

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.848 OF 2014

IN

NOTICE OF MOTION NO.2737 OF 1995

IN

**S.C. SUIT NO.109070 OF 1995
(HIGH COURT SUIT NO.3699 OF 1995)**

**Manilal Premji Gala of Bombay
Indian inhabitant, residing at 1101/B,
Surya Apartments, 53,
Bhulabhai Desai Road,
Bombay-400 026.**

.. Applicant

Versus

**1. Boman P. Irani (since deceased)
of Bombay Indian inhabitant,
residing at Raj Neelam,
Second Floor, Bhulabhai Desai
Road, Bombay-400 026.**

**(Expired on 01.01.2002)
(Org. Plaintiff No.1)**

**1(a) Mrs. Homayun Boman Irani
(Khaver), Age 70,
Occupation Housewife, 212
Rajneelam, Breach Candy,
Mumbai-400 026.**

(Expired on 18.09.2004)

**1(b) Mr. Perviz Boman Khaver
Age 50 years, Occupation: Business,**

Residing at 212, Rajneelam
Breach Candy, Mumbai-400 026. (Expired on 12.06.2004)

1(c) Ms. Shahnaz Boman Khaver,
Age 49 years, Occupation- Business,
Residing at 212, Rajneelam,
Breach Candy, Mumbai-400 026.

1(d) Mr. Farhang Boman Khaver,
Age 44 years, Occupation- Business,
residing at 4th Floor, Vinepar Castle,
Bandstand, Mumbai.

1(e) Mrs. Nargis Khaver wife of Pradip
Gidwani, age 36 years,
Occupation: Housewife, residing a
212, Rajneelam, Breach Candy,
Mumbai-400 026.

1(f) Eric Parvez Khaver,
Adult, residing at 212, Rajneelam, ...Respondents
Breach Candy, Mumbai-400 026. (Org. Plaintiff Nos.1(a) to 1(f))

2. Eruch Boman Khaver,
of Mumbai Indian inhabitant,
residing at 801, Nishant, 16, ...Respondent
Altamount Road, Mumbai-400 026 (Orig. Plaintiff No.2)

3. Khodadad H. Irani, of Mumbai
Indian inhabitant, residing at Battery
House, 4th Floor, Flat No.8,

Breach Candy, Mumbai-400 026

...Respondent

(Org. Defendant No.2)

Mr. Shailesh Shah with Ms. Mamta Sadh, Mr. Niranjan Parekh, Mr. Dharampal Dave & Ms. Dipti Vora i/b Mansukhlal Hiralal & Co., for the Applicant.

Mr. P S. Dani, Senior Advocate i/b Mr. Nainesh H. Amin, for Respondents No.1(C), 1(E), 1(F) & 2.

CORAM : R.M. SAVANT, J.

RESERVED ON : 18th DECEMBER, 2014

PRONOUNCED ON : 21st JANUARY, 2015

ORAL JUDGMENT

1. Admit. With the consent of the learned counsel for the parties heard forthwith.

2. The Revisionary Jurisdiction of this Court under Section 115 of the CPC is invoked against the order dated 19th May, 2014 passed by the learned Judge of the City Civil Court, Bombay by which order the learned Judge has decided the preliminary issue and ruled on the said preliminary issue by holding that the City Civil Court has jurisdiction to try and entertain the suit.

3. The suit in question being SC Suit No.9070 of 1995 was originally filed in this Court and was bearing High Court Suit No.3699 of 1995. The Applicant herein is the original Defendant No.1. The

Respondents No.1 and 2 are the original Plaintiffs and the Respondents No.1(a) to 1(e) are the heirs of the original Plaintiff Boman P. Irani who has expired. The Defendant No.2 i.e. Respondent No.3 herein is also supporting the Plaintiffs.

4. The suit in question has been filed by the Plaintiffs for declaration that the partnership in the name of Roopsons is dissolved with a further declaration that the Plaintiff and the second Defendant have 10 paisa share each and the Defendant No.1 has 70 paisa share in the suit partnership. The second relief that is sought by the Plaintiff No.1 is a declaration that he is entitled to possession of shop No.7 and to the trade name and goodwill of the suit partnership. The Plaintiff has also prayed for a direction for winding up of the affairs of the partnership firm and further to direct the Defendant No.1 to render true and faithful accounts of the partnership firm.

5. It is averred in the plaint that the original deceased Plaintiff No.1 was the tenant of one M/s. Palmbeach Trust in respect of various shops which include shop Nos.4 and 7 in the building owned by the said Trust known as "Zaver Galleries". It is averred that on or about 26.11.1965, deceased Plaintiff No.1 and three others entered into a partnership to carry on business in ready-made clothes in the name and

style of M/s. Beauty Kendra in shop No.4 in the said building. It is further averred that in the year 1971, the first Plaintiff along with the second Defendant and three other persons agreed to enter into a partnership to carry on business of clothes in the name and style M/s. Roopsons. It is during the currency of the said Partnership Deed that by Conveyance dated 27.04.1978 the Defendant No.1 and his two brothers purchased the entire building and became owners thereof and as such the deceased Plaintiff No.1 and his son became joint tenants of the new owners in respect of shop No.7. It is further the case of the Plaintiffs that the said partnership was renewed from time to time and lastly on 01.04.1990 a fresh Partnership Deed was executed between the parties and by virtue of the said partnership, the Defendant No.1 was entitled to 70 paisa share and Plaintiff and the Defendant No.2 were each entitled to 10 Paisa share in the profits of the partnership. It was also agreed between the parties that shop No.7 be allowed to be used along with trade name Roopsons by the partnership firm on the basis of Leave and Licence. It is averred in the plaint that the said Deed of Partnership contemplates rights and liabilities of all the partners and also makes provision about the stock in trade, furniture, Bank Balance and assets of the partnership. It is further the case of the Plaintiffs that on 31.03.1994, the period of partnership came to an end and the Defendant No.1 who was managing the affairs of the suit partnership was required to finalize the accounts and was permitted to

continue the suit partnership for winding up purposes, but instead of winding up the business of the suit partnership and submitting its account to the other partners, the Defendant No.1 wrongfully and without the consent of the Plaintiffs proposed to carry on business of the suit partnership. The Plaintiffs therefore, addressed a notice to the Defendant to stop business. However, the said notice did not meet with any reply from the Defendant No.1. It is the case of the Plaintiffs that by virtue of the said notice the partnership stood dissolved on 31.03.1994 and the Defendant instead of sending any reply to the said notice filed a declaratory suit in the Court of Small Causes, Mumbai claiming to be a tenant of the deceased Plaintiff No.1 in respect of shop No.7.

6. It seems that by an ad-interim order passed in the said suit, the Plaintiffs No.1 and the second Defendant were restrained from dispossessing the Defendant No.1 from shop No.7 otherwise than by due process of law. It is in view thereof that the present suit has been filed by the Plaintiffs seeking the relief which has been adverted to in the earlier part of this order. The Plaintiffs in the said suit filed Notice of Motion No.2737 of 1995 for appointment of the Court Receiver. In reply to the said motion, the Defendant No.1 filed an affidavit in reply dated 17.08.1998 inter-alia raising various contentions amongst which was the contention that the document styled as Partnership Deed is in fact a

camouflage document and in fact the relationship between the Defendant No.1 and deceased Plaintiff No.1 and Defendant No.2 is that of landlord and tenant and the real dispute and/or issue in the above suit is relating to the shop No.7 and that the said Partnership Deed was only a camouflage to conceal the contract of tenancy in respect of the suit premises and since the question of tenancy is involved, this Court does not have jurisdiction to try and entertain the suit. The Defendant No.1 therefore, prayed for a preliminary issue of jurisdiction be framed and decided by the Trial Court, it is on account of the objection raised by the Defendant No.1 as regards the jurisdiction of the Trial Court that the following issue was framed by the Trial Court.

ISSUE	FINDINGS
Whether this Hon'ble Court has no jurisdiction as alleged in para 1 of Defendant No.1's Affidavit in Reply dated 17/08/1998 ?	<i>In the Negative.</i>

7. The said issue was adjudicated upon by the Trial Court the Defendant No.1 had led evidence in support of his assertion that the Partnership Deed was merely a camouflage for the tenancy agreement. The Trial Court however adjudicated upon the said issue on the basis that the question about the maintainability of the suit would have to be decided only on the basis of the averments made in the plaint and that the

defence taken in the written statement would not be material. The Trial Court therefore, did not deem it necessary to consider the evidence which was led on the said preliminary issue. The Trial Court by its order dated 09/10.01.2014 adjudicated upon the said issue and held that the City Civil Court would have the jurisdiction to try and dispose of the suit. Suffice it to say that the Trial Court whilst adjudicating the said issue did not take into consideration the evidence which was adduced by the Defendant No.1 in support of his case that the City Civil Court did not have jurisdiction as the Partnership Deed was merely a camouflage for the tenancy agreement in respect of the said shop No.7.

8. The said order passed by the Trial Court was challenged by the Defendant No.1 by filing Civil Revision Application No.253 of 2014 in this Court. The said Civil Revision Application came to be allowed by a Learned Single Judge of this Court by order dated 21.03.2014 and resultantly the order dated 09/10.01.2014 came to be set aside and the matter came to be relegated back to the Trial Court for de-novo consideration of the issue of jurisdiction by taking into consideration the evidence led in respect of the said issue. It is on remand that the said issue came to be once again adjudicated and as indicated above the Trial Court has by the impugned order dated 09.05.2014 has decided the said preliminary issue and held that the City Civil Court has the jurisdiction to

try and decide the suit.

9. Since the remand was directed by this Court on the ground that the evidence which had come on record had not been considered by the Trial Court. The Trial Court on remand considered the evidence which has come on record in respect of the said preliminary issue threadbare. The Trial Court on consideration of the oral and documentary evidence has ruled on the preliminary issue by holding that the Trial Court has jurisdiction to try and entertain the suit and that the objection of the Defendant No.1 that the suit can only be tried by the Small Causes Court would have to be rejected.

10. The gist of the reasoning of the Trial Court was based on the Partnership Deeds. The Trial Court held that the execution of the Partnership Deeds and especially the Partnership Deed whereby the Defendant No.1 had become the partner and thereafter the Partnership Deeds right up to the year 1990 was not in dispute. The Trial Court observed that the said Partnership Deeds inter-alia disclose the manner in which the firm was reconstituted from time to time on which occasion no such claim of sub-tenancy was raised by the Defendant No.1 as is sought to be raised now. The Trial Court has held that the Bank account was in the name of partnership firm Roopsons. The Trial Court also referred to

the extracts from the Registrar of Firms which inter-alia disclose that the firm was registered with the Registrar of Firms. The Trial Court has also adverted to the Income Tax Returns for the year 1997-1998 to 1993-1994 which were marked as Exh.P-41 to P-42 which Income Tax Returns inter-alia were of the partnership firm. The Trial Court also observed that the profits of the firm were credited to the capital accounts of the partners and were carried forward from year to year and were credited to the capital accounts of the partners and profits were carried forward from year to year and taken into consideration at the time of settling the account. The Trial Court also observed that for more than twenty years, affairs of the firm were conducted on the basis of the Partnership Deeds and that for the first time in the year 1993-1994 a claim was made that the Partnership Deed was a camouflage for a tenancy agreement.

11. The Trial Court also considered the two audio cassettes which were relied upon by the Defendant No.1 which are audio cassettes according to the Defendant No.1 recording the conversation between the wife of the Plaintiff No.1 Mrs. Humayun and the Defendant No.1. The Trial Court held that the evidence in the form of said audio cassettes was not clinching, unambiguous, credible and reliable. In arriving at the said finding, the Trial Court observed that the date and time when the recording was made is not stated. In so far as the cassette Exh.D1/5 is

concerned, it has come on record in the evidence of the Defendant No.1 that in the midst of the conversation the tape record was switched off, meaning thereby that the entire conversation was not recorded. The Trial Court also took into consideration the fact that the Inlay Card of both the cassettes was not produced. Inlay Card would show the month and year of the production of the said cassettes. The Trial Court also adverted to the fact that the said cassettes were in the custody of the Defendant No.1 and were taken out in the year 1995 and three copies were prepared, one of which was given to the advocate. The said cassettes were once again taken out in the year 2001 and the said cassettes were therefore, altogether for 7 years with the Defendant No.1. Therefore, doubts arose about the originality of the said cassettes. The Trial Court found it curious that though RAD Stamp No.1804/1994 was filed by the Defendant No.1 and though various applications were made in the present suit since 1994 after the suit was filed, the Defendant No.1 had never once mentioned about the existence of the said cassettes, for which there was no explanation coming from the Defendant No.1. The Trial Court also took into consideration the fact that the cassettes were never sealed before any authority much less a Notary public, when the said precaution could have been taken by the Defendant No.1, if it was his intention to produce the said cassettes in evidence. The Trial Court also observed that the evidentiary value of the said cassettes was dented in view of the fact that

there were more than 100 instances of the conversation being not audible and therefore, not transcribed in respect of cassette D1/1 and 200 instances of non transcription in respect of cassette D1/5 for which there was no explanation. The Trial Court held that the cassettes could not be safely relied upon in view of the fact that substantial portion in the recording is neither audible nor transcribed and that the long standing silence of the Defendant No.1 in respect of said cassettes also casts serious doubts as regards the said piece of evidence.

The Trial Court further held that assuming that the said cassettes had to be considered, the Trial Court was of the view though it is the case of the Defendant No.1 that Plaintiff No.1 was present at the time of talks which took place between the Defendant No.1 and the Plaintiff. The voice recorded allegedly is that of Mrs. Humayun and there is not a single word of the Plaintiff No.1. The Trial Court was of the view in the absence of any material being brought on record by the Defendant No.1 to show Mrs. Humayun was authorized by the Plaintiff No.1 her evidence would not bind the Plaintiff No.1. The Trial Court took into consideration the test laid down by this Court as well as the Apex Court in so far as audio cassettes is concerned and having regard to the said test laid down the Trial Court held that in the instant case the evidence brought by way of the said audio cassettes do not further the case of the Defendant No.1.

The Trial Court was of the view that in juxta position there was voluminous documentary evidence on record in the form of the execution of Partnership Deeds, the Income Tax Returns and the accounts which unmistakably point out that there was a partnership between the Plaintiffs and the Defendant No.1 and that the suit has been filed for dissolution of the partnership, accounts and for possession of the said shop No.7 which would revert back to the Plaintiff No.1 in terms of the Partnership Deed. As indicated above, it is the said order dated 19th May, 2014 which is taken exception to by way of the above Civil Revision Application.

SUBMISSIONS ON BEHALF OF THE APPLICANTS BY LEARNED SENIOR COUNSEL SHRI. SHAILESH SHAH :-

- I) That the averments in the plaint have not been properly considered by the Trial Court as in paragraph 13 the Plaintiffs have described the status of the Defendant No.1 as gratuitous licensee.
- II) The Trial Court has also not considered the relief sought in the suit which is for recovery of possession of the said shop No.7.
- III) That the Defendant was in exclusive possession of the suit premises being shop No.7 has not been considered by the Trial Court whilst coming to a conclusion that the suit was maintainable before it.
- IV) That the Trial Court failed to appreciate the evidence by way of the two audio tapes Exh.D1/1 and Exh.D1/5 in its proper perspective. The

Trial Court ought to have accepted the said evidence assuming that there was any defect. Reliance is placed on the judgment of the Apex Court reported in **AIR 1964 SC Page 72** in the matter of **S. Partap Singh Vs. State of Punjab**.

V) That the finding of the Trial Court in respect of the audio tapes is against the well settled principles which have been laid down governing the acceptance of the evidence by way of tapes by the Apex Court.

VI) The Trial Court failed to consider that the meetings which had taken place between the parties, in respect of the which meetings the tapes were produced which recorded the conversation that took place between the Defendant No.1 and Mrs. Humayun i.e. wife of Plaintiff No.1 in respect of increase in rent. The said meetings have not been denied on behalf of the Plaintiff No.1.

VII) The Trial Court failed to take into consideration the fact that the Plaintiff No.1 had not led any evidence to contradict the evidence in respect of the meetings and therefore, adverse inference ought to have been drawn against the Plaintiffs and the case of the Defendant No.1 ought to have been accepted by the Trial Court.

VIII) The Trial Court ought to have seen that a partner could not file a suit for recovery of the partnership premises, reliance is placed on the judgment of a Learned Single Judge of this Court reported in **2006(3)**

BLR Page 837 in the matter of **American Dry Fruits Vs. Adf Foods Limited.**

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.1 / ORIGINAL PLAINTIFF BY LEARNED SENIOR COUNSEL SHRI. P. S. DANI :-

I) Since the preliminary issue as regards jurisdiction was raised by the Defendant No.1, it was for him to prove that the City Civil Court did not have the jurisdiction and it is not open for the Defendant to contend that since Plaintiff has not led evidence, the case of the Defendant should be accepted.

II) That the averments in the plaint unmistakably and unequivocally show that the suit has been filed for a declaration of dissolution of the partnership and for accounts and that the relief of possession of the said shop No.7 is sought on the basis of the recitals in the Partnership Deed where the said shop premises are to come back to the Plaintiff No.1 on dissolution of the said partnership. The relief of possession of the said shop premises No.7 can therefore be said to be incidental to the main reliefs which have been sought.

III) That the reliefs of declaration of dissolution of partnership, for accounts are solely within the domain of the Bombay City Civil Court and therefore the objection of the Defendant No.1 to the jurisdiction of the City Civil Court has no merit.

IV) That the word gratuitous licensee appearing in paragraph 13 of the plaint has to be considered in the context of the fact that the said shop No.7 was bought in as contribution of the Plaintiff No.1 to the partnership.

V) That the Partnership Deeds executed from the year 1971 onwards till date delineate the rights and liabilities of the parties and therefore, the contention of the Defendant No.1 that the said Partnership Deed is a camouflage cannot be accepted.

VI) That the Trial Court has considered both the documentary and oral evidence in its proper perspective and on such consideration has reached a conclusion that it has the jurisdiction to try and entertain the suit.

CONSIDERATION :-

12. Having heard the learned counsel for the parties, I have considered the rival contentions. As mentioned herein above, the earlier adjudication of the said preliminary issue was set aside by a Learned Single Judge of this Court as the Trial Court whilst adjudicating upon the said issue in the earlier round had not taken into consideration the evidence which had come on record. However, in so far as the present order is concerned, the Trial Court has gone thread bare into the evidence and accordingly recorded a finding on the preliminary issue. At this stage, it would be apposite to refer to the averments made in the plaint. In the plaint, the Partnership Deeds which have been executed from time to time

have been mentioned. In so far as the Defendant No.1 is concerned, the decision to take the Defendant No.1 as a partner was taken in the year 1971 and thereafter immediately the Partnership Deed was executed on 13th May, 1972 and the factum of the partners retiring and the first Defendant joining the partnership has been averred in the plaint. It has further been averred that by a further Deed of Partnership dated 12th November, 1973, the Plaintiff No.2 was admitted to the benefits of the said partnership. On the plaintiff No.2 attaining majority a fresh Partnership Deed was executed on 28th May, 1975. The factum of the building wherein the shop premises are situated was purchased by the Defendant No.1 Damaji P. Gala and his brother Dhirajlal P. Gala has been mentioned. It has further been averred that the Plaintiff No.1 and his son Parvez became tenants of the Defendants. A reference to the last Partnership Deed executed on 1st April 1990 has also been made in the plaint. It has further been averred that it has been provided for in the Partnership Deed that it was mutually agreed to renew the previous partnership on the same terms and conditions as contained in Deed of Partnership dated 28th May, 1975. A reference to clause (3) of the said Partnership Deed dated 1st April, 1990 has been made which provides that the said partnership shall be for the period 01.04.1990 to 31.03.1993. A reference is also made to clause (4) which provides that shop No.7 on the ground floor of Zaver Galleries is kept at the disposal to the partnership by

way of their contribution towards capital. A reference is also made to clause (5) of the said partnership providing a proportion in which the profits would be shared. For the sake of ready reference the said shares are reproduced hereunder:-

- | | | |
|----|---------------------------|----------------------|
| 1. | SHRI. MANILAL PREMJI GALA | :70 PAISE IN A RUPEE |
| 2. | SHRI. BOMAN P. IRANI | :10 PAISE IN A RUPEE |
| 3. | SHRI. KHODADAD H. IRANI | :10 PAISE IN A RUPEE |
| 4. | SHRI ERUCH BOMAN KHAVER | :10 PAISE IN A RUPEE |

A reference is also made to clause (6) which provides that the parties of the second and third parts i.e. Plaintiff No.1 and the Defendant No.2 shall not be responsible for any loss suffered by the firm. A reference is also made to clause (7) which provides that the said shop premises would be allowed to be used by the partnership on the basis of Leave and Licence during the subsistence of the partnership and upon the dissolution of the partnership for any reason whatsoever the parties of the second and third parts shall be entitled to take possession of the said shop No.7. The said clause also provides as to how the assets of the firm have to be dealt with on dissolution. A reference is also made to clause (9) which provides that the partnership will be for a fixed period of four years from 01.04.1990 to 31.03.1994.

13. It has also been averred that on 31st March, 1994 after the

partnership came to an end by efflux of time, the Defendant No.1 instead of winding up the affairs of the business of the suit partnership and submitting its accounts to the other partners, wrongfully and without the consent of the permission of the Plaintiffs purported to carry on business of the partnership. The Plaintiff No.1 therefore by his advocate's letter dated 26th May, 1994 addressed to the Defendant and the second Plaintiff called upon the other partners to stop running the business of partnership in shop No.7 submitting of accounts of the assets, profits etc. of the partnership. By the said notice, the other partners were also informed that after the expiry of one month from the date of receipt of notice the first Plaintiff would take charge of the business premises of the suit partnership including the trade name and goodwill. It has been averred that though the partnership stood dissolved on 31st November, 1994, it has been averred in the plaint that the said notice was replied to by the Defendant No.2 by his advocates letter dated 1st July, 1994. The Defendant No.1 accepted the fact of the partnership being dissolved to contend that the Plaintiff No.1 and Defendant No.2 both were entitled to take possession of the shop No.7 including the trade name and goodwill.

14. In the plaint, a reference is also made to the R. A. Declaratory suit being RAD (Stamp) No.1804 of 1994 filed by the Defendant No.1 claiming tenancy right to the effect that the Defendant No.1 was the

tenant in respect of shop No.7. It has lastly been averred that in spite of the said notice of dissolution, the Defendant No.1 wrongfully had assumed sole and exclusive charge of the partnership and its properties, assets, to the exclusion of other partners and continuing the business of the partnership without the right to do so. The averments justifying the relief sought in the plaint are also made. As indicated above, the Plaintiffs have also sought a declaration as also the possession of the premises being shop No.7, the accounts of the partnership and directions have been sought for taking the accounts realizing or wasting the properties of the suit firm.

15. Since it is the case of the Defendant No.1 that the Partnership Deed is a camouflage and is executed only to conceal the contract of tenancy in respect of the suit premises and in fact the relationship is that of tenant and landlord, the material on record is required to be considered in the said context. The Trial Court has accordingly proceeded to adjudicate upon the said preliminary issue having regard to the said material.

16. In the said context, it is required to be noted that the Defendant No.1 in his evidence has not denied the execution of the Partnership Deeds including the last of them which was executed on 31.03.1990. In so far as the Defendant No.1 is concerned, he has joined

the partnership by virtue of the Partnership Deed executed in the year 1972. The relevant clauses of the Partnership Deed has been already adverted to herein above. It is required to be noted that though the Partnership Deeds have been executed right from the year 1972 when the Defendant No.1 joined the partnership, the partners who retired from time to time or the Defendant No.1 never once questioned the relationship between the parties as partners or raised the issue of tenancy which is now seeking to be raised in the above suit. This is in respect of the Partnership Deeds which have been executed from time to time.

17. In so far as the Bank account is concerned, it is required to be noted that it is in the name of partnership firm Roopsons and is being operated by the Defendant No.1 as the Partnership Deed so provides. The said fact therefore cannot be held against the Plaintiffs and in favour of the Defendant to come to a conclusion that the partnership was a mere camouflage. The Income Tax Returns which were placed on record for the period 1977-1978 to 1993-1994 which are marked Exh.P-41 to Exh.P-42 also show the returns are filed in the name of partnership firm. It is also required to be noted that the extracts from the Registrar of Firms were also produced showing that the said partnership firm was registered with the Registrar of Firms. It is further required to be noted that the profits of the firm were credited to the capital accounts of the partners and carried

forward from year to year and were taken into consideration at the time of settling of the accounts of the retiring partners. As indicated above, for more than 20 years the affairs of the firm were conducted on the basis of the Partnership Deeds executed from time to time and it is for the first time in the year 1993-1994 that the claim was made that the Defendant No.1 was the tenant of the said shop No.7 and that there was a jural relationship of landlord and tenant. In the said context, it is also required to be noted that the Defendant No.1 had become owner of the building in question wherein the said shop No.7 was situated and in spite of the same, a stand was sought to be taken that he has become the tenant of the Plaintiff. The aforesaid material therefore, dents the case of the Defendant No.1, in so far as his claim that the Partnership Deed was a camouflage and in fact the actual agreement was in respect of a tenancy.

18. It would now be necessary to consider the evidence which was produced by way of the tape recorded conversation. The conversation that is recorded is of the two alleged meetings which took place in May 1994 and in July 1995 between the wife of the Plaintiff No.1 Mrs. Humayun and the Defendant No.1. In so far as the said two cassettes (tapes) Exh.D1/1 and Exh.D1/5 are concerned the most telling infirmity, in so far as the said evidence is concerned is that the date and time of the tape recorded conversation is not mentioned. As indicated above, it is the

case of the Defendant No.1 that he had gone for meeting with Mrs. Humayun in May 1994 and in July 1995. It has also come in evidence that in respect of the cassette Exh.D1/5, the tape record was switched off in the midst of conversation and therefore, the entire conversation was not recorded. In so far as the said two cassettes are concerned, they are admittedly magnetic audio cassettes, which can be erased and rerecorded. Pertinently the Inlay Card of both the cassettes were not produced which could have shown the month and year of the manufacturing of the said cassettes. It is the case of the Defendant No.1 that the cassettes after the recording was made were taken out from the cupboard in the year 1995 and three copies were prepared, one of which was given to his advocate. The Trial Court has therefore, observed the said fact raises a serious doubt about the audio cassettes produced being original. It is further required to be noted that the cassettes were taken out again in the year 2001 and therefore, the cassettes were in the custody of the Defendant No.1 for seven years. It is required to be noted that the said audio cassettes were never sealed before any authority much less a Notary public when the said precaution could have been taken. It has come on record that there are 100 instances of the conversation not transcribed in respect of the audio cassette Exh.D1/1 and 200 instances in respect of Exh.D1/5. Apart from the fact that the substantial portion of the cassettes Exh.D1/1 and Exh.D1/5 are not audible and therefore, could not be transcribed. What

creates a doubt is the long standing silence of the Defendant No.1 in respect of the said cassettes. In as much as, though the RAD suit was filed by him in the Small Causes Court and various applications were filed in the instant suit, no mention of said cassettes was ever made until in some proceedings a fleeting reference was made by the Defendant No.1 in the year 2001 that he has recorded the conversation. The said conduct of the Defendant No.1 therefore, creates a doubt and strikes at the evidentiary value of the said cassettes, in so far as the case of the Defendant No.1 that the Partnership Deed was a camouflage for the tenancy agreement.

19. In so far as the audio cassettes (tapes) are concerned, the parameters for their acceptance as evidence has been well settled by the judgments of this Court and the Apex Court. The Apex Court has laid down certain parameters for acceptance of the evidence by way of tape recorded conversation. Amongst the parameters is that the record is not tampered with, the time and place of the recording is definite. In so far as the magnetic tapes are concerned, it has been held that since they are susceptible to being erased and reused the evidence by way of the said tapes has to be accepted with utmost caution. See the judgment of this Court in **1976 BLR 217** in the matter of **The State of Maharashtra Vs. Prakash Vishnurao Mane** and the judgment in **Shri. Tukaram S. Dighole Vs. Shri. Manikrao Shivaji Kokate** reported in **MANU/MH/0068/20008**.

Hence, applying the said parameters, the Trial Court has observed that the said piece of evidence cannot be safely relied upon and that the audio cassettes in the instant case is not evidence which is clinching, unambiguous, credible and reliable.

20. The Trial Court has also rejected the evidence by way of the tapes on the ground that the recording of the conversation is between Mrs. Humayun i.e. wife of the Plaintiff No.1 and the Defendant No.1 the said tapes do not disclose a single word uttered by the Plaintiff No.1 who though unwell was very much present in the alleged meetings which took place between the Plaintiff No.1 and the Defendant No.1. Hence, in the absence of any material placed on record, of Mrs. Humayun being authorized to make statements on behalf of the Plaintiff No.1. The Trial Court has held that the statements of Mrs. Humayun were not binding on the Plaintiff No.1. The Trial Court has therefore, refused to give credence to the evidence by way of the said tape recorded conversation on the said ground also.

21. In juxta position to the audio cassettes, there is voluminous documentary evidence by way of execution of Partnership Deeds right from the year 1972 when the Defendant No.1 entered in the partnership for the first time which clearly show the composition of the partnership

firm and the changes took place from time to time right from the first Partnership Deed to the Deed of the year 1990. The accounts of the firm, the Income Tax Returns and the fact that the profits were credited to the capital accounts of the partners and were taken into consideration at the time of the settling of the account of the retiring partners totally outweigh the evidence by way of the cassettes which has been relied upon by the Defendant No.1. The record of the Registrar of Firms and the Income Tax Returns would have to be given credence as the said record is in respect of the record of the authorities under the relevant statutes, if the contention of the Defendant No.1 of camouflage is to be accepted it would amount to calling in question the record maintained under the other provisions of law which cannot be permitted.

22. In so far as the use of the word gratuitous licensee is concerned, on which much emphasis was sought to be placed by the learned Senior Counsel appearing for the applicant. In my view, the said fact does not further the case of the applicant. The use of the said word is required to be considered in the context that the Plaintiff No.1 had bought the said shop No.7 of which he is a tenant as his contribution to the capital of the partnership firm. In fact, it has been so recorded in the Partnership Deeds. It has also been provided for in the Partnership Deeds that the firm would use the premises in question as a licensee. It has further been provided

that the said premises would revert back to the Plaintiff No.1 on the dissolution of the Partnership and that the other partners would have no right whatsoever in respect of the said premises. The mere use of the word, would not confer jurisdiction of the Small Causes Court, as the issue of jurisdiction has to be considered by considering the plaint as a whole and not stray averments. If so considered it discloses that it is a suit for dissolution of partnership and for accounts. The judgment of the Learned Single Judge of this Court in *American Dry Fruit Stores (supra)* would have no application in the light of the facts of the present case.

23. Now coming to the judgment of the Apex Court in *Partap Singh Case (Supra)*, in my view the said judgment does not further the case of the Applicant in any manner. Though the Apex Court in the said judgment held that the evidence by way of tape records could not be rejected as inadmissible, or the Court refuses to consider it on the ground that it can be tampered. The Apex Court at the same time has held that the said factor would have a bearing only on the weight to be attached to the evidence and not its admissibility. The Apex Court further held that if in any particular case there is a well grounded suspicion, not even say proof that a tape recording has been tampered with that would be a good ground for the Court to discount wholly its evidentiary value.

24. The facts in Partap Singh's case were that the tape recordings were referred to by the Petitioner in his Writ Petition as part of the evidence on which he proposed to rely in support of his assertions as regards the substance of what passed between him and the Chief Minister of Punjab and the members of the latter's family. The written statement of the State was filed only after they had their own copies of the tape-records and they were in a position to verify the whether there were any interpolations, and whether there was any tampering. In the counter-affidavit filed by the State there was no denial of the genuineness of the tape-records, there was no denial of the voices in the tape records. It is in the context of the said facts that the Apex Court held as above.

25. However, the facts of the instant case stand apart from the facts before the Apex Court in *S. Partap Singh's Case (Supra)*. The Plaintiffs have objected to the said piece of evidence by way of tapes on the grounds which are appearing in paragraph 38 of the impugned order. The Trial Court has also refused to give credence to the said evidence for the reasons mentioned in the impugned order which has already referred to herein above. In fact, the Apex Court has held that in *S. Partap Singh's* case that if there is a well grounded suspicion, not even say proof that a tape recording has been tampered with that would be a good ground for the Court to discount wholly its evidentiary value. This is what precisely

the Trial Court has done in the instant case, the Trial Court after considering the said evidence has held that the said evidence is not free from suspicion and that it is not clinching, unambiguous, credible and reliable. Therefore, as mentioned herein above S. Partap Singh's case (supra) does not aid the Defendant No.1 in any manner.

26. In so far as the case of the Defendant No.1 that the amount which has been paid to the Plaintiff No.1 over a period of time is actually rent. The Trial Court has considered the said aspect and has held that though the figure comes to about Rs.40,000/- at an average at times a lower or higher amount has been paid and therefore, the case of the Defendant No.1 that the said amount is towards the rent cannot be accepted. The case of the Defendant No.1 based on exclusive possession has also been turned down by the Trial Court on the ground that the Partnership Deed itself provides that the Defendant No.1 would be exclusively in-charge of the business and that he would conduct the business. However, having regard to other recitals in the Partnership Deed providing for the shop being returned to the Plaintiff No.1 on the dissolution of the partnership, the case of exclusivity of the Defendant No.1 could not be accepted.

27. The Trial Court has therefore, gone threadbare into the

evidence which has come on record and on such consideration has come to a conclusion, it has the jurisdiction to try and entertain the suit.

28. In my view, the impugned order does not suffer from any error of jurisdiction or any other illegality or infirmity for this Court to exercise its revisionary jurisdiction. The above Civil Revision Application is accordingly dismissed. Parties to bear their respective costs.

[R.M. SAVANT, J]