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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO.64 OF 2020

Abdul Hameed s/o Abdul Kalam,
Aged about 47 years, Occupation: Business,
R/o C/o R. K. Photo Studio,
Ahabab Colony Chowk, Nagpur,
Tah. and Dist. Nagpur.

..... APPELLANT
(ORG. DEFENDANT)
ON RA

// VERSUS //

Abdul Aleem Khan s/o Abdul Kalam Khan,
Aged about 54 years, Occupation: Service,
R/o 56-B, N.I.S.W.F. Campus, Munirka,
New Delhi.

.... RESPONDENT
(ORG. PLAINTIFF)
ON RA

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

CORAM : AVINASH G. GHAROTE, J.
DATED : 19/09/2022

ORAL JUDGMENT :

1. Heard Mr. Bhalerao, learned counsel for the appellant and
Mr. S. Raisuddin, learned counsel for the respondent.

2. By the order dated 5.2.2021, the following substantial
question of law was framed.

*“Whether both the courts below erred in
holding that the Plaintiff/Respondent is the
owner of the suit property ?”*

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3. By the order dated 4.10.2021, the following substantial question of law was also framed while admitting the appeal.

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

4. Heard learned counsel for the respective parties on the aforesaid substantial question of law. It is not in dispute that the property in question was originally occupied by the respondent/plaintiff as a tenant of Shri. S. M. Quadri, who was the owner of the same and there was a relationship of landlord and tenant between the said Shri. S. M. Quadri and the plaintiff/respondent, under an agreement dated 3.8.1992 (Exh.23). It is also not in dispute that since the plaintiff, who was running a shop from the premises in question under the name and styled as R. K Photo Studio, having secured Central Government employment at Cochin had handed over the business to his sister Smt. Raziya Begum with the consent of the landlord. It is also not in dispute that by a sale deed dated 7.12.2013, the said property stands transferred in the name of the plaintiff. On 20.8.2011, the plaintiff/respondent filed a suit for possession plus perpetual injunction and mesne profit against the defendant/appellant claiming that the defendant/appellant had no legal right whatsoever to occupy the premises in question and his

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occupation of the premises was merely to assist the said Raziya Begum, who was handed over the business by the plaintiff/respondent. Both the Courts below, have held in favour of the plaintiff/respondent. The learned trial Court by the judgment dated 9.1.2017 had granted decree for possession with a further direction of an enquiry into the mesne profit. The learned Appellate Court by the judgment dated 8.3.2019, has confirmed the judgment of the learned trial Court.

5. Mr. Bhalerao, learned counsel for the appellant by placing reliance upon the judgment in *RCS No.4528 of 2001 (Raziya Begum D/o Abdul Kalam @ Razia Begum w/o Mustaq Ahmad Vs. Abdul Hamid s/o Abdul Kalam)* decided on 29.3.2006 (Exh.39/pg.64 of the paper book), contends that since the finding has been rendered therein that if the defendant, who was in possession of the shop in question and the suit by Raziya for possession has been dismissed, the same would indicate that the appellant/defendant was in possession of the shop in question since 1994, and therefore the suit for possession as filed on 20.8.2011 before the learned trial Court, by the present plaintiff, would be barred by limitation considering the Articles 64 and 65 of the Limitation Act. It is further contended that on the date of institution of the suit dated 20.8.2011 the respondent/appellant was not the owner of

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the property in question, and therefore was not entitled to institute the suit at all.

6. Insofar as the first question is concerned, admittedly the present plaintiff/respondent was not a party to RCS No.4528 of 2001 decided on 29.3.2006, and therefore any finding rendered therein, would not be binding upon the present plaintiff. Even otherwise, presuming that the defendant/appellant was in possession of the property in question since 1994, the judgment in RCS No.4528 of 2001, does not indicate any legal status under which the possession of the defendant, can be attributed to. It has come on record, that when the present plaintiff had handed over the business, to his sister Raziya Begum in the year 1994, the defendant being the elder brother was also assisting her in the said business. Admittedly, the tenancy was in favour of the plaintiff, who as a tenant was in possession, and therefore was a person legally entitled to seek possession from the defendant/appellant, who did not have any legal right to continue in possession, except through the plaintiff. The right to recovery of possession, in such a case would be a continuous right, and therefore the suit instituted for that purpose on 20.8.2011, even presuming, that the defendant/appellant was in the premises assisting the Raziya Begum in the business being conducted therefrom or even otherwise having conducted the business on his own, did not acquire any legal right to be in possession *vis-a-vis*

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the present plaintiff. That being the position, the question of any limitation, considering the continuous cause of action accrued in the matter for seeking possession to the plaintiff, would not arise at all, and therefore, it cannot be said that the suit has been filed by the plaintiff and is barred by limitation considering the provisions of Article 64 or for that matter Article 65 of the Limitation Act, as the possession of the Raziya Begum could always be considered to be the possession on behalf of the plaintiff, which also would be the possession *vis-a-vis* the defendant/appellant. The substantial question of law, insofar as it is framed by the order dated 4.10.2021, is answered in the negative. Insofar as the first substantial question of law is concerned, there is no dispute that the sale deed of the suit property has been executed by the original owner in favour of the plaintiff on 7.12.2013. However, the suit as filed by the plaintiff would indicate that the suit was not on the basis of sale deed dated 7.12.2013 but his tenancy in respect of the premises in question under the rent agreement dated 3.8.1992 (Exh.23). That being the position, nothing turns around the findings rendered by the Courts below that by virtue of the sale deed dated 7.12.2013, the plaintiff had become owner of the suit property and that being an undisputed position and subsequent event, was rightly taken note of.

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7. In view of the above, the substantial questions of law, are answered accordingly. There is no merit in the Second Appeal. The Second Appeal, therefore is dismissed. No costs.

(AVINASH G. GHAROTE, J)

Sarkate.