

## Kathuria Brothers and Another Vs Amba Prasad Sharma

**Court:** Delhi High Court

**Date of Decision:** Jan. 17, 1997

**Citation:** (1997) 2 AD 609 : (1997) 67 DLT 393

**Hon'ble Judges:** S.N. Kapoor, J

**Bench:** Single Bench

**Advocate:** M.S. Vohra, for the Appellant;

### Judgement

S.N.Kapoor, J.

(1) This revision petition is directed against an order in appeal restraining the defendants from putting any stool in the passage having width 3" x 8".

(2) The defendants/petitioners have a shop No. 5665, Chowk Gandhi Market, Sadar Bazar and in front of that shop there is a passage having

width of 3" x 8". Across the passage, the plaintiff has been vending his wares on a "phar". Earlier the plaintiff wanted to raise the height of his

wooden stool which might have obstructed the view of the shop of the defendants. After a suit was filed an agreement was reached between the

parties at that stage that neither the plaintiff should keep any opening of his "phar" towards the passage in front of the shop defendant nor would he

raise the height of his "phar". The plaintiff/respondent has filed the present suit subsequently for grant of injunction restraining the defendant from

putting any wooden stool or ice box or any other articles in the common passage existing between the shop of the defendants and the "phar" of the

plaintiff. Initially injunction was granted after hearing both the parties holding that it was a public passage and the defendant was restrained from

putting any article in the common passage shown red in the site plan behind "Phar" No. 2 of the plaintiff.

(3) After passing of the aforesaid order the defendant-petitioner, moved an application for modifying the aforesaid stay under Order 39 Rule 4.

The learned Sub-Judge on the basis of the site plan filed by the plaintiff/respondent showing one ice box of the size of 1.5" x 1.5", three stools of

2" x 2.5" adjoining their shop and accepting version of the defendant-petitioner took the view that defendants were keeping it for the last 25 years

a fact which was not considered by the Court earlier. Thus allowed the defendant/petitioner to place three stools only just adjacent to their shop in

common passage adjoining to their shop.

(4) An appeal was filed against this subsequent order by the plaintiff- respondent and the then Addl. District Judge allowed the appeal against this

order holding that the defendants had no right to put any article in the public passage there being a statutory duty to keep the public passage free

from any encroachment. Consequently, question of not allowing the defendant to put any stool in the public passage and the defendant suffering

any under hardship did not arise. Thus, the order dated 3rd August, 1983 under Order 39 Rule 4 was set aside.

(5) In the initial injunction order and in order under Order 39 Rule 4 as well as in the order passed by learned Addl. District Judge in appeal the

passage has been held to be a common passage. This is a finding of a fact which should not be interfered with in revision. It may be mentioned that

there is a statutory prohibition under Sections 320 & 321 of the Delhi Municipal Corporation Act (hereinafter called the Dmc Act, for short)

against putting any structure and fixtures which cause obstruction in the street. Section 320 of the Dmc Act reads as under :

320. Prohibition of structure or fixtures which cause obstruction in streets- (1) No person shall, except with the permission of the Commissioner

granted in this behalf, erect or set up any wall, fence, rail post step, booth or other structure whether fixed or movable or whether of permanent or

temporary nature, or any fixture in or upon any street or upon or over any open channel, drain, well or tank. (2) Nothing in this section shall apply

to any erection or thing to which Clause (c) of the Sub-section 325 applies. 321. Prohibition of deposit, etc. of thing in streets-(1) No person shall,

except with the permission of the Commissioner and on payment of such fee as he in each case thinks fit, place or deposit upon any street, or upon

any open channel drain or well in any street or upon any public place any stall, chair, bench, box or encroachment thereon. (2) Nothing in Sub-

section (1) applies to building materials.

(6) It is apparent from the language of the Sections 320 and 321 of the Dmc Act that there is a prohibition against putting up "any fixtures in or

upon any street or upon or over in the open Channel, drain, well or tank and placing or depositing "upon any street, or upon any open channel,

drain or well, or in any street or upon any public place any stall, chair, bench, box or encroachment therein". If the adjoining shop owners or "phar"

owners or their employees, agent or representatives or Hawkers or squatters are allowed to put anything and thereby caused obstruction to the

passage in the garb of injunction, firstly they would violate the provisions of Section 320 & Section 321 of the Dmc Act, and secondly Courts

would be blamed for unconsciously encouraging such encroachments. Moreover, there would hardly be any space for passing or reposing by the

pedestrians or other traffic passing through that passage. Thus, it is bound to cause great inconvenience to public at large. Neither this kind of

encroachment nor its permission as was granted by the learned Sub-Judge under Order 39(4) could be approved by any stretch of imagination.

Consequently, it appears that the view taken by the learned Addl. District Judge was absolutely justified and does not call for any inference of this

Court. The revision petition is accordingly dismissed.

(7) A copy of this order be sent to the learned Trial Court concerned through learned District Judge for information and to proceed in accordance

with law.