

Bhoora Singh Vs. State of U.P.

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Court : Allahabad

Decided On : Jul-12-1991

Reported in : 1992CriLJ2294

Judge : B.L. Yadav and ;J.N. Dubey, JJ.

Acts : Code of Criminal Procedure (CrPC) - Sections 82, 83, 313, 366 and 386; [Indian Penal Code \(IPC\), 1860](#) - Sections 302, 304B and 498A; Dowry Prohibition Act - Sections 4; Dowry Prohibition (Amendment) Act, 1986 - Sections 113B; [Evidence Act, 1872](#) - Sections 4, 32, 32(1), 79 to 85, 101 to 105, 113A and 113B; Foreign Exchange Regulation Act, 1947 - Sections 23(1); Matrimonial Causes Act, 1963 - Sections 2 and 2(1); [Constitution of India](#) - Article 20 and 20(1)

Appeal No. : C.A. Nos. 2854 and 2917 of 1988 and Reference No. 30 of 1988

Appellant : Bhoora Singh

Respondent : State of U.P.

Advocate for Def. : Govt. Adv. and ;Dilip Kumar, Adv.

Advocate for Pet/Ap. : D.N. Misra, ;K.K. Misra, ;S. Ratan, ;Virendra Saran and ;Y.K. Shukla, Adv.

Judgement :

B.L. Yadav, J.

1. Bhoora Singh, father-in-law of deceased Smt. Urmila has preferred Criminal Appeal No. 2854 of 1988 whereas there is a Reference No. 30 of 1988 for the confirmation of the death sentence as envisaged by provisions Section 366 of the Criminal P.C. (for short the Code). Raju alias Raghvendra Pratap Singh the husband, and Smt. Gulhari, mother-in-law of deceased Smt. Urmila have also preferred appeal against the judgment dated 9-12-1988 passed by Sri U.K. Khare, III Additional Sessions Judge, Fatehpur, convicting the appellant Bhoora Singh under Section 498A, I.P.C. and sentencing him to 3 years imprisonment and a fine of Rs. 500/- and further convicting him under Section 4 of the Dowry Prohibition Act and sentencing him to imprisonment for 6 months and a fine of Rs. 500/- and in default to undergo imprisonment for 3 months, and convicting appellants Raju alias Raghvendra Pratap Singh and Gulhari Devi alias Champa Devi (husband and mother-in-law respectively of the deceased Smt. Urmila) under Section 302, I.P.C. sentencing them to be hanged till death further convicting them under Section 304B, I.P.C. sentencing them to imprisonment for 7 years and further convicting under Section 498A, I.P.C. and sentencing to imprisonment for 3 years and fine of Rs. 500/- each and in default to undergo imprisonment for 3 months, in S.T. No. 70 of 1987, State v. Bhoora Singh, P.S. Malwan Distt. Fatehpur.

2. The appellants, along with one Smt. Aruna Devi alias Vijaylakshmi since acquitted, were charged under Sections 302, 304B, 498A, I.P.C. and Section 4 of the Dowry Prohibition Act for having committed murder of Smt. Urmila wife of appellant Raju alias Raghvendra Pratap Singh, for inadequate dowry. The prosecution case was that informant Yadunath Singh Chauhan performed marriage of his daughter Km. Urmila Devi with Raju alias Raghvendra Pratap Singh resident of village Bhadwan; P. S. Malwan, Distt. Fatehpur in the year 1983 and gave Rs. 20,000/- in cash Rs. 10,000/- in the form of utensils etc. and spent Rs. 10,000/- in the reception of the marriage party. Smt. Urmila Devi visited her father-in-law's house 3-4 times but every time her in-laws' made complaints regarding insufficiency of dowry. They tortured her and also threatened to kill her. This was conveyed by the deceased to her mother and father 6-7 months prior to the date of occurrence. Once when the father of deceased went to bring her from her husband's house all the inmates including appellants complained for inadequate dowry. In fact they demanded Bullet Motor Cycle and double bed etc.

and told that Urmila will be allowed to go with him only when the demands were fulfilled. The informant was also told that Bhoora Singh had an offer of Rs. 80,000/- for the marriage of his son and after repeated requests, she was allowed to go with his father. On 11-10-1986 all the accused burnt her with intention to commit murder, she was brought to the hospital by the one Vijay Bahadur Singh with burn injuries her face, head, neck, chest, back, abdomen and both hands and both legs. At about 3.05 p.m. the same day she was examined by Dr. Harish Chandra (P.W. 5) who found the said injuries on her person. At that time, for general condition was very low. Pulse was 120/Mt, Vol. low rapid. Her temperature was normal and at that time she was semi-conscious. According to the doctor, the burn injuries were 3rd to 4th degree and about 90%. It was also mentioned that injuries were caused by flames caused from Choolha and were fresh. The memo was sent by the doctor on 11-10-86 the same day, at about 3.10. P.W. 5 Dr. Harish Chandra sent a letter to Sri S.K. Singh, Magistrate on duty for recording the dying declaration of the patient, but the Magistrate did not come. The Senior Medical Superintendent sent a letter to the Distt. Magistrate Fatehpur. Ultimately Sri S.K. Singh S.D.M. arrived at 6.55 p.m. in the hospital but the patient had already expired at 5.35 p.m. The F.I.R. was lodged by informant Yadunath Singh P.W. 1 father of the deceased on 12-10-86 at about 00.55 in Police Station Kotwali alleging that his daughter had gone to her father-in-law's house about six months ago and about 25-30 days prior to the occurrence, had sent a letter that efforts are being made to kill her. The letter was sent through her brother Indrabhan Singh who had gone to bring her but was misbehaved and was asked to go back without his sister, The F.I.R. is Exbt. Ka-1 (on page 4 of the paper book) and the letter dated 22-9-86 sent by the deceased is Exbt. Ka-2 (on page 5 of the paper book).

3. The informant P.W. 1 was posted as S. I. in P.S. Mohabbatpur Pansa in Distt. Allahabad and at about 7 p.m. he came to know through wareless that his daughter was admitted in the hospital when he reached the hospital, he came to know that she expired at about 6 p.m. and murdered by the appellants, and Smt. Karuna Devi etc. since acquitted.

4. The Sub-Inspector S.K. Misra was posted at P.S. Kotwali who received order for preparing inquest report and went to the Distt. Hospital and prepared inquest

report at 7 a.m. appointed the panches, prepared photolash, challan lash, letter to R.I., letter to C.M.O. sealed the dead body and sent it through constable Prakash and Home Guard Ram Asrey for post-mortem.

5. The Station Officer Malwan, Sri V.K. Sharma, took over the investigation on 13-10-1986, recorded the statement of the complainant Yadunath Singh and Bhagauti Prasad Maurya, Head Moharriar of P.S. Kotwali. As the offence under Section 498A, I.P.C. was also made out investigation was entrusted to the Gazetted Police Officer, the C.O. City, on 13-10-86. On 14-10-86 he perused the place of occurrence, got the sight plan prepared, recorded the statement of Smt. Sukhya and Chanda Devi. He found the pieces of Sari and one empty glass of Kerosene oil and ashes of the choolha. Smt. Sukhya stated that at that time, she was cleaning her house when the deceased came to the door in a burn condition crying BACHAO--BACHAO. Some persons residing in the Mohalla collected there and extinguished the fire by pouring water. The deceased fell down and asked to call her cousin sister and her father. Her cousin sister Smt. Chandi Devi told the I.O. that when she was going to have her bath, she heard the burning incident. She rushed to the place of occurrence immediately and placed the deceased in the northern room of the house with the help of other ladies. She was badly wounded and was crying. Smt. Urmila told her how she got the burn injuries. She told that she has been several bad days and now her life was taken. She also requested her to call her father and mother and told that she will tell them by whom and how was she burnt.

6. All the accused were not available consequently proceedings under Sections 82 and 83 of the Code were initiated.

7. Prosecution examined Yadunath' Singh, complainant as P.W. 1, Raj Kishore as P.W. 2, Sankatha Devi as P.W. 3, Dr. V. Namdeo as P.W. 4, Dr. S. C. Sachan as P.W. 4, Sri Dalbir Yadav I.O. as P.W. 6, Chandrapal as P.W. 7, Bhagauti Prasad as P.W. 8, Suresh Chandra Dubey as P.W. 9, Shivakant Misra as P.W. 10 and Sri V. K. Sharma as P.W. 11.

8. The defence examined Mata Prasad as D.W. 1 and Sri Wasit Ali as D.W. 2. The defence filed the copies of Khhataunis and also filed a copy containing some

songs.

9. All the accused pleaded alibi under Section 313 of the Code. They denied the prosecution case.

10. Learned trial Judge believed the prosecution case and convicted and sentenced the appellants as indicated above.

11. Mr. P.N. Misra, learned counsel for the appellants urged that the conviction of the appellants was based on circumstantial evidence and there was no direct evidence. He tried to point out a number of infirmities in the prosecution version. He further urged that the murder was alleged to have been committed on 11th October, 1986, provisions of Section 304B added to the Penal Code by the Dowry Prohibition (Amendment) Act, 1986 (Act No. 43 of 1986) for. short the (Amendment Act), being not retrospective would not be applicable in the present case, and the provisions of Section 113B added to the Indian [Evidence Act, 1872](#) by the aforesaid Amendment Act is not retrospective and hence not applicable in the present case. The prosecution case was based on the circumstantial evidence which was not of conclusive nature and there was no explanation for delay in lodging the F.I.R. It was further urged that the dying declaration was not recorded by the Magistrate, hence it has no probative value. Reliance was placed on Shree Ram Sharma v. State of U.P., 1989 All Cri R 436 : 1989 All LJ 990; State of U.P. v. Chet Ram, 1989 Cri LJ 1785 : AIR 1989 SC 1453; Wazir Chand v. State of Haryana, AIR 1989 SC 378 : 1989 Cri LJ 809.

12. Mr. Dilip Kumar, learned counsel for the complainant, on the other hand, urged that the provisions of Section 113B added to the [Evidence Act, 1872](#) and Section 304B added to the Penal Code by the Amendment Act were retrospective. There was a deeming clause in Section 113B and under Section 304B indicating that if death of a woman was caused within 7 years of her marriage and there was evidence that she was subjected to cruelty by her husband or any other relative, such death was to be called dowry death and such husband or relatives were deemed to have caused her death. Section 113B added to the Evidence Act by the Dowry Prohibition (Amendment) Act, 1986, is retrospective in operation and points out the mode as to how the prosecution evidence has to be appreciated and

how the guilt has to be proved. Under the circumstances the dying declaration made by the deceased to her mother finds corroboration from other prosecution evidence, hence it was correct. Reliance was placed on *Kailash Kaur v. State of Punjab*, AIR 1987 SC 1368 : 1987 Cri LJ 1127; *Gurbachan Singh v. Satpal Singh*, AIR 1990 SC 209 : 1990 Cri LJ 562 and *Smt. Lichchamadevi v. State of Rajasthan*, AIR 1988 SC 1785 : AIR 1988 Cri LJ 1812.

13. Learned counsel for the State, however, adopted the arguments advanced by the learned counsel for the complainant.

14. The points -in these analogous appeals and the Reference, including appraisal of evidence being common, hence these are being disposed of by a common judgment.

15. The points for our determination are as to whether the provisions of Section 304B of the Penal Code and Section 113B of the Evidence Act as added by the Amendment Act are retrospective in their operation, if so its effect? and the mode of appreciation of evidence in a dowry death case in view of Section 113B of the Evidence Act and the appraisal of evidence in view of Section 386 of the Code.

16. Taking the first point as to whether the provisions of Section 304B of the Penal Code and Section 113B of the Evidence Act are *ex post facto* law, or in other words is it retrospective in operation.

17. *Ex abundante cautela* provisions of Section 304B of the Penal Code and Section 113B of Evidence Act are set out as follows :--

304-B : DOWRY DEATH :-- (1) Where the death of a woman is caused by any burns or bodily injury 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.

113B. PRESUMPTION AS TO DOWRY DEATH :--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.

The legislature or the Parliament has got limitless power of declaring new crimes and establishing rules of conduct for the people in future. It may also declare as to what is right or what is wrong. At the same time it is not inapt to set out Blackstone's Commentary, Vol. 1, page 6 as follows :

If an action indifferent in itself is committed and the legislature then for the first time declares it to have been a crime and inflict punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action innocent when it was done, should be afterwards converted into guilt by a subsequent law....

18. It appears to be relevant to discuss the concept of ex post facto law.

19. In Kent, Commentaries 10th Edition Vol. I page 458, the following statements may be noticed :

The words Ex post facto laws are technical expression and meant every law, that made an act which was innocent when done, before passing of the law criminal or which aggravated a crime and made it greater than it was when committed, or which changed the punishment and inflicted a greater punishment than the law annexed to the crime when committed.

(See Philips v. Eyre, (1870) 40 LJQB 28 (31); Galder v. Bull, (1780-1800) 1 Law Ed 648).

20. It is to be noticed that the language of Article 1, Section 1, 9(3) of the American Constitution is different in some respect than the language of Article 20(1) of our Constitution, hence American cases are not very material in interpreting Article 20(1) of our Constitution.

21. In *Ratan Lal v. State of Punjab*, AIR 1965 SC 444 : 1965 (1) Cri LJ 360 para 6 it was observed :--

Every law that takes away or impairs a vested right is retrospective. However ex post facto law is necessarily retrospective. Under Article 20(1) of the Constitution, no person shall be convicted of any offence except for violation of a law in force at the time of the commission of that act. But an ex-post-facto law which only mollifies the rigour of a criminal law does not fall within the said prohibition under Article 20 of the Constitution.

If a particular law makes provision to that effect, though retrospective in operation, it will be valid. The question whether such a law is retrospective and, if so, to what extent depends upon the interpretation of a particular statute, having regard to the well settled rules of construction.

22. Article 20(1) of our Constitution provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that, which might have been inflicted under the law in force at the time of the commission of the offence.

23. In our opinion the present. Article 20(1) sets two limitations upon the law making power of every sovereign legislative authority, as regards retrospective criminal legislation (i.e. Ex post facto law). What Article 20(1) forbids are (a) making ex post-facto criminal law, in other words making an act crime for the first time and then making that law retrospective (b) infliction of a greater penalty than that which could have been inflicted under the law which was in force when the act was committed. What is prohibited is not only the enactment of a statute with retrospective operation but also against conviction under such law.

24. In *Shiv Bahadur Singh v. State of Vindhya Pradesh*, 1953 SCR 1188 : AIR 1953 SC 394c : 1953 Cri LJ 1480 it was held that Article 20(1) in its broad import has been enacted to prohibit convictions and sentences under Ex post-facto laws, whether the same was a post Constitution law or a pre-Constitution law. It was also held that what was prohibited was only conviction and sentence under Ex post

facto law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a Court different from that which had competence, at the time cannot ipso facto be held to be unconstitutional. An accused has no fundamental right to trial by a particular Court or by a particular procedure.

25. In *G.P. Nayar v. State (Delhi Administration)*, AIR 1979 SC 602 : 1979 Cri LJ 589 it was observed (Para 7) :

All that Article 20(1) prohibits is Expost-facto laws and is designed to prevent a person being punished for an act or omission which was considered innocent when done. It only prohibits the conviction of a person or his being subjected to a penalty under Expost-facto laws. A person as an accused cannot object to a procedure different from what obtained at the time of commission of the offence.

26. In *Union of India v. Sukumar*, AIR 1966 SC 1206 : 1966 Cri LJ 946 at p. 949 in connection with adjudication proceedings for contravention of Section 23(1) of Foreign Exchange Regulation Act, 1947 (as substituted by the Act 39 of 1957) it was held under para 9 as follows :--

A person accused of the commission of an offence has no vested right to be tried by a particular Court or a particular procedure except in so far as there is any constitutional objection of any other fundamental right is involved.... There is no principle underlying Article 20 of the Constitution which makes a right to any course of procedure a vested right.

27. In *Dobbert v. Floride* (U.S. Supreme Court Reports), (1977) 53 57 Ed 2nd 344 (356) it was held as follows:

The inhibition upon the passage of Expost facto laws does not give a criminal right to be tried in all respects by the law in force when the crime charged was committed. The Constitution does not limit the legislative control or remedies and modes of procedure which do not affect matters of substance. Even though it may work to the disadvantage of an accused a procedural change is not Expost-facto.

28. In the light of the aforesaid observations in cases having bearing on the subject pertaining to Expost-facto law, we have to ascertain as to whether Section 304B of the Penal Code was an expost-facto law, keeping in view that the occurrence in present appeal has taken place prior to the date when Section 304B was brought on the Statute Book. No doubt Section 304B was not on the Statute Book when the occurrence took place but Section 304B does not create a new offence rather it reiterates in substance the offence under Section 302, I.P.C. Even prior to the enactment of Section 304B in a number of reported cases the husband, mother-in-law etc. have been convicted under Section 302, I.P.C. for murdering the wife by sprinkling kerosene oil etc. It cannot, therefore, be said with certainty that for the offence of bride burning the conviction cannot be recorded under Section 302 or that the offence under Section 304B was a new offence.

29. However, the matter was urged by the learned counsel for the appellants that Section 304B was an expost facto law and it would not apply in connection with the occurrence which took place prior to it, as new offence of 'bride-burning' Was unknown on the date of occurrence. In other words, it was emphatically urged by the learned counsel for the appellants that Section 304B could not be held to be retrospective in operation, hence the conviction under Section 304B may be set aside.

30. The object of enacting Section 304B by the Amendment Act was to combat the menace of Dowry-Deaths. By enacting Section 304B the Parliament seems to have laid more emphasis on the deterrent theory of punishment in Criminal Jurisprudence to curb the evil of bride burning. It enacts that where the death of a woman is caused by any burns or bodily injury or 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 relative for or in connection with demand of dowry such death shall be called dowry death and such husband or relative shall be deemed to have caused her death and shall be punished with imprisonment for a minimum of seven years which may extend to life-imprisonment.

31. It is to be noticed that the legislature has used the expression 'deemed to' with a view to create a legal fiction. Its effect is that a position which otherwise could not obtain is deemed to obtain under the given circumstances. We may say that the Court is entitled to and bound to ascertain for which purposes and between whom the statutory fiction is to be resorted to and full effect must be given to it and it should be carried to its logical conclusions.

32. We, however proceed on a different plank that if conviction Under Section 304B is set aside assuming that it was not retrospective in operation, it makes little effect on the disposal of the appeal or on the quantum of sentence that we propose to impose after appraisal of the evidence on the record afresh. There is another aspect of the matter that Section 304B creates an offence and is penal provision and hence it stands on different footings than procedural provisions contained Under Section 113B of the Evidence Act. We are accordingly proceeding with the assumption that the provisions, of Section 304B have no retrospective operation. We rely upon *Sri Ram Sharma v. State of U.P.* 1989 All Cri. R 436 : 1989 All LJ 990 (Supra), cited by counsel for the appellants.

33. Turning to the next question which emanates from the first as to whether Section 113B of Evidence Act inserted by the Amendment Act which is procedural has retrospective operation so that it applies to the present case and its correct interpretation. Broad import of Article 20(1) of the Constitution is to prohibit conviction and sentence under Ex post facto laws. This provision creates no inhibition in respect of procedure to be followed in connection with the trial. No person as an accused has fundamental right to be tried in accordance with particular procedure and the same may be different by introducing Amendment even subsequent to the date of occurrence or when the offence was committed. In other words the provisions of Article 20(1) of the Constitution do not limit the legislative control of remedies and modes of procedures. Normally a law has to be prospective and not retrospective except in special circumstances, i.e. *Maxim Nova Constitution Futuris For-man Imponere Defet Non Praeteritis*, Similarly there is another maxim : *Leges Et Constitutiones Futuris Certum Est Dare Formam Necotiis* which connotes that every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation or imposes a new

duty or attaches a new disability, in respect of transactions or considerations already past, must be deemed retrospective in its operation and opposed to sound principles of legislation.

34. In *West v. Gwynne* (1911) 2 Ch 1, 12 it was held that except in special cases a new Act ought to be so construed as to interfere as little as possible with vested rights. (See *M.R. Gissing v. Liverpool Corporation* (1935) Ch. 1,31).

35. It is thus obvious that normally unless the legislature otherwise indicates a law has to be interpreted as prospective and not retrospective. But this is rule of substantive law. It does not apply to the procedural law as no person, particularly an accused, has a vested right or fundamental right to be tried in accordance with particular procedure.

36. In *Halsbury's Laws of England* (4th edition) Vol. 44 page 570 it was stated as follows :

The general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication it appears that this was the intention of the legislature.

37. In *Herridge v. Herridge*, (1966) 1 All ER 93 where the question was whether Section 2 of Matrimonial Causes Act 1963 which was procedural was retrospective in its operation, it was held that Section 2(1) of the Act of 1963 was a procedural provision, for it dealt with the adducing of evidence in relation to an allegation of condonation in any trial after July 31, 1963 accordingly the sub-section was applicable, even though the evidence related to events before that date.

38. In *Gurbachan Singh v. Satpal Singh*, AIR 1990 SC 209 : 1990 Cri LJ 562 (Supra), Under Section 113A of the Evidence Act, presumption raised as to abatement of suicide by married woman, came for consideration before their lordships of Supreme Court and the question was as to whether the provisions of Section 113A which were procedural has retrospective application. It was held

under para 36 (of Gir Bachan Singh's case) that Section 113A is merely a matter of procedure of evidence and as such it is retrospective.

39. Recently in *State of Punjab v. Iqbal Singh* (In Crl. Appeal No. 325 of 1987 decided on 10-5-91) (1991) 2 JT 495 : 1991 Cri LJ 1897 their lordships of Supreme Court have considered the scope of the provisions of Sections 113A & 113B of the Evidence Act as added by the Dowry Prohibition Amendment Act 1986 and the dictum was pointed out as follows (at pp. 1901-02 of Cri LJ) :

On a plain reading of (Section 113A) it is obvious that if a wife is shown to have committed suicide within a period of seven years from the date of marriage and there is evidence that she was subjected to cruelty by her husband or his relative, it would be permissible for the court to presume that such suicide was abetted by her husband or by such relative of her husband....

The law underwent a further change with the introduction of Section 304B in the Penal Code and Section 113B in the Evidence Act, where the death of a woman is caused by burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and evidence reveals that soon before her death she was subjected to cruelty or harassment by her husband or any of his relative for or in connection with any demand for dowry, such death is described as dowry death Under Section 304B for which the punishment extends to imprisonment for life.... By Section 113B of the Evidence Act the court has to raise a presumption of dowry death if the same has taken place within seven years of marriage and there is evidence of the woman having been subjected to cruelty and/or harassment.... The legislative intent is clear to curb the menace of dowry deaths, etc. with a firm hand. We must keep this legislative intent. It must be remembered that since such crimes are generally committed in the privacy of residential homes and in secrecy, independent and direct evidence is not easy to get. That is why the legislature has by introducing Sections 113A and 113B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundational facts are established and the unfortunate event has taken place within seven years of marriage. This period of seven years is considered to be the turbulent one after which the legislature

assumes that the couple would have settled down in life.

40. In the present case also as the provisions contained Under Section 113B of the Evidence Act in connection with dowry death was procedural and keeping in view the legislative intent I am of the opinion that the provisions of Section 113B of Evidence Act was retrospective in its operation and would be applicable to the present case even where the occurrence took place prior to the enforcement of the Section.

41. Reverting to the import and interpretation of Section 113B of the Evidence Act the ambit of the section stands circumscribed with the wide sweep of the language designedly employed by the Legislature. The heading of the Section 113B is 'Presumption about dowry deaths', No doubt the heading of a section cannot control or restrict or extend the scope of the section where the language is clear. Normally heading is the key to the interpretation of the Section but not to restrict or enlarge its meaning. The heading can be referred to determine the sense of an ambiguity. In the present case the heading throws considerable light on the interpretation of the section. May presume, shall presume and conclusive proof are defined terms Under Section 4 of the Evidence Act. But the expression presumption itself is not defined under the Act. The word 'presume', according to grammar is 'verb' transitive and intransitive both and means for granted, to take for granted, to assume before hand. The 'presumption', is noun according to grammar and means supposition, a ground for presuming, that which is supposed to be true without direct proof, the conclusion or inference that a fact exists.

42. The term 'presumption' in its largest and most comprehensive signification may be defined, where in the absence of actual certainty of the truth of a fact or proposition, an inference affirmative of that truth is drawn by a process of probable reasoning from something which is taken for granted. presumptive evidence has obtained a restricted legal signification, and is used to designate an inference affirmative or disaffirmative of the existence of some fact, drawn by a court or a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the Court or the tribunal. (See Best Eleventh Edition p. 313).

43. According to Black's Law Dictionary a 'presumption', is a rebuttable assumption of fact, resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action. A presumption is not evidence in itself. It is either rebuttable or conclusive. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof. (See N. J. Evidence Rule 13, Calif Evi. Code).

44. In our opinion presumption is a rule of law under which courts are authorised to draw an inference in respect of a particular fact. The presumptions of law are in reality rule of law and part of the law itself. In other words presumption of law is one which once the basic fact is proved and no evidence to the contrary has been led, compels a finding of the presumed fact. In fact the presumption Under Section 113B is statutory.

45. The Legislature has designedly used the expression 'shall presume' Under Section 113B, to indicate that it is mandatory and obligatory for the Court to draw the Inference and no option is left to the Court but to take for granted, and proceed on the supposition that the husband, and other relatives have committed the dowry death. The Court is bound to take the fact of dowry death as proved until very strong and positive evidence is given in rebuttal by the accused. Presumption of law introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus (onus?) on the accused. The legislature has chosen to use the expression 'shall presume' which is mandatory and not the expression 'may presume'. May presume is presumption of fact and 'shall presume' is a presumption of law, but rebuttable, but at the same time it is not lightly to be repelled. The evidence for the purpose rebutting or repelling it must be strong, distinct, satisfactory and of a conclusive nature. The conclusive proof, however, is irrebuttable presumption of law.

46. Similar to the rebuttable presumption of law Under Section 113B of the Evidence Act, there are presumptions provided Under Section 79 of the Evidence Act, which provides that the Court shall presume to be genuine every document purporting to be a certified copy of a document i.e. judgment or decree etc. which

is by law declared to be admissible as evidence of a particular fact and Which purports to be duly certified by any officer. Section 80 (Eighty) provides that a Court shall presume as genuine a document produced as record of evidence. Section 81 (Eighty one) enacts that Court shall presume the genuineness of every official Gazette. Section 82 (Eighty Two) enacts that Court shall presume a document admissible in England without proof of seal etc. Section 83 (Eighty three) provides that Court shall presume that maps and plans preferred by the Central or State Government to be genuine. Section 84, (Eighty four) provides that Court shall presume every book printed under authority of a Government containing Law to be genuine. Section 85 provides that Court shall presume every document purporting to be a power of attorney to be genuine. It can very safely be inferred that the presumption pointed out Under Section 113B is similar to Sections 79 to 85 of the Evidence Act.

47. As regards the last question formulated by us in respect of appreciation of evidence in a Dowry death case in the light of Section 113B as added by the Amendment Act, held by us to be retrospective may be read along with Sections 101 to 105 of the Evidence Act. Section 105 enacts rebuttable presumptions of law in criminal cases. Section 105 runs as follows :

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Section 101 enacts that whoever desires a Court to give judgment as to any legal right or liability dependent upon existence of facts which he asserts must prove that those facts exist. This section is based on a Maxim *El Incumbit Probatio Qui Dicit Non Quit Negat* which means that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not on the party who denies it, as the negative is usually incapable of proof. Section 102 provides that the burden of proof would lie on the person who would fail if no evidence at all were given. Section 103 provides that burden of proof as to particular fact lies on

the person who wishes the Court to believe in its existence. Section 104 provides that the burden of proving fact to be proved to make evidence admissible is on that person who wishes to give such evidence.

48. There is a presumption of innocence in favour of an accused in Criminal cases as provide exceptions to the general rule that in criminal cases burden of proof lies on the prosecution. No doubt the prosecution is bound to negative any exception favourable to the accused. But where the facts proved raise a rebuttable presumption of law against accused as provided Under Section 113B as added by the Amendment Act, the burden is shifted on the accused in view Section 105 of the Evidence Act and also otherwise, to lead such convincing, positive and strong evidence so that the presumption of law Under Section 113B may be rebutted.

49. We may consider the standard or the degree or presumption and the degree of proof and evidence in rebuttal. As the court shall presume one certified copy of a judgment or decree certified to be rule to be a genuine document (vide Section 79) or the Court is to presume an official Gazette to be a genuine document (vide Section 81) and the map and plans prepared by Central or provincial Government are presumed to be genuine and the law books printed under the authority of Government are presumed to be genuine (vide Sections 84 and 83), the same is the degree of presumption and it is obligatory for the court to raise. No option has been left to the Court in the matters where it is shown that a woman was subjected to cruelty in connection with demand of dowry before her death and the, question is whether a person has committed the dowry death, the Court shall presume,, unless this presumption of law is rebutted by strong, cogent and positive evidence, that the person has not committed dowry death. We shall proceed to appreciate the evidence in the present appeals and reference in the light of these legal propositions having bearing on the subject.

50. Statements of witnesses have been referred to us from both sides. Reference shall be made to the material Witnesses and their statements. P.W.1 Yadunath Singh (page 16 of the paper book) is the father of deceased Smt. Urmila Devi. He stated that about 6/7 months prior to the occurrence he has gone to his daughter's husband's house to take her back and there met her in-laws. They all complained

of insufficient dowry and demanded bullet motor cycle, double bed etc. They told that they were getting offer of Rs. 80,000/- towards dowry and in case his daughter dies, they can certainly get Rs. 80,000/-. After great pursuation they permitted his daughter to come back and his daughter complained not to go back under the circumstances. On receiving wireless message on 11-10-86 at 7 p.m. when he reached the hospital on 11-10-86 at 10 p.m. the appellants were not, there. He was told by his wife Smt. Sankatha Devi and son Indrabhan Singh that his daughter Smt. Urmila Devi was admitted in the hospital at 3 p.m. with burn injuries. He lodged F.I.R. on next day i.e. 12-10-1986 at about 00.55, FIR is Ex.Ka-1 and he proved the same. He further stated that his daughter had sent a letter before her death through Raj Kishor his sister's son, which is Ex.Ka-2, complaining therein that her in-laws and husband are demanding more dowry and efforts are being made to kill her. He further stated that he had sent his son Indra Bhan Singh to bring back his daughter from her in-laws house but he was misbehaved by the in-laws and his daughter was not permitted to come back. There was no infirmity in the statement of this witness and we do not agree with the criticism made or infirmities pointed out by the learned counsel for the appellants.

51. We have perused the statement of P.W. 2 Raj Kishor Singh. He was the sister's son of Yadunath Singh, the father of deceased. He stated that Smt. Urmila, the deceased was his sister, and on 22-9-86 he went to her husband's house and met his sister. She told him about the demand of more dowry by her in-laws and husband and that she was tortured and was threatened to be killed and her husband would marry again. She sent a letter to her parents through him. He further stated that his sister told him that she does not sleep in the night due to fear of being killed by her in-laws. She requested him to take her back. That letter Ex. Ka-2 was handed over to him to be delivered to the mother of deceased. In this way the letter, Ex. Ka-2, sent by the deceased to her parents prior to the occurrence has been proved. We have perused the entire statement and we have no reason to disbelieve this witness.

52. Similarly P.W. 3 Smt. Sankatha Devi mother of deceased Urmila Devi made statement on oath and proved the letter Ex. Ka-2 received from Rajkishor Singh. She reached the hospital after being informed by Raj Kumar that her daughter was

admitted in the Sadar Hospital Fatehpur having received a number of burn injuries. She reached there along with her sons Dinesh and Indrabhan and Jagroop Singh son of the elder brother of her husband. At that time Smt. Urmila was alive and had received so many burn injuries. P.W. 3, the mother of deceased asked how she (deceased) received burn injuries, she (Urmila the deceased) told that she neither burnt herself nor it was accidental burning rather her (Urmila's) mother-in-law Smt. Gulhri, (appellant No. 2 in Criminal Appeal No. 2917 of 1988) told her to prepare Khichri and then to prepare Paratha and when she was to lit the oven, her mother-in-law Smt. Gulhri asked her to close the door, she told her mother-in-law that she has closed the door and again started lighting the oven, thereafter her husband Raghvendra Pratap Singh fell her down and her mother-in-law Smt. Gulhari, poured kerosene oil on her and burnt her, she further told that when she started burning badly, her mother-in-law Smt. Gulhri, her father-in-law Bhoora Singh and her husband Raghbendra Pratap Singh went out of the room from the back door and then she came out of the house crying 'Bachao-Bachao'. She was given some milk through spoon by Smt. Chanda Devi. She also requested her mother not to send her to her husband's house in case she is cured and in case she dies on account of burn injuries, she requested her mother to tell her father (Yadunath Singh) to take revenge. We see no reason to disbelieve the statement of this witness.

53. Thrust of the arguments of the learned counsel for the appellant was on the validity of the dying declaration inasmuch as the deceased was not in a fit state of mind so as to make it admissible Under Section 32 of Evidence Act. We have perused the statements made by the deceased. We are conscious that the provisions of Section 32(1) of the Evidence Act is an exception to the Rule of hearsay and makes admissible the statement of a person who is dead. The statement so made must relate to the cause of death or explain circumstances leading to the cause of death. What is to be ascertained is that the deceased was in a fit state of mind to make the statement. Not necessary that the statement must have been recorded by the Magistrate First class. Dying declaration can be made even to his own family member. The substantive part of the statement relating to the cause of death is to be taken into account.

54. In *Vaswant Narayan Pawar v. State of Maharashtra*, AIR 1980 SC 1270 : 1980 Cri LJ 1009 where, in a dying declaration by a lady burnt to death by her husband was stated that even if she was dying having been burnt her husband should not be beaten, their Lordships of Supreme Court held that it could not be said that this statement could be converted into one exculpatory of the accused. We are accordingly of the opinion that the substantial part of the statement relating to the cause of death has to be ascertained.

55. Even in the case of circumstances of the transaction there must be some proximate relation to the occurrence in order to make the statement of the deceased admissible. In brief this can be stated that Clause (1) of Section 32 of the Evidence Act makes a statement, of a person who has died, relevant only when that statement is made by a person, as to the cause of his or her death or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question. In the present case the deceased has made statement about the cause of her death and as to who were responsible for causing her death. Even though the Magistrate was summoned by the Doctor but he could not come and after reminder he came but by that time she was dead. There is no hard and fast rule to judge the authenticity of the dying declaration. The same has to be judged in accordance with the circumstances of each case depending upon many factors which would vary with each case but in any view of the matter we are conscious that the object of dying declaration is to get from the person making the statement the cause of death or the circumstances of the transaction which resulted in death. In the present case after perusing the statement of P.W. 3 Smt. Sankatha Devi to whom the statement was made by the deceased before her death, we are satisfied that the statement so made relating to the cause of the death does not suffer from any infirmity as pointed out by the learned counsel for the appellants.

56. Next limb of the argument of the learned counsel for the appellants was as to whether the letter Ex.Ka-2 alleged to have been written by Smt. Urmila the deceased did contain her signature. Questions were put to the mother of deceased P.W. 3 and she very specifically stated that she has received the letter and was conversant with the signature of her daughter (page 38 of the paper

book). Much emphasis was laid as to whether her signature tallies with the specimen signature contained in her bank account, but nothing particular was pointed out. After perusing entire statement of Smt. Sankatha Devi, P.W. 3 we are satisfied that the letter Ex. Ka.2 has been proved.

57. We have perused the statements of P.W. 4 Dr. Bharat Nam Dev (page 41 of the paper book) who has prepared the postmortem report and P.W. 5 Dr. Harishchandra, Medical Officer who was present when the deceased was admitted to the hospital. He stated that her general condition was very low, pulse 120/mt, vol. low, rapid, temp, normal. Patient was semi-conscious. She has received injuries alleged to have been caused by the flames of kitchen and that he wanted to contact Sri S.K. Singh, S.D.M. so as to arrange for the dying declaration of the deceased but he could not come, till 6-55 p.m. whereas the deceased died at 5-35 p.m. Reminder was also sent by the Doctor which means the deceased was actually at least in such a state of mind that she could make statement about the cause of her death. The Doctor was also satisfied to that effect. After perusing the statements we are satisfied that the deceased was in a proper state of mind so as to make the dying declaration to her mother.

58. We have perused the statement of P.W. 7 Chandra Pal Singh, Branch Post Master, Post Office Ajhi who has proved that there was saving bank account in the name of Smt. Urmila deceased and that he recognised the signature of deceased and compared with the specimen signature. He stated that he can recognise specimen signature of the deceased on the saving bank account but cannot say as to whether her signature in the saving bank does tally with Ex. Ka-2 as he has not seen her writing the letter. To put it differently he also did not state that the signature of the deceased on the letter Ex. Ka-2 written by her to her mother was not of the depositor in the branch post office.

59. The statement of P.W. 11, V.K. Sharma S.O. was also referred to in the arguments. This witness has stated that the FIR was lodged on 12-10-86 and he was entrusted with the investigation and recorded the statement of Suresh Chandra and proceeded to Fatehpur for investigation and also proceeded to ascertain the witnesses of Panchayatnama. We have perused the statement of

this witness and statements of other witnesses. We do not find any infirmity in the prosecution case.

60. As regards the dying declaration their Lordships of Supreme Court in Smt. Lichhamadevi v. State of Rajasthan AIR 1988 SC 1785 : 1988 Cri LJ 1812 (supra) held that even if the dying declaration was not recorded by the person who heard it but nevertheless that can be relied upon. In this connection the observations on page 1787 (of AIR) : (at p. 1815 of Cri LJ) para 9 are set out as follows :

It was Lalit Kishore who took Pushpa to the hospital and got her admitted. Dr. Goel who received Pushpa and admitted her in the emergency ward has testified that neighbours brought Pushpa and no relative accompanied her. He has stated that Pushpa was in a serious condition. He has deposed that upon his questioning, Pushpa told him that her mother-in-law had burnt her. It is true that Dr. Goel has not recorded this statement in the medical register but that is no ground to disbelieve him. Dr. Goel is a disinterested person. The High Court has accepted his version and we have no reason to reject it. Dr. Goel himself has treated the victim. Therefore, there was no question of finding out from the Doctor whether Pushpa was in a position to give her statement or not.

Similarly in the present case; statement so made by the deceased to her mother, P.W. 3 Smt. Sankatha Devi after perusing the statement of mother and the statement of Dr. Harishchandra, we are satisfied that nothing has been elicited from their statement in Cross-examination so as to disbelieve them.

61. In Kailash Kaur v. State of Punjab AIR 1987 SC 1368 : 1987 Cri LJ 1127 (supra) it was stated in para 5 as follows :

There is no reason whatever not to act upon the dying declaration of the deceased wherein she has given a clear and vivid account of the pouring of kerosene oil over body and her being set on fire by the appellant. She had also implicated Mahinder Kaur as the person who held her while the kerosene oil was being poured on her body by the appellant. We have very grave doubts about the legality, propriety and correctness of the decision of the High Court in so far as it has acquitted Mahinder Kaur by giving her the benefit of doubt.

In para 6 following observation is also noticeable :

The dying declaration made by the deceased has the ring of truth and the testimony of the doctor P.W. 2 and of the Head Constable P.W. 7 clearly establishes that she was in a fit condition to make the statement. The conviction of the appellant by the High Court was, therefore, fully justified and there is absolutely no ground for interference with the same by this Court.

62. In the aforesaid case of *Kailash Kaur v. State of Punjab* 1987 Cri LJ 1127 (supra) in para 1 their Lordships of Supreme Court pointed out how the approach has to be made in appreciating the evidence and awarding the sentence. The observations in para 1 are set out as follows :

This is yet another unfortunate instance of gruesome murder of a young wife by the barbaric process of pouring kerosene oil over the body and setting her on fire as the culmination of a long process of physical and mental harassment for extraction of more dowry. Whenever such cases come before the Court and the offence is brought home to the accused beyond reasonable doubt, it is the duty of the Court to deal with it in most severe and strict manner and award the maximum penalty prescribed by the law in order that it may operate as a deterrent to other persons from committing such antisocial crimes.

63. In *Gurbachan Singh v. Satpal Singh* AIR 1990 SC 209 : 1990 Cri LJ 562 (supra) their Lordships of Supreme Court held that even if there was some delay in FIR that has to be ignored as the information was communicated (as in the present case) to the father of deceased who lodged the FIR.

64. We have also considered the statements of witnesses examined on behalf of the appellants. D.W. 1 Raj Bahadur, Sub Post Master of post office where account of deceased Smt. Urmila was maintained, who was examined to prove that signature of Smt. Urmila deceased on the letter Ex.Ka-2 sent to her parents prior to the occurrence, was not similar to that of her specimen signature in the post office account. Similarly we have considered statements of D.W. 2 Mata Prasad, postal assistant Head Post Office and D.W. 3 Wasit Ali, officiating post master. After considering their statements we are of the view that the statements of these

witnesses fail to prove that the signature of Smt. Urmila deceased on the letter Ex.Ka-2 sent to her parents prior to the occurrence was not similar to that of her specimen signature in the post office account. After scrutinising entire evidence on the record some minor discrepancies have been pointed out in the evidence of the prosecution witnesses but the principle is that while appreciating the evidence a court need not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. There may be some discrepancies of minor nature on account of errors of perception or observation, lapse of human memory etc. Further there may be exaggeration in the prosecution case and statements of witnesses. In other Words the prosecution witnesses may go on adding embellishments to the prosecution case but the Court has to take into account the statements of witnesses as it stands. Similarly there may appear some inconsistency in the prosecution case but that itself should not be made a ground to reject the prosecution case. On account of lapse of human memory minor inconsistencies in the statements of witnesses are bound to occur. We have appreciated the evidence having due regard to the human failings and human psychology and we are of the view that prosecution has proved its case and prosecution witnesses referred to above are reliable, whereas no reliance can be placed on the defence witnesses who failed to rebut the presumption Under Section 113B, and to prove that signature of Smt. Urmila deceased on the letter Ex.Ka-2 sent to her parents prior to the occurrence, was not similar to that of her specimen signature in the post office account.

(See Appabhai v. State of Gujarat AIR 1988 SC 696 : 1988 Cri LJ 848 and State of U.P. v. Anil Singh AIR 1988 SC 1998 : 1989 Cri LJ 88.)

65. Now coming to the quantum of sentence awarded by III Addl. Sessions Judge Fatehpur to the appellants Raju alias Raghvendra Pratap Singh (husband) and Smt. Champa Devi alias Gulahri (mother-in-law). We have given our thoughtful consideration to the quantum of sentence awarded to these appellants. We are conscious that death sentence can be awarded in very reprehensible and gruesome murder cases and in rarest of rare cases. Unless it is a rarest of rare cases, as principle has been pointed out in Machhi Singh v. State of Punjab (1983)

3 SCC 470 : 1983 Cri LJ 1457, Bachan Singh v. State of Punjab (1980) 2 SCC 684 : 1980 Cri LJ 636 and Asharfi Lal v. State of U.P. AIR 1987 SC 1721 : 1987 Cri LJ 1885, the death sentence need not be awarded. In the present case having considered entire facts and circumstances of the case we are of the view that in view of the provisions of Section 386(b)(III) of the Code, appellate Court can alter nature or extent of the sentence, life imprisonment, in place of death sentence, would meet the ends of justice.

66. There is one more circumstance against the appellants in order to prove that they have caused dowry death of the deceased and that is, that all the accused persons from the date of occurrence i.e. 11-10-86 absconded and only after the proceedings Under Section 82/83 of the Code were initiated against them, that accused Bhoora Singh (father-in-law), Raju alias Raghvendra Singh (husband) appeared in the Court on 6-11-86 while Smt. Gumari (mother-in-law) appeared in the Court on 26-6-87.

67. In view of the premises aforesaid, Criminal Appeal No. 2917 of 1988 succeeds in part and is partly allowed. The conviction of appellants Raju alias Raghvendra Pratap Singh and Smt. Gulahri Devi alias Champa Devi Under Section 302, I.P.C. is maintained, but the sentence (i.e. death sentence) is reduced to life imprisonment. The conviction of Raju alias Raghvendra Pratap Singh and Smt. Gulhari Devi alias Champa Devi Under Section 304B, IPC is set aside and they are acquitted of the charge Under Section 304B, IPC. Their conviction and sentence Under Section 302, 498A, IPC and Section 4 of the Dowry Prohibition Act are maintained. Criminal Appeal No. 2854 of 1988 fails and is dismissed. The conviction and sentence awarded to the appellant Bhoora Singh Under Section 498-A, IPC and Section 4 of the Dowry Prohibition Act are maintained. All the sentences of the accused persons shall run concurrently.

68. The appellant Bhoora Singh appears to be on bail. Bail bonds are cancelled. He may be taken into custody forthwith. Chief Judicial Magistrate, Fatehpur and Senior Supdt. of Police, Fatehpur may be informed by the office within a week so as to ensure that Bhoora Singh is taken into custody as a result of dismissal of his appeal.

69. The reference for confirmation of death sentence is rejected.

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