

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 5560 OF 2022

Ajitsing Nirh

Age : 70 years, Occu : Business

R/o : Osmanpura, Aurangabad

Tq. and Dist. Aurangabad

... PETITIONER

VERSUS

M/s. S.D. Associates,
through its Partners firm

01. Vitthal Ganpat Sahane

Age : 47 years, Occu : Business

R/o : Bhagatsing Nagar, Aurangabad

02. Prajwal Ramhari Dapurkar,

Age : 43 years, Occu : Business,

R/o : Disha Sanskrati Aurangabad

... RESPONDENTS

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Mr. Atul M. Karad, Advocate for the petitioner

Mr. S.B. Deshpande, Advocate for the respondents no. 1 and 2

...

CORAM : MANGESH S. PATIL, J.

Reserved on : 21.07.2022

Pronounced on : 12.08.2022

JUDGMENT :

Heard. Rule. Rule is made returnable forthwith. Learned advocate Mr. S.B. Deshpande waives service for the respondent Nos.1 and 2. At the joint request of the parties, the matter is heard finally at the stage of admission.

2. The petitioner is the original defendant. He is aggrieved by the decision of the lower appellate court in an appeal preferred by the

respondents (plaintiffs) under Section 104 read with Order XLIII of the Code of Civil Procedure, allowing it, reversing the order of the trial court rejecting their application for temporary injunction and restraining him from obstructing and interfering their peaceful possession in the suit property.

3. There is not much of dispute on facts except the facts regarding alleged termination of the leave and licence agreement entered into between the parties, whereby, the petitioner had permitted the respondents to use the suit property, and the fact of actual possession.

4. The learned advocate Mr. Karad for the petitioner would submit that though there is no dispute about the petitioner having permitted the respondents to use the suit property on leave and licence basis, it has been his specific stand that the respondents were not in actual possession of the suit property and no injunction could have been granted in their favour more so when the trial court had refused to exercise the discretion vested in it and which order, in the facts and circumstances of the case, was clearly pointed out that the trial court had taken a plausible view and it was not perverse or arbitrary. The lower appellate court had limited jurisdiction while deciding an appeal under Section 104 read with Order XLIII of the Code of Civil Procedure. The lower appellate court was not justified in substituting its own views.

5. Mr. Karad would submit that since it was merely a leave and licence agreement, the question was merely of user of the suit property. Its possession in law would continue to be with the petitioner. The lower

appellate court ought not to have held the respondents to be in settled possession. There was ample material demonstrating that though the licence was registered in 2017, in fact it was brought in existence on 03.06.2015 and the tenure was seven years. Even the respondent's licence issued by the Food and Drug Department was issued on 09.09.2015. They had voluntarily closed down the business and vacated the suit property and had abandoned the licence. The entire structure was thereafter removed and a new commercial complex was constructed in its place in February 2021 even before the suit was filed thereby completely changing the structure. They were in huge arrears of licence fees and the other charges to the tune of Rs.15,00,000/-. After long persuasion and in lieu of premature abandonment, after negotiation an amicable settlement was arrived at. They issued a cheque for an amount of Rs.5,12,730/- towards full and final settlement of all the arrears. But the cheque was not honored. Thereafter they vacated the suit property on 23.01.2021 by taking away all their belongings which fact was witnessed by couple of persons one of whom was an employee of the respondents. In view of such ample material the trial court had refused to grant temporary injunction. Without their being sufficient and cogent reasons, the lower appellate court has caused interference and has illegally reversed the order.

6. Mr. S.B. Deshpande for the respondents submits that admittedly the respondents were in occupation of the suit property since long. They had never surrendered the licence. A blank cheque issued to the petitioner

was misused. The licence was never legally terminated and it was *prima facie* proved that the respondents were in occupation of the suit property. The petitioner had with the help of gundas drove the respondents away from the suit property and locked it. A police complaint was also lodged. All these circumstances were overlooked by the trial court. The decision was perverse, arbitrary and capricious and the lower appellate court has rightly exercised the jurisdiction in reversing the decision.

7. I have carefully considered the rival submissions, perused the orders of the two courts below and the papers. For the present it is sufficient to bear in mind the fact that there is no dispute that the petitioner is the owner of the suit property and handed over its occupation to the respondents under a leave and licence agreement which was registered in the year 2017. Irrespective of the dispute as to the actual date of commencement of such agreement the fact remains that the term of the licence was seven years. Assuming that it was executed on 03.06.2017 even then the period of seven years has expired on 02.06.2022.

8. If it was a leave and licence agreement as distinct from a lease, being the owner, the petitioner must be regarded as in possession *de jure*. Only the right to occupy and use the suit premises was given to the respondents and irrespective of any other circumstance, by passage of time, the right of the respondents, may be to occupy and use the suit property, has come to an end. In my considered view, therefore, irrespective of any other factor, this circumstance itself is sufficient to hold that the respondent's right

to occupy and use it has seized by efflux of seven years from the date of agreement which is 03.06.2017 and consequently the petitioner would be entitled to possess it.

9. True it is that the suit was filed on 23.01.2021. However, since it is a matter of leave and licence as distinguished from lease, the respondents cannot be said to have any right, title or interest *qua* the suit property which can be protected.

10. As a corollary, even if it is assumed for the sake of arguments that the leave and licence agreement was not legally terminated when the suit was filed, it has lived its life to the fullest by now, bringing at naught whatever rights the respondents had on the date of the suit.

11. As laid down in catena of judgments including decision in the matter of **Wander Ltd. and Ors. Vs. Antox India Pvt. Ltd.; 1990 (2) ARBLR 399 (SC)** the powers of the lower appellate court in an appeal preferred under Section 104 read with Order XLIII of the Code of Civil Procedure are circumscribed by several limitations. It is only when the order of the trial court is perverse, arbitrary or capricious that the lower appellate court would get a jurisdiction to cause any interference. If such were the limitations on the powers of the lower appellate court, it was imperative for the learned District Judge to have, even before undertaking any fresh scrutiny of facts, demonstrated with reasons as to which of the observations and the conclusions of the trial court were perverse, arbitrary or capricious. It appears that the lower appellate court had got swayed away by the

alleged circumstance, which was still to be proved, regarding filing of the police complaint by the respondents in respect of the alleged act of the petitioner to forcibly putting up a lock to the suit property which was a pure question of fact still to be established. Pertinently, in the absence of any extension of the leave and licence agreement, the lower appellate court less than a month before its expiry that is on 04.05.2022 has passed the impugned judgment and order. In spite of the fact that the decision in the matter of **Wander Ltd.** (supra) was brought to his notice, he has not objectively demonstrated as to how the order of the trial court could have been discarded as illegal and arbitrary refusal to exercise the discretion.

12. The lower appellate court has relied upon the decision in the matter of **Rame Gowda (dead) by L.Rs. Vs. M. Varadappa Naidu (dead) by L.Rs. and Anr.; AIR 2004 SC 4609** to justify his conclusion that a person in settled possession cannot be dispossessed except by following due process of law. But then, in the process, the lower appellate court has overlooked the distinction between a lease and licence. Pertinently, the trial court had precisely for this reason refused to recognize respondents alleged possession as a settled possession.

13. True it is that the trial court could not have attributed admission by the respondents about having lost possession merely on the basis of the fact that even according to them they were driven out from the suit property which was thereafter locked by the petitioner. But then except the agreement of leave and licence and filing of this complaint with the police,

no tangible material was placed on record to substantiate the factum of Respondents' possession in the suit property and none has been referred to by the lower appellate court. Meaning thereby that the lower appellate court simply by relying upon these two factors has found the respondents entitled to temporary injunction, which for the plausible reasons assigned by the trial court, had not found favour with it.

14. Assuming that the order passed by the trial court was erroneous still, it was not sufficient for the lower appellate court to undertake a fresh scrutiny. When the trial court had refused to exercise the discretion which order was not perverse, arbitrary or capricious the lower appellate court had no jurisdiction to substitute its own discretion by undertaking a fresh scrutiny.

15. The judgment and order under challenge is illegal and is liable to be quashed and set aside.

16. The Writ Petition is allowed. The impugned judgment and order of the lower appellate court is quashed and set aside and the one passed by the trial court is restored.

17. Rule is made absolute.

(MANGESH S. PATIL, J.)