

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.64/2020

Abdul Hameed s/o Abdul Kalam
Vs.
Abdul Aleem Khan s/o Abdul Kalam Khan.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders

Shri S.S. Bhalerao, Advocate for appellant.
Shri S. Raisuddin, Advocate for respondent.

CORAM : S.M. MODAK, J.
DATE : OCTOBER 04, 2021.

CIVIL APPLICATION NO.603/2021

Today it is submitted on behalf of the respondent that he does not want to file reply. In the memo of appeal, the substantial question on the point of limitation was not proposed. The appellant is permitted to argue that question in second appeal. This will be also a substantial question of law. So the application is allowed. Still the appellant has to satisfy that substantial question of law needs to be framed on the point of limitation. Respondent is at liberty to oppose the same.

Civil application is disposed of.

SECOND APPEAL NO. 64/2020

Farad sheet dated 26/08/2021 says that inadvertently stay writ was not issued. Office to issue the stay writ. In future, care should be taken.

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2. Heard both the learned Advocates. The present plaintiff Abdul Aleem Khan has filed the suit for possession bearing Regular Civil Suit No.720/2011. It was filed on the premise that he is a tenant and defendant Abdul Hameed is a trespasser. During the pendency of the suit, the plaintiff has purchased the property from the landlord by executing a sale-deed on 07/12/2013. The plaint was amended. The defendant filed written statement thereby opposing the original cause of action and also the ownership of the plaintiff.

3. The Trial Court as well as the First Appellate Court have framed issues/points. After reading them, one may find that one of the issues pertains to a proof of title by the plaintiff. Whereas the other issue pertains to pleadings of the plaintiff prior to the execution of the sale-deed. It says about proof of defendant being in wrongful possession of the property.

4. It seems that the issue of ownership of the plaintiff was answered in the affirmative by both the Courts below on the basis that the sale-deed is executed. Whereas all other issues framed on the basis of pleadings prior to execution of sale-deed were also answered in favour of the plaintiff.

5. Learned Advocate for the defendant pointed out to me the findings given by the Trial Court in respect of RCS No.4528/2002. It was filed by one Raziya Begum who is sister of both the plaintiff and defendant. She filed a suit for declaration that Shop Act License was changed by defendant

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fraudulently. The present defendant contested the suit. He claimed to be in possession since 1990. He has claimed that the business was started by their father and after the plaintiff has shifted out of Nagpur for job, defendant is doing the business in the said shop. Whereas the present plaintiff has pleaded that after he went out of Nagpur, his sister Raziya Begam was looking after the business and in fact, the present defendant dispossessed her in the year 2000.

6. It is true that the suit filed by Raziya Begum was dismissed and parties are not coming with the case that that judgment is challenged. According to the learned Advocate for the defendant-appellant, both the Courts below have not dealt with the issue of limitation. He relied upon one judgment in case of State of Gujarat Vs. Kothari and Associates reported in (2016) 14 Supreme Court Cases 761. He has submitted that as per Article 64 of the Limitation Act, if the plaintiff has pleaded that dispossession took place in the year 2000, from that period of 12 years has to be computed. Learned Advocate for the appellant fairly admitted that from 2000, suit has been filed within 12 years. He also submitted that in fact the period of limitation will start from the averments in the written statement filed in the present suit. My attention is invited to the averments in paragraph no.2 of that written statement. The defendant has pleaded that Civil Court in earlier suit RCS No.4528/2002 has confirmed the possession of the defendant over the suit premises since 1994. So according to him, the period will start from 1994 and not 2000.

7. Learned Advocate for the respondent-plaintiff relied upon a judgment in case of Kusuma Vs. Dilip reported in 2021 (5) Mh.L.J. page 137. This Court (at Goa) was pleased not to allow belated plea of limitation taken for the first time in second appeal. It was neither raised earlier and there were no pleadings. My attention is also brought to a substantial question of law framed in that appeal. It was framed on the basis of law of limitation only.

8. It is true that the Hon'ble Supreme Court in case of State of Gujarat Vs. Kothari and Associates as referred above, has observed that in fact duty is cast on the Court to consider issue of limitation even on its own initiative and since the Court failed to do so, the appellant's side was competent to raise this legal question in appeal and indeed even in any successive appeal.

9. The law laid down by the Hon'ble Supreme Court is certainly binding on us. The observations made in Kusuma Vs. Dilip (supra) case are on the basis of that case. Hence, I am inclined to frame substantial question of law on the point of limitation. And even in this case substantial question of law was framed on the point of limitation.

10. As observed by Hon'ble Supreme Court in paragraph no.8, learned Advocate for the appellant submitted that even if this question is framed, the appellant does not want to adduce any more evidence. It is true that this Court has already framed one substantial question of law on 05/02/2021. It is in respect of the proof of ownership by the

plaintiff. In addition to that following substantial question of law is framed:

“Whether the suit filed by the plaintiff-respondent was filed in time considering the averments in the written statement to the effect that defendant claimed to be in possession of the suit property since 1994?”

11. The appeal be **admitted**. Record and proceedings from both the courts below be called.

Appellant to file private paper book within the period of one year from today.

CIVIL APPLICATION (CAS) NO.15/2020

Already this Court has granted interim relief in terms of prayer Clause- (c) on 05/02/2021 till returnable date. It was not extended thereafter. The appellant-defendant is in possession of the suit property. The respondent-plaintiff is deprived of getting fruits of the decree if the decree is stayed. Both the parties are directed to address the Court on the point of conditions to be imposed if at all the decree is to be stayed hereinafter. Both the parties may consider the principles laid down by the Hon'ble Supreme Court in case of Atmaram Properties (P) Ltd. Vs. Federal Motors (P) Ltd. reported in (2005)1 SCC 705.

Matter be kept after **two weeks**.

JUDGE