

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.1428 OF 2015
IN
SUIT NO. 536 OF 2011

DHIRAJLAL ALIAS DHIRUBHAI BABARIA AND ANR. ... APPLICANTS

IN THE MATTER BETWEEN:

DHIRAJLAL ALIAS DHIRUBHAI BABARIA AND ANR. ... PLAINTIFFS

VERSUS

NAVINBHAI C. DAVE & ANR. ... DEFENDANTS

Mr. D.J. Khambatta, Senior Advocate, along with Mr. J.P. Sen, Senior Advocate, along with N. Variava, instructed by M/s. Wadia Ghandy & Co., for the Plaintiffs.

Mr. R. Narichania, Senior Advocate, along with Mr. K.Tamboly, along with Alya Khan, instructed by M/s. Bharucha & Partners, for the Defendants.

CORAM: S.J. KATHAWALLA, J.

Judgment reserved on: 13th June, 2017.

Judgment pronounced on: 29th August, 2017

ORAL JUDGMENT

1. The present Notice of Motion has been filed by the abovenamed Plaintiffs for expunging/striking off parts of the Affidavit of Evidence in Lieu of

Examination-In-Chief of the Defendants' Witness – Mr. Patrick Keel, wherein he states that he is “*making this Affidavit as an expert in Texas civil law*”. The reliefs sought by the Plaintiffs is based on their contention that Mr. Keel has not confined his evidence to what the Texas Law is, but has proceeded to apply that law. In other words, in the present Notice of Motion, the Plaintiffs raise an issue as to the proper scope of expert evidence on a point of foreign law. This issue arises in the following circumstances:

(a) The Plaintiffs are seeking to enforce a Judgment dated 21st September 2010 of the District Court, 14th Judicial District, Dallas County, Texas, U.S.A. (“**Texas Court**”) in Case No.09-15036 (“**Texas Case**”) directing the Defendants, jointly or severally, to pay the Plaintiffs a sum of USD 7.5 million. The Defendants have sought to resist the enforcement of that Judgment on various grounds including, *inter alia*, a plea that the Texas Court did not have jurisdiction over the Defendants and, consequently to render the Judgment of which the Plaintiffs seek enforcement.

(b) The Plaintiffs in support of their case examined two Witnesses, one Mr. Lawrence L. Mealer and one Mr. Gregory G. Jones. Both Mr. Mealer and Mr. Jones are lawyers licensed to practice in the State of Texas. In addition, Mr. Mealer was also the Attorney who acted on behalf of the Plaintiffs in the Texas Case in which the Judgment dated 21st September 2010 came to be passed. Both

Mr. Mealer and Mr. Jones offered evidence in their capacity as experts on Texas Law on the issue of jurisdiction raised by the Defendants. The Defendants raised certain preliminary objections as to the relevancy and admissibility of the evidence of Mr. Mealer and Mr. Jones. These objections were ruled upon and both Witnesses were thereafter extensively cross-examined.

(c) On the Plaintiffs closing their case, the Defendants offered their first Witness, Mr. Patrick Keel. Mr. Keel is also an attorney licensed to practice, amongst others in the State of Texas. He also appears at one point to have served as the Judge of the 345th District Court of Travis County, Texas. Mr. Keel has himself no personal connection with the proceedings before the Texas Court which resulted in the Judgment in question. He has been offered by the Defendants as an expert on Texas Law.

(d) When the Affidavit in Lieu of Examination in Chief of Mr. Keel was tendered across the Bar on 14th July, 2015, Mr. Khambata, on behalf of the Plaintiffs, took exception to certain portions of his Affidavit as being inadmissible. The Plaintiffs, thereafter, filed the present Notice of Motion articulating those objections, which Notice of Motion is taken up for hearing and final disposal.

2. Both parties have addressed me at length on the issue of admissibility and filed Written Submissions with respect to their case.

3. It is the Plaintiffs' case:

- (a) That an expert on a point of foreign law must confine his evidence to what the foreign law is, and ought not to go further and apply that law to the facts of the case in which he is deposing. That task according to the Plaintiffs, is that of the Court alone. In support of this proposition, the Plaintiffs have relied on various Judgments including *inter alia*, the Judgment of the Hon'ble Supreme Court in *Ramesh Chandra Agrawal v. Regency Hospital Ltd. & Ors.*¹, the Judgment of the Privy Council in *Florence A. Deeks v. H.G. Wells & Ors.*², the Judgment of the Madras High Court in *N.P.L. Palaniappa Chetty v. N.M.R. Nagappa Chettiar*³ and the Judgment of the Full Bench of the Delhi High Court in *Commissioner of Income Tax, Punjab, Jammu and Kashmir and Himachal Pradesh v. R.B. Jodhamal Kuthiala*⁴.
- (b) The Plaintiffs contend that many portions of the Evidence of Mr. Keel do not meet this test. He has in several places sought to apply Texas Law, as he perceives it, to the facts of the case and to conclude that the Texas Court acted in error in assuming jurisdiction over the Defendants and rendering the Judgment, of which

1 AIR 2010 SC 806

2 1933 The Law Weekly 314

3 AIR 1930 Mad 146

4 (1968) 69 ITR 598

the Plaintiffs seek enforcement. The Plaintiffs have annexed to their Written Submissions a statement extracting the portions of the Evidence of Mr. Keel which they contend fall foul of the test articulated by them and are for that reason inadmissible. This statement is reproduced hereinbelow:

Para Nos.	Extract	Reason for Inadmissibility
12	4th line 2nd Sentence from top <i>Based on the documents filed in the Texas Action, including the Petition filed by Plaintiffs that admits that both Defendants are residents of India, it is clear that the Texas Court did not have general jurisdiction over the Defendants.</i>	Purported effect and result based on his opinion of Texan law
18	7th last line <i>Because the execution and performance called for by the Settlement Agreement were entirely outside of Texas, the exercise of personal jurisdiction would not comport with the Texas long-arm statute or the Due Process Clause. In my opinion, the record before the Texas Court did not contain sufficient facts to support specific personal jurisdiction. The Texas Court was not a competent court of jurisdiction to entertain and dispose of Texas Action.</i>	Purported effect and result based on his opinion of Texan law
22	First line <i>The challenges in the Answers, both made on a pro se basis, are even more direct in challenging jurisdiction than the challenges deemed a special appearance in N803RA, Inc. v. Hammer.</i>	Purported effect and result based on his opinion of Texan law
22	Last Sentence	

	<i>In my opinion, the language contained in the Answers repeatedly asserting that the cause of action is not related to Texas and that Texas is not a proper forum for the Texas Action constituted special appearances by both Defendants.</i>	
23	First line <i>For these reasons, the Answers did not constitute general appearances</i>	Purported effect and result based on his opinion of Texan law
26	4 th line from bottom <i>In my opinion they did not. It is further my opinion, for the reasons explained above, that the Defendants expressly denied the jurisdictional allegations that Plaintiffs made; thus, Defendants satisfied the requirements described in Kawasaki.</i>	Purported effect and result based on his opinion of Texan law
27	5 th line from bottom <i>In my opinion they did. Indeed, as explained above, the Defendant's answers here were even more detailed and in better compliance with Rule 120a than the answers that Texas courts have found to be sufficient in other cases. In my opinion, there is no room for debate on this issue: The Defendants' answers complied with Rule 120a.</i>	Purported effect and result based on his opinion of Texan law
32	7 th line from bottom <i>Based on these authorities, it is my opinion that, had any defect in the special appearances been brought to the Texas Court's attention, the Texas Court would have afforded Defendants an opportunity to cure any such defects, including any defect concerning verification. The Jones Affidavit is therefore incorrect in asserting that the special appearances were defective.</i>	Purported effect and result based on his opinion of Texan law

	<i>Plaintiffs never brought any defect to the Texas Court's attention.</i>	
34	4th line from top till end <i>That is precisely the problem here, but this was a problem of the Plaintiffs' making. Mr. Mealer, attorney for the Plaintiffs, knew by the Defendants' answers that Defendants had contested personal jurisdiction under Rule 120a yet Mr. Mealer moved the court for summary judgment by asserting that the Defendants had made "general appearances." This, in my opinion, misled the Court</i>	Comment on Plaintiff's Advocate's alleged conduct before Texan Court
35	6th line from top till bottom <i>In my opinion, Mr. Mealer compounded his error by further misleading the Texas Court into finding, in his second paragraph of the Judgment, that each Defendant "has entered an appearance in this action and accepted the jurisdiction of this [Texas] Court for all purposes." Based upon the authorities cited above and for the reasons previously explained, the Defendants unquestionably made special appearances under Rule 120a of the Texas Rules of Civil Procedure and without any doubt the Defendants objected to jurisdiction of the Texas Court, rather than accept it.</i>	Comment on Plaintiff's Advocate's alleged conduct before Texan Court
36	Entire paragraph <i>Further, as to the Corporate Defendant, Mr. Mealer's position is inconsistent. On the one hand, Mr. Mealer contended to the Texas Court that the Corporate Defendant could not file an answer except through an attorney, which never happened. On the other hand, Mr. Mealer asserted to the Texas Court that the corporate director's</i>	Comment on Plaintiff's Advocate's alleged conduct before Texan Court

	<i>answer on behalf of the Corporate Defendant could be used against the Corporate Defendant as a “general appearance.” Neither the Mealer Affidavit nor the Jones Affidavit offers any explanation for this inconsistency. Either the corporate director’s answer should be considered (in which case it was a proper objection to personal jurisdiction) or it should not (in which case it could not be used to establish a “general appearance”)</i>	
39	8th line from bottom Pg. 20 <i>In my opinion, the so-called evidence of damages that Plaintiffs presented in connection with the Summary Judgment Motion, i.e., the value of the Subject Property, was inadmissible under Rules 701 and 802 of the Texas Rules of Evidence. (A printout of rules 701 and 802 of the Texas Rules of Evidence is at Sr. Nos. 17 and 18 to the Defendant’s Additional Compilation of Documents) The fact that there was no evidence for quantifying the damages demonstrates that the finding in the Judgment as regards damages was not supportable on its face.</i>	Criticism of approach of Texan Court + Purported effect and result based on his opinion of Texan law
40	Entire paragraph <i>In the Mealer Affidavit, Mr. Mealer states in paragraph 21 the basis for the \$ 7.5 million value: “I say that since the Plaintiffs had after the filing of the lawsuit received information reflecting a more recent appraisal of the value of the property, the same was claimed in the Plaintiffs’ Motion for Summary Judgment.” In his answers to Questions 105-107 on cross examination, Mr. Mealer admitted that Plaintiff’s only knowledge on the fair market value of the</i>	Comment on evidence / cross examination of Plaintiff’s witness

	<i>Subject Property was “[o]n the basis of his investigation into valuation of the property in question.” Yet that “investigation” consisted merely of Plaintiff’s review of documents that, as Mealer conceded, “would themselves would be hearsay.” Mealer nevertheless appears to maintain that Plaintiff was able to testify on “personal knowledge.” In my opinion, Mr. Mealer’s lack of impartiality as an advocate for his client is demonstrated here because his own description belies any notion that Plaintiff’s testimony was based on “personal knowledge.”</i>	
41	Last Sentence <i>The Plaintiff testified as a lay witness and is not the owner of the Subject Property; therefore, his opinion as to value was not admissible to establish the amount of damages.</i>	Comment on probative value of Plaintiff’s evidence before Texan Court
42	6th line from the top <i>To the extent that Plaintiff’s affidavit relied on other peoples’ opinions (such as an appraisal) to determine the value of the Subject Property, such opinions constitute hearsay not subject to any exception to the hearsay rule and are therefore not admissible as evidence of value. Mr. Mealer’s contention that Plaintiff’s affidavit was based upon “personal knowledge” is belied by Mr. Mealer’s own description of the facts. Because Rule 166a(f) of the Texas Rules of Civil Procedure requires that supporting affidavits be made on personal knowledge, and because the Plaintiff’s affidavit in the Texas Action was not based upon personal</i>	Purported effect and result based on his opinion of Texan law + Comment on evidence / cross examination of Plaintiff’s witness + Criticism of approach of Texan Court

	<i>knowledge, there was no evidence before the Texas Court to support the award of damages in the Judgment.</i>	
43	8th line from the top <i>And therefore, Plaintiffs failed to satisfy their burden of showing that their evidence was based upon personal knowledge-whether a hearsay objection was made or not.</i>	Purported effect and result based on his opinion of Texan law + Criticism of approach of Texan Court
43	Last two sentences <i>Plaintiffs did not meet this burden. To the contrary, Plaintiffs' own description shows that their affidavit was based upon other than the affiant's personal knowledge.</i>	
44	4th line from the top <i>In his answer to Question 59 during cross-examination, Mr. Mealer attempted to justify Plaintiff's failure to comply with this requirement by contending that Plaintiff's affidavit was based upon "personal knowledge." Yet that assertion is belied by Mr. Mealer's statement in paragraph 21 of the Mealer Affidavit, in which Mr. Mealer admitted that the basis of Plaintiff's contention regarding fair market value was another person's appraisal. Rule 166a(f) required that such an appraisal be attached to Plaintiff's affidavit.</i>	Comment on evidence / cross examination of Plaintiff's witness
45	1st line from the top. <i>Because no admissible evidence of the value of the Subject Property was submitted to the Texas Court in connection with the Summary Judgment Motion, the Texas Court should not have granted summary judgment as to damages and therefore should not have entered the Judgment in</i>	Purported effect and result based on his opinion of Texan law + Criticism of approach of Texan Court

	<i>favor of the Plaintiffs.</i>	
45	The last sentence. <i>The evidence that Plaintiffs submitted was not admissible.</i>	
46	2nd line from the top <i>As set forth above, Texas law is clear that, because the Answers objected to the jurisdiction of the Texas Court, each Answer constituted a special appearance, not a general appearance. There was no basis for the Texas Court to conclude that the Answers constituted general appearances. Findings such as this one in a summary judgment are typically drafted by the Plaintiff's attorney.</i>	Purported effect and result based on his opinion of Texan law + Criticism of approach of Texan Court
46	Last sentence <i>Plaintiffs' attorney included a "finding" of general appearances that any competent Texas attorney would have realized was insupportable.</i>	Comment on Plaintiff's Advocate's alleged conduct before Texan Court
47	10th line from bottom <i>Had the motion to abate been granted as requested by the Plaintiffs, the Corporate Answer would have been automatically stricken without any further action by the Texas Court. In my opinion, the Texas Court chose to have the Order of Abatement use the permissive word "may" rather than the mandatory word "shall" to benefit the Corporate Defendant by allowing the Court to be flexible should the Corporate Defendant not obtain counsel during the allotted time frame. Further, in my opinion, the Order of Abatement cannot be interpreted in a manner detrimental to the Corporate Defendant, i.e., to mean that</i>	Criticism of approach of Texan Court

	<i>the Corporate Answer was not stricken and constituted an appearance in the Texas Action.</i>	
48	1st Line <i>Because there were no general appearances to constitute a waiver, the Texas Court was required to decide the special appearances before granting the Summary Judgment Motion.</i>	Criticism of approach of Texan Court
50	Entire Paragraph <i>Because the Defendants did not file any papers other than the Answers (which did not constitute general appearances), in my opinion Defendants were not required to request a hearing before entry of the Judgment.</i>	Purported effect and result based on his opinion of Texan law
52	4th Line from the bottom <i>Here, the Defendants' answers did question the court's jurisdiction and Defendants' answers were limited as special appearances in accordance with Rule 120a, for the reasons discussed above.</i>	Purported effect and result based on his opinion of Texan law
57	3rd line from the top <i>The Defendants' statement that they "had not done business in Texas," coupled with their other statements regarding their residence in India and that the Settlement Agreement had been signed in India are exactly the sort of assertions in a special appearance that, in my opinion, are sufficient to raise a question about whether the court has personal jurisdiction.</i>	Purported effect and result based on his opinion of Texan law
60	Entire Paragraph <i>Based on the foregoing analysis and my experience with the laws of the State of</i>	Purported effect and result based on his opinion of Texan law +

	<i>Texas, I conclude that:</i> <i>1) the language of the Answers was sufficient to constitute special appearances;</i> <i>2) the Answers were not defective as special appearances by virtue of being unsworn because any such defect was not brought to the Texas Court's attention, which would have afforded Defendants the opportunity to cure the defect;</i> <i>3) the Texas Court erred in not considering whether the Petition adequately alleged personal jurisdiction before entering the judgment;</i> <i>4) had the Texas Court considered whether the allegations in the Petition were sufficient to confer personal jurisdiction, it could not have properly concluded that they supported either specific or general personal jurisdiction;</i> <i>5) there was no evidence before the Texas Court as to the value of the Subject Property;</i> <i>6) absent evidence as to the value of the Subject Property, it was clearly erroneous for the Texas Court to render judgment in the amount of \$ 7.5 million; and</i> <i>7) the Texas Court was not a competent court of jurisdiction to entertain and dispose of the Texas Action.</i>	Criticism of approach of Texan Court
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(c) That if portions of the Evidence of Mr. Keel are inadmissible, this Court not only has the power, but indeed the duty to strike out such evidence. In this behalf, the Plaintiffs have relied on the Judgment of this Court in *Mr. Jitendra Singh Rajendra Singh Kushwaha - Caveator*⁵, *Mahabanoo Navroz Kotwal v. Piloo Fali Bomanji*⁶, and *Harish Loyalka & Anr. v. Dileep Nevatia & Ors.*⁷.

4. The Defendants in their turn, argued:

(a) That the Plaintiffs' Witnesses too have offered evidence very similar to those portions of the Evidence of Mr. Keel which are alleged to be offending. In particular, both Mr. Mealer and Mr. Jones (the Plaintiffs' Witnesses) have not only stated Texas Law for what it is, but have also contended for the reasons set out in their Affidavit that the Texas Court acted properly in assuming jurisdiction and passing the Judgment of which enforcement is sought before this Court. The Defendants therefore submitted that the Plaintiffs themselves understood the scope of expert evidence on a point of foreign law in the same way as the

5 (2013) 6 MhLJ 802,

6 unreported judgment dated 10th June, 2014 of this Court in Chamber Summons (L) No.67 of 2014 in Testamentary Suit No.26 of 1999 in Testamentary Petition No.504 of 1998.

7 Unreported Judgment dated 7th April, 2014 passed by this Court in Suit No.3598 of 1996

Defendants, and that in any event the Plaintiffs' Witnesses having committed the same transgression of which Mr. Keel is accused, the Plaintiffs cannot seek to have Mr. Keel's Evidence struck off on the ground that it is inadmissible.

(b) That the evidence of Mr. Keel in its entirety, including the portions complained of, is both relevant and admissible. The Defendants assert that an expert, including one on a point of foreign law, is entitled to offer his opinion and conclusions, including on the facts of the case in which he has been invited to depose. In support of this proposition, as to the scope of expert evidence, the Defendants relied on several Judgments, including the Judgments of the Hon'ble Supreme Court in *State of H.P. v. Jai Lal & Ors.*⁸, *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee & Ors.*⁹, and *Ramesh Chandra Agrawal v. Regency Hospital Ltd. & Ors.*¹⁰, as well as of various High Courts in *Chellappan v. State of Kerala*¹¹, and *The State of Maharashtra v. Hormusji Dinshaw Davierwala*¹². The Defendants also relied on several Judgments of the English Courts in *Re M and R*

8 (1999) 7 SCC 280

9 Unreported Judgment dated 7th August, 2009 in Criminal Appeal Nos.1191-1194 of 2005 along with Civil Appeal No.1727 of 2007

10 AIR 2010 SC 806

11 2013 (2) KLJ 279

12 (1979) 81 Bom.LR 114

(*minors*) (*sexual abuse: expert evidence*)¹³, *G. & H. Montage G.M.B.H. v. Irvani*¹⁴, and *Fenwick v. Bell*¹⁵, and *Sills v. Brown*¹⁶.

(c) That this view of the law is borne out by the plain language of Sections 45 and 46 of the Indian Evidence Act, 1872, which stipulates that the opinion of experts, including on a point of foreign law, are relevant facts; and

(d) That only portions of the evidence of a witness which are clearly inadmissible are liable to be struck out. Issues of relevancy ought to be relegated to the stage of final arguments in the trial. The opinion of an expert on foreign law being admissible as a relevant fact, the portions of the evidence of Mr. Keel which express an opinion or conclusion as to the correctness of the course adopted by the Texas Court, ought not to be struck off at this stage.

5. In rejoinder, the Plaintiffs sought to distinguish the Judgments relied upon by the Defendants. It was pointed out that none of the Judgements of the Indian Courts sought to be relied upon by the Defendants pertain to the evidence of an expert on a point of foreign law. It was submitted that Judges being themselves legally trained, expert evidence on foreign law can only legitimately state what the

13 (1996) 4 All ER 239

14 (1991) WLR 667

15 (1844) 1 Carrington and Kirwan 312

16 9 C. & P. 601

law is, rather than how it is to be applied, which is within the exclusive province of the Court deciding the matter. Even in respect of branches of learning, which are not ordinarily within the skill and experience of a Court, expert evidence is not a substitute for the adjudicatory process. The Judge must, on the basis of often competing expert evidence, decide how that particular branch of learning impacts on the facts of the case before him. The Plaintiffs sought to distinguish the Judgments of the English Courts relied upon by the Defendants, on the basis that the law in England is in fact materially different from that in India. They submitted that Section 3 of the English Civil Evidence Act, 1972 is not in *pari materia* with Section 45 of our Evidence Act. Even so, it was submitted, the law in England on the scope of the evidence of an expert on a point of foreign law is not materially different from the position in India. In this behalf, the Plaintiffs relied on the Judgment of the Court of Appeal in *McMillan Inc. v. Bishopgate Investment Trust Plc. (No.4)*¹⁷. It was submitted that even under English Law, it is not the function of an expert on foreign law to opine on the facts of the case, the evidence before the Court, or how the foreign law is to be applied. On this basis, the Plaintiffs sought striking off those portions of the Evidence of Mr. Keel complained off by them.

17 [1999] C.L.C. 417

6. As regards the Defendants' contention that the Plaintiffs' Witnesses have offered evidence very similar to the portions of Mr. Keel's Evidence now sought to be struck off as inadmissible, the Plaintiffs' response was two-fold. The Plaintiffs contended that the Defendants had not deemed fit to object to those portions of the Evidence of Mr. Mealer and Mr. Jones which, according to them constituted an expression of opinion on the facts of the case. As such, they remain part of the record. However, Mr. Khambata also fairly conceded that any standard that may be applied to the Evidence of Mr. Keel must also be applied to those of Mr. Mealer and Mr. Jones and that portions of their Evidence which may be found inadmissible on the test canvassed by the Plaintiffs, may be disregarded at the time of final hearing.

7. I have perused the proceedings and have considered the oral as well as written arguments advanced by the Learned Senior Advocates appearing for the parties. It cannot be disputed that the role of an expert is not to act as a Judge or Jury. The Hon'ble Supreme Court in paragraphs 14 and 15 of its Judgment in *Ramesh Chandra Agrawal v. Regency Hospital Ltd. & Ors.* (supra), has inter alia explained the role/function /duty of an expert witness as follows:

“14. *It is not the province of the expert to act as Judge or Jury. It is stated in Titli v. Jones (AIR 1934 All 237) that the real function of the expert is to put before the court all the materials, together with*

reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials.

15. *An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions. (See Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Ors.) Criminal Appeal Nos. 1191-1194 of 2005 alongwith Civil Appeal No. 1727 of 2007, decided on 7.8.2009.”*

8. This is also clear from the plain language of Section 45 of the Evidence Act which reads:

“Opinions of experts – When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts.”

9. The role of the expert as envisaged in the Indian Evidence Act is thus essentially to assist the Court in forming an opinion upon a point of foreign law or science or art or as to the identity of handwriting, or finger impressions. The question however, remains as to whether it would be the proper role of an expert to express an opinion not only on a point of foreign law, or science, or art, but also upon how his opinion on those aspects would bear upon the facts before the Court. It appears that this would depend very largely on the nature of the opinion that is sought from the expert examined as a witness in a proceeding. If an opinion is sought as to whether a signature appearing on a document is genuine, it is inevitable that a handwriting expert offered as a witness would compare the signature in question to the admitted signature of the alleged executant. Having done so, he would then express his opinion as to whether the signature/s are, in fact, identical. He would, in fact, be expected to do so. The reasons that he might offer in support of his opinion may or may not appeal to the Court which would be perfectly free to reject the view of the expert and to decide on its own course. Similarly, in a case where the identity of a victim or a perpetrator is in question, an expert in DNA evidence may undertake a comparative study of tissue samples and express an opinion on the basis of his examination. He would in this sense be undoubtedly expressing his view or opinion on one of the issues in controversy in

the case in question. However, what would be the proper role of an expert on foreign law? In answering this question, it is important to keep in mind that a Judge is himself legally trained. The application of the law to a set of facts is within his or her special expertise. As such, when a case involves a point of foreign law, while a Judge may require assistance in forming an opinion as to what the foreign law is, he certainly requires no assistance in applying the law so ascertained, to the facts before him. This view of the proper scope of expert evidence on a point of foreign law is borne out by the plain language of Section 45 which reads in relevant part:

“When the Court has to form an opinion upon a point of foreign law ... the opinions upon that point of persons specially skilled in such foreign law, ... are relevant facts.”

The expert thus expresses his opinion on what the foreign law is, which is undoubtedly a relevant fact, but not on how that law is to be applied.

10. I am fortified in this view by the Judgment of the Madras High Court in *N.P.L. Palaniappa Chetty v. N.M.R. Nagappa Chettiar* (supra) where the role of an expert on a point of law was described thus at Page 146:

“An expert in foreign law is called as I understand it to state what the law of a foreign country on a particular point is; an Advocate of the Scottish Bar is often called as a witness in the English Courts to

explain the Law of Scotland on any particular point that arises. But in this case we have the law laid down for us in a particularly elaborate manner in the Ceylon Civil Procedure Code and it appears to us that it is our duty to interpret that Code as best we can and that we are not entitled to rely on any outside opinion, however eminent, as to the interpretation of that Code.” (emphasis supplied)

11. This view is also echoed in a Judgment of a Full Bench of the Delhi High Court in *Commissioner of Income Tax, Punjab, Jammu and Kashmir and Himachal Pradesh v. R.B. Jodhamal Kuthiala* (supra) where the Court held at Page 603:

“... It is relevant to point out that under the English law, foreign law can be proved only by expert testimony and not by mere production of books containing foreign law as is permissible in India under section 38 of the Indian Evidence Act, 1872. Under that section courts can take judicial notice of a foreign statute contained in a book issued under the authority of the foreign Government. Section 45 of the said Act makes the evidence of an expert on foreign law a relevant fact. It is always for the courts to judge the evidence of an expert and if an expert in foreign law says, the law in his country is this, and if that evidence is accepted by the court, that may be a finding of fact. If, on the other hand, the expert produces the foreign law and thus proves the contents thereof, his opinion as to the construction of that law will be

subjected to scrutiny by the court and is placed at par with the evidence of other experts. It is only where the matter enquired of lies within the range of the peculiar skill and experience of the witness and is one of which the ordinary knowledge and experience of mankind does not enable the courts to see what inferences should be drawn from the facts that the witness may supply opinion as their guide. The afore-mentioned basic difference in laws in the two countries calls for caution in applying English decisions. It follows, therefore, that when the contents of a foreign law in the language or translated into the language known to the courts in India are proved by an expert, what that law means must always be left to the determination by the courts. If Mr. Veda Vyasa argument were to be accepted, the result would be that in a case where judicial notice of a foreign law is taken under section 38 of the Indian Evidence Act and the court of fact construes that law, without any external aid, the appellate court will be bound by that construction thereby subjecting the matter of interpretation of law to a more rigid rule than of even ordinary documents in relation to the extent of the jurisdiction of the appellate courts. That would, in my opinion be an irrational approach to the problem. Even in England it has been held that, where an expert states his opinion based upon his knowledge and practical experience of foreign law, he may refer to courts decisions or treatises for the purpose of refreshing his memory but in such an event the court is at liberty to examine the law, decision or passage in question in order to arrive at its correct

meaning. Such an ascertainment of the meaning would always remain a question of law. ...” (emphasis supplied)

12. The Judgment of the Delhi High Court, in fact, points out the difference between English Law and the law prevailing in India as to the mode of proof of foreign law. However, though the two approaches are distinct, the English position on the role of an expert on foreign law does not appear to be very divergent from the Indian one.

13. The Court of Appeal in *Macmillan Inc. v. Bishopsgate Investment Trust Plc (No.4)* (supra) has summarised the role of an expert on foreign law as follows:

“ 23. In our judgment, the function of the expert witness on foreign law can be summarised as follows:

(1) to inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court’s approach to their construction;

(2) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and

(3) where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign court’s ruling would be if the issue was to arise for decision there.”

Thus, even under English law, the role of an expert on foreign law appears to be confined to informing the Court what the foreign law is. His role is predictive only

where there is no statute or authority on the point. He is then of necessity required to predict, by extrapolating from the settled legal principles of that body of jurisprudence, as to what view a Court in that jurisdiction may take when confronted with the question on which he is deposing. This, however, cannot be construed as applying foreign law to the set of facts before the Court in which he is deposing or suggesting what the conclusion ought to be on the merits of the matter. The only opinion or conclusion that he expresses is, as to the content of the foreign law on which he has been offered as an expert witness.

14. I do not believe that the Judgments relied upon by Mr. Narichania lay down any different proposition. It must be noted at the outset that none of the Judgments relied upon by him, save and except for the Judgment of the Court of Appeal in *G. & H. Montage G.M.B.H. v. Irvani* (supra), relates to the evidence of an expert on a point of foreign law. In my view, this difference is quite material.

15. The Judgment of the Kerala High Court in *Chellappan v. State of Kerala* (supra) concerns medical evidence in a criminal case and is of little assistance on the proper scope of testimony of an expert on foreign law. The question in that case was whether a partial denture found at the scene of crime belonged to the Accused. It is on this limited question that expert evidence was offered. The evidence offered by a Forensic Odontologist in that case was accepted as being

reliable. The Judgment however holds in no uncertain terms, that the role of an expert is purely advisory and that the advice so offered may be accepted or rejected by the Court.

16. The Judgment of the Hon'ble Supreme Court in *State of H.P. v. Jai Lal & Ors.* (supra) was a case where the expert testimony of a District Horticultural Officer on the fruit bearing capacity of the orchard in question, was considered and rejected. The Court in doing so held:

“18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and materials furnished which form the basis of his conclusions.”

17. The decision of this Court in *State of Maharashtra v. Hormusji Dinshaw Davierwala* (supra) pertained to expert evidence as to the proper valuation of an immovable property. Mr. Narichania relied upon this Judgment in support of the

proposition that the opinion of an expert witness may rest upon evidence offered by other witnesses. He invited my attention, in particular, to an extract which reads:

“5. ... It is true that the opinion of an expert witness is admissible in evidence not only when it rests on the personal observation and inquiry of the witness himself or on facts within his own knowledge, but also when it is founded on the case as proved by other witnesses of the trial; and, under S.51 of the Evidence Act, when the opinion is admissible, the grounds upon which it is based are also admissible. But we understand it to be settled law that an expert may not be asked purely speculative hypothetical questions having no foundation in the evidence in other words, before the expert witness is entitled to give evidence on the hypothesis, a sufficient foundation for it must be laid by due evidence alluinde of the facts assumed.”

The scope of the evidence offered by an expert must, as adverted to above, necessarily depend on the nature of the evidence offered by him. It is thus inevitable that a valuer who is examined as an expert witness will comment upon the value of the property in question in the proceedings. In fact, his evidence would not be of much help if he did not. However, the Judgment casts no light on what the proper scope of expert evidence on a point of foreign law would be.

18. The Judgment of the Hon'ble Supreme Court in *Ramesh Chandra Agrawal v. Regency Hospital Ltd. & Ors.*(supra), which was relied upon by the Plaintiffs as well, also did not concern the evidence of an expert in foreign law. Mr. Narichania invited my attention in particular to paragraphs 20 and 22, which are reproduced hereinbelow:

“15. An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his “conclusions” and the data and material furnished which form the basis of his conclusions. (See Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Ors.) Criminal Appeal Nos. 1191-1194 of 2005 alongwith Civil Appeal No. 1727 of 2007, decided on 7.8.2009.

.....

17. In the Article "Relevancy of Expert's Opinion" it has been opined that the value of expert opinion rest on the facts on which it is based and his competency for forming a “reliable opinion”. The evidentiary value of the opinion of expert depends on the facts upon which it is based and also the validity of the process by

which the conclusion is reached. Thus the idea that is proposed in its crux means that the importance of an opinion is decided on the basis of the credibility of the expert and the relevant facts supporting the opinion so that its accuracy can be cross checked. Therefore, the emphasis has been on the data on basis of which opinion is formed. The same is clear from following inference: Mere assertion without mentioning the data or basis is not evidence, even if it comes from expert. Where the experts give no real data in support of their “opinion”, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value.”

Mr. Narichania relied on the said paragraphs to contend that it was perfectly legitimate for an expert to offer his “opinion” or “conclusions”. While this is, no doubt true, these “opinion” or “conclusions” must of necessity be in respect of that aspect of the case on which the expert has been invited to depose. The Hon’ble Supreme Court in that case was considering medical evidence, a body of knowledge which the Court acknowledges to be beyond the experience of a lay person. While holding that in “*cases where the science involved is highly specialised and perhaps even esoteric, the central role of an expert cannot be disputed*”, the Court was also careful to hold that it is not the province of the expert to act as a judge or jury. The act of adjudication is even in such a case the

exclusive province of the court hearing the matter. The evidence of the expert is merely one of the aspects that the court will take into account in doing so.

19. The Judgment of the Court of Appeal in *Re M and R (Minors) Sexual Abuse: Expert Evidence*(supra), related to the proper scope of expert medical and psychiatric evidence in a case involving suspected child abuse. The Court held, on a construction of Section 3 of the Civil Evidence Act, 1972 that a medical or psychiatric expert was entitled to express his opinion or indeed his conclusion, after a careful mental, behavioural and emotional analysis, as to the likely veracity of the child in question. This was held not to usurp the judge's or jury's function. Apart from the fact that Section 3 of the English Act is materially different from Section 45 of the Indian Evidence Act, 1872, this Judgment is also of little assistance on the proper scope of expert evidence on a question of foreign law.

20. The Judgment of *Fenwick v. Bell* (supra) also does not render any assistance to the Defendants. That case concerned a question as to whether a collision between two ships could have been avoided by proper care on the part of the defendants' servants. The expression of opinion by a nautical witness on this issue was held to be legitimate. The court held that the opinion of a person of competent skills as to what might or might not have been done by the parties under a given set of circumstances, was relevant and that the jury was free to

decide upon the value of that opinion. The Judgment in *Fenwick v. Bell* was followed in the case of *Sills v. Brown* (supra) which also involved a case of maritime collusion and casts no light on the proper scope of expert evidence on a point of foreign law.

21. The only Judgment relied upon by Mr. Narichania which relates to expert evidence on a point of foreign law is that of the Court of Appeal in *G. & H. Montage G.M.B.H. v. Irvani* (supra). The Judgment related to an issue arising under Article 242 of the German Civil Code which had no clear or immediate answer and on which expert evidence had been offered by both parties. The Court observed at Page 16:

“The fact that the plaintiffs’ expert was not able to do more than assert, in this novel situation, his own view on how the German court would react when faced with a similar problem does not disqualify his evidence from being relied upon. There are many fields of law in which the books provide no direct answer, and where the skill of the lawyer lies precisely in predicting what answer should be given, if the judge concludes that the expert’s prediction is reliable, he is fully entitled to give effect to it.”

The reliance placed by Mr. Narichania on this Judgment is misplaced. As correctly submitted by the Learned Senior Advocates appearing for the Plaintiffs, the expert on German Law in that case was not predicting the outcome of the case

before him. He was predicting rather how a German Court is likely to decide a point of German Law on which there was no clear or decisive authority. That was a perfectly legitimate exercise, and one which an expert in foreign law would be entitled to undertake even in our courts. What he would not be entitled to do, however, is apply what he believes to be the foreign law in question to the facts of the case before him and to recommend a solution. That has always been within the exclusive province of the Court deciding the matter. This is to my mind is a point of distinction between foreign law as a body of learning and other scientific disciplines. A court, given its legal training, would be perfectly capable of applying foreign law, once it is ascertained, to the facts before it. However, in respect of other fields of inquiry, such as medicine, odontology or psychiatry, an expert witness may legitimately bring his learning to bear upon the facts of the case in expressing his opinion, which the Court would then proceed to weigh in the balance along with other factors in deciding the ultimate issue. Indeed, expert evidence of this nature would not be meaningful unless it bore upon the facts in question. Even here, however, the role of the expert is not, as the Hon'ble Supreme Court observes in *Ramesh Chandra Agrawal v. Regency Hospital Ltd. & Ors.*(supra), that of a judge or jury and the task of adjudication falls upon the court alone.

22. If one were to test the evidence of Mr. Keel against this touchstone viz., an expert in foreign law would be entitled to express an opinion as to what the law is, but not apply that law to the facts before the Court, it quite clearly appears to me that the extracts from Mr. Keel's Witness Statement, to which the Plaintiffs have objected, must be struck off from Mr. Keel's Witness Statement. Mr. Khambata has been at pains to show me from the Affidavit of Mr. Keel that none of the portions of his testimony which relates to what the law in Texas is, has been objected to by the Plaintiffs. Similarly, the Plaintiffs have also not objected to those portions of the testimony of Mr. Keel where he comments on the evidence of Mr. Mealer and Mr. Jones, as long as he is disputing their view of what the Texas Law is. The Plaintiffs have sought to impugn as inadmissible only those parts of the Evidence which seek to comment on the merits of the case before this Court, and on the conduct of the Plaintiffs' Advocates in Texas and generally on the merits of the case. These, it appears to me, are clearly beyond the legitimate scope of his testimony.

23. As for the argument of Mr. Narichania that issues of relevancy ought to be relegated to the stage of final argument in the trial, it does not further the Defendants' cause. As I have understood Mr. Khambata's submissions, the Plaintiffs have sought to challenge portions of Evidence of Mr. Keel as being "inadmissible" and not as being irrelevant, which argument I have accepted. Even

Mr. Narichania concedes that while issues of relevancy may be postponed to the stage of final arguments, issues of admissibility cannot be so postponed. The portions of Mr. Keel's Evidence which are complained of as being inadmissible, would thus have to be struck off at this stage.

24. I, accordingly, pass the following Order:

(a) The portions of the Affidavit dated 14th July, 2015 of Mr. Patrick Keel, which are set out in Exh. 'A' to the Plaintiffs' Written Submissions, and which are reproduced in paragraph 2 (b) above, shall be treated as not forming part of his Evidence.

(b) The statement made on instructions by Mr. Khambatta, Senior Advocate, for the Plaintiffs that the standard applied to the Evidence of Mr. Keel may also be applied to those of Mr. Mealer and Mr. Jones, and that portions of their Evidence which may be found inadmissible on the test canvassed by the Plaintiffs may be disregarded at the time of final hearing, is accepted.

(c) The Notice of Motion is accordingly disposed off with no order as to costs.

(S.J. KATHAWALLA, J.)