

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

REVIEW PETITION NO. 4 OF 2016

IN

NOTICE OF MOTION NO. 3139 OF 2010

IN

SUIT NO. 886 OF 2010

WITH

SUIT NO. 886 OF 2010

Kirti Sohan Modi & Ors.

...Petitioners

Versus

M/s. Creation

...Respondent

Mr. M.B. Singh a/w Ms. Pooja Jalan, i/b MBS & Co., for the
Petitioners.

CORAM : S.C. GUPTE, J.

DATE : 9th February 2016

P.C. :

1. The Petition seeks review of an order passed by this Court on 24th November 2015, dismissing the Suit for want of jurisdiction. The Suit seeks an order of permanent injunction restraining the Defendant from entering upon the terrace of the suit building and for direction to remove hoardings installed by the

Defendant from the terrace of the suit building and cease to occupy the suit premises. The Suit also seeks an order for recovery of licence fee or compensation. The Suit was dismissed on the ground that under Section 41 of the Presidency Small Causes Courts Act, 1882, only the Court of Small Causes has jurisdiction to entertain and try such a suit.

2. The Review Petition is on the footing that for the purposes of Section 41 of the Presidency Small Causes Courts Act, 1882, the suit must not only be between a licensor and a licensee, but must also relate to recovery of possession of immovable property or recovery of licence fee or charge therefor. It is submitted by the Review Petitioner that the impugned order does not consider whether the possession, or licence fee or charge, sought to be recovered from the Defendant is in respect of an immovable property. It is conceded by learned Counsel for the Review Petitioner that this aspect of the matter was not argued before the Court, when the impugned order was passed. It is, however, submitted by Counsel that the Court was bound to consider this aspect, whilst considering the question of jurisdiction under Section 41 of the Presidency Small Causes Courts Act, 1882.

3. In the first place, when the parties are not at issue on a particular question and accordingly, the Court does not consider that issue in its order, the order cannot be said to disclose any mistake or error apparent on the face of the record. The order in that case cannot be made the subject matter of a Review Petition. Secondly, the Plaintiffs have filed the present Suit relying on an agreement between the predecessor-in-title of the Plaintiffs and the Defendant. By this Agreement, what the predecessor-in-title of the Plaintiffs has permitted the Defendant to do was to put up hoarding structures on two terraces of the suit building, namely, one on the big terrace and the other on the small terrace, as per plan annexed to the agreement. This agreement was initially for a period of one year and provided for payment of a monthly licence fee or compensation by the Defendant. The agreement was renewed from time to time. The last extended licence period ended on 31st March 2007. It is the Plaintiffs' grievance that by their Advocate's letter dated 10th March 2007, the Plaintiffs terminated/cancelled the agreement calling upon the Defendant to remove its belongings, including its servants, agents and hoarding signs from the terraces of the suit building; but that despite such termination, the Defendant continues to trespass upon the property and to illegally occupy and use the premises for display

of advertisements; and that after expiry of the period of licence, the Defendant has no right to remain in the premises. Accordingly, a permanent injunction has been sought in the Suit restraining the Defendant from entering upon the terraces of the suit building and also a direction and order to remove the hoardings and all belongings from the terraces of the suit building and cease from using the hoardings site. The Plaintiffs have also prayed for a decree of compensation/damages towards the use of the premises from 1st April 2007 upto the date of filing of the Suit. This is nothing but an action relating to recovery of possession of immovable property and licence fee and compensation for the same. The Defendant is in effect sought to be evicted from the terraces of the suit building, an immovable property.

4 . A Licence under Section 52 of the Easement Act, 1882 is defined as follows :-

***“License” defined.-** Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license.”*

Thus, by definition a licence is grant of a right to do or continue to do something in or upon an immovable property, which does not amount to an easement or interest in the property. It is the Plaintiffs' own case that by the Suit Agreement the Defendant was permitted to enter upon an immovable property, namely, terraces of the suit building and to display and continue to display in or upon this immovable property hoardings of a certain specification. This right does not amount to either an easement or an interest in the property. It is, accordingly, nothing but licence. It is claimed accordingly in the Plaint and argued accordingly at the bar at the hearing of the Notice of Motion. There is, thus, no merit in the contention of the Plaintiffs either that there was no licence in respect of immovable property or that non consideration of the question of nature of the property, whether immovable or movable in the impugned order, calls for a review under Order XLVII Rule 1 of the Code of Civil Procedure, 1908.

5. The Judgment of the Madras High Court in Union of India Vs. V. Krishnamurthy¹ cited by learned Counsel for the Review Petitioner does not bear on the facts of the present case. In the case before the Madras High Court, hoardings were sought to be

¹ 1994 MLJR pg 630

removed from a certain site and the person who had put up the hoardings moved the Court with a Writ Petition praying for a *mandamus* for an injunctive relief with respect to the hoardings put up at the site. What was in question in that case, was applicability of Section 5A of the Public Premises (Eviction of Unauthorised occupant) Act, 1971. Section 5A has two separate sub-sections for dealing with removal of a movable structure or fixture and removal of a building or other immovable structure or fixture. Sub-section (2) *inter alia* deals with immovable structure or fixture, while sub-section (3) deals with immovable structure or fixture unauthorisedly erected in public premises. These two sub-sections provide for different procedures for removal of immovable and movable structures and fixtures. The question before the Court was, which of the provisions was applicable. That depended in turn on whether the hoarding itself was a movable structure or fixture or whether by reason of the fact that it was attached to earth, it was an immovable structure or fixture. The Court considered the provisions of the Transfer of Property Act, 1882, the General Clauses Act, 1897 and the Public Premises (Eviction of Unauthorised occupant) Act, 1971, and came to a conclusion that the hoarding in that case was only a movable property. These facts and conclusion based thereon have no bearing

on the controversy in the present Suit. In the present Suit, relief is sought in respect of the removal of the Defendant, its servants and agents from the terraces of the suit building or, in other words, eviction of the Defendant from the terraces of the suit building.

6 . As I have noted above, the subject matter of the Suit has, accordingly, been covered by Section 41 of the Presidency Small Causes Courts Act, 1882.

7 . In the premises, there is no case made out for review of the impugned order under Order XLVII Rule 1 of the Code of Civil Procedure, 1908. Hence, the Review Petition is dismissed.

8. Certified copy of the order is expedited.

[S.C. GUPTE, J.]