaning.* The golden rule of interpretation can be given a go-by only in cases where the language of the section is ambiguous and/or leads to an absurdity.
>
> ….[I]t is thus unequivocally clear that *registration of FIR is mandatory* and also that it is to be recorded in the FIR Book…[Emphasis added][93]

Shall: useless when provision is inapplicable

A unique position of "shall" can be found in *Manohar Lal Sharma*[94] where the interpretation of section 6A of the Delhi Special Police Establishment Act, 1946 was in question. Section 6A provides that "Delhi Special Police Establishment *shall not conduct* any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 *except with the previous approval* of the Central Government..." According to ordinary meaning of "shall" the provision is mandatory in nature and therefore it has to be applied indiscriminatory. Whether this ordinary meaning of shall mandating a statutory restriction is applicable in those matters where the Supreme Court is monitoring a case or will it be applicable only if State is monitoring. The court held that if constitutional courts are monitoring a case there is no need of application of section 6A. The court took support from the majority view of constitution bench in *Union Carbide Corporation* v. *Union of India*[95] "that the prohibitions or limitations or

92 *Id.* at para 45.

93 *Id* at para 63.

94 (2014) 2 SCC 532; AIR 2014 SC 666.

95 (1991) 4 SCC 584 at para 83.

provisions contained in ordinary laws, cannot *ipso facto*, act as prohibitions or limitations on the constitutional powers under Article 142"[96] and "in exercise of the powers under Article 142 is to take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly".[97] A concurring opinion with different reasoning has been separately given by Madan B Lokure J in following words:[98]

> ....[S]ection 6A of the Act must be meaningfully and realistically read, only as an injunction to the executive and not as an injunction to a constitutional court monitoring an investigation under Article 32 of the Constitution in an exercise of judicial review and of issuing a continuing mandamus.

In other words "shall" used in section 6A is mandatory if executive (State) is monitoring a case while the provision becomes ineffective if constitutional courts are monitoring the case.

M/S Delhi Airtech Services Private Ltd v *State of U.P.* [99] was a case discussed in 2012 survey where interpretation of "shall" and "may" was also in issue. It has been referred to larger bench (three judges bench)due to conflicting views of division bench and could not be decided in 2013. In this judgement both judges referred to the principle of strict construction to explore the intention of legislature with different reasonings and final outcome.

Liberal v. *Strict*

Words should be given liberal or strict meaning is another area of debate. This year the first important observation could be found in *State of Gujarat* v. *Hon'Ble Mr. Justice R.A. Mehta (Retd)*[100] where the term 'consultation' contained in Section 3 of the Gujarat Lokayukta Act 1986, and primacy of opinion of high court judge regarding appointment of the Lokayukta was in issue. The court stated one of the principles of interpretation by extracting a passage from a British case which is as under:[101]

> Viscount Simon, L.C. in the case of *Nokes* v. *Doncaster Amalgamated Collieries Ltd*,[102] stated as follows:

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96 *Manohar Lal Sharma* , para 50.

97 *Id.* at para 52.

98 *Id.* at para 105.

99 AIR 2012 SC 573 *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.

100 (2013) 3 SCC 1, decided on 02.01.13. Judis.nic.in indate wise search does not show this case.

101 *Id.* at para 66.

102 [1940] 3 All E.R. 549:[1940] A.C. 1014.

> .....if the choice is *between two interpretations, the narrower of which* would fail to achieve the manifest purpose of the legislation we *should avoid a construction which would reduce the legislation to futil*ity, the [court] should rather *accept the bolder construction,* based on the view that Parliament would legislate only for the purpose of bringing about an effective result.[103] [Emphasis added].

The court in *Badshah*[104] denied giving a legalistic interpretation of term 'wife' in section 125 with the help of its decision in *Chanmuniya* v. *Virendra Kumar Singh Kushwaha*[105] which is so stated in the following manner:[106]

> *A broad and expansive interpretation should be given to the term "wife"* to include even those cases where a man and woman have been living together as husband and wife for reasonably long period of time, and strict proof of marriage should not be a pre-condition for maintenance under Section 125 of the Code of Criminal Procedure so as to fulfill the true spirit and essence of the beneficial provision of maintenance under Section 125.

The Rajasthan State Industrial Development and Investment Corporation v. *Diamond and Gem Development Corporation Ltd*,[107]can be treated as fresh authority on interpretation of contractual obligations where certain provisions of Rajasthan Land Revenue (Industrial area Allotment) Rules, 1959 were in dispute. It advocated literal rule of interpretation in following words:[108]

> …Thus, contract being a creature of an agreement between two or more parties, has *to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract* and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. *It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid.* The *terms of the contract have to be construed strictly without altering the nature of the contract,* as it may affect the interest of either of the parties adversely.[109]

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103 *Gujrat Lokayukta* case, para 66.

104 *Supra* note 74.

105 MANU/SC/0807/2010; (2011) 1 SCC 141.

106 *Badshah,* para 12.

107 MANU/SC/0116/2013; (2013) 5 SCC 47; AIR 2013 SC 1241. The court has classified the judgement in various heads. One head is head four (IV. Interpretation of terms of contract), *hereinafter* referred as *Rajasthan State Industrial Development*. Paras cited are from manupatra.

108 *Id*., para 16.

109 *Ibid.* The court found its justification from *United India Insurance Co. Ltd.* v. *Harchand Rai Chandan Lal* AIR 2004 SC 4794; *Polymat India P. Ltd.* v. *National Insurance Co. Ltd.* AIR 2005 SC 286.

Inclusive and exhaustive definition

Inclusive and exhaustive definition has remained a contemporary issue in interpretative discussion which generally helps court understand whether liberal or strict interpretation is required.

In the case of *Indra Sarma*[110] the interpretation of phrase "relationship in the nature of marriage" used in section 2(f) [111] of Protection of Women from Domestic Violence Act, 2005 was under consideration. Should this phrase be liberally construed to cover any relationship between male and female or should it be strictly construed to exclude certain relationship. The court found first guidance from word "means" used in the section. It observed:

> The definition clause mentions only five categories of relationships which exhausts itself since the expression "means", has been used. When a definition clause is defined to *"mean" such and such, the definition is prima facie restrictive and exhaustive.* Section 2(f) has not used the expression "include" so as to make the definition exhaustive. It is in that context we have to examine the meaning of the expression "relationship in the nature of marriage".

The court decided that 'the Appellant was not ignorant of the fact that the Respondent was a married person with wife and two children, hence, was party to an adulterous and bigamous relationship'.

The court expressed its desire to reform law with its helplessness to reform in following words:

> Long standing relationship as a concubine, though not a relationship in the nature of a marriage, of course, may at times, deserves protection because that woman might not be financially independent, but we are afraid that DV Act does not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(f) of the DV Act, *which is restrictive and exhaustive.*

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110 AIR 2014 SC 309.

111 S. 2(f) in The Protection of Women from Domestic Violence Act, 2005 "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a *relationship in the nature of marriage,* adoption or are family members living together as a joint family; tc" (f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family"

In the case of *Balmer Lawrie and Co. Ltd.* v *Partha Sarathi Sen Roy*[112] while dealing with the Article 12 constitution of India, the court discusses this exhaustive and inclusive definition in following words:[113]

> … it is evident that it is rather difficult to provide an exhaustive definition of the term "authorities", which would fall within the ambit of Article 12 of the Constitution.

Narrating its reason for an inclusive definition of article 12 the court further observed:

> This is precisely why, *only an inclusive definition is possible.* It is in order to keep pace with the broad approach adopted with respect to the doctrine of equality enshrined in Articles 14 and 16 of the Constitution, that whenever possible courts have tried to curb the arbitrary exercise of power against individuals by centers of power, *Budh Singh* and therefore, there has been a corresponding expansion of the judicial definition of the term State, as mentioned in Article 12 of the Constitution.

In this case the meaning of 'deep and pervasive control' was under discussion. Should this phrase be given liberal interpretation or strict? This interpretation became relevant because of the question whether Balmer Lawrie and Company Ltd is a State or not within the purview of article 12 of the Constitution of India. Balmer Lawrie is a government company in which around 59% shares are held by the government. The court observed: [114]

> The said issue has been considered by various larger benches, and it has been held that in order to meet the requirements of law with respect to being a State, the concerned company must be under the *deep and pervasive control* of the government.

While quoting from *Zee Telefilms Ltd.* v. *Union of India*[115] the court observed:[116]

> In conclusion, it should be noted that there can be no two views about the fact that the Constitution of this country is a living organism and it is the duty of Courts to *interpret the same to fulfil the needs and aspirations of the people depending on the needs of the time*. [Emphasis added]

Initially article 12 of the constitution of India had 'a limited objective of granting judicial review of actions of such authorities which are created under the

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112 MANU/SC/0171 (2013) 8SCC 345, Decided on 20.02.2013, *hereinafter* referred as *Balmer Lawrie*. Paras cited herein are from manupatra.

113 *Balmer Lawrie*, para 12.

114 *Id.*, para 6.

115 AIR 2005 SC 2677.

116 As cited in *Balmer Lawrie* at para 10.

Statute and which discharge State functions'. This objective, however, has been changed because the policy of government changed. This change in policy can also be traced in judicial interpretation of "other authorities" and "other authorities" include bodies other than statutory bodies.[117] The court continued from *Zee Telefilms Ltd.*:[118]

> However, because of the need of the day this Court in noticing the socio- economic policy of the country thought it fit to expand the definition of the term "other authorities" to include bodies other than statutory bodies. This development of law by *judicial interpretation culminated in the judgment of the 7-Judge* Bench in the case of *Pradeep Kumar Biswas*.[119]

Any further extension of article 12, according to the court, was unwarranted:[120]

> It is to be noted that in the meantime the socio-economic policy of the Government of India has changed in the case *Balco Employees' Union (Regd.)* v. *Union of India*[121]and the State is today distancing itself from commercial activities and concentrating on governance rather than on business. Therefore, the situation prevailing at the time of *Sukhdev Singh* [122] is not in existence at least for the time being, hence, there seems to be *no need to further expand the scope of "other authorities" in Article 12 by judicial interpretation at least for the time being*.

The court also warned that judicial interpretation should not be a used as a tool to remove the line between State enterprise and a non- State enterprise:

> It should also be borne in mind that as noticed above, in a democracy there is a dividing line between a State enterprise and a non- State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so.

Criticising the over enthusiastic approach towards liberal interpretation and not exploring the possibility of applying the other rules of interpretation the court in the case of *Thalappalam Ser. Coop. Bank ltd.* v. *State of Kerala*[123] held as under:[124]

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117 *Rajasthan State Electricity Board Jaipur* v. *Mohan Lal*, AIR 1967 SC 1857; *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi*, AIR 1975 SC 1331para 35 of *Zee Telefilms Ltd.* v. *Union of India.*

118 Zee Telefilms Ltd. Para 35, in *Balmer Lawrie* at para 10.

119 *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*, (2002) 5 SCC 111.

120 *Zee Telefilms Ltd.* v. *Union of India*, Para 35, as quoted in *Balmer Lawrie* at para 10.

121 2002 2 SCC 333.

122 AIR 1975 SC 1331.

123 2013 (12) SCALE 527, *hereinafter* referred as *Thalappalam.* The judgement is delivered by K.S. Panicker and Radhakrishnan JJ. The Para cited herein are from judis.nic.in

124 *Id.*, para 43.

> We are of the view that the High Court has given a complete go-bye to the above-mentioned statutory principles and gone at a tangent by mis-interpreting the meaning and content of Section 2(has given a liberal construction to expression "public authority" under Section 2(h) of the Act, bearing in mind the "transformation of law" and its "ultimate object" i.e. to achieve "transparency and accountability", which according to the court could alone advance the objective of the Act. Further, the High Court has also opined that RTI Act will certainly help as a protection against the mismanagement of the society by the managing committee and the society's liabilities and that vigilant members of the public body by obtaining information through the RTI Act, will be able to detect and prevent mismanagement in time.

Stating reason on why a liberal construction is not warranted the court found that:[125]

> In our view, the categories mentioned in Section 2(h) of the Act exhaust themselves, hence, there is *no question of adopting a liberal construction* to the expression "public authority" to bring in other categories into its fold, which do not satisfy the tests we have laid down. Court cannot, *when language is clear and unambiguous, adopt such a construction which, according to the Court, would only advance the objective of the Act.* We are also aware of the opening part of the definition clause which states "unless the context otherwise requires". No materials have been made available to show that the cooperative societies, with which we are concerned, in the context of the Act, would fall within the definition of Section 2(h) of the Act.[126]

In *Devender Pal Singh Bhullar* v. *State of N.C.T. of Delhi*,[127] the court dealt with the issue of delay in Capital Punishment. It found *Maneka Gandhi* v. *Union of India*[128] relevant through *Bachan Singh* v *State Of Punjab.*[129] In *Bachan Singh* Sarkaria J of the constitution bench referred *Maneka Gandhi* and observed:[130]

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125 *Ibid.*

126 *Thalappalam,* para 43.

127 2013(5) SCALE 575, at para 5.

128 (1978) 1 SCC 248.

129 AIR 1980 SC 898, 1980 CriLJ 636, 1982.

130 *Bachan Singh,* para 136. 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' If this Article is expanded in accordance with the interpretative principle indicated in *Maneka Gandhi*, it will read as follows: No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.In the converse positive form, the expanded Article will read as below:A person may be deprived of his life or

> …Thus expanded and *read for interpretative purposes, Article* 21 *clearly brings out the implication,* that the founding fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. … On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the basic structure of the Constitution.[131]

In the case of *Yakub Abdul Razak Memon* v. *The State of Maharashtra*[132]the conviction and sentence of prisoners involved in Bombay Blast (post ayodhya demolition) was in question. The court observed:[133]

> …[t]he majority view in *Bachan Singh*,[134] gave a wider interpretation to the term special reasons by embracing within its ambit both the circumstances connected with the particular crime and the criminal. Upshot of this interpretation is that the special reasons required for confirming the death sentence under Section 302 or in the context of this case in Section 3(2) (i) of TADA will have to be identified by balancing the aggravating and mitigating or extenuating circumstances.

In *Surinder Singh* the court accepted that 'penal provisions have to be construed strictly.'[135]The court also admitted the fact that *literal and lexical construction* may defeat the purpose.[136]

In *Manohar Lal Sharma*[137] the question was "whether the approval of the Central Government is necessary under Section 6A of the Delhi Special Police Establishment Act, 1946 in a matter where the inquiry/investigation into the crime under the Prevention of Corruption Act, 1988 is being monitored by the Court." it was argued that "requirement of sanction under Section *6A is to be interpreted strictly* and cannot be waived under any circumstances. The court, however, held that "Such an interpretation will be directly contrary to the power (as well as constitutional duty) of the constitutional court to monitor an investigation in larger public interest.[138] It is the duty of this court that anti-corruption laws which

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personal liberty in accordance with fair, just and reasonable procedure established by valid law.

131 Indeed *Bachan Singh* at para 136 starts with following: 136. Article 21 reads as under: [Emphasis Added]

132 (2013) 13 *SCC* 1, the case has been decided by P. Sathasivam, J *hereinafter* referred as *Yakub Abdul Razak Memon*. Paras cited herein are from

133 *Id.* at para 490.

134 AIR 1980 SC 898.

135 *Surinder Singh*, para 17.

136 *Id.*, para 18. Discussed in detail under the head *Penal* v. *Remedial*.

137 (2014) 2 SCC 532.

138 *Supra* note 96, para 26, cited in *judis.nic.in.*

are penal statute are interpreted and worked out in such a fashion that helps in minimizing abuse of public office for private gain.[139]

Penal v. *Remedial Statutes*

Dowry cases

Dowry death cases are one of the species of cruelty against women. In last few years the 'cruelty against women' cases are on the priority radar of all the wings of governance. Interpretations in this respect revolves round the diverse and inconsistent meaning of dowry, relative of husband, wife *etc*. The inconsistency owes its origin to the use of different interpretative rules and tools by apex judiciary. The case under discussion considers the word 'soon before', difference between dowry demand and business demand. The interpretation of 'soon before' has not created much controversy. However, the interpretation of word 'dowry' and its distinction from demand for business has developed some disputes. Certain judgements argue that Indian Penal Code and Dowry Prohibition Act 1961 being penal legislation, has to be strictly interpreted while a few judgements feel that strict interpretation is too lexican to serve the purpose.

In the case of *Vipin Jaiswal* v. *State of AP rep. by Pub. Prosecutor*[140] the interpretation of expression 'dowry' and "in connection with the marriage of the parties to the marriage" was one of the issues.[141]

Is it wide enough to cover any monetary demand for any purpose [in this case demand of Rs. 50,000/- made by the Appellant for purchase of a computer]? Or the demand must be very closely related 'in connection with the marriage'.

The court observed:[142]

> In our view, both the Trial Court and the High Court failed to appreciate that the demand, if at all made by the Appellant on

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139 *Id.* at para 59.

140 AIR 2013 SC 1567; 2013 CriLJ 2095.

141 Dowry Prohibition Act, 1961 S. 2 runs as under here :

Explanation II.-The expression 'valuable security' has the same meaning as in Sec. 30 of the Indian Penal Code (45 of 1860).

Definition of 'dowry'-In this act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly-

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person; at or before or any time after the marriage *in connection with the marriage* of said parties but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

142 *Vipin Jaiswal*, at para 6.

> the deceased for purchasing a computer to start a business six months after the marriage, *was not in connection with the marriage and was not really a 'dowry demand'* within the meaning of Section 2 of the Dowry Prohibition Act, 1961.

The court imported its *ratio* from *Appasaheb* v. *State of Maharashtra,*[143] where the court held:[144]

> In view of the aforesaid definition[145] of the word "dowry" any property or valuable security should be given or agreed to be given either directly or indirectly at or before or any time after the marriage and in connection with the marriage of the said parties. Therefore, the giving or taking of property or valuable security must have some connection with the marriage of the parties and a correlation between the giving or taking of property or valuable security with the marriage of the parties is essential.

On the point of interpretation the court observed in the case of *Appasaheb* v. *State of Maharastra*[146]

> *Being a penal provision it has to be strictly construed*. Dowry is a fairly well known social custom or practice in India. It is *well settled principle of interpretation of Statute that if the Act is passed with reference to a particular trade, business or transaction and words are used which everybody conversant with that trade, business or transaction knows or understands to have a particular meaning in it, then the words are to be construed as having that particular meaning.*[147] [Emphasis Added]

Taking clues from precedent and the rule of strict interpretation the court decided that demand of Rupees 50000/ for computer after six months of marriage is not 'in connection with the marriage' and therefore does not amount to 'dowry'.

Surinder Singh v. *State of Haryana*[148] is on the point of 'soon before' used in section 304B, Indian Penal Code, 1960 and 113B Indian Evidence Act, 1872 where the court observed: [149]

> For the presumptions contemplated under these Sections to spring into action, it is necessary to show that the cruelty or

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143 MANU/SC/7002/2007 .

144 *Id.,* para 9.

145 See *supra* note 141.

146 *Supra* note 143 at para 9.

147 The court also cited *Union of India* v. *Garware Nylons Ltd.* AIR (1996) SC 3509 MANU/SC/0967/1996; and *Chemicals and Fibres of India* v. *Union of India*, AIR (1997) SC 558) MANU/SC/0147/1997.

148 (2014) 4 SCC 129, Ranjana Prakash Desai and Madan B. Lokur, JJ. Unanimous decision of division bench, *hereinafter* referred as *Surinder Singh*. The para cited are at *judis.nic.in*

149 *Id.* at para13.

> harassment was caused soon before the death. The *interpretation of the words 'soon before' is, therefore, important.* The question is how 'soon before'? This would obviously depend on facts and circumstances of each case.
>
> Therefore, 'soon before' is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death.[150]

Applying this test the court found that the complete period of marriage was a period of cruelty for demand of dowry and therefore could be covered under 'soon before':[151]

> The cruelty was spread over the short period covering the date of her marriage till her death displaying a course of conduct. In her case, in our opinion, cruelty caused to her on any day from the date of her marriage i.e. 20/04/1994 till the date of her death i.e. 22/07/1994 could be cruelty caused 'soon before' her death.

Dowry demand *vis a vis* other commercial demands

Should the word 'dowry' be given wide interpretation to incorporate every demand by husband and his relative or should 'dowry' be limited to literal meaning to provide space to the argument of 'demand made for business'?

The issue, therefore, was 'being a penal provision section 2 of the Dowry Prohibition Act, 1961 will have to be construed strictly' or not because in the case of *Vipin Jaiswal*[152] and *Appasaheb* v. *State of Maharashtra*,[153] the court construed it strictly.[154] Admitting this fact the court in *Surinder Singh* observed:[155]

> It is true that penal provisions have to be construed strictly. However, we may mention that in *Murlidhar Meghraj Loya* v. *State of Maharashtra*[156] this Court was dealing with the Prevention of Food Adulteration Act, 1954. Speaking for this Court, *Krishna Iyer, J. held that* It is trite that the social mission of Food Laws should inform the interpretative process so that the legal blow may fall on every adulterator.*Jany narrow and pedantic, literal and lexical construction of food laws is likely*

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150 *Ibid.*

151 *Id.* at para 15.

152 (2013) 3 SCC 684.

153 (2007) 9 SCC 721.

154 *Surinder Singh, p*ara 17.

155 *Id.*, para 18.

156 (1976) 3 SCC 684,

157 *Id*. at para 5.

> *to leave loopholes for the offender to sneak out of the meshes of law* and should be discouraged and *criminal jurisprudence must depart from old canons defeating criminal statutes* calculated to protect the public health and the nation's wealth.[157] Similar view was taken in *Kisan Trimbak Kothula* v. *State of Maharashtra*.[158]

The court also found force from *State of Maharashtra* v. *Natwarlal Damodardas Soni*[159] which dealt with section 135 of the Customs Act and Rule 126-H(2)(d) of the Defence of India Rules, where a narrow construction given by the high court was rejected, because:[160]

> that will emasculate these provisions and render them ineffective as a weapon for combating gold smuggling. It was further held that the provisions have to be specially construed in a manner which will suppress the mischief and advance the object which the legislature had in view.[161]
>
> While we reiterate what this Court has said in *Appasaheb* that a penal statute has to be construed strictly, in light of *Kisan Trimbak* and *Natwarlal Damodardas*, we are of the opinion that penal statute, even if it has to be strictly construed, must be so construed as not to defeat its purport…*The presumption under Section 113B of the Indian Evidence Act, 1872 and the presumption under Section 304B of the IPC have a purpose.* These are beneficent provisions aimed at giving relief to a woman subjected to cruelty

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158 (1977) 1 SCC 300, [1977]2SCR102), AIR1977SC435, decided on 7.11.1976, by P.N. Bhagwati, S. Murtaza Fazal Ali and V.R. Krishna Iyer, JJ. This judgement being a full bench judgement has greater force than previous one.

159 (1980) 4 SCC 669.

160 *Surinder Singh,* para 18.

161 *State of Maharashtra* v. *Natwarlal Damodardas Soni* AIR 1980 SC 593, 1980 CriLJ 429, (The original paragraph runs as under: The High Court has held that these Rules do not apply because the accused respondent had not acquired possession of these gold biscuits by purchase or otherwise within the meaning of these Rules. Such a narrow construction of this expression, in our opinion, will emasculate these provisions and render them ineffective as a weapon for combating gold smuggling. As was pointed out by this Court in *Balakrishna Chhaganlal* v. *State of West Bengal* MANU/SC/0088/1975:1975CriLJ1862;Rule 126P(2)(ii) penalises a person who has in his possession or under his, control any quantity of gold in contravention of any provision of this part, and the court cannot cut back on the width of the language used, bearing in mind the purpose of plenary control the state wanted to impose on gold, and exempt smuggled gold from the expression "any quantity of gold" in, that sub-rule. These provisions have, therefore, to be specially construed in a manner which will suppress the mischief and advance the object which the Legislature had in view. The High Court was, in error in adopting too narrow a construction which tends to stultify the law. The second charge thus had been fully established against the respondent.

> routinely in an Indian household. The meaning to be applied to each word of these provisions has to be in accord with the legislative intent. Even while construing these provisions strictly care will have to be taken to see that their object is not frustrated.

The court in *Surinder singh* case found proofs to convince that the demand of Rs 60000/ was in continuation of demand made in marriage while in *Vipin Jaiswal* the court did not found convincing evidence that the demand of Rs 50000/ was not in continuity of the previous dowry transactions.

Extradition: principle of speciality

Deciding a case of extradition the Supreme Court in *Abu Salem Abdul Qayyum Ansari* v. *Central Bureau of Investigation*[162] restated that its previous interpretation of Principle of Speciality in the case of same accused holds good. It observed: [163]

> ...the analysis and reasoning rendered in the impugned judgment[164] with regard to the *interpretation of the Principle of Speciality still stands good* as the law declared by this Court u/ art. 141 of the Constitution of India shall be binding on all courts within the territory of India.

Principle of Speciality has been discussed in *Daya Singh Lahoria* v. *Union of India*[165] as under:[166]

> The doctrine of speciality is yet another established rule of international law relating to extradition. Thus, when a person is extradited for a particular crime, he can be tried for only that crime. If the requesting State deems it desirable to try the extradited fugitive for some other crime committed before his extradition, the fugitive has to be brought to the status quo ante, in the sense that he has to be returned first to the State which granted the extradition and a fresh extradition has to be requested for the latter crime. The Indian Extradition Act makes a specific provision to that effect. In view of Section 21 of the Indian Extradition Act, 1962 an extradited fugitive cannot be tried in India for any offence other than the one for which he has been extradited unless he has been restored to or has had an opportunity to return to the State which surrendered him. The doctrine of speciality is in fact a corollary to the principles of double criminality, and the aforesaid doctrine is premised on

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162 JT 2013 (11)SC 14 *hereinafter* referred as *Abdul Qayyum Ansari*, decided by P. Sathasivam CJI and Chelameswar. The work referred here are from *Indlaw.*

163 *Id.*, para 16.

164 (2011) 11 SCC 214.

165 (2001) 4 SCC 516 2001.

166 *Id.*, para 23.

> the assumption that whenever a State uses its formal process to surrender a person to another State for a specific charge, the requesting State shall carry out its intended purpose of prosecuting or punishing the offender for the offence charged in its request for extradition and none other.

NDPS: Rights and Privilege

Court while interpretation should be cautious of the fact that interpretation of fundamental rights in the constitution of India is different from interpretation of a privilege and human rights under national or international instruments.[167] In the case of *Budh Singh* v. *State of Haryana* [168] the 'true and correct meaning of the effect of the period/periods of remissions' was in question.[169] On 13.12.1988 the accused committed offence under NDPS Act 1985. On 29.5.1989 section 32A was incorporated by amendment in NDPS Act which prohibited the executive to extend its discretionary power for remission after completion of a substantial part of imprisonment under Cr PC 1973.[170]Can this section 32A have retrospective operation? In other words can section 32A be interpreted in a manner that makes it applicable in offences committed prior to 29.5.1989?

A liberal, accused centric and impact based interpretation will screen the offender from anything detrimental to his interest. Literal interpretation has deprived the offender of his opportunity of consideration for remission but for 32A the application of offender has not even been considered. The court, however, toe the line of state. It followed two constitution bench judgements of *Sarat Chandra Rabha* v. *Khagendranath Nath*[171] and *Maru Ram* v. *Union of India*[172] and rightly held as under:[173]

> …[W]hat Section 32A has done is to obliterate the benefit of remission(s) that a convict under the NDPS Act would have normally earned. But, if the correct legal position is that the remission(s) do not in any way touch or affect the penalty/ sentence imposed by a Court, we do not see how the exclusion of benefit of remission can be understood to have the effect of enlarging the period of incarceration of an accused convicted under the NDPS Act or as to how the said provision, i.e., Section 32A, can have the effect of making a convict undergo a longer

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167 The *Budh Singh* judgement neither uses the word interpretation, construction nor privilege or human rights.

168 AIR 2013 SC 2386, *hereinafter* referred as *Budh Singh.* Decided on 11.03.13. Para referred in this case are from manupatra.

169 *Budh Singh*, para 5.

170 S. 432 and 433 of CrPC 1973 deals with this power of the appropriate government.

171 AIR 1961 SC 334.

172 (1981) 1 SCC 107 (para 27).

173 *Budh Singh*, para 9.

> period of sentence than what the Act had contemplated at the time of commission of the offence.

Article 20(1) of constitution of India recognises a fundamental right while section 432 and 433 of Cr PC 1973 recognises a privilege. According to article 13(2) constitution of India State is not prohibited from taking away a privilege, benefit *etc*.

Regarding retrospectively operation *Government of Andhra Pradesh* v. *Ch. Gandhi* [174]extracts a passage from Bennion's.[175] While emphasizing on the concept of retrospective legislation and rights, the learned author has stated thus:

> The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex post facto law is enshrined in the United States Constitution and in the Constitution of many American States, which forbid it. The true principle is that lex prospicit non respicit (law looks forward not back). As Willes, J. said retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.

Cannons of interpretation

Traditional legal wisdom classifies fundamental rules of statutory interpretation into three categories for convenience viz. literal, golden and mischief rules. Authorities, however, do not follow a straight jacket classification. On various occasion these rules undergo fusion or overlapping. 'The first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation *e.g.*, the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute.'[176]

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174 (2013) 5 SCC 111.

175 Francis Bennion's *Statutory Interpretation*, 2nd edn., (1992).

176 *M/s Hiralal Rattanlal* v. *State of U.P,* (1973)1 SCC 216, *Premanand* v. *Mohan Koikal* (2011) 4 SCC 266, also see *Lalita Kumari*, para 37.

Literal Meaning: The First Principle

In the case of *Lalita Kumari*[177] the constitution bench delivered its opinion on the interpretation of various sections of Cr PC, 1973 to ascertain whether police has any discretion to register FIR in cognizable offence cases or not. The court took support from various cases[178] where it was observed that, "Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule…"[179]

It was contented that any and every first information in section 154 is not to be recorded as FIR because it has to be first incorporated in General Diary/Station Diary/Daily Diary. "Then if any preliminary inquiry is needed the police officer may conduct the same and thereafter the information will be registered" as FIR.[180] The court held "this interpretation is wholly unfounded."[181]

Providing reason to the above conclusion the court observed:[182]

> If at all, there is any inconsistency in the provisions of Section154 of the Code and Section 44 of the Police Act, 1861, with regard to the fact as to whether the FIR is to be registered in the FIR book or in the General Diary, the provisions of Section 154 of the Code will prevail and the provisions of Section 44 of the Police Act, 1861 shall be *void to the extent of the repugnancy*.

Literal meaning has been discussed in 2012 the judgement of *Namit Sharma*,[183] which has generated maximum ripples and disappointment in legal circle. It felt that language of RTI Act 2005 in section 12 and 15 was not plain. There was ambiguity and the parliament missed something very important. On the other hand *Namit Sharma second*, feels that provision is plain and unambiguous. Intention of legislature is clear. Therefore judiciary should not intervene.

From plain and simple language of Sections 18, 19 and 20 of RTI Act 2005 the court inquired whether information commission has to decide a dispute or not. It observed in following words:[184]

> . …[H]ence, the functions of the Information Commissions are limited to ensuring that a person who has sought information from a public authority in accordance with his right to

177 *Lalita Kumari*, at para 37.

178 *M/s Hiralal Rattanlal* v. *State of U.P,* (1973)1 SCC 216, *Premanand* v. *Mohan Koikal* (2011) 4 SCC 266.

179 *Lalita Kumari*, at para 37.

180 *Id.* at para 47

181 *Id.* at para 48.

182 *Id.* at para 61.

183 (2013)1 SCC 745, referred as *Namit Sharma* first.

184 *Namit Sharma second*, para 20.

> information conferred Under Section 3 of the Act is not denied such information except in accordance with the provisions of the Act. ... While deciding whether a citizen should or should not get a particular information "which is held by or under the control of any public authority", *the Information Commission does not decide a dispute between two or more parties concerning their legal rights other than their right to get information in possession of a public authority.* [Emphasis added]

What is the nature of function of information commission? Is it judicial, quasi judicial or administrative? On the basis of plain meaning of sections 18, 19 and 20 and section 3 the court held:[185]

> This function obviously is not a judicial function, but an administrative function conferred by the Act on the Information Commissions.

On the logic that the function of information commission is non judicial in nature the court attempted to get some reason behind the disputed sections: [186]

> Perhaps for this reason, Parliament has not provided in Sections 12(5) and 15(5) of the Act for appointment of persons with judicial experience and acumen and retired Judges of the High Court as Information Commissioners and retired Judges of the Supreme Court and Chief Justice of the High Court as Chief Information Commissioner …

The court, therefore, inferred that the (so called) omission by parliament, of not providing basic qualification and use of word 'wide knowledge and experience' is deliberate and it was not a case where 'Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results'.

Golden rule

'When there are two meanings the court generally selects the meaning which is just and convenient and that which avoids absurd result.'[187]

In *Lalita Kumari* where mandatory registration of FIR was in question it was observed that "the golden rule of interpretation can be given a go-by only in cases where the language of the section is ambiguous and/or leads to an absurdity."[188]

On the issue of MPs or MLAs as Information Commissioner *Namit Sharma* second, acknowledges that two possible interpretations could be conceived. Dealing

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185 *Ibid.*

186 *Namit Sharma second*, para 25.

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

188 *Lalita Kumari*, at para 45.

with first possibilities it found that this one could violate equality clause. In the words of the court: [189]

> ...There could be two interpretations of Sections 12(6) and 15(6) of the Act. One interpretation could be that a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession will not be eligible to be considered for appointment as a Chief Information Commissioner and Information Commissioner. If this interpretation is given to Sections 12(6) and 15(6) of the Act, then it will obviously offend the equality clause in Article 14 of the Constitution as it debars such persons from being considered for appointment as Chief Information Commissioner and Information Commissioners.

On second possibilities it observed:[190]

> The second interpretation of Sections 12(6) and 15(6) of the Act could be that once a person is appointed as a Chief Information Commissioner or Information Commissioner, he cannot continue to be a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession. If this interpretation is given to Sections 12(6) and 15(6) of the Act then the interpretation would effectuate the object of the Act inasmuch as Chief Information Commissioner and Information Commissioners would be able to perform their functions in the Information Commission without being influenced by their political, business, professional or other interests.

The court therefore followed the second interpretation:[191]

> It is this second interpretation of Sections 12(6) and 15(6) of the Act which has been rightly given in the judgment under review and Sections 12(6) and 15(6) of the Act have been held as not to be violative of Article 14 of the Constitution. Therefore, the argument of Mr. Sharma, learned Counsel for the Respondent-writ Petitioner, that if we do not read Sections 12(5) and 15(5) of the Act in the manner suggested in the judgment

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189 *Namit Sharma second*, para 28.

190 *Ibid.*

191 *Ibid.*

> under review, the provisions of Sections 12(5) and 15(5) of the Act would be ultra vires the Article14 of the Constitution, is misconceived.

Mischief rule[192]

A glimpse of mischief rule may be found in *Gujrat Lokayukta* case where the court observed:[193]

> The court must adopt a construction which *suppresses the mischief and advances 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 *Surinder Singh*[194] the court extracted from *State of Maharashtra* v. *Natwarlal Damodardas Soni*,[195] and reiterated that:[196]

> the provisions have to be specially construed in a manner which will *suppress the mischief and advance the object* which the legislature had in view.[197]

In *Badshah* v. *Badshah*[198] also *Heydon'* rule was applied as under:[199]

> Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted,

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192 *Heydon's Case* [1584] EWHC Exch J36 (01 Jan 1584). is, probably, the oldest authority in the area of interpretation. It propounds the rule as under: 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.*

193 *State Of Gujarat* v. *Hon'Ble Mr. Justice R.A. Mehta (Retd)*, 2013) 3 SCC 1, AIR 2013 SC 693.

194 *Surrender singh* para 18.

195 (1980) 4 SCC 669. In this case a narrow construction given by the high court was rejected while dealing with s. 135 of the Customs Act and Rule 126-H(2)(d) of the Defence of India Rules.

196 *Surinder Singh,* para 18.

197 *State of Maharashtra v. Natwarlal Damodardas Soni AIR 1980 SC 593, 1980* CriLJ 429.

198 AIR 2014 SC 869.

199 *Ibid.*

> but also the mischief it seeks to suppress. It is this mischief rule, first propounded in Heydon's Case (1854) 3 Co. Rep. 7a, 7b which became the historical source of *purposive interpretation*.

Purposivistic interpretation

Regarding origin, concept and development of the technique of interpretation Bennion[200] remarks:

> 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.[201] (Emphasis added)

Gujrat Lokayukta case discusses the need of purposive interpretation to realise the objective of an enactment. The division bench quoted with approval the observation of *Whitney* v. *Inland Revenue Commissioner,*[202] which is as under:[203]

> A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable....

It further observed: [204]

> The *doctrine of purposive construction may be taken recourse to for the purpose of giving full effect to statutory provisions*, and the courts must state what meaning the statute should bear, rather than rendering the statute a nullity, as statutes are meant to be operative and not inept. The courts must refrain from declaring a statute to be unworkable. The *rules of interpretation require that construction, which carries forward the objectives of the statute, protects interest of the parties and keeps the remedy alive*, should be preferred, looking into the text and context of the statute. *Construction given by the court must promote the object of the statute and serve the purpose* for which it has been enacted and not efface its very purpose. "The courts strongly lean against any construction which stands to reduce a statute to futility. The provision of the statute must be so construed so as to make it effective and operative. (Emphasis added)

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200 Bennion *Statutory Interpretation* (5th edn. 2008)

201 Also cited in *Regional Provident Fund Commissioner* v. *Hooghly Mills Co.Ltd* 2012 (1) SCALE 422, at para 37.

202 [1926] A.C. 37.

203 *Supra* note 103.

204 *Id.* at para 67.

In the case of *Rajasthan State Industrial Development*[205]the court dealt with the interpretation of contract. The court found *DLF Universal Ltd.* v. *Director, T. and C. Planning Department Haryana*[206] very relevant where it was observed:[207]

> It is a settled principle in law that *a contract is interpreted according to its purpose*. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. *Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract* primarily by the joint intent of the parties at the time the contract so formed. [Emphasis Added]

Namit Sharma first and *second* discussed the need of purposive rule of interpretation. [208] Section 12(5) and 15(5) of RTI Act, 2005 provides no specific qualification for members of Information Commissions, though it uses the phrase 'wide knowledge and experience'. [209]

> 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.

What is the meaning of the phrase 'wide knowledge and experience'? Whether these words include the basic qualification in that subject. The issue before the court was whether the phrase is too vague to provide any clear guideline?[210] And consequently are they against article 14.

In *Namit Sharma first* the court found that the statute was clear enough to determine the qualification for the appointment of the Information Commissioners both at Central and state level. The court therefore held: [211]

> 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*

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205 *Rajasthan State Industrial Development, supra* note 107, at para 17.

206 AIR 2011 SC 1463.

207 *Supra* note 205.

208 AIR 2014 SC 122. Same provision is provided for State Information Commissioner in Section 15 (5).

209 RTI Act 2005, S. 12 (5).

210 Anurag Deep, ''Interpretation of Statutes'', XLVIII *ASIL* 551-602 (2012) 578.

211 *Namit Sharma first*, para 106. 2.

> *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.[212]

The court, therefore held in previous *Namit Sharma* case that: [213]

> 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.*[214] [Emphasis Added]

The court in *Namit Sharma second*, was not in agreement with purposive interpretation made in *Namit Sharma first*. Rather it started with plain meaning rule explaining sections 18, 19 and 20 of the Act. It observed:[215]

> *It will be clear from the plain and simple language of Sections 18, 19 and 20 of the Act that,* Under Section 18 the Information Commission has the power and function to receive and inquire into a complaint from any person who is not able to secure information from a public authority, Under Section 19 it decides appeals against the decisions of the Central Public Information Officer or the State Public Information Officer relating to information sought by a person, and Under Section 20 it can impose a penalty only for the purpose of ensuring that the correct information is furnished to a person seeking information from a public authority.[216]

Badshah v. *Badshah*[217] discusses the scope and limitation of the phrase "wife". Whether a lady who is not "legally wedded wife" may claim maintenance

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212 *Namit Sharma second*, para 7.2.

213 *Namit Sharma* first, para 106.2.

214 *Ibid*, Also *Namit Sharma* Second, para 7.2.

215 *Namit Sharma* Second, para 20

216 *Ibid.*

217 AIR 2014 SC 869.

under Section 125, Code of Criminal Procedure or not? The court did three things. Firstly there was proof of marriage, secondly it harmonized the judicial approach and then it observed:[218]

> Thirdly, in such cases, *purposive interpretation needs to be given to the provisions of Section 125*, Code of Criminal Procedure While dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society.

Purposive interpretation and constitutional mandate

The court in *Badshah* inter related the objective of section 125, Cr PC 1973 with the goal of social justice and observed:[219]

> The purpose [of section 125 CrPC 1973] is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. … Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. *While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society.*

It further observed:[220]

> In both Constitutional and statutory interpretation, the Court is supposed to exercise discretion in determining the proper relationship between the subjective and objective purpose of the law.

The judgement quoted two eminent authorities in this context. From 'The Nature of Judicial Process' he cited Cardozo that 'no system of *jus scriptum* has been able to escape the need of it' and continued:[221]

> It is true that Codes and Statutes do not render the Judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however, obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The

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218 *Supra* note 74 at para 17.

219 *Ibid.*

220 *Badshah* v *Badshah*, para 20. Available at : http://judis.nic.in & para 16 at SCc online.

221 *Ibid.*

> ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a stature.[222]

The second authority, the judgement quoted, was Gray who, hundred years ago observed:[223]

> The fact is that the *difficulties of so-called interpretation arise when the legislature has had no meaning at all*; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine that the legislature did mean on a point which was present to its mind, but to guess what is would have intended on a point not present to its mind, if the point had been present.[224]

The court observed what are three basic functions of court in the words of Cardazo:[225]

> The Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision-"libre recherche sceintifique" i.e. "free Scientific research". We are of the opinion that there is a non-rebuttable presumption that the Legislature while making a provision like Section 125 Code of Criminal Procedure, to fulfill its Constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances.

After 2012, *16 December Gang rape* case[226] crime against women is in focus in India and all machinery of State is trying good to check the menace. Zero tolerance and no compromise are the policy words. In such scenario whether a compromise between husband and wife could be a ground for quashing an FIR, that too when the FIR discloses commission of a non bailable, cognizable offence against women. *Jitendra Raghuvanshi* v. *Babita Raghuvanshi*,[227]answers this

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222 Benjamin N. Cardozo, *The Nature of Judicial Process*, Lecture I. Introduction-The Method of Philosophy, (Yale University Press 1921) *available at*: http://www.constitution.org/cmt/cardozo/jud_proc.htm.(last visited on Aug. 26th 2014).

223 John Chipman Gray, *The Nature and Sources of the Law* (The Columbia university press, 1909). The book is *available* on https://archive.org/stream/natureandsource04graygoog#pag.

224 *Badshah*, para 21.

225 *Badshah*, para 22. The words "supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision-"libre recherche sceintifique" are from *The Nature of Judicial Process.*

226 FIR No. 413/2012 *State (Government of NCT of Delhi)* v. *Ram Singh*. Decided bythe court of Yogesh Khanna ASI, Special - Fast Track Courts.

227 (2013) 4 SCC 58, decided on March 15, 2013. Unanimous decision by three judges bench P. Sathasivam, Jagdish Singh Kehar and Kurian Joseph, JJ. Delivered by P. Sathhasivam J, *hereinafter* referred as *Jitendra Raghuvanshi*.

query where mutual relationship of section 482 and 320 of CrPC 1973 was in question. The Supreme Court referred a number of judgements[228] and quoted *B.S. Joshi* v. *State of Haryana*,[229] where it was held that:[230]

> ....[W]e are, therefore, of the view that *if for the purpose of securing the ends of justice*, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power. [Emphasis Added]

The judgement no where uses the word interpretation or construction still this judgement is of interpretative value as the judgement is influenced by the purpose or object of enactment.

In the last survey of 2012 the case of *Ritesh Sinha* v. *The State of Uttar Pradesh*[231] had been discussed under *purposive interpretation* head. Here an order for taking the voice sample was challenged as violative of article 20(3) of Constitution of India. The division bench was not unanimous and therefore, the case was referred for three judge's bench. In 2013 the case could not be decided.

Harmonious construction and Implication of interpretation

Harmonious construction of two inconsistent provisions is a priority practice in interpretative business. However, harmonious construction of two different judgements is also a part of judicial interpretation. A point of interpretative importance could be found in *Badshah*[232]regarding harmonious construction. In this case the court has to consider judgements having different findings on the interpretation of word 'wife' in section 125 of Cr PC 1973.

The court considered the case of *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav*[233] and *Savitaben Somabhai Bhatiya* v. *State of Gujarat*[234] where it was held that a Hindu lady who married with a person who had a living lawfully wedded wife cannot be treated to be "legally wedded wife". She, therefore, cannot

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228 *State of Haryana* v. *Bhajan Lal*, 1992 Supp (1) SCC 335 and explaining the decisions rendered in *Madhu Limaye* v. *State of Maharashtra* (1977) 4 SCC 551, *Surendra Nath Mohanty* v. *State of Orissa* (1999) 5 SCC 238 and *Pepsi Foods Ltd*. v. *Special Judicial Magistrate* (1998) 5 SCC 749.

229 (2003) 4 SCC 675.

230 *Id.*, para 8.

231 AIR 2013 SC 1132: (2013) 2 SCC 357: MANU/SC/1072/2012. 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.

232 AIR 2014 SC 869.

233 (1988) 1 SCC 530.

234 (2005) 3 SCC 636.

claim maintenance under section 125. On the other hand in *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit* [235] held that:[236]

> Once it is admitted that the marriage procedure was followed then it is not necessary to further probe into whether the said procedure was complete as per the Hindu Rites in the proceedings under Section 125, Code of Criminal Procedure.

The court relied on the judgement of five judges bench of the Supreme court in *S. Sethurathinam Pillai* v. *Barbara alias Dolly Sethurathinam* [237] where on maintenance under Cr PC 1898, Section 488, (similar to section 125, Cr PC 1973 1973)it was observed:

> We do not think it necessary in this case to decide the case on the merits. The order passed in an application filed under Section 488 of the Code of Criminal Procedure is a summary order which does not finally determine the rights and obligations of the parties thereto. It is an order made in a proceeding under a provision enacted with a view to provide a summary remedy for providing maintenance, and for preventing vagrancy. The decision of the criminal court that there was a marriage between Barbara and Sethurathinam and that it was a valid marriage will not operate as decisive in any civil proceeding between the parties for determining those questions. We are informed at the Bar that Sethurathinam has lodged a suit in the civil court for decision on the factum and validity of the marriage. Since the order of the criminal court is a summary order and is not conclusive between the parties, we do not think it necessary to decide whether on the evidence the High Court was justified in reaching the conclusion it has reached. It cannot be denied that there was some evidence on which the conclusion could be reached.

In *Chanmuniya* case, also the court held that for section 125, Cr PC valid marriage need not be proved and a presumption could be drawn.[238] The court then held that:[239]

> ….[S]he should know that second marriage with such a person is impermissible and there is an embargo under the Hindu Marriage Act and therefore she has to suffer the consequences thereof. The said judgment[240] would not apply to those cases

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235 (1999) 7 SCC 675. *Badshah* v. *Badshah,* para 10.

236 *Ibid.*

237 (1971) 3 SCC 923, at 924; *Badshah* v *Badshah,* para 9.

238 *Chanmuniya* v. *Chanmuniya Virendra Kumar Singh Kushwaha* , (2011) 1 SCC 141.

239 *Supra* note 74, para 16.

240 *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav* and *Savitaben Somabhai Bhatiya* v. *State of Gujarat.*

> where a man marriages second time by keeping that lady in dark about the first surviving marriage. *That is the only way two sets of judgments can be reconciled and harmonized.*

In the case of *Bank of Baroda* v. *S.K. Kool (D) Through L.Rs*[241] there was a dispute as to the interpretation of clause 6(b) of the Bipartite Settlement 2002 and article 22(1) of Bank of Baroda (Employees) Pension Regulation, 1995. The regulation has been made in exercise of powers conferred by clause (f) of sub-section (ii) of section 19 of the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970. As per 'article 22(1) of the Regulation, removal of an employee from the service of the bank would entail forfeiture of entire past service and consequently he shall not be entitled to pensionary benefits. Clause 6(b) of the Bipartite Settlement, however, provides that an employee found guilty of gross misconduct may be removed from service with superannuation benefits.'[242] The High Court (Allahabad) observed:[243]

> It is true that both the provisions have to be harmonized. What logically follows from bare reading of the aforesaid provisions is that the disciplinary authority has the competence to inflict punishment of removal from service with a condition that such removal from service shall not in any way result in forfeiture of pensionary benefits to which the workman concerned is otherwise eligible. Only simple reading of the words "AS WOULD BE DUE OTHERWISE" would mean that irrespective of the order of punishment of removal from service, workman would be entitled to superannuation benefits, if it is found due otherwise i.e. if the workman concerned satisfies the other requirement of superannuation benefits under Regulations, 1995, namely, he has completed requisite number of years of working etc.

The Supreme Court held [244]

> Regulation in question is statutory in nature and the *court should accept an interpretation which would not make any other provision redundant.* [Emphasis added]

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241 AIR 2014 SC 915, *hereinafter* referred as *SK Kool.*

242 *Id.,* para 7. Cl. 6(b) of the Bipartite Settlement : An employee found guilty of gross misconduct may; (a)...(b) be removed from service with superannuation benefits i.e. Pension and/or Provident Fund and Gratuity as would be due otherwise under the Rules or Regulations prevailing at the relevant time and without disqualification from future employment, or...Art.22(1) of Bank of Baroda (Employees) Pension Regulation, 1995 : Forfeiture of service: (1) Resignation or dismissal or removal or termination of an employee from the service of the Bank shall entail forfeiture of his entire past service and consequently shall not qualify for pensionary benefits.

243 As cited in *SK Kool* at para 5.

244 *SK Kool,* para 10.

The court, however, warned that:[245]

> From a plain reading of the aforesaid Regulation, it is evident that removal of an employee shall entail forfeiture of his entire past service and consequently such an employee shall not qualify for pensionary benefits. If we accept this submission, no employee removed from service in any event would be entitled for pensionary benefits. But the fact of the matter is that the Bipartite Settlement provides for removal from service with pensionary benefits "as would be due otherwise under the Rules or Regulations prevailing at the relevant time". The consequence of *this construction would be that the words quoted above shall become a dead letter.* Such a construction has to be avoided.
>
> The construction canvassed by the employer shall give nothing to the employees in any event. Will it not be a fraud Bipartite Settlement? Obviously it would be. [Emphasis added]

Applying rules of harmonious construction as applied by the high court, the Supreme Court observed:[246]

> From the conspectus of what we have observed we have no doubt that such of the employees who are otherwise eligible for superannuation benefit are removed from service in terms of Clause 6(b) of the Bipartite Settlement shall be entitled to superannuation benefits. *This is the only construction which would harmonise the two provisions. It is well settled rule of construction that in case of apparent conflict between the two provisions, they should be so interpreted that the effect is given to both.* [Emphasis added]

On the basis of harmonious construction the court held:[247]

> Hence, we are of the opinion that such of the employees who are otherwise entitled to superannuation benefits under the Regulation if visited with the penalty of removal from service with superannuation benefits shall be entitled for those benefits and such of the employees though visited with the same penalty but are not eligible for superannuation benefits under the Regulation shall not be entitled to that.

Without naming literal rule of interpretation the court in the case of *National Federation of the Blind*[248] stated that '… it is a settled rule of interpretation that if

245 *Id.*, para 12.

246 *Id.*, para 13.

247 *Ibid.*

248 2013 Indlaw SC 674; (2013) 10 SCC 772. Unenimously decided by full bench and decided by CJI Hon'ble Justice P. Sathashivam. Other member of the bench were Ranjana Prakash Desai and Ranjana Yogoi.

the language of a statutory provision is unambiguous, it has to be interpreted according to the plain meaning of the said statutory provision.' Applying this rule the court held:[249]

> In the present case, the plain and unambiguous meaning of Section 33 is that every appropriate Government has to appoint a minimum of 3% vacancies in an establishment out of which 1% each shall be reserved for persons suffering from blindness and low vision, persons suffering from hearing impairment and persons suffering from locomotor or cerebral palsy. [Emphasis added]

The court further held that: [250]

> …if we accept that the computation of reservation in respect of Group C and D posts is against the total vacancies in the cadre strength because of the applicability of the scheme of reservation in Group C and D posts prior to enactment, Section 33 does not distinguish the manner of computation of reservation between Group A and B posts or Group C and D posts respectively. As such, *one statutory provision cannot be interpreted and applied differently for the same subject matter.* [Emphasis added]

II LEGISLATIVE INTENTION

General

Regarding legislative intention one very recent work, acknowledges that: [251]

> For at least six centuries, common law courts have maintained that the 'primary object of statutory interpretation 'is to determine what intention is conveyed either expressly or by implication by the language used', or in other words, 'to give effect to the intention of the [lawmaker] as that intention is to be gathered from the language employed having regard to the context in connection with which it its employed'.

The primary task of a judge while interpretation is to gather the intention of legislation. However doubts have been raised whether gathering intention of

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249 *Ibid.*

250 *Id* at para 38. The appellants (state) argued that 'since reservation of persons with disabilities in Group C and D has been in force prior to the enactment and is being made against the total number of vacancies in the cadre strength according to the OM dated 29.12.2005 but the actual import of s. 33 is that it has to be computed against identified posts only.

251 Sir Peter Benson Maxwell, *The Interpretation of Statutes* (Maxwell & Son, 1883), *Attorney-general* v. *Carlton Bank* [1899] 2 QB 158,164 (Lord Russel), in Richard Ekins and Jeffrey Goldsworhty, "The Reality And Indispensability of Legislative Intentions," 36: 1 *The Sydney law review*, 39 (2014).

legislature is primary task or is it a type of fiction.[252] If the traditional wisdom prevails, exploring the intention of legislature is a fundamental task which may be some time clear and obvious. In those cases the guideline for court could be found in *Gujrat Lokayukta* case[253] where the court observed:[254]

> A statute must be construed in such a manner so as to ensure that the Act itself does not become a dead letter, and *the obvious intention of the legislature does not stand defeated*, unless it leads to a case of absolute intractability in use.

If the intention is not obvious the words of the statute must be seen. And in cases where issue of reservation is subject matter of discussion, the court has to balance various competing interest. *National Federation of the Blind*[255] discusses legislative intention in detail. The main question in this case was 'is it obligatory on the part of the government establishments to provide at least 3% reservation of posts in the total cadre strength and not in the identified vacancies'. In other words the controversy was reservation in cadre strength *vis a vis* vacancies. The controversy raised because of conjoint reading(or misreading) and contradictory interpretation of section 32, 33 and 36 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Section 32 stipulates for identification of posts which can be reserved for persons with disabilities. Section 33 provides for reservation of posts and section 36 thereof provides that in case a vacancy is not filled up due to non-availability of a suitable person with disability, in any recruitment year such vacancy is to be carried forward in the succeeding recruitment year. Section 33 uses the word 'vacancies'. Does this mean vacancies only against identified post or does it include unidentified post? *National Federation of Blind* extracted a passage from *Prakash Nath Khanna* v. *Commissioner of Income Tax*,[256] where it was stated that: [257]

> The language employed in a statute is the determinative factor of legislative intent. The *first and primary rule of construction is that the intention of the legislation must be found in the words* used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them".[258] (Emphasis added)

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252 *Ibid*.

253 *Supra* note 5.

254 *Id*. at para 67.

255 *Supra* note 248.

256 (2004) 9 SCC 686.

257 *Supra* note 248 at para 43.

258 *Ibid*. The court (without providing any citation) also referred *Lenigh Valley Coal Co*. v. *Yensavage*. The view was reiterated in *Union of India* v. *Filip Tiago De Gama of Vedem Vasco De Gama* and *Padma Sundara Rao* v. *State of T.N*. The original quotation

If the words of provision are clear and intention could be gathered from that there is no space for headings, marginal note in statute or judicial thinking. They could be very helpful if the provision is ambiguous.

The court resolved the conflict and held:[259]

> Thus, after thoughtful consideration, we are of the view that the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., "computing 3% reservation on total number of vacancies in the cadre strength" which is the *intention of the legislature.*

Primary sources: Statutes

The court took support from proviso to section 33 of Disabilities Act 1995:[260]

> The *proviso also justifies the above said interpretation that the computation of reservation has to be against the total number of* [261] *vacancies in the cadre strength and not against the identified posts*. Had the *legislature intended to mandate* for computation of reservation against the identified posts only, there was no need for inserting the proviso to Section which empowers the appropriate Government to exempt any establishment either partly or fully from the purview of the Section subject to such conditions contained in the notification to be issued in the Official Gazette in this behalf. Certainly, *the legislature did not intend to give such arbitrary power for exemption* from reservation for persons with disabilities to be exercised by the

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is as under: It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See *Lenigh Valley Coal Co*. v. *Yensavage* (218 FR 547). The view was reiterated in *Union of India* v. *Filip Tiago De Gama of Vedem Vasco De Gama* (AIR 1990 SC 981), and *Padma Sundara* Rao (dead) v. *State of Tamil Nadu*. (2002 (3) SCC 533.

259 *Supra* note 248, para 51.

260 *Id.* at para 33. S. 33 proviso runs as under: Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

261 The judgement available at *Judis.nic.in* does not show 'of' after number [writes total number vacancies] *Westlaw, Manupatra* also misses 'Of'. *Scconline* shows 'of'.

> appropriate Government when the computation is intended to be made against the identified posts. [Emphasis added]

Legislative intention was also inferred from section 41:[262]

> In this regard, *another provision of the said Act also supports this interpretation.* Section 41 of the said Act mandates the appropriate Government to frame incentive schemes for employers with a view to ensure that 5% of their work force is composed of persons with disabilities. ... Thus, on a conjoint reading of Sections 33 and 41, it is clear that while Section 33 provides for a minimum level of representation of 3% in the establishments of appropriate Government, the legislature intended to ensure 5% of representation in the entire work force both in public as well as private sector. [Emphasis added]

Secondary sources: Bills, etc

Draft of Rights of Persons with Disabilities Bill, 2012 also lent support to this intention of legislature: [263]

> Moreover, the intention of the legislature while framing the Act can also be inferred from the Draft Rights of Persons with Disabilities Bill, 2012, which is pending in the Parliament for approval. In Chapter 6 of the Bill, viz., Special Provisions for Persons with Benchmark Disabilities, similar sections like Sections 32 & 33 in the Act have been incorporated under Sections 38 and 39.
>
> A perusal of Sections 38 and 39 of the Bill clarifies all the ambiguities raised in this appeal. *The intention of the legislature is clearly to reserve in every establishment under the appropriate Government*, not less than 3% of the vacancies for the persons or class of persons with disability, of which 1% each shall be reserved for persons suffering from blindness or low vision, hearing impairment and locomotor disability or cerebral palsy in the posts identified for each disability. [Emphasis added]

The court held that '3% reservation for the disabled persons has to be computed on the basis of total strength of the cadre, *i.e.*, both identified as well as unidentified posts'. In order to correctly understand and interpret the word 'vacancies' the court divided section 33 into three parts. The first part is[264]

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262 *National Federation of Blind*, at para 34. Disabilities Act 1995, S. 41:Incentives to employers to ensure five per cent of the work force is composed of persons with disabilities: The appropriate Government and the local authorities shall, within limits to their economic capacity and development, provide incentives to employers both in public and private sectors to ensure that at least five percent of their work force is composed of persons with disabilities.

263 *Id.* at para 35.

264 *Id.* at para 31.

> every appropriate Government shall appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disability.

The court elaborated the meaning of first part in following words:[265]

> It is evident from this part that it mandates every appropriate Government shall appoint a minimum of 3% vacancies in its establishments for persons with disabilities. In this light, the contention of the Union of India that reservation in terms of Section 33 has to be computed against identified posts only is not tenable by any method of interpretation of this part of the Section.[266]

The second part of section 33 is [267]

> ...*of which* one percent each shall be reserved for persons suffering from blindness or low vision, hearing impairment & locomotor disability or cerebral palsy in the *posts identified* for each disability. [Emphasis added]

The court took note of the words "of which" in section 33 of Disability Act 1995:[268]

> From the above, it is clear that it deals with distribution of 3% posts in every establishment among 3 categories of disabilities. It starts from the word "of which". The word "of which" has to relate to appointing not less than 3% vacancies in an establishment and, in any way, it does not refer to the identified posts.

The court considered if the word 'vacancy' may mean 'identified vacancies':[269]

> In fact, the contention of the Union of India is sought to be justified by bringing the last portion of the second part of the section viz. "....identified posts" in this very first part which deals with the statutory obligation imposed upon the appropriate Government to "appoint not less than 3% vacancies for the persons or class of persons with disabilities."

The court, however, felt that 'established rule of interpretation' do not allow the meaning as abovementioned. Analysing first two part of section 33, the court observed:[270]

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265 *Ibid.*

266 *Ibid.*

267 *Id* at para 32.

268 *Ibid.*

269 *Ibid.*

270 *Ibid.*

> In our considered view, it is not plausible in the light of *established rules of interpretation.* The minimum level of representation of persons with disabilities has been provided in this very first part and the second part deals with the distribution of this 3% among the three categories of disabilities. Further, in the last portion of the second part the words used are "in the identified posts for each disability" and not "of identified posts". This can only mean that out of minimum 3% of vacancies of posts in the establishments 1% each has to be given to each of the 3 categories of disability viz., blind and low vision, hearing impaired and locomotor disabled or cerebral palsy separately and the number of appointments equivalent to the 1% for each disability out of total 3% has to be made against the vacancies in the identified posts. The attempt to read identified posts in the first part itself and also to read the same to have any relation with the computation of reservation is completely misconceived. [Emphasis added]

After seeking legislative intention the court exercised another tool of interpretation *ie*., objective accomplishment and observed that 'the Act is a social legislation enacted for the benefit of persons with disabilities and its provisions must be interpreted in order to fulfill its objective.'[270a]

In *Thalappalam Ser. Coop. Bank ltd.* v. *State of Kerala* the court observed:[271]

> Legislative intention is clear and is discernible from Section 2(h) [of RTI Act 2005]that intends to include various categories, discussed earlier. It is trite law that the primarily language employed is the determinative factor of the legislative intention and the intention of the legislature must be found…

Lalita Kumari also seeks legislative intention through amendment:[272]

> The insertion of sub-section (3) of Section 154, by way of an amendment, reveals the intention of the legislature to ensure that no information of commission of a cognizable offence must be ignored or not acted upon which would result in unjustified protection of the alleged offender/accused.

Gathering intention: the negative way

In order to gather the intention of legislature the judiciary in previous cases has used the presence of words and provisions in enactment or Bill. Some time absence of certain provision also throw light on intention of legislature. Legal

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270a *Id.* at para 36.

271 *Supra* note 123, para 42.

272 *Lalita Kumari*, para 74.

authorities like Law Commission of India *etc* some time make good suggestions to reform law. If they are not incorporated by parliament, does this also indicate intention of legislature? *Kaushal* is affirmative on this negative way of gathering intention. *Kaushal* notices the absence of any amendment in section 377 and non implementation of the report of Law Commission of India as supportive evidence to read the mind of legislature. It observed: [273]

> After the adoption of the IPC in 1950, around 30 amendments have been made to the statute, the most recent being in 2013 which specifically deals with sexual offences, a category to which Section 377 IPC belongs. The 172nd Law Commission Report specifically recommended deletion of that section and the issue has repeatedly come up for debate. However, the Legislature has chosen not to amend the law or revisit it. This shows that Parliament, which is undisputedly the representative body of the people of India has not thought it proper to delete the provision.

While the logic as above quoted is convincing what is not understandable is the corroborative support from the inaction of Union of India in *Naz foundation* case of Delhi high court[274] judgement. It observed: [275]

> Such a conclusion is further *strengthened* by the fact that despite the decision of the Union of India to not challenge in appeal the order of the Delhi High Court, the Parliament has not made any amendment in the law. While this does not make the law immune from constitutional challenge, it must nonetheless guide our understanding of character, scope, ambit and import.

There seems some inconsistency in the above two paragraphs. Did this approach of Union of India *strengthened* the conclusion or *dilutes* the conclusion?

Intent of the contract

Where there is some ambiguity as to the words in a provision of law, the judiciary has to seek intention of legislature. What will happen in case of terms of an agreement in a contract? The Supreme Court in *Rajasthan State Industrial Development*[276] discusses that intent of agreement has to be traced in joint intent of both parties. Taking out a paragraph from *DLF Universal Ltd.* v. *Director, T. and C. Planning Department Haryana*[277] it observed:

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273 *Supra* note 12, para 32.

274 *Naz Foundation* v *Government of NCT of Delhi,* 2009 (160) DLT 277.

275 *Kaushal,* para 32.

276 *Supra* note 107.

277 AIR 2011 SC 1463.

> It is not the intent of a single party; it is the joint intent of both parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation.

In other words the intent of contract is different from intent of legislation. For intent of contract joint intention of both parties has to be considered.

III JUDICIAL LEGISLATION

Judicial legislation is an established fact as we have mentioned in our last year survey 2012. The whole of common law and the law of tort is judge made law.[278] It has been rightly observed that:[279]

> ...[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.

In *Namit Sharma second* the court overruled its previous directions in *Namit Sharma first*. The court, inferred that the omission, if any, is deliberate and it was not a case where 'Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results'. It warned:[280]

> …any direction by this Court for appointment of persons with judicial experience, training and acumen and Judges as Information Commissioners and Chief Information Commissioner would amount to encroachment in the field of legislation.

It followed the seven-Judge Bench ruling in *P. Ramachandra Rao* v. *State of Karnataka*:[281]

> Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature.

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

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

280 *Namit Sharma* second.

281 (2002) 4 SCC 578. *P. Ramachandra Rao* was also referred as binding in *Ranjan Dwevedi* v. *CBI, through Director*, AIR 2012 SC 3217 where 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.

Namit Sharma second used the precedent of *Union of India* v. *Deoki Nandan Aggarwal* [282] where V. *Ramaswami* J writing the judgment on behalf of a three judge bench says:[283]

> It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. *The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there.* Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities. [Emphasis Added]

Principle of severability and reading down leads to various questions, for example does it lead to judicial legislation? On judicial legislation *Kaushal* imported the answer from Constitution Bench judgement of *D.S. Nakara* v. *Union of India (UOI)*[284] as under:[285]

> In reading down the memoranda, is this Court legislating? Of course 'not' When we delete basis of classification as violative of Article 14, we merely set at naught the unconstitutional portion retaining the constitutional portion.[286]

In the case of *Thalappalam,*[287] the court referred *Magor and St. Mellons Rural District Council* v. *New Port Corporation,*[288] where the courts were warned that they are not entitled to usurp the legislative function under the guise of interpretation. The Court mentioned various judicial authorities like *D.A.*

State of Karnataka. In *Ranjan Dwevedi,* the case was pending in trial court itself for more than 37 years. The petitioners presented a writ petition praying for quashing of the charges and trial because of violation of his fundamental right of speedy trial. The court rejected this contention.

282 1992 Supp. (1) SCC 323. A full bench decision.

283 *Namit Sharma* second, para 26.

284 (1983)1 SCC 305.

285 *D.S. Nakara,* para 67.

286 Also see *Kaushal,* para 30.

287 *Supra* note 123.

288 (1951) 2 All ER 839 (HL).

Venkatachalam v. *Dy. Transport Commissioner,*[289] *Union of India* v. *Elphinstone Spinning and Weaving Co. Ltd,*[290] *District Mining Officer* v. *Tata Iron & Steel Co,*[291] *Padma Sundara Rao (Dead)* v. *State of Tamil Nadu,*[292] . *Maulvi Hussain Haji Abraham Umarji* v. *State of Gujarat,*[293] where it was held that the court must avoid the danger of *an apriori* determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provisions to be interpreted is somehow fitted. It is trite law that words of a statute are clear, plain and unambiguous i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequences, meaning thereby when the language is clear and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the statute speaks for itself.[294] It reiterated from *Kanai Lal Sur* v. *Paramnidhi Sadhukhan,*[295] where the court observed: [296]

> …[I]f the words used are capable of one construction only then it would not be open to courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

If the provisions have no ambiguity the court must not interpret it in such a manner that the subjectivity of judge becomes the outcome of interpretation leading to judicial legislation. The court in *National Federation of Blind*[297] warned: [298]

> It is clear that when the *provision is plainly worded and unambiguous*, it has to be *interpreted in such a way that the Court must avoid the danger of a prior determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. While interpreting the provisions, the Court only interprets the law and cannot legislate it.* It is the function of the Legislature to amend, modify or repeal it, if deemed necessary. [Emphasis added]
>
> In other words 'ought law' should be best left to legislative domain.

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289 (1977) 2 SCC273.

290 (2 001) 4 SCC 139.

291 (2001) 7 SCC 358.

292 (2002) 3 SCC 533.

293 (2004) 6 SCC 672.

294 *Supra* note 123, para 41.

295 AIR 1957 SC 907.

296 *Supra* note 123, para 42.

297 *Supra* note 248.

298 *Id.* at para 44.

IV INTERNAL AID

The internal aids to construction are the parts of the enactment itself *eg.*, preamble, long and short titles, headings, marginal-notes, proviso, exceptions etc.

Role of headings and plain meaning rule

Every provision has main heading followed by text. What is the value of headings while interpretation? Is it at par with text? If the two conveys inconsistent meaning, what is the right way of construction of provision? *National Federation of Blind*[299] highlights this issue where the Supreme Court while discussing vacancy or post based reservation observed:[300]

> Yet another contention raised by the appellants is that the reservation for persons with disabilities must be vacancy based reservation whereas Respondent No. 1 herein contended that it must be post based reservation as laid down by the High Court in the impugned judgment. Respondent No. 1 herein *relied upon the heading of Section 33 of the Act [*Bombay Police Act, 1951*], viz., 'Reservation of Posts', to propose the view that the reservation policy contemplated under Section 33 is post based reservation.* [Emphasis added]

The court addressed this issue with the help of its previous observation in *Prakash Nath Khanna* v. *Commissioner of Income Tax*:[301]

> It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature.

Plain meaning rule does not '*give any weightage to headings'*.The court observed:[302]

> It is settled law that *while interpreting any provision of a statute the plain meaning has to be given effect* and if language therein is simple and unambiguous, there is no need to traverse beyond the same. Likewise, *if the language of the relevant section gives a simple meaning and message, it should be interpreted in such a way and there is no need to give any weightage to headings of those paragraphs.*

Determining the limits of heading and marginal note the court held:[303]

> The *heading of a Section or marginal note* may be relied upon to clear any doubt or *ambiguity in the interpretation of the*

299 *Supra* note 248.

300 *Id.* at para 42.

301 (2004) 9 SCC 686 at para 13.

302 *Supra* note 248, para 43.

303 *Id.* at para 45.

> *provision* and to discern the legislative intent. However, when the Section is clear and unambiguous, there is no need to traverse beyond those words, hence, the headings or marginal notes cannot control the meaning of the body of the section. [Emphasis added]

Applying the above criteria the court held that 'the *heading of Section 33 of the Act is "Reservation of posts" will not play a crucial role,* when the Section is clear and unambiguous.'

Preamble, object and reason of Act

In *Bombay Bar Dancer* case the validity of section 33A and 33B of Bombay Police Act, 1951 had been challenged on the basis of article 14 and 19. The court held that unless the object clause is sufficiently clear in its classification made in the provision, it cannot be helpful in screening a provision. It held:[304]

> A perusal of the Objects and the Reasons would show that the impugned legislation proceed on a hypothesis that different dance bars are being used as meeting points of criminals and pick up points of the girls. Objects and Reasons say nothing about any evidence having been presented to the Government that these dance bars are actively involved in trafficking of women.

Proviso

In the case of *National Federation of Blind* the court took help of proviso to section 33 of Disabilities Act 1995, which has already been discussed under legislative intent head.[305]

Office Memorandum

Can an Office Memorandum be used to interpret a provision of a statute. In the case of *Manohar Lal Sharma* answers this query in negative in following words:[306]

> The Office Memorandum relied on by the learned Attorney-General can hardly be termed as efficacious in any manner. Firstly, it cannot be used to interpret a provision of law such as Section 6A of the [Delhi Special Police Establishment Act, 1946]Act. I am not inclined to give any importance to the Office Memorandum for understanding or appreciating Section 6A of the Act.

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304 *Bombay Bar Dancer* case, para 106.

305 *Id.* at para 33. S. 33 proviso runs as under:Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

306 *Manohar Lal Sharma,* para 28.

The court has rightly observed as above because a memorandum is an executive document while an Act is a legislative instrument. A court while exercising its power under article 32 and 142 cannot be guided by an executive directive while interpreting a provision of a statute.

V EXTERNAL AID

Legal maxim

In the *Gujrat Lokayukta* case[307] the term 'consultation' contained in section 3 of the Gujarat Lokayukta Act 1986, was in question. The court observed:

> In the process of statutory construction, the court must construe the Act before it, bearing in mind the legal maxim *ut res magis valeat quam pereat* - which mean - it is better for a thing to have effect than for it to be made void, i.e., a statute must be construed in such a manner, so as to make it workable.

Ut res magis valeat guam pereat has been discussed in *Badshah*[308] where the court observed: [309]

> The court would also invoke the legal maxim construction *ut res magis valeat guam pereat*, in such cases i.e. where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section125, Code of Criminal Procedure, such a woman is to be treated as the legally wedded wife.

To justify its stand the court quoted with approval following statement from *Capt. Ramesh Chander Kaushal* v. *Veena Kaushal*:[310]

> The brooding presence of the Constitutional empathy for the *weaker sections like women and children must inform*

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307 *Supra* note 193.

308 AIR 2014 SC 869

309 *Supra* note 74, para 25.

310 (1978) 4 SCC 70.

> *interpretation if it has to have social relevance*. So viewed, it is possible to be selective in *picking out that interpretation out of two alternatives which advances the cause - the cause of the derelicts*.[311]

In *Lalita Kumari* the court used *uniusest exclusion alterius* without any discussion as under:[312]

> The maxim expression *uniusest exclusion alterius* (expression of one thing is the exclusion of another) applies in the interpretation of Section154 of the Code, where the mandate of recording the information in writing excludes the possibility of not recording an information of commission of a cognizable crime in the special register.

Dictionary

In a very recent research article Richard A Posner has made some comments. He has observed that though judges are not consistent in use of 'preferred' dictionaries "dictionaries have become a principle source of determining the meaning of statutes". [313] In the case of *Rajasthan State Industrial Development*[314] the phrase *Mutatis Mutandis* was explained with various previous judgements. The court took support from *Ashok Service Centre* v. *State of Orissa*,[315] where dictionaries were used to understand the meaning of the phrase:

> Earl Jowitt's 'The Dictionary of English Law 1959)' defines 'mutatis mutandis' as 'with the necessary changes in points of detail'. Black's Law Dictionary (Revised 4th Edn. 1968) defines 'mutatis mutandis' as 'with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like...'Extension of an earlier Act *mutatis mutandis* to a later Act, brings in the idea of adaptation, but so far only as it is necessary for the purpose, making a change without altering the essential nature of the things changed, subject of course to express provisions made in the later Act....In the circumstances the conclusion reached by the High Court that the two Acts were independent of each other was wrong. We are of the view that, it is necessary to read and to construe the two Acts together as if the two Acts are one, and while doing so to give effect to the provisions of the Act which is a later one in preference to the

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311 *Badshah* para 27.

312 *Lalita Kumari*, at para 76.

313 Richard A Posner, *Reflections on Judging*, 181 (Harward University Press, 2013).

314 *Rajasthan State Industrial Development*, *Supra* note 107.

315 MANU/SC/0313/1983MANU/SC/0313/1983 : AIR 1983 SC 394.

> provisions of the Principal Act wherever the Act has manifested an intention to modify the Principal Act....

Kaushal being a case containing various technical words, use of dictionary *etc.* was natural. With the assistance of various dictionaries the court found following meaning:[316]

> Buggery – a carnal copulation against nature; a man or a woman with a brute beast, a man with a man, or man unnaturally with a woman. This term is often used interchangeably with "sodomy".[317]

Carnal – Pertaining to the body, its passions and its appetites animal; fleshy; sensual; impure; sexual. [318]

Carnal knowledge – Coitus; copulation; the act of a man having sexual bodily connections with a woman; sexual intercourse. Carnal knowledge of a child is unlawful sexual intercourse with a female child under the age of consent. It is a statutory crime, usually a felony. Such offense is popularly known as "statutory rape". While penetration is an essential element, there is "carnal knowledge" if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male.[319] It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. [320]

Nature-(1) A fundamental quality that distinguishes one thing from another; the essence of something. (2) Something pure or true as distinguished from something artificial or contrived. (3) The basic instincts or impulses of someone or something.[321]

The word 'intercourse' means 'sexual connection'. In *Khanu* v. *Emperor*[322] the meaning of the word 'intercourse' has been considered:

> Intercourse may be defined as mutual frequent action by members of independent organization. Then commercial intercourse, social intercourse, etc. have been considered; and then appears.
>
> By a metaphor the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organization, for certain clearly defined and limited objects. The

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316 *Kaushal*, para 35.

317 *Black's Law Dictionary* 6th edn. 1990.

318 *People* v. *Battilana*, 52 Cal. App.2d 685, 126 P.2d 923, 928 (*Black's Law Dictionary* 6th edn. 1990).

319 *State* v. *Cross*, 2000 S.E.2d 27, 29.

320 *De Armond* v. *State*, Okl. Cr., 285 P.2d 236. (*Black's Law Dictionary* 6th edn. 1990)

321 *Black's Law Dictionary* 9th edn. 2009.

322 AIR 1925 Sind 286.

> primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity.

According to *Concise Oxford Dictionary* 'penetrate' means in the 'find access into or through, pass through.' When the male organ is inserted between the thighs kept together and tight, is there no penetration? The word 'insert' means place, fit, thrust. Therefore, if the male organ is 'inserted' or 'thrust' between the thighs, there is 'penetration' to constitute unnatural offence.[323]

Kaushal also quoted from *Calvin Francis* v. *Orissa* [324] where the Orissa High Court observed:[325]

> In *Stroud's Judicial Dictionary*, the word 'buggery' is said to be synonymous with sodomy. In K. J. Ayer's Manual of Law Terms and Phrases (as Judicially Expounded), the meaning of the word 'sodomy' is stated to be a carnal knowledge committed against the order of Nature by a man with a man or in the same unnatural manner with a woman, or by a man or woman in any manner with a beast. This is called buggery. [326]
>
> The dictionary meaning of 'pervasive' is: [327]
>
> It means that which pervades/tends to pervade in such a way, so as to be, or become, prevalent or dominant. Extensive or far reaching, spreading through every part of something.

Delivering on what it meant by 'pervasive control' or 'regulate' the court observed:[328]

> When we discuss 'pervasive control', the term 'control' is taken to mean check, restraint or influence. Control is intended to regulate, and to hold in check, or to restrain from action. The word 'regulate', would mean to control or to adjust by rule, or to subject to governing principles.[329]

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323 *Khanu* v. *Emperor* AIR 1925 Sind 286, para 20, *Kaushal,* para 38.

324 1992 (2) Crimes 455.

325 *Id.*, para 12.

326 *Supra* note 12, para 38.

327 *Balmer Lawrie* , para 6.

328 *Balmer Lawrie,* para 13.

329 *Ibid.* See also *State of Mysore* v. *Allum Karibasauppa,* AIR 1974 SC 1863; *U.P. Co-operative Cane Unions Federations* v. *West U.P. Sugar Mills Association,* AIR 2004 SC 3697; *Zee Telefilms Ltd*., (supra); and *Union of India* (UOI) v. *Asian Food Industries,* AIR 2007 SC 750.

The court has also occasion to examine the meaning of 'unconscionable'. It observed: [330]

> The dictionary meaning of the word 'unconscionable' is "showing no regard for conscience; irreconcilable with what is right or reasonable. An unconscionable bargain would therefore, be one which is irreconcilable with what is right or reasonable. Legislation has also interfered in many cases to prevent one party to a contract from taking undue or unfair advantage of the other. Instances of this type of legislation are usury laws, debt relief laws and laws regulating the hours of work and conditions of service of workmen and their unfair discharge from service, as also control orders directing a party to sell a particular essential commodity to another".

Books

The court in *Rajasthan State Industrial Development*[331]extracted from *Anson's Law of Contract* which says:

> …a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they will accept...Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large.[332]

Reports

In *Bombay Bar Dancer* case the findings of various reports were submitted to justify the ban on dancing of bargirl. The reports, however, failed to satisfy the court that there is *intelligible differentia*. The reports as external aid to interpretation were too meaningless to be used because of credibility. The court held as under:[333]

> The High Court, in our opinion, has rightly declined to rely upon the Prayas and Shubhada Chaukar's report. The *number of respondents interviewed was so miniscule as to render both the studies meaningless*. As noticed earlier, the subsequent report submitted by SNDT University has *substantially contradicted the conclusions reached by the other two reports*.

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330 *Balmer Lawrie*, para 28.

331 *Supra*, note 107.

332 *DLF Universal Ltd.* v. *Director, T. and C. Planning Department Haryana* AIR 2011 SC 1463.

333 *Bombay Bar Dancer* case, para 104.

The court found that "*isolated examples would not be sufficient to establish the connection of the dance bars covered under section 33A with trafficking.*"[334] [Emphasis added]

Lalita Kumari, also takes support from various reports including Malimath Committee report for the purpose of interpretation.[335]

VI MISCELLENOUS

Legal fiction

Legal fiction is a powerful means in the hands of law to create something artificially. It comes with various nomenclatures. Deemed to be, as if *etc*. *Rajasthan State Industrial Development*[336] gives the meaning of "As if" used in Clause (iv) of Rule 11-A of Rajasthan Land Revenue (Industrial area Allotment) Rules, 1959 in following words:[337]

> The expression "as if", is used to make one applicable in respect of the other. The words *"as if" create a legal fiction.* By it, when a person is "deemed to be" something, the only meaning possible is that, *while in reality he is not that something, but for the purposes of the Act of legislature he is required to be treated that something,* and not otherwise. It *is a well settled rule of interpretation* that, in construing the scope of a legal fiction, it would be proper and even necessary, to assume all those facts on the basis of which alone, such fiction can operate. The words "as if", in fact show the distinction between two things and, such words must be used only for a limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created.[338]

Legal fiction, its purpose and its application was discussed in *Industrial Supplies Pvt. Ltd.* v. *Union of India,*[339] which is also referred in *Rajasthan State Industrial Development* [340] where the court observed as follows:[341]

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334 *Id*, para 105.

335 *Lalita Kumari*, at para 93.

336 *Supra*, note 107.

337 *Ibid. Rajasthan State Industrial Development* discusses 'as if' in a separate head at para 19.

338 *Ibid.* See also *Radhakissen Chamria* v. *Durga Prasad Chamria* , AIR 1940 PC 167; *Commr. of Income-tax, Delhi* v. *S. Teja Singh*, 1959 SC 352; *Ram Kishore Sen* v. *Union of India*, AIR 1966 SC 644; *Sher Singh* v. *Union of India*, AIR 1984 SC 200; *State of Maharashtra* v. *Laljit Rajshi Shah*, AIR 2000 SC 937; *Paramjeet Singh Patheja* v. *ICDS Ltd.* AIR 2007 SC 168; and *Commissioner of Income Tax* v. *Willamson Financial Services*, (2008) 2 SCC 202) as authority on the point.

339 AIR 1980 SC 1858.

340 *Supra* note 107.

341 *Id.* at para 21

> It is now axiomatic that when a legal fiction is incorporated in a statute, the court has to ascertain for what purpose the fiction is created. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried to its logical conclusion. The court has to assume all the facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction.

Writ jurisdiction and contractual obligation

New economic policy has provided ample scope of sharp rise in business. As contract is the basis of mercantile law the contractual obligations has increased in form and content. No surprise, aggrieved parties may try to invoke writ jurisdiction of courts. *Rajasthan State Industrial Development,*[342] however, reiterates the position as held in *Kerala State Electricity Board* v. *Kurien E. Kalathil,*[343] where the court held as under:[344]

The *interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition*. ....If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract.....The contract between the parties is in the realm of private law. It is not a statutory contract. *The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article* 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract.... The contractor should have relegated to other remedies.[[Emphasis added]

Comparative law and constitutional interpretation

In India judges and writers have a tendency to quote laws, legal materials and quotations from foreign jurisdictions. In foreign judgements and works Indian judgements, legislative developments *etc* are not discussed with the same vigour as we Indians do.

In *Kaushal* the court has warned the courts while using position in other foreign jurisdiction. It observed:[345]

> In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments

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342 MANU/SC/0116/2013.

343 AIR 2000 SC 2573.

344 *Rajasthan State Industrial Development, Supra* note 107, para 13.

345 *Kaushal*, para 52.

> shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.

Kaushal reiterated the caution through Constitutional Bench judgement of *Jagmohan Singh* v. *State of U.P.*[346] forty years back that the courts "have grave doubts about the expediency of transplanting Western experience in our country. Social conditions are different and so also the general intellectual level."

The court in *Bhullar* second compared India with the USA while quoting its previous decision in *T.V. Vatheeswaran's* case. In *State of Tamil Nadu* v *T.V. Vatheeswaran*[347] the court observed:[348]

> In the United States of America where the right to a speedy trial is a Constitutionally guaranteed right, the denial of a speedy trial has been held to entitle an accused person to the dismissal of the indictment or the vacation of the sentence.[349] Analogy of American law is not permissible, *but interpreting our Constitution sui generis*, as we are bound to do, we find no impediment in holding that the dehumanising factor of prolonged delay in the execution of a sentence of death has the Constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way...[350]

The constitution of India has borrowed good number of its elements from the instruments of other nations. This could be one strong justification of why a good number of learned advocates and judges are 'in the habit of' relying on foreign jurisdictions. The Supreme court, however, has been cautious which can be reflected by a five judges constitution bench observation in *Babulal Parate* v. *The State of Bombay*[351] that "it will be improper to import into the question of construction doctrines of democratic theory and practice obtaining in other countries, unrelated to the tenor, scheme and words of the provisions which we have to construe."

Competence of legislature

In the case of *Lily Thomas* v. *Union of India*[352] public interest litigation was filed for declaring sub-sections (4) of section 8 of the Representation of the People Act, 1951 as *ultra vires* the Constitution.[353] In other words whether "Parliament

346 (1973) 1 SCC 20.

347 (1983) 2 SCC 68.

348 *Vatheeswaran's* case, para 27.

349 *Strunk* v. *United States.*

350 *Bhullar* Ist, para 27.

351 1960 SCR (1) 605.

352 Indlaw SC 419 AIR 2013 SC 2662, *hereinafter* referred as *Lily Thomas*. This is a division bench judgement delivered by A.K. Patnaik J, the para referred herein are from Indlow.

353 *Lily Thomas,* para 1.

lacked the legislative power to enact sub-section (4) of section 8 of Representation of People Act, 1951".[354]

The court extracted a Privy Council ruling of *The Empress* v. *Burah*,[355] where Selborne J laid down the following *fundamental principles for interpretation of a written Constitution* laying down the powers of the Indian Legislature[356] and observed that the correctness of the "principles with regard to interpretation of a written Constitution has been re-affirmed by the majority of Judges in the case *Kesavananda Bharti* v. *State of Kerala"*.[357] On this point it concluded:[358]

> Hence, when a question is raised whether Parliament has exceeded the limits of its powers, courts have to decide the question by *looking to the terms of the instrument by which affirmatively,* the legislative powers were created, and by which negatively, they are restricted.

Competence of parties: *locus standi*

Locus Standi of third party in criminal case is not open to much discussion. Third party, however, can have *locus standi* in exceptional cases if interpretation of public importance is involved. In the case of *Dr. Subramanian Swamy* v. *Raju, through Member, Juvenile Justice Board* [359] the court accepted this exception in following words:[360]

> Petitioners seek is an *authoritative pronouncement of the true purport and effect of the different provisions* of the JJ Act so as

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354 *Id.* at para 14. According to court this issue was not at all considered by the Constitution Bench in *K. Prabhakaran,* 2005 Indlaw SC 1999.

355 [1878] 5 I.A. 178]

356 *Lily Thomas,* para14.

357 AIR 1973 SC 1465. The principles are as under: The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it; and it can, of course, do nothing beyond the limits which circumscribes these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

358 *Lily Thomas,* para14.

359 MANU/SC/0849 2013. (2013) 10 SCC 465. The paras referred herein are from manupatra.

360 *Id.* at para 12.

> to take a juvenile out of the purview of the said Act in case he had committed an offence, which, according to the Petitioners, on a true interpretation of Section 2(p)of the Act, is required to be identified and distinguished to justify a separate course of action, namely, trial in a regular Court of Law as a specific offence under the Penal Code and in accordance with the provisions of the Code of Criminal Procedure. …*In fact, interpretation of the relevant provisions of the JJ Act in any manner by this Court, if made, will not be confined to the first Respondent alone but will have an effect on all juveniles* who may come into conflict with law both in the immediate and distant future. …If this Court is to interpret the provisions of the Act in the manner sought by the Petitioners, the possible effect thereof in so far as the first Respondent is concerned will pale into insignificance in the backdrop of the far reaching consequences *that such an interpretation may have on an indeterminate number of persons* not presently before the Court. We … hold that the special leave petition does not suffer from the vice of absence of locus …, will proceed to hear the special leave petition on merits.

Meaning of particular words

i. Coparcenary property : Meaning In the case of *Rohit Chauhan* v. *Surinder Singh*[361] the Supreme Court stated the meaning of coparcenary property in following words:[362]

In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.

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361 (2013) 9 SCC 419, Decided on July 15, 2013.

362 *Id* at para 11.

ii. "As-is-where-is" is a phrase which is widely used in contractual documents. *Rajasthan State Industrial Development* carried the meaning from *Punjab Urban Planning and Development Authority* v. *Raghu Nath Gupta* [363] where the court explained in following words: [364]

… the commercial plots were allotted on "as-is-where-is" basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on "as-is-where-is" basis, they cannot be heard to contend that PUDA[Punjab Urban Planning and Development Authority] had not provided the basic amenities like parking, lights, roads, water, sewerage, etc. If the allottees were not interested in taking the commercial plots on "as-is-where-is" basis, they should not have accepted the allotment and after having accepted the allotment on "as-is-where-is" basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage, etc. were not provided by PUDA when the plots were allotted....[365]

iii. Post, 'vacancies', 'of which' National federation of Blind discusses the meaning of "posts", "vacancies" and "of which" used in context of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. [366] For the meaning the court relied on the judgement of Constitution Bench in R.K Sabharwal v. State of Punjab[367] which reads as under: [368]

The expressions "posts" and "vacancies", often used in the executive instructions providing for reservations, are rather problematical. The word "post" means an appointment, job, office or employment. A position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre- strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of *posts, which form the*

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363 (2012) 8 SCC 197.

364 *Rajasthan State Industrial Development, Supra* note 107 at para 18. The court also pointed out *UT Chandigarh Admn*. v. *Amarjeet Singh* (2009) 4 SCC 660.

365 *Ibid.*

366 *Supra* note 248.

367 1995 Indlaw SC 1756.

368 *Id.*, para 16.

*cadre-strength. The co*ncept of 'vacancy' has no relevance in operating the percentage of reservation.[369]

iv. "Control" word also came for discussion in some cases. In the case of Balmer Lawrie[370] took support from Vodafone judgement for meaning of control:[371]

'Control' is a mixed question of law and fact. The control of a company resides in the voting power of its shareholders and shares represent an interest of a shareholder which is made up of various rights contained in the contract embedded in the Articles of Association. The question is, what is the nature of the "control" that a parent company has over its subsidiary? It is not suggested that a parent company never has control over the subsidiary. Control, in our view, is an interest arising from holding a particular number of shares and the same cannot be separately acquired or transferred. Each share represents a vote in the management of the company and such a vote can be utilized to control the company.

After discussing various judicial authorities and dictionary meaning of 'deep and pervasive' the court concluded:[372]

> In the event that the Government provides financial support to a company, but does not retain any control/watch over how it is spent, then the same would not fall within the ambit of exercising deep and pervasive control. Such control must be particular to the body in question, and not general in nature. It must also be deep and pervasive. The control should not therefore, be merely regulatory.

Section 2(h) (d)(i) of Right To Information Act, 2005 while defining "public authority" uses the phrase 'body owned, controlled or substantially financed'. The court in the case *Thalappalam*,[373] had to examine the meaning of these words. While making a comparison of with article 12, constitution of India where the same word "controlled" has been used, the court observed:[374]

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369 *National federation of Blind*, para 46.

370 *Balmer Lawrie*, at para 15.

371 *Vodafone International Holdings B.V.* v. *Union of India* (2012) 6 SCC 613. As quoted in *Balmer Lawrie*, para 15.

372 *Balmer Lawrie*, para 17.

373 2013(12) SCALE 527.

374 *Supra* note 123, para 31.

> Let us examine the meaning of the expression "controlled" in the context of RTI Act and not in the context of the expression "controlled" judicially interpreted while examining the scope of the expression "State" under Article 12 of the Constitution or in the context of maintainability of a writ against a body or authority under Article 226 of the Constitution of India.

The court in *Thalappalam* relied upon from State of *West Bengal* v. *Nripendra Nath Bagchi*,[375] *Chief Justice of Andhra Pradesh* v. *L.V.A. Dixitulu.*[376] The court extracted from *Corporation of the City of Nagpur. Civil Lines, Nagpur* v. *Ramchandra*,[377] where it observed:

> It is thus now settled by this Court that the term "control" *is of a very wide connotation and amplitude* and includes a large variety of powers which are incidental or consequential to achieve the powers-vested in the authority concerned…[378] [Emphasis added]

The court made a tour to its previous judgements like *The Shamrao Vithal Cooperative Bank Ltd.* v. *Kasargode Pandhuranga Mallya*,[379] *State of Mysore* v. *Allum Karibasappa*,[380] *Madan Mohan Choudhary* v.*State of Bihar*,[381] and held that: [382]

> The word "control" is also sometimes used synonyms with superintendence, management or authority to direct, restrict or regulate by a superior authority in exercise of its supervisory power.

It further explained the meaning and scope of the phrase "substantially financed" used in sections 2(h) (d)(i) & (ii), while defining the expression public authority as well as in section 2(a) of the Act, while defining the expression "appropriate government". It observed:[383]

> ...A body can be substantially financed, directly or indirectly by funds provided by the appropriate Government. The expression "substantially financed", as such, has not been defined under

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375 AIR 1966 SC 447.

376 (1979) 2 SCC 34.

377 (1981) 2 SCC 714.

378 Supra note 123, para 32.

379 (1972) 4 SCC 600.

380 (1974) 2 SCC 498.

381 (1999) 3 SCC 396.

382 Supra note 123, para 33.

383 *Id.* at para 36.

> the Act. "Substantial" means "in a substantial manner so as to be substantial.

Comparative law from British jurisdiction came for the support of the court which stated as under:[384]

> In *Palser* v. *Grimling*,[385] *while interpreting the provisions* of Section 10(1) of the Rent and Mortgage Interest Restrictions Act, 1923, the House of Lords held that *"substantial" is not the same as "not unsubstantial"* i.e. just enough to avoid the *de minimis* principle. The word *"substantial" literally means solid, massive* etc. [Emphasis Added]

Applying the precedent the court concluded on this point:

> Legislature has used the expression "substantially financed" in Sections 2(h)(d)(i) and (ii) indicating that the degree of financing must be actual, existing, positive and real to a substantial extent, not moderate, ordinary, tolerable *etc.*[386]

Implications of interpretation

While interpreting any provision should a court be conscious of its impact and implications? The answer is yes because words do not have same meaning all the time. National Federation of Blind judgement rightly considers that:[387]

> acceptance of the interpretation as argued by the appellants[UoI] that computation of reservation has to be against the identified posts only, '*would result into uncertainty of the application of the scheme of reservation'*… [Emphasis added]

This uncertainty could be due to two reasons. The court has given first reason with examples:[387A]

> …[T]hat identification has never been uniform between the Centre and States and even between the Departments of any Government. For example, while a post of middle school teacher has been notified as identified as suitable for the blind and low vision by the Central Government, it has not been identified as suitable for the blind and low vision in some States such as Gujarat and J&K etc.

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384 *Ibid.*

385 (1948) 1 All ER 1, 11 (HL).

386 *Thalappalam,* para36.

387 *National Federation of Blind* at para 35.

387A *Id.* at para 39.

One of the purposes of interpretation is to reduce and if possible remove uncertainty in legal provision. This uncertainty 'has led to a series of *litigations* which have been pending in various high courts. The second reason of uncertainty could be found in the paragraph 4 of the office memorandum (OM) dated 29.12.2005. while 'dealing with the issue of identification of jobs/posts in sub clause (b) states that list of the jobs/posts notified by the Ministry of Social Justice & Empowerment is not exhaustive *which further makes the computation of reservation uncertain and arbitrary* in the event of acceptance of the contention raised by the appellants.' If 'vacancies' used in section 33 does mean only *identified vacancies*, as contended by Union of India, it would lead to arbitrariness, uncertainty and litigation.

Budh Singh v. *State of Haryana,*[388] discussed under head penal versus remedial can also be studied in the context of implication of law.

VII CONCLUDING REMARKS

This year's survey is significant in respect of the fact that it reflects the importance of various interpretative tools like presumption of constitutionality, rule of severability, *etc*. The survey also indicates that interpretation of penal laws is not limited to strict or literal construction. Regarding use of internal aids like headings of text, object clause they are well applied after a detailed analysis. Increasing role of comparative law in interpretation and their repercussions are also highlights of this year's survey. *State of Maharashtra* v *Indian Hotel & Retaurants Assn*[389] *@ Bombay Bar dancer* case, *Namit Sharma second*,[390] *Lalita Kumari* v. *Govt. of U.P.*[391] *Suresh Kumar Kaushal* v. *Naz Foundation*,[392] *Manohar Lal Sharma* v. *The Principal Secretary*[393] are cases where presumption of constitutionality, rule of severability and reading down as an interpretative tool has been discussed. Presumption of constitutionality is a rebuttable presumption. It conceives three situations. One, if the petitioner is not able to convince *prima facie* that a provision violates fundamental rights *etc*., the court had observed that the law is valid. Second, if the petitioner is able to convince and *prima facie* rebuts the presumption, then the state comes in picture so far as burden of proof is concerned. If the state is able to convince the court that the provision is within the bounds of established principle and law, the provision is held to be valid. Third, if after *prima facie* proof of violation of fundamental rights etc, the state is not able to justify the grounds of restrictions the provision is not valid. *Kaushal* comes in first category while *Bombay Bar dancer* falls in third category. *Kaushal* did not accept that the *prima facie* violations of fundamental rights have been established.

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388 AIR 2013 SC 2386 .

389 (2013) 8 SCC 519.

390 *Union of India* v *Namit Sharma*, AIR 2014 SC 122.

391 (2014) 2 SCC1.

392 (2014) 1 SCC 1.

393 (2014) 2 SCC 532.

It, therefore, held that section 377 of IPC is not violative of article 14, 15 or 21. On the other hand in *Bombay Bar dancer* case the aggrieved persons could *prima facie* convince that sections 33A and 33B, [of Bombay Police Act, 1951] lead to *arbitrary classification*. Burden of proof then shifted to state and it was duty of the state to justify the reasonableness of the classification, which the state could not do. The court, therefore, held both of these sections unconstitutional.

Another device of interpretation as submitted above, is reading down which is used to save the provision from being turned down as violative of fundamental rights *etc*. *Kaushal* with the help of previous authorities has widely discussed it. A passing reference has also been made in *Namit Sharma second*, *Bombay Bar Dancer* case. In the three cases the court rejected the application of this tool while in *Manohar Lal Sharma*, it seems the court has accepted the argument of 'reading down.'

Various legal authorities like Law Commission of India, Supreme Court itself recommend modifications in laws. If they are not incorporated by parliament, does this also indicate intention of legislature? *Kaushal* is affirmative on this negative approach of gathering intention. *Kaushal* notices the absence of any amendment in section 377 and non implementation of the report of Law Commission of India as supportive evidence to read the mind of legislature. This proposition of *Kaushal* is 'risky if not reckless' because sometime the Legislature in India is infamous for conscious disregard of constitutional provisions. It is not that they do not want to legislate. Their priority list is volatile where important legislative business some time gets low priority.

Namit Sharma second was able to contain to an extent the reaction and resentment among legal and RTI circle. *Namit Sharma first* decided in 2012. It is unique in the sense that Justice Patnaik was present in both *Namit Sharma first* and *Second.* In *Namit Sharma second* he delivered the verdict overruling *Namit Sharma first* where he was an agreed silent judge. It seems he agreed with both judgements. *Namit Sharma second* agreed that a judicial member could have been better which is an *orbiter* remark. *Namit Sharma first* thought law should be like this and therefore the bench incorporated its subjectivity or thinking in the judgement. In *Namit Sharma first* the thinking was 'ought law' not 'is law' which is not the province of judges. The court denied giving liberal construction in *Balmer Lawrie* for article 12 of constitution of India because due to new economic policy the situation has changed and interpretation should not be a used as a tool to remove the line between State enterprise and a non- State enterprise.

Penal laws are known for their strict interpretation where words have to be literally interpreted. However, the penal legislation which are either protective or procedural in nature are being given liberal and purposive interpretation. It results in inconsistency in judicial approach.

Interpretation of penal laws regarding dowry is showing inconsistent trends in last few years. Meaning of words like 'dowry', 'relative of husband', 'wife' have been given diverse meaning. Indications of *Vipin Jaiswal and Surinder singh* decided in 2013 can be summarized as under:

a. One transaction rule-Prosecution has not only to prove that there was some demand of money or property but also that the demand was not independent of dowry transactions, *ie* not for business or commercial purpose but to satisfy the customary practice of dowry.

b. Inconsistency in judicial *means* of reasoning-The judges are in dilemma which interpretative tool to use? Whether to interpret strictly or take into consideration the objective of legislation? This dilemma is a part of judicial process but law has to reduce this dilemma to reduce chances of discretion and enhance the chance of certainty. Otherwise the illustrations of two inconsistent interpretations of same provision will increase as happened in *Vipin Jaiswal and Surinder singh*. Both are decided in 2013 on section 2 of Dowry Prohibition Act 1961, but in *Vipin* tool used was literal interpretation while in *Surinder singh* liberal interpretation was made to satisfy the objective of legislation.

c. Judicial process and individual psychology-While *Vipin Jaiswal* has no female member on bench, *Surinder singh* has one female member who wrote the judgement. It is difficult to state that this could be reason of a different approach but there is no difficulty in stating that *Surinder singh* is right direction.

d. Parliament should intervene with an explanation that 'any demand was for business needs and not in continuity of dowry has to be proved by the accused party.'

e. It seems in *Vipin Jaisawal* and *Appasaheb* the court is more worried for the misuse of section 498A and 304B and therefore interpreted to balance the needle in favour of husband and his relatives. In other words while *Surinder singh* is a victim oriented interpretation, *Vipin Jaisawal* is concerned for individual liberty of accused.

In 2012 also there was some controversy on the issue whether section 304B Indian Penal Code creates a legal fiction or not? In *Devinder @Kala Ram* v. *State Of Haryana*[394] the bench observed that "the word 'deemed' in Section 304B, IPC, however, does not create a legal fiction but creates a presumption that the husband or relative of the husband has caused dowry death."[395] In a previous decision in 2012 the Supreme Court in *Rajesh Bhatnagar* v. *State of Uttarakhand,*[396] maintained that "it is by fiction of law, that the husband or relative would be presumed to have committed the offence of dowry death rendering them liable for punishment unless the presumption is rebutted".

394 MANU/SC/0894/2012 10 SCC 763.

395 *Id. at* para 9.

396 (2012) 7 SCC 91.

Badshah rejected the argument that the term 'wife' in section 125 of Cr PC be given a legalistic interpretation because it is a penal legislation. It allowed a broad and expansive interpretation and include even those cases where a man and woman have been living together as husband and wife. Similarly *Manohar Lal Sharma* shows that the enactment dealing with prevention of corruption should not be casualty of literal or traditional approach and the limitation of section 6A of DSPEA 1946 requiring prior approval before investigation cannot limit the power of constitutional courts. However same spirit of interpretation cannot be found in the case of *Indra Sarma* where the phrase "relationship in the nature of marriage" used in section 2(f) of Protection of Women from Domestic Violence Act, 2005 was given a strict interpretation because the section used 'means' and not 'includes.' The law needs to be amended to make it inclusive and because of immoral relationship the female cannot be left at the mercy of male partners and conservative societies. The message from *Budh Singh* is that article 20(1) of constitution of India recognises a fundamental right while section 432 and 433 of Cr PC 1973 recognise a privilege. Retrospective Operation of Sec. 32A of NDPS is permissible (32A not being a sustantive criminal Law). According to article 13(2) of the constitution of India, State is not prohibited from taking away a privilege, benefit *etc* and while interpreting a provision the court will take note of this fact. Present survey reveals that like previous years this year also the court has taken recourse of various principles and rules of interpretation. It is neither possible nor desirable to stick to one rule of interpretation if the situation so demands. In this context Friedrich Bodmer is worth quoting that:[398]

> Words … [d]o 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.

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397 Decided on May 07, 2013.

398 Friedrich Bodmer, *The Loom of Language*, (1944) as quoted in *Hooghly Mills, id.* at 430, para 32. Also see 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