

## LAWS REGARDING DOWRY AND MAINTENANCE TO WOMEN: THE INTERPRETATIONAL DILEMMA\*

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### I. INTRODUCTION

Penal statutes are those which provide punishment for a conduct. Unlike other statutes penal statutes are given strict interpretation because accused must be afforded a level playing field *vis a vis* all powerful State. It will be seemly to quote a passage from Maxwell:<sup>1</sup>

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

Should all criminal laws be given strict interpretation? There are certain enactments which though penal are indeed remedial in nature. A remedial statute according to *Corpus Juris Secundum*, “is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good.”<sup>2</sup> *Hooghly Mills*<sup>3</sup> is also useful to understand the concept of penal *vis a vis* remedial statutes. It is explained as:<sup>4</sup>

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

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<sup>1</sup> Maxwell, *THE INTERPRETATION OF STATUTES* (12th Edn.), as quoted in *Aneeta Hada v. M/S Godfather Travels & Tours*, AIR 2012 SC 2795 at 2812.

<sup>2</sup> Rudolph H. Heimanson, *Remedial Legislation*, available at <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=2717&context=mulr>.

<sup>3</sup> *Regional Provident Fund Commissioner v. Hooghly Mills Co. Ltd.*, 2012(1) SCALE 422, decided on 18.01.2012, (hereinafter referred as *Hooghly Mills*), The case has been unanimously decided by A.K. Ganguly and T.S. Thakur, JJ. The judgment was delivered by Justice A.K. Ganguly.

<sup>4</sup> *Id.* at 429, para 24.

The criminal laws are known for their strict interpretation. However, provisions relating to female are more welfare and remedial in nature. Provision of maintenance under section 125 of Code of Criminal Procedure, 1973; section 304B of Indian Penal Code, 1860; section 113B of Indian Evidence Act, 1872; and section 2 of Dowry Prohibition Act, 1961—are a few of them. Should the word ‘dowry’ be widely constructed to include demands for commercial purposes? Should the words ‘relatives of husband’ be given a liberal or a literal interpretation? Should the word ‘wife’ be interpreted to include second wife for maintenance purposes? Can a living in partner be presumed to be wife in certain cases? The conflict of words and purpose has created troubles in judicial interpretation. Can the established rule of strict interpretation of penal law be compromised to give such beneficial provisions a purposive construction? This paper highlights the dilemma of interpretation in dowry as well as maintenance cases.

### II. DOWRY CASES

Provisions regarding dowry are those provisions where contentions of penal *vis a vis* remedial has been raised in Indian courts. Dowry is one of the species of cruelty against women. In the last few years the ‘cruelty against women’ cases are on the priority radar of all the wings of governance. Interpretations in this respect revolve 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. Though there are various provisions which may be relevant in context of dowry, only three provisions are reproduced here as the discussion centers around these provisions. They are as under-

#### **Section 304B.** Dowry death (Indian Penal Code 1860)<sup>5</sup>

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.

Explanation - For the purpose of this sub-section, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.

(2) Whoever commits dowry death shall be punished with imprisonment

<sup>5</sup> Ins. by Act 43 of 1986, s.10 (w.e.f. 19-11-1986).

for a term which shall not be less than seven years but which may extend to imprisonment for life.

**Section 113B.** Presumption as to dowry death (Indian Evidence Act 1872)<sup>6</sup>

When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation: For the purposes of this section, “dowry death” shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860).]

**Section 2.** Definition of ‘dowry’ (Dowry Prohibition Act, 1961)<sup>7</sup>

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.

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

The interpretation of word ‘dowry’ and its distinction from demand for business has developed serious disputes. The Court in certain cases hold that Indian Penal Code and Dowry Prohibition Act 1961 being penal legislation, have to be strictly interpreted while in others the Court feel that strict interpretation is too lexican to serve the purpose.

Criminal laws regarding women have witnessed diverse interpretation. A Court in certain decisions tried to stick to the strict interpretation of penal laws while dowry laws being social welfare provision have also witnessed purposive interpretation. Should the word ‘dowry’ be given wide interpretation to incorporate every material demand by husband and his relative to provide space to the argument of ‘demand made for business’ or should ‘dowry’ be limited to literal/strict meaning?

<sup>6</sup> Ins. by Act 43 of 1986, s.12 (w.e.f. 5-1-1986).

<sup>7</sup> Act 28 of 1961 (w.e.f. 20-5-1961).

### **A. Dowry: Non purposive interpretation**

In a case of 2007, *Appasaheb v. State of Maharashtra*,<sup>8</sup> one of the issues, was whether every demand of money will be treated as dowry demand or the nature and reason of demand will be the decisive factor? In this case it was alleged that some money was demanded from deceased wife to purchase manure as husband was passing through financial stringency. He was not able to meet some urgent domestic expenses. The court made a literal and strict interpretation of the provision as under and held:<sup>9</sup>

In view of the aforesaid definition<sup>10</sup> 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 corelation between the giving or taking of property or valuable security with the marriage of the parties is essential.

The rational for strict interpretation in *Appasaheb*<sup>11</sup> was given as:

*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. [Emphasis Added]*

*Appasaheb* made something which is called as ‘distinction without difference.’ The purpose of dowry enactment was defeated by this interpretation. The Parliament should have incorporated modifications under dowry laws. But it did not do it despite the Criminal Laws Amendment Act 2013 was brought. This indirectly indicated that the Parliament did not notice the problem due to *Appasaheb* or was comfortable with the dowry demand *vis a vis* commercial demand difference or thought that the judicial process will correct it. This indecisive approach of the Parliament led to further follow the wrong path made by *Appasaheb* case.

<sup>8</sup> AIR 2007 SC 763.

<sup>9</sup> *Id.*, para 9.

<sup>10</sup> Section 2 of the Dowry Prohibition Act, 1961.

### B. *Appasaheb followed*

In the case of *Vipin Jaiswal v. State of A.P.* a demand of Rs. 50,000/- was made by the Appellant for purchase of a computer. The question was regarding the interpretation of expression ‘dowry’ and “in connection with the marriage of the parties to the marriage”.<sup>13</sup> Is the word ‘dowry’ wide enough to cover any monetary demand for any purpose? Or the demand must be very closely related ‘in connection with the marriage’. The court observed:<sup>14</sup>

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 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.

Taking clues from the precedent of *Appasaheb* 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’.

### C. *Distinguishing Vipin Jaiswal*

*Appasaheb* (2007) and *Vipin Jaiswal* (2013) were against the spirit of dowry enactment. Dilution and discard was the fate of the judgments. Dilution started in 2014 while discard took place in 2015. In *Surinder Singh v. State of Haryana*<sup>15</sup> the wife died within three months of marriage (date of marriage was 20/04/1994 and the date of her death was 22/07/1994). One of the issues was ‘demand being for commercial needs and not dowry demand.’ Distinguishing *Vipin Jaiswal* the court held in *Surinder Singh* case that there is convincing evidence that ‘the accused were unhappy by the quality and quantity of the dowry’ given at the time or before marriage transaction. As ‘sufficient quantity of dowry was not given and that transaction was sought to be completed by asking for Rs. 60,000/,’ the latter demand was a part of the first transaction. Proximity of demand with marriage was proved beyond reasonable doubts. While in *Vipin Jaiswal* the nexus between two transaction could not be proved proximately by prosecution and the benefit on the point has to go to the accused. Next arguments in *Surinder Singh* was that ‘being a penal provision Section 2

<sup>11</sup> *Supra* n. 9.

<sup>12</sup> AIR 2013 SC 1567 (*hereinafter* referred as *Vipin Jaiswal*).

<sup>13</sup> Section 2, Dowry Prohibition Act, 1961.

<sup>14</sup> *Supra* n. 12, para 6.

<sup>15</sup> (2014) 4 SCC 129, (*hereinafter* referred as *Surinder Singh*).

of the Dowry Prohibition Act, 1961 will have to be construed strictly,’ more so in the light of the case of *Vipin Jaiswal* and *Appasaheb* where the court construed it strictly in no uncertain terms.<sup>16</sup> Partially admitting this fact, the court in *Surinder Singh*<sup>17</sup> observed that the rule of strict interpretation of penal statutes is not absolute.<sup>18</sup> In the words of the court :

It is true that penal provisions have to be construed strictly. However, we may mention that in *Murlidhar Meghraj Loya v. State of Maharashtra*<sup>19</sup> 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. Any narrow and pedantic, literal and lexical construction of food laws is likely 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.”<sup>20</sup>

Similar view was taken in *Kisan Trimbak Kothula v. State of Maharashtra*.<sup>21</sup> The court also found force from *State of Maharashtra v. Natwarlal Damodardas Soni*<sup>22</sup> 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 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.<sup>23</sup>

The court further observed:

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*

<sup>16</sup> *Id.*, para 17.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Id.*, para 18.

<sup>19</sup> (1976) 3 SCC 684, at para 5.

<sup>20</sup> *Ibid.*

<sup>21</sup> AIR 1977 SC 435.

<sup>22</sup> (1980) 4 SCC 669.

<sup>23</sup> *Supra* n. 15, para 18.

*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 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.<sup>24</sup>

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 in continuity of the previous dowry transactions.

#### ***D. Discarding Appasaheb and Vipin Jaiswal***

In 2015 a full bench of the apex court in *Rajinder Singh v. State of Punjab*,<sup>25</sup> not only addresses the issue of interpretation of dowry provision but also corrects two precedents. In the previous judgments of *Appasaheb* and *Vipin Jaiswal* a two judge bench gave strict interpretation to dowry provision and declared that demand of dowry is different from commercial demand or demand for domestic needs. *Rajinder Singh* rightly held that:

Given that the statute with which we are dealing must be given a fair, pragmatic, and common sense interpretation so as to fulfill the object sought to be achieved by Parliament, *we feel that the judgment in Appasaheb's case followed by the judgment of Kulwant Singh*<sup>26</sup> *do not state the law correctly.* We, therefore, declare that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise.<sup>27</sup>

The Court also produced the opinion of *Standard Chartered Bank v. Directorate of Enforcement*,<sup>28</sup> a Constitution Bench (3:2) judgment, which follows:

*All penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment.*

<sup>24</sup> *Id.* para 24.

<sup>25</sup> (2015) 6 SCC 477.

<sup>26</sup> *Kulwant Singh v. State of Punjab*, (2013) 4 SCC 177.

<sup>27</sup> *Supra* n. 25, para 20.

<sup>28</sup> (2005) 4 SCC 530, p. 547.

Here, the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. It is sheer violence to common sense that the legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes.

In the conclusion of 'Interpretation of Statutes' in the Annual Survey of Indian Law Institute (2013) while commenting on *Vipin Jaiswal* this author suggested that: <sup>29</sup>

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.'

The suggestion was made because it was thought the decision was not in right spirit. Before parliament removes the anomaly, the Supreme Court has itself and rightly repaired the derailment. Dowry, though is a penal enactment, is also a welfare and protective legislation. Sticking to strict interpretation of penal provision will frustrate the purpose of provision.

#### ***E. Relative of husband***

Section 304B Indian Penal Code uses the words '*relative of husband*'. In the case of *State of Punjab v. Gurmit Singh*<sup>30</sup> interpretation of these words were in dispute. Does it include husband's Aunt's brother (Chachi's brother)? The court observed that "IPC is a penal provision which is to be construed strictly. A word for which the definition is not mentioned should be construed in natural, ordinary and popular sense. For this reliance was placed on dictionaries as to what a word would mean in common parlance."<sup>31</sup> Relative means relations coming out of marriage, adoption and blood. The court did not find any reason to go beyond this meaning. It observed:

It is well known rule of construction that when the Legislature uses same words in different part of the statute, the presumption is that those words have been used in the same sense, unless displaced by the context. We do not find anything in context to deviate from the general rule of interpretation. Hence, we have no manner of doubt that the word "relative of the husband" in **Section 304 B** of the IPC would mean such persons, who are related by blood, marriage or adoption.<sup>32</sup>

<sup>29</sup> Anurag Deep, *Interpretation of Statutes*, XLIX ASIL 825 (2013).

<sup>30</sup> (2014) 9 SCC 632.

<sup>31</sup> *Id.*, para 11.

<sup>32</sup> *Id.*, para 12.

Hence, in this case the respondent was not covered in the ambit of 'relative' but court went on to add that this shall not preclude the court from fastening liability under some other section of the IPC. This interpretation does not serve the purpose of incorporating section 304B. Purpose was to protect wife from dowry demand and harassment. If this strict interpretation is continued it shall leave chances wherein the other relatives who could enjoy the shield (of not being relative because of blood, marriage or adoption) under this section (due to narrow understanding, though they would be liable in other sections) would perpetuate such crimes knowing they would be safe while they are equally playing with the plan of the husband and others. Indian family structure in many cases is a joint family which contains various members. Also, for people who are aware of the nuances of law shall always have their exits before they undertake to indulge in such crimes by engaging their relatives and refraining themselves. Moreover women being vulnerable class a liberal interpretation may be considered so that she feels protected.

#### **F. Section 304B – Whether a Legal Fiction**

Section 304B attracts interesting interpretation. 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*<sup>33</sup> 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."<sup>34</sup> In a previous decision in 2012 the Supreme Court in *Rajesh Bhatnagar v. State of Uttarakhand*<sup>35</sup> 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". *Devinder* sounds more logical. A legal fiction is something, which does not exist in reality but has been brought to existence by virtue of law. Reverse evidences cannot deny this existence. In dowry death cases husband and relatives are deemed culpable but they can rebut their deemed culpability. This however is a matter of academic dispute.

#### **(i) Read up and read down of dowry provision**

There is an impression that 'read into' or 'read down' is used to save a provision from being declared as unconstitutional. This is correct statement of a principle of Constitution but is not limited to it. Read into or read down may be

<sup>33</sup> (2012) 10 SCC 763 (hereinafter referred as *Devinder*), decided on 18.10.2012. This case has been decided by division bench of Hon'ble Justice K.S. Radhakrishnan, Dipak Misra, J., unanimously. The judgment was delivered by Hon. Justice Dipak Mishra.

<sup>34</sup> *Id.* at para 9.

<sup>35</sup> AIR 2012 SC 2866.

used for interpretation other than non constitutional purpose. *Sher Singh @ Pratapa v State of Haryana*<sup>36</sup> uses the tool of read up and read down even if it is not a case of constitutional validity. A statement from the case can be useful for reference:

Section 304B, the proper manner of interpreting the Section is that "shown" has to be read up to mean "prove" and the word "deemed" has to be read down to mean "presumed". [Emphasis added].<sup>37</sup>

In this case the constitutional validity of 304B (or any provision) was not in question but meaning of certain words in the section was discussed. While it is understandable why shown should be read up to prove, it is not understandable how "deemed" to be read down to mean "presumed" is helping. It does indicate that even if the validity of a provision is not in question, the tools of read into or read down may be used.

#### **(ii) Shown, prove, deem and presume**

*Sher Singh* is probably one of the few cases which deliberates on the meaning and scope of shown, prove, deem and presume. It observes as under:<sup>38</sup>

17. Keeping in perspective that Parliament has employed the amorphous pronoun/noun "it" (which we think should be construed as an allusion to the prosecution), followed by the word "shown" in Section 304B, the proper manner of interpreting the Section is that "shown" has to be read up to mean "prove" and the word "deemed" has to be read down to mean "presumed".

Following finding in *Sher Singh* regarding 304B is perplexing:

Once the *presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility*, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the *heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt*. [Emphasis Added]

This observation in *Sher Singh* has been approved by three judges bench in the case of *Rajinder Singh v. State of Punjab*<sup>39</sup> The judgment in *Sher Singh* gives a U turn in the traditional jurisprudence which goes against

<sup>36</sup> (2015) 3 SCC 724 (hereinafter referred as *Sher Singh*).

<sup>37</sup> *Id.* at para 16.

<sup>38</sup> *Id.* at para 17.

<sup>39</sup> *Supra* n. 25.

accused. It would be harsh to expect the accused proves his/her case beyond reasonable doubts when the elements of crime has already been reduced to conduct and circumstances element, and no mental element is required to be proved by prosecution. As it is approved in various judgments, soon this precedent will get the status of *stare decisis* and make the life of accused more miserable in the light of fact that female related laws are alleged to be misused. Deliberate use of word 'shown' is understandable but the mandate of beyond reasonable doubts for accused is not digestible.

This judgment is a setback to a time honoured principle of criminal jurisprudence. This undisputed principle mandates that the prosecution has to prove its case beyond reasonable doubts and the accused, if required, can prove his arguments on balance of probabilities. This well established rule of evidence was completely reversed by a division bench in *Sher Singh*. As submitted above what is more disturbing is the fact that precedent of *Sher Singh* has been approved by three judges bench in the case of *V.K. Mishra v. State of Uttarakhand*<sup>40</sup> as well as *Rajinder Singh*.<sup>41</sup>

Prosecution is not required to prove beyond reasonable doubts. The judgment in *Sher Singh* has gone to the extent of upholding that 'accused' in dowry death cases has to prove beyond reasonable doubts because of 'deemed' culpability. The judgment has not produced a single authority which can substantiate its findings. Indeed it has referred cases which has no direct bearing on the interpretation of dowry provision. *Sher Singh* has grossly overlooked not only well established principle of criminal jurisprudence but also precedents of larger bench.

### (iii) *The principle*

Presumption of Innocence is a celebrated principle of criminal jurisprudence. According to this principle an accused is presumed to be innocent unless the State proves him guilty beyond reasonable doubts. Then the accused is required to give his evidence. In civil cases both parties are required to prove by preponderance of probability. In criminal cases State is bound to prove beyond reasonable doubts while for accused it is preponderance of probability. In other words accused has only to raise doubts in the evidence of prosecution and has nothing to prove beyond reasonable doubts. This is known as standard of proof and the principle is applicable in common law countries. *Sher Singh* has changed this traditional principle of criminal law and also further diluted the protection available to accused.

<sup>40</sup> (2015) 9 SCC 588.

<sup>41</sup> *Supra* n. 25.

Unlike civil cases, in criminal cases one party is accused and other is State. Judiciary is neutral in civil cases but not neutral in criminal cases because State is very strong *vis a vis* accused. This non neutrality is essential part of fair trial which creates balance between State and accused. The State has human and material resources to bring evidences. A powerful State with the help of justice seeking victim can make a strong case against accused. Accused is not only weak but becomes vulnerable because an allegation of crime brands him/her as criminal in the eye of general public. Not only people but friends begin avoiding him/her. His vulnerability is further increased because his liberty is also completely curtailed if s/he is arrested and partially restricted if s/he is on bail. Therefore, great jurist Stephen suggests that the State 'can afford to be generous.' To make a level playing field the more powerful State has more obligations and heavier responsibilities. Less privileged accused has lesser responsibilities.

However in certain cases like socio economic crimes State finds its responsibility too difficult to prove. In other words it is humanly not possible for the prosecution to prove all the elements of crime beyond reasonable doubts like in dowry death cases where the crime is committed in close doors. In those cases the offender cannot be punished for want of evidence and victims cannot get justice. Therefore the law thought of reducing the burden of prosecution. In these cases the State has two options, that it reduces the number of elements to be proved by drawing inferences from certain facts. Such inferences are called presumption. Or it dilutes the standard of proof for prosecution. The practice all over the world is to choose first option, which is called as reverse burden. In this case the prosecution is not required to prove all elements of crime (like *mens rea* or elements of *actus reus viz* conduct, circumstances, causal relation etc). Rather the accused has to prove certain facts in order to secure his acquittal. In dowry death cases the prosecution is neither required to prove that the death was with *mens rea* (intention or knowledge), nor who actually killed the married women nor to prove any proximate causal relationship between death and conduct of accused in all cases unlike murder under section 302. What the prosecution has to prove is death within 7 years of marriage (unnatural death including suicide), soon before death, demand of dowry and harassment of wife by accused. If the prosecution proves these elements beyond reasonable doubts, 'such husband or relative shall be deemed to have caused her death'. Now the accused may prove his innocence on mere balance of probabilities.

### (iv) *Precedents ignored*

This is the law laid down and followed in various dowry death cases

like *Shanti v. State of Haryana*,<sup>42</sup> *Pawan Kumar v State of Haryana*,<sup>43</sup> *Kans Raj v. State of Punjab*,<sup>44</sup> [which is a three judges bench decision], *Indrajit Sureshprasad Bind v. State of Gujarat*,<sup>45</sup> *Karan Singh v. State of Haryana*,<sup>46</sup> *Asha v State of Uttarakhand*,<sup>47</sup> *Rajeev Kumar v State of Haryana*.<sup>48</sup> It is inconsistent with the interpretation made to ‘shall presume’ by a three judges bench in *V.D. Jhangan v. State of Uttar Pradesh*<sup>49</sup> and *State of Maharashtra v Wasudeo Ramchandra Kaidalwar*<sup>50</sup>. *Sher Singh* also goes contrary to the law laid down in the constitution bench cases of *K. Veeraswami v Union of India*<sup>51</sup> and *Sanjay Dutt v State Through C.B.I., Bombay*<sup>52</sup> on reverse onus. On reverse onus clause (when a statute shifts burden of proof on accused regarding certain facts) way back in 1981 in the case of the *State of Maharashtra v Wasudeo Ramchandra Kaidalwar*, a three judge bench discussed the nature and scope of ‘shall presume’ clause. In context of Prevention of Corruption Act, 1947 it held that accused has ‘not to prove his innocence beyond reasonable doubt, but only to establish a preponderance of probability.’ Similarly the constitution bench in the case of *K. Veeraswami v. Union of India* held that prosecution has to prove beyond reasonable doubts. In the case of *Justice K. S. Puttaswamy (Retd) v. Union of India*,<sup>53</sup> a three judge bench reiterated that “the pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches.” *Sher Singh* case has not discussed any of previous precedent on reverse onus which is inconsistent with institutional integrity and judicial discipline.

#### (v) *Restore protection of accused*

The rights of accused in case of dowry laws have been diluted because the substantive elements have already been reduced by deeming clause and presumption. Misuse of these laws have been recognised by courts. *Sher Singh* further dilutes the protection available to accused by changing the rules regarding standard of proof which is not only unreasonable but also lead to absurd consequences. “Shown” word is used in Indian Evidence Act 1872,

<sup>42</sup> (1991) 1 SCC 371.

<sup>43</sup> (1998) 3 SCC 309.

<sup>44</sup> (2000) 5 SCC 207

<sup>45</sup> (2013) 14 SCC 678.

<sup>46</sup> (2014) 5 SCC 73.

<sup>47</sup> (2014) 4 SCC 174.

<sup>48</sup> AIR 2014 SC 227.

<sup>49</sup> AIR 1966 SC 1762.

<sup>50</sup> AIR 1981 SC 1186.

<sup>51</sup> 1991 SCC (3) 655.

<sup>52</sup> 1995 CriLJ 477.

<sup>53</sup> (2015) 8 SCC 735.

sections 111A, 113A, 113B, 114A. Can the same interpretation be applied in these cases? Will provisions in these cases be proved just by preponderance of probability and the accused will have to prove beyond reasonable doubts. Another apprehension is that in terror enactment the interpretation by judiciary and amendments by Parliament can be made in similar lines where an accused would be required to prove beyond reasonable doubts and prosecution will satisfy by a mere preponderance of probability. Surprisingly and thankfully a few judgments on dowry death cases in 2016 and 2017 have overlooked the dictum of *Sher Singh* probably because the case was not brought to their notice. But two inconsistent opinion (one mandating that prosecution has to prove beyond reasonable doubts and other giving liberty to prosecution to prove on balance of probability) on the interpretation of dowry death provision create confusion and problem to thousands of sessions courts and hundreds of high court judges. It is high time a higher bench of the Supreme Court removes the confusion and restores the well established principle of criminal jurisprudence. *Bajinath v. State of Madhya Pradesh*<sup>54</sup> though a two judge bench opinion, has (rightly) not taken note of *adverse* precedents of 2015 on ‘reverse onus’ clause but based its decisions on the precedents of pre 2015 criminal jurisprudence.

### III. MAINTENANCE UNDER SECTION 125 CrPC, 1973

Another significant aspect of interpretation of female related criminal law is section 125 of CrPC 1973. Can the marriage be a matter of presumption for the purpose of maintenance? Can the proof of marriage may be dispensed with by the court in certain circumstances? This issue came for discussion while interpreting the word ‘wife’ under section 125 of CrPC 1973.

#### A. *Presumption as to legal marriage*

*Badshah v. Sou. Urmila Badshah Godse*<sup>55</sup> rejected the argument that the term ‘wife’ in section 125 of CrPC be given a legalistic interpretation because it is a penal legislation. It allowed a broad and expansive interpretation and included even those cases where a man and woman have been living together as husband and wife.

In *Dhannulal v. Ganeshram*,<sup>56</sup> the question relating to presumption of a valid marriage arose. The Supreme Court referred the classic decision of *A. Dinohamy v. W.L. Balahamy*,<sup>57</sup> where it was held that where a man and woman

<sup>54</sup> AIR 2016 SC 5313, decided by a division bench on 18 November, 2016.

<sup>55</sup> AIR 2014 SC 869.

<sup>56</sup> (2015) 12 SCC 301.

<sup>57</sup> AIR 1927 PC 185.

are proved to have lived together as husband and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on a party, who seeks to deprive the relationship of legal origin.<sup>58</sup>

In the case of *Dwarika Prasad Satpathy v. Bidyut Prava Dixit*<sup>59</sup> it was held that:<sup>60</sup>

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*. [Emphasis Added]

May presumptions are presumption of fact. For factual presumption of marriage i.e. may presume, a court might require two proofs, living together and living together as husband and wife. Suppose two are living together but the people are aware that they are not husband and wife. In that case the court cannot presume a marriage. This is important for subordinate judiciary because marriage disputes go to family courts.

Similar dispute arose in the case of *Chanmuniya v. Virendra Kumar Singh Kushwaha*.<sup>61</sup> The question was whether ‘wife’ under section 125 CrPC 1973 may include a second wife or not? There are inconsistent precedents of different benches of the Supreme Court. Therefore the court in this case referred this matter to a larger bench after framing following three issues:

- i. 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, CrPC?
- ii. Whether strict proof of marriage is essential for a claim of maintenance under Section 125, CrPC. having regard to the provisions of the Domestic Violence Act, 2005?
- iii. Whether a marriage performed according to the customary rites and ceremonies, without strictly fulfilling the requisites of Section 7(1) of the

<sup>58</sup> *Dhannulal v. Ganeshram* (2015) 12 SCC 301, 306.

<sup>59</sup> (1999) 7 SCC 675.

<sup>60</sup> *Ibid.*

<sup>61</sup> (2011) 1 SCC 141 (hereinafter *Chanmuniya*).

Hindu Marriage Act, 1955, or any other personal law would entitle the woman to maintenance under Section 125, CrPC?

### B. *Chanmuniya inconclusive*

Unfortunately the matter in *Chanmuniya* case was dismissed on 5.9.2014 by an order because the court found that ‘the appellant is not interested in pursuing the matter.’<sup>62</sup> It is doubtful if a question of law raised by one bench which has inconsistent pronouncements by different judgments of the Supreme Court and has been referred to a larger bench, can be dismissed because of technicalities of uninterested party?

The Supreme Court in *Badshah* case considered *Chanmuniya* and discussed the scope and limitation of the phrase “wife”. In this case a lady married the petitioner as per Hindu rites and customs. She was not aware that the petitioner was already married. After three months of marriage the lady came to know this material fact, which he did not disclose to the lady while marrying. Factually this lady was now second wife and the marriage was *void ab initio*. The lady, however, 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, CrPC 1973 or not? The court held:<sup>63</sup>

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.

The court identified *Heydon’s* case<sup>64</sup> as historical source of purposive interpretation. It also took support from the maxim *magis valeat quam pereat*<sup>65</sup>. It also used the precedent for ‘selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts.’<sup>66</sup> The Supreme Court upheld the grant of maintenance. Fortunately the maintenance was granted by Trial Court and affirmed by the Additional Sessions Judge. The High Court also granted maintenance of Rs.1000/- per month to second wife and to respondent No.2 (daughter) at the rate of Rs.500/- per month. Objective

<sup>62</sup> Advocate on Record who was representing the appellant has died. In these circumstances the Registry had issued notice to the appellant for making alternate arrangement. The said notice has been duly served. However, no arrangements are made. It seems that the appellant is not interested in pursuing the matter. It is accordingly dismissed. ....J. (A.K. Sikri)

<sup>63</sup> *Supra* n. 55, para 22.

<sup>64</sup> [1584] EWHC Exch J36.

<sup>65</sup> 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.

<sup>66</sup> *Capt. Ramesh Chander Kaushal v Veena Kaushal*, AIR 1978 SC 1807.

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.

This case has a different dimension also. The case was filed in 2005 and Supreme Court decided it in 2013. The petitioner husband used two forums at district level, came to High Court and then to the Supreme Court for a sum of Rs 1500/ month. He must have been wealthy enough to pay Rs 1500/ because he could afford to come to the Supreme Court. This seems more a case of harassment of the lady (second wife) and satisfaction of ‘wounded vanity’ of husband for which he used the legal tools of appeal. This tendency should be checked. Parliament could have checked it by bringing suitable amendment to relevant provisions in time. It can still do it. Courts (High Court and the Supreme Court) should discourage this type of access to court just because one can afford. Least the Supreme Court could have done was to grant the lady the reasonable cost of litigation and time. As it was a case of fraud by husband, it should have ordered authorities to file a criminal case so that the petitioners like him and advocates who encourage such litigations have some deterrence.

### ***C. Wife aware of Previous Marriage: Presumption denied***

Similar question of presumption of marriage was raised in the case of *Indra Sarma v. V.K.V Sarma*.<sup>67</sup> A female lived with a male knowing the fact that the male is husband of some other lady and also father. All family members of male were opposed to her living with him. 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’<sup>68</sup> The court, taking clues from *Gokal Chand v. Parvin Kumari*<sup>69</sup> held that :<sup>70</sup>

...the continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is a rebuttable one and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.

<sup>67</sup> AIR 2014 SC 309.

<sup>68</sup> *Id.* at para 56.

<sup>69</sup> AIR 1952 SC 231.

<sup>70</sup> *Supra* n. 67, para 56.

In this case the appellant lady knew the male is married. Therefore the court held that:<sup>71</sup>

in 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 other words there is no need to ‘rebut the presumption’ because there is no presumption at all in this case as lady was a consenting and willing party in the relationship with male who was already married.

A lady who is staying in living in relationship with a married male knowing the fact of marriage, whether this illegitimate culpable wife can legally claim maintenance? Present position is that such lady/wife is not entitled to maintenance because the Supreme Court has not interpreted in favour of such lady. The Supreme Court has made liberal interpretation if lady/wife is illegitimate but not culpable. It has not made more liberal interpretation because lady/wife is illegitimate as well as culpable. Should the judiciary protect such illegitimate and culpable lady/wife by resorting to ultra liberal interpretation? The decision raises various questions:

- i. Is judiciary right or wrong in not making an over liberal interpretation?
- ii. Should the judiciary modify its approach next time in a similar case?
- iii. Should parliament step in?
- iv. If parliament does not do, should state legislature amend?
- v. Why instead of parliament state legislature should step in?
- vi. First two questions may be taken together.

Is judicial interpretation wrong? No, judiciary has already made a wide interpretation. An *Austinian* judge with positivist attitude would never have presumed a lady as wife unless there would have been a proof of marriage. Following arguments may be made to explore the judicial process in reaching to the decision that such lady should not receive maintenance. This author does not agree with all six reasons (which are not given by the apex court and is a common sense guess), which may have consciously or unconsciously come in the mind of the Judge:

- i. Judicial restraint—A more wide interpretation would have been an illustration of unwarranted judicial legislation. The law experts should not push judiciary for doing the job of legislature except in extraordinary case.

<sup>71</sup> *Id.* at para 57.

- ii. *Volenti non fit injuria*—As the lady is aware of the marital status of man with whom she is enjoying living-in relationship willingly and with consent, she cannot complain later on that the male does not maintain him. After all the male is legally bound to maintain his lawfully wedded wife and children. How many ladies in her life would claim maintenance from him?
- iii. Rights of illegitimate Child—The rights of child born of the relationship between a married male and a woman living with him knowing the male is married is protected by law to some extent as such child, though illegitimate is entitled to receive maintenance under various laws in India.
- iv. Moral concern—Another view of why judiciary has not made a more wide interpretation could be that judiciary is concerned as to moral fabric of Indian society. It does not wish to encourage and legitimize an illegal and penal relationship by designating such women as wife for the purpose of maintenance.
- v. Punishment to such lady—By not giving maintenance the court wanted to punish the lady for her immoral and illegal conduct.
- vi. Equity—Equity is also not in her favour as those who want equity must come with clean hands. The lady being involved in immoral and illegal conduct cannot claim equity.

Should the legislature step in these cases of illegitimate culpable lady/wife. It is correct that the female partners are involved in those activities, which the conservative societies find immoral. This does not deprive the female partner their claim for maintenance. The incidents of living in, bigamous marriage are increasing because of departure in social norms, greater scope for female education and jobs, change in mind set of society, dilution of morals and values in human life. The increasing incidents of family disputes, divorce petitions, false cruelty cases under 498A Indian Penal Code 1860 etc has compelled even persons of older generation to modify their thinking on 'living in' relationship. A few of the legal experts, who are absorbed in traditional thinking, are of the opinion that there is nothing wrong in 'living in'. This makes both the parties know each other before marriage. Though 'living in' is a moral departure from traditional thinking, even then law should not leave the female on the mercy of males. Not providing maintenance will invite further complications to these female. The lady like other wife may be without any means and resort to other immoral practices like, prostitution, begging etc. This is the very purpose of maintenance. By not providing maintenance the law frustrates the purpose of maintenance. Such maintenance, therefore, should be made mandatory and law should be changed accordingly.

Parliament may not take steps as it may find the conduct of lady not worthy of maintenance. There are, however, certain States, which are either open to such conduct or have more such problems. For example the State of Goa, NCT-Delhi etc where living in relationship is not a very surprising conduct and may find it suitable to modify law.

#### IV. CONCLUSION

Penal laws are known for their strict interpretation where words have to be literally interpreted. However, the penal legislation which are either protective (section 498A, 304B IPC) or procedural (section 125 CrPC 1973) in nature are being given liberal and purposive interpretation which is a right approach. Interpretation of penal laws regarding dowry is showing inconsistent trends in last few years because some judgments are *Austianian* in their approach. They seem to believe in what is written in black and white only. That is why meaning of words like 'dowry', 'relative of husband', 'wife' has been given diverse meaning. *Sher Singh* restates the law on section 304B regarding standard of proof without satisfactorily discussing that prosecution has to prove on balance of probabilities while accused has to bear a heavy burden to prove his innocence beyond reasonable doubts. This is approved by three judges bench judgement in *Jivendra Kumar*. In this light *Sher Singh* requires reconsideration as it does not seem to follow any principle or precedent or policy or professional opinion and needs to be declared *per incuriam*. Before the precedent of *Sher Singh* finds the status of *stare decisis* the judiciary should intervene. A positive aspect of *Rajinder Singh* is that it refuses to give strict interpretation to 'dowry' and denies to accept *Vipin Jaiswal* which declared that demand of dowry is different from commercial demand or demand for domestic needs. A connected commercial demand is also dowry demand. It was expected that *Vipin Jaiswal* needed reconsideration and legislative modification. Now it is not required because judiciary has corrected the bad law. Indications of *Vipin Jaiswal* and *Surinder Singh* decided in 2013 can be summarized as under:

- i. 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, *i.e.* not for business or commercial purpose but to satisfy the customary practice of dowry.
- ii. Inconsistencies 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 Jaiswal*, tool used was literal interpretation while in *Surinder Singh* liberal interpretation was made to satisfy the objective of legislation.

- iii. 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 Jaiswal* is concerned for individual liberty of accused.

The *Badshah* case rejected the argument that the term ‘wife’ in section 125 of CrPC be given a legalistic interpretation because it is a penal legislation. It allowed a broad and expansive interpretation and includes even those cases where a man and woman have been living together as husband and wife. 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. *Sher Singh* is the biggest blunder which the Supreme Court has committed in the area of criminal jurisprudence. A larger bench ought to be set up to settle the matter regarding interpretation of reverse onus clause under section 304B of IPC and 113B of Indian Evidence Act 1872 regarding ‘shall presume and deeming clause.’