

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

**904 REVIEW APPLICATION (CIVIL) NO.8 OF 2023
IN WP/5560/2022**

**M/S S. D. ASSOCIATES THROUGH ITS PARTNERS FIRM VITTHAL GANPAT
SAHANE AND ANOTHER
VERSUS
AJITSING NIRH**

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Advocate for Applicants : Mr. Deshpande Sanjeev B.

CORAM : MANGESH S. PATIL, J.

DATE : 13.01.2023.

PER COURT :

Heard learned advocate Mr. Deshpande for the review applicant who is the original plaintiff.

2. The applicant was claiming to be in possession and occupation of the suit premises on the basis of a leave and licence agreement which was entered into in the year 2017 and its tenure was seven years extendable by another ten years depending upon the agreement between the parties. He was seeking temporary injunction restraining the respondent/defendant from obstructing his possession on the demised premises.

3. The trial court for the reasons recorded in the order rejected the application for temporary injunction *inter alia* holding that the material before it was not sufficient to disclose exclusive possession of the applicant.

4. The applicant challenged that order before the District Court in a Misc. Civil Appeal preferred under Order XLIII of the Code of Civil Procedure which was allowed and the order of the trial court was reserved and he was granted temporary injunction. The respondent/defendant

challenged that order before this Court in a writ petition, which has been allowed by the judgment under review.

5. The learned advocate Mr. Deshpande would strenuously submit that error apparent on the face of record is evident inasmuch as this Court has proceeded to consider the rival claims/rights by treating the leave and licence agreement to be for five years when it was for seven years and by reaching a conclusion that the agreement had lived its life fullest. He would refer to the terms of the agreement which has been entered into on 03.06.2017 and the period was agreed to be for seven years and in the normal course it would expire on 02.06.2024. He would, therefore, submit that the entire decision of this Court was based on such erroneous conclusion. It was a decisive factor and this court should undertake a review.

6. Mr. Deshpande would further submit that no prejudice would be caused to the other side only because this Court now is called upon to hear the parties once again.

7. It is necessary to emphasize at the outset that apart from the fact that power of review under Section 114 of the Code of Civil Procedure has been sought to be invoked, it is also necessary to note that this Court was deciding a writ petition preferred under article 227 of the Constitution of India questioning the judgment and order passed by the lower appellate court in a Misc. Civil Appeal preferred under Order XLIII of the Code of Civil Procedure against the order of rejection of an application for temporary injunction under Order XXXIX Rule 1 of the Code of Civil Procedure by the trial court. Apart from the facts, this factor needs to be emphasized as, in exercise of writ jurisdiction under article 227, it was sufficient for this Court to demonstrate if the petition was to be allowed as to how the order of the lower appellate court in exercise of powers under Order XLIII was perverse, arbitrary or capricious. This court in exercise of writ jurisdiction is not

expected to enter into the factual controversy.

8. Once it is borne in mind that this Court was merely exercising the power under article 227, the order under review demonstrates as to how the lower appellate court ought not to have caused any interference in the order of rejection of the application by the trial court and its order was perverse, arbitrary and capricious and there were no circumstances which would have enabled it to reverse the order of rejection. It was expressly pointed out that the lower appellate court could not have substituted its own discretion in place of the one refused to be exercised by the trial court.

9. True it is that factually this Court had erred in treating the life of the leave and licence agreement to be five years and recording some observations in that regard. But then, that was not decisive factor or the only ground on which the writ petition was allowed. Since it was demonstrated that the lower appellate court had no power to reverse the order of the trial court that in itself was sufficient to allow the writ petition.

10. Consequently, though to some extent, as far as the observation of this Court in the order under review is factually incorrect, that by itself cannot be the ground to enable this Court to undertake the review.

11. The Review Application is dismissed.

(MANGESH S. PATIL, J.)

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