

\$~37(Appellate)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) 1208/2022 & CM APPL.48349/2022, CM APPL.48350/2022

KIRAN KATYAL & ORS. Petitioners
Through: Mr. A.K. Singla, Sr. Adv. with
Mr. Akshit Sachdeva, Adv.

versus

ZAHOOR AHMAD Respondent
Through: Mr. Mukul Talwar, Sr. Adv.
with Ms. Anju Lal, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

% **14.11.2022**

1. This petition under Article 227 of the Constitution of the India assails the following order dated 1st October 2022, passed by the learned Additional District Judge (“the learned ADJ”) in CS DJ 149/2017 (*Zahoor Ahmad v. Kiran Katyal*):

“Heard. Perused.

PW1 has been partly cross-examined.

During the cross-examination of PW1, one objection is raised by the counsel for the plaintiff which is reproduced as under:-

“My father was the owner alongwith my two uncles namely late Mohd Swelhin and Late Mohd Ayub. (**objected to by counsel for plaintiff on the ground that the question of title cannot be asked as the defendants have admitted the ownership of the plaintiff vide Ex.PW1/20 and otherwise also as per the settled law.**)”

WS perused.

The aforesaid objection is allowed as there is no challenge to the title of the plaintiff in the WS filed by the defendants.

His cross-examination is deferred at the request of Id counsel for the defendant, **subject to cost of Rs.10,000/- to be paid to the opposite counsel on the NDOH.**

PW1 is directed to appear on the NDOH.

Put up for cross-examination of PW1/PE on **13.12.2022** at **11:30 AM.**

Steps be taken for summoning of other PWs, if any.”

2. CS DJ 149/2017 was instituted by the respondent Zahoor Ahmad against four defendants, of whom three are the petitioners before this Court.

3. The respondent, as the plaintiff in the suit, claimed to be the owner of a property at Khasra No. 355 Min., Village Malikpur Chhawani, Azadpur, Delhi, known as “Hans Cinema”(referred to, hereinafter, as “the suit property”).

4. The respondent claimed to be in actual and exclusive physical possession and occupation of the suit property, except for a small shop bearing No. 7 (“the shop”, hereinafter) located towards the front of the property, which, according to the plaint, was in unauthorised occupation of the petitioners.

5. Given the limited nature of the controversy in the present case, it is not necessary to enter into the particulars of the various allegations in the plaint. Suffice it to state that the respondent, in the plaint, ultimately sought decrees for (i) recovery possession of the suit property, (ii) recovery of ₹ 2,88,000/- as damages, (iii) permanent injunction against the petitioners installing any display or signboard above the shop or outside the Cinema Complex, (iv) mandatory

injunction, directing the petitioners to remove the display board already installed on the first floor above the shop, (v), damages of ₹ 6,00,000/- with *pendente lite* and future interest and (vi) further damages at the rate of ₹ 7,000/- per month with interest, along with costs.

6. The petitioners filed their written statement by way of response to the suit instituted by the respondent. In the written statement, it was asserted, by the petitioners, that the entire property at Khasra no. 355 min., Village Malikpur Chhawani, Azadpur, Delhi had been let out by the original landlord M/s Vijay Cinema to Om Prakash Katyal and the petitioners *vide* Rent Agreement dated 14th August 1990. The written statement further asserted that the petitioners could not maintain the suit to the exclusion of M/s Vijay Cinema, a co-owner in respect of the suit property. The petitioners claimed to be lawful tenants in the suit property and denied the allegation that they were in unauthorised occupation thereof.

7. Consequent to filing of written statement and replication, issues were framed in the suit, which was, at that time, pending before this Court as CS (OS) 2536/2010, prior to enhancement of pecuniary jurisdiction of the learned Trial Courts. The issues framed *vide* orders dated 10th December 2012 and 15th October 2015 may be enumerated thus:

Issues framed on 10th December 2012

“(1) Whether the plaintiff does not have the locus standi to institute the suit? (OPD 1-3)

(2) Whether the suit filed by the plaintiff is bad for misjoinder or nonjoinder of necessary parties? (OPD 1-3 and OPD-4)

(3) Whether the suit as framed is undervalued for purposes of

court fees and jurisdiction? (OPD 1-3)

(4) Whether the suit as framed is not competent and maintainable in view of Section 50 of the Delhi Rent Control Act? (OPD-1-3)

(5) Whether the rent deed dated 14.8.1990 executed between Late Shri Om Prakash Katyal, defendants No. 1 to 3 and defendant No.4 created any tenancy in their favour? (OPD 1-3)

(6) Whether the defendants No.1 to 3 are unauthorized occupants of the suit property? (OPP)

(7) Whether the plaintiff is entitled to a decree for recovery of possession of suit property bearing Shop No.7, Hans Cinema, G.TKarnai Road, Azadpur, Delhi? (OPP)

(8) Whether the plaintiff is entitled for recovery of damages for use and occupation? If so, for which period and at what rate? (OPP)

(9) If issue No.7 is decided in affirmative, whether the plaintiff is entitled to interest on the amount of damages for use and occupation? If so, for which period and at what rate?(OPP)

(10). Relief.”

Additional Issues framed on 15th October 2015

“1. Whether plaintiff is entitled to permanent and mandatory injunction against installation or display of sign board as claimed in para (ba) & (bb) of the prayer clause? OPP

2. Whether plaintiff is entitled to a sum of Rs. 6,00,000/- as fixed damages along with pendente lite and future interest @ 15% p.a. upto 17/10/2011 till realization as claimed in para (bc) of the prayer clause? OPP

3. Whether plaintiff is entitled to future damages @ Rs.7,000/- p.m. with interest @ of 15% p.m. upto 17/10/2011 till realization as claimed in para (bd) of the prayer clause? OPP

4. Relief.”

8. The respondent-plaintiff led his evidence as PW-1 and filed two affidavits by way of evidence dated 16th August 2013 and 5th April 2019.

9. Cross-examination of PW-1, which commenced thereafter on 1st October 2022, was, however, brought to a grinding halt, with the objection having been raised by the respondent to the very first question posed by learned Counsel for the petitioners to PW-1 in cross-examination which was allowed by the learned ADJ *vide* the impugned order.

10. The cross-examination was not being recorded in question-answer form, and the response of the respondent, deposing as PW-1, to the very first question posed to him by learned counsel for the petitioners, reads thus:

“my father was the owner along with me, two uncles, namely, Mohd. Swelhin and late Md. Ayub”.

11. An objection was immediately raised by learned Counsel for the respondent-plaintiff, to the aforesaid question, as well as to the answer tendered by the respondent as PW-1. This itself appears a trifle peculiar as, having answered the query posed by learned counsel for the petitioners to him, the respondent, who was deposing as PW-1, objected, through learned Counsel, to the question itself.

12. On the said objection, the learned ADJ came to pass the impugned order dated 1st October 2022 *supra*.

13. I have heard Mr. A.K. Singla, learned Senior Counsel for the petitioners and Mr. Mukul Talwar, learned Senior Counsel for the respondent.

14. The impugned order disallows the very first question posed to the respondent as PW-1 by learned Counsel for the petitioners on the

ground that the petitioners had, in their written statement, and *vide* Exhibit PW-1/20, allegedly admitted the factum of ownership of the respondent over the suit property.

15. To my mind, even if this were to be treated as correct, that cannot constitute a ground to disallow the question posed by learned counsel for the petitioners.

16. To a query from the court as to the provision under which such a question could be disallowed, Mr. Mukul Talwar, learned Senior Counsel for the respondent has invited my attention to Section 148 of the Indian Evidence Act, 1872 (the Evidence Act) which reads as under:

“148. Court to decide when question shall be asked and when witness compelled to answer. – If any such question *relates to a matter not relevant to the suit or proceeding*, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:-

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.”

17. Mr. Talwar submits that, though the present case may not fall within one of the four considerations (1) to (4) enumerated in Section 148, the learned ADJ was, nonetheless, justified in disallowing the question posed to PW-1 by learned Counsel for the petitioners as it was not relevant. He seeks to support the impugned order passed by the learned ADJ on the basis of the opening words of Section 148, which reads “if any such question relates to a matter not relevant to the suit or proceeding.....”. Inasmuch as the defendants-petitioners had, according to Mr. Talwar, admitted the title of the respondent over the suit property, applying the test envisaged by the opening words of Section 148, the learned ADJ had rightly disallowed the question posed by learned Counsel for the petitioners.

18. I am unable to subscribe to the views expressed by Mr. Talwar, for more than one reason.

19. Section 148 does not confer any omnibus power to a court to disallow questions in cross-examination. Considerations (1) to (4) in the said section have not been provided by way of examples. What the section says is that, in exercising discretion as to whether to *compel a witness to answer an irrelevant question*, the court *shall have regard* to the four considerations (1) to (4) enumerated in that Section. The Court does not, therefore, have, before it, a *tabula rasa*. The question had to be decided *having regard to* the four considerations enumerated in Section 148. If none of the four considerations apply, ordinarily, Section 148 would not permit disallowing of the question.

20. Mr. Mukul Talwar fairly does not seek to bring his case within

any of the four enumerated considerations in Section 148. He, however, relies on the opening words of the Section, which permit disallowance of questions which are not relevant to the matter in issue in the suit. At a plain glance, these words apply where the point on which the question was being posed was *irrelevant* to the proceedings.

21. There is a great degree of difference between a point which is irrelevant and a point on an issue which, according to the opposite party, may stand admitted. Even if a particular issue of facts stands admitted, it continues, nonetheless, to retain relevance. So long it retains relevance, it can be made subject matter of question posed to the witness.

22. Section 5 of the Evidence Act expressly allows evidence to be given, in any suit or proceeding, of the existence, or non-existence, of every fact in issue or of facts declared, in the succeeding provisions of Chapter II, to be relevant, and expressly proscribes evidence to be given of any other fact.

23. The expression “facts in issue” is defined, in Section 3, thus:

“ **“Facts in issue”**. – The expression “facts in issue” means and includes –

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.”

The expression “facts in issue” is, thus, defined, in the Evidence Act, in the “means and includes” format. Definitions which use “means and includes” are intended to be exhaustive in nature. The following passages, from *D.D.A. v. Bhola Nath Sharma*¹ are instructive

regarding the difference in the manner in which definition clauses are to be interpreted, depending on the format in which they are worded:

“25. The definition of the expressions “local authority” and “person interested” are inclusive and not exhaustive. The difference between exhaustive and inclusive definitions has been explained in *P. Kasilingam v. P.S.G. College of Technology*² in the following words : (SCC p.356, para 19)

“19. ... A particular expression is often defined by the legislature by using the word ‘means’ or the word ‘includes’. Sometimes the words ‘means and includes’ are used. The use of the word ‘means’ indicates that ‘definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition’. (See *Gough v. Gough*³ ; *Punjab Land Development and Reclamation Corpn. Ltd. v. Labour Court*⁴ , SCC p. 717, para 72.) The word ‘includes’ when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words ‘means and includes’, on the other hand, indicate ‘an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions’. [See *Dilworth v. Commr. of Stamps*⁵ (Lord Watson); *Mahalakshmi Oil Mills v. State of A.P.*⁶ , SCC p. 170, para 11.] The use of the words ‘means and includes’ in Rule 2(b) would, therefore, suggest that the definition of ‘college’ is intended to be exhaustive and not extensive and would cover only the educational institutions falling in the categories specified in Rule 2(b) and other educational institutions are not comprehended. Insofar as engineering colleges are concerned, their exclusion may be for the reason that the opening and running of the private engineering colleges are controlled through the Board of Technical Education and Training and the Director of Technical Education in accordance with the directions issued by the AICTE from time to time.”

26. In *Bharat Coop. Bank (Mumbai) Ltd. v. Employees Union*⁷ this Court again considered the difference between the inclusive and exhaustive definitions and observed : (SCC p. 695, para 23)

“23. ... when in the definition clause given in any statute the word ‘means’ is used, what follows is intended to speak

² 1995 Supp (2) SCC 348

³ (1891) 2 QB 665 (CA)

⁴ (1990) 3 SCC 682 : 1991 SCC (L&S) 71

⁵ 1899 AC 99 : (1895-99) All ER Rep Ext 1576

⁶ (1989) 1 SCC 164 : 1989 SCC (Tax) 56

⁷ (2007) 4 SCC 685 : (2007) 2 SCC (L&S) 82

exhaustively. When the word ‘means’ is used in the definition ... it is a ‘hard-and-fast’ definition and no meaning other than that which is put in the definition can be assigned to the same. ... On the other hand, when the word ‘includes’ is used in the definition, the legislature does not intend to restrict the definition : it makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore, the use of the word ‘means’ followed by the word ‘includes’ in [the definition of ‘banking company’ in] Section 2(bb) of the ID Act is clearly indicative of the legislative intent to make the definition exhaustive and would cover only those banking companies which fall within the purview of the definition and no other.”

28. In *Hamdard (Wakf) Laboratories v. Labour Commr.*⁸ it was held as under : (SCC p. 294, para 33)

“33. When an interpretation clause uses the word ‘includes’, it is prima facie extensive. When it uses the word ‘means and includes’, it will afford an exhaustive explanation to the meaning which for the purposes of the Act must invariably be attached to the word or expression.” ”

24. “Relevant” is defined, in Section 3 of the Evidence Act, thus:

“**Relevant.** – One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.”

25. Relevancy of facts form subject matter of Chapter II of the Evidence Act, comprising Sections 5 to 55.

26. Given the amplitude of the expressions “fact and issue” and “relevant fact” as contained in Section 3 of the Evidence Act, it is clear that the expression “every fact in issue and of such other facts as are hereinafter declared to be relevant”, employed by Section 5, are wide and compendious, and embrace an expansive factual panoply.

27. Section 6 of the Evidence Act treats “facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction” as relevant. “Facts which are the occasion, *cause* or effect, immediate or otherwise, of relevant facts, or facts in issue, *or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction,* are relevant”, *vide* Section 7. Section 9 ordains that “facts necessary to explain or introduce a fact in issue or relevant fact ... or which show the relation of parties by whom any such fact was transacted” are relevant insofar as they are necessary for that purpose.

28. Viewed thus, there can be no gainsaying that, in the present case, the title of the respondent over the suit property was relevant. Mr. Mukul Talwar, learned Senior Counsel also did not dispute this fact. In fact, the issues framed by this Court in the suit itself indicate that the title of the respondent over the suit property was a relevant fact. Equally relevant, per consequence, would be rival titular claims to the suit property, if laid.

29. That being so, a question with respect to the issue of title of the respondent over the suit property cannot be treated as a question relating to a matter not relevant or to the suit or proceeding.

30. Thus, even if it were to be presumed that there was an admission on the aspect of title, that cannot be a ground to disallow a question on that aspect, *so long as the aspect remained relevant to the suit or proceeding before the Court.* The question of whether the fact, with respect to which a question is posed to a witness while recording evidence, stands admitted or denied, is not regarded, by the Evidence Act, as a valid consideration, while deciding whether to allow or

disallow the question. If the question relates to a relevant fact, it has to be allowed. That is the mandate of Section 5.

31. Section 48 is, in fact, in the nature of an exception to Section 5. Section 5 permits, unequivocally, evidence to be given “of the existence or non-existence *of every fact in issue and of such other facts as are hereinafter declared to be relevant*”, i.e., of every fact in issue or relevant fact. Section 148 envisages the circumstance in which the Court may require a witness to answer a question which relates to a matter *not relevant to the suit or proceeding*. The occasion to take recourse to Section 148, therefore, arises only if the question that is asked relates to a matter not relevant to the suit or proceeding. While deciding whether, even in respect of such an “irrelevant” question, the witness should be compelled to answer, the Court is required to “have regard to” the four considerations (1) to (4) enumerated in Section 148.

32. No occasion arises, in the present case, to advert to Section 148, as the issue of the presence, or absence, of titular rights of the parties over the suit property was a fact which was, both “in issue” as well as “relevant” to the suit proceedings. As such, evidence, of the fact could be led, by virtue of Section 5. Section 148, which would be attracted only if the fact was irrelevant, has no application at all.

33. On first principles, the manner in which a party is to proceed with the recording of evidence should remain, ideally, the pristine prerogative of that party. A court should not, save in the rarest of circumstances, monitor the manner in which the evidence is being recorded or navigate the questions which are posed by one party to the witness of the other.

34. Having said that, it is always open to the court, where it feels that the questions which are posed are vexatious, repetitive or otherwise abusive of the legal process, to disallow such questions.

35. The circumstances in which a court may interfere with the questions which are being posed to a witness must necessarily take guidance, apart from Section 148, from Sections 149 to 159 of Evidence Act which, for the purpose of instruction, may be reproduced thus:

“149. Question not to be asked without reasonable grounds. — No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

150. Procedure of Court in case of question being asked without reasonable grounds. — If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

151. Indecent and scandalous questions. — The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

152. Questions intended to insult or annoy. — The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

153. Exclusion of evidence to contradict answers to questions testing veracity. — When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may after wards be charged with giving false evidence.

Exception 1. — If a witness is asked whether he has been

previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2. — If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

154. Question by party to his own witness. —

(1) The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

(2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness.

155. Impeaching credit of witness. — The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him: —

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) By proof that the witness has been bribed, or has accepted the offer of bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

156. Questions tending to corroborate evidence of relevant fact, admissible. — When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

157. Former statements of witness may be proved to corroborate later testimony as to same fact. — In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

158. What matters may be proved in connection with proved statement relevant under section 32 or 33. — Whenever any statement, relevant under section 32 or 33, is proved, all matters

may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

159. Refreshing memory. — A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct. When witness may use copy of document to refresh memory. -

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non- production of the original. An expert may refresh his memory by reference to professional treatises.”

36. The query put learned Counsel for the petitioners to the respondent as PW-1, which the impugned order disallowed, cannot be said to fall within any of the above-extracted provisions of the Evidence Act. Nor can its disallowance be justified under Section 148.

37. Mr. Talwar places reliance on a judgment rendered by this Bench in *Ravinder Suri v. Dayawati*⁹. The judgement, if anything, militates against the stand that Mr Talwar seeks to canvas, as is apparent from the following passage from the report:

“27. The power of the Court to disallow questions which are irrelevant, therefore, cannot be gainsaid. At the same time, as the above passages note, the question of “relevancy” is, more often than not, problematic, especially at the stage when evidence is being recorded, and the appropriate course of action would, therefore, be to allow, rather than disallow, the questions, except

where they are “manifestly irrelevant”. *Questions which relate to facts in issue are, on the other hand, manifestly, relevant. To borrow from R.K. Chandolia v. C.B.I.*¹⁰, questions which “may be directly relevant in the bearing on, elucidating, or disproving, the very merits of the points in issue” are *ex facie* relevant.”

(Emphasis contained in original judgment)

38. In that view of the matter, the impugned order clearly invites interference under Article 227 of the Constitution of India.

39. It is made clear that this Court has only examined the aspect of whether the first query put by learned Counsel for the petitioner to the respondent as PW-1 was rightly disallowed.

40. This judgment should not be treated as an expression of opinion on any other aspect of the case.

41. The impugned order is therefore set aside. The objection raised by the respondent, as noted in the impugned order, accordingly stands dismissed. The petition is accordingly is allowed with no order as to costs.

C. HARI SHANKAR, J.

NOVEMBER 14, 2022

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