

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

**19 SECOND APPEAL NO. 93 OF 2015**

**WITH**

**CA/3001/2015**

**IN**

**SA/93/2015**

**WITH**

**CA/3129/2016**

**IN**

**SA/93/2015**

**NEW SWARASHTRA CAP DEPO  
AND ANR.**

**VERSUS**

**GIRDHAR HARILAL SOLANKI**

.....

Mr. B.A.Darak, Advocate for Appellants.

Mr.Sachin S.Deshmukh h/f Mr.M.S.Shaikh,  
Advocate for Respondent.

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**CORAM : T.V.NALAWADE, J.**

**DATE : 1<sup>st</sup> AUGUST, 2016**

**ORDER :-**

. The Appeal is filed against the Judgment and decree of R.C.S. No. 84/2012 which was pending in the Court of the Civil Judge [Sr.Division], Dhule and also to challenge the Judgment and decree of R.C.A. No. 293/2012 which was

pending in the District Court, Dhule. The Suit filed for relief of partition and possession of  $\frac{1}{2}$  share in the tenancy rights of the shop premises and also the movable property of the shop was decreed in favour of the respondent/original plaintiff by the trial Court. This decision was challenged by the defendant in the aforesaid Appeal and Appeal is partly allowed. The decree of mesne profit is set aside and enquiry is ordered by the first appellate Court and to that extent, the decision of the trial Court is modified. Heard both sides.

2. The Suit was filed in respect of shop and business run in the shop under the name and style as "M/s Saurashtra Cap Depot". This shop is situated in CTS No. 1852 from Tahsil and District Dhule and the property is owned by one Vallabhdas Shankardas Gujarathi. It is the case of the plaintiff that the property was taken on rent basis by the father of plaintiff and defendant No. 2 in the year 1929-30 and after the death of the father, plaintiff and defendant No. 2 became the tenants of the suit property.

3. It is the case of the plaintiff that one Jairam Walji/Harilal Solanki is also the brother of plaintiff and defendant No. 2, but in the family partition of the year 1972-

73, Jairam got separated from the family and the shop remained with defendant No.2 and plaintiff and so each of these 2 brothers has  $\frac{1}{2}$  share in the shop and in the business. It is contended that defendant No. 2 is not giving profit from the business and so the cause of action has taken place for the Suit.

4. Defendant No. 2 contested the Suit by filing Written Statement. He contended that the Suit is not tenable in present form as there was partnership agreement and it was dissolved on 20/08/1997. It is contended that after dissolution of the partnership and when the partner Hemantkumar left, defendant No. 2 started doing business in the property as his own business.

5. On the basis of the aforesaid pleadings, issues were framed. Both sides gave evidence. It is not disputed that the shop was taken on lease basis by the father of these parties and initially the father was running the business. One important document viz. partition document which was registered [Exh.73] is also not disputed and this document shows that the contention of plaintiff made in the plaint finds mention in this document. This document shows that after

the death of father, plaintiff, defendant No. 2 and their brother registered partnership firm and they continued the business. Then under the document of partition, Jairam, the third brother collected his share by accepting the consideration and left the business. The amount was received before the Sub-Registrar. It was admitted in this document that due to this circumstance, only present plaintiff and defendant No. 2 were entitled to run business which was there in the shop. Thus, these 2 brothers became entitled to get equal share in the shop as per this document. This document was registered in the year 1973. There is one document of partnership of the year 1992, showing that 2 more persons viz. Rajendra and Hemantkumar, who are sons of defendant No. 2, joined the business. But these documents are not duly proved and it is not the case of defendant No. 2 that the share of plaintiff was reduced as shown in the document. On the other hand, the record of sales tax, etc. was in the name of defendant No. 2 Visanji till the year 1997.

6. In view of the aforesaid record of partition and admitted facts, Courts below held that the plaintiff has equal share in the shop and business. Relief of partition and also mesne profit is given as it is the case of the plaintiff that

profit was not given to him though the shop was used. The partnership has come to an end even as per the case of the defendant and so there was no question to claim the accounts. At present there is property like movables of the shop and there is tenancy right in respect of the shop.

7. Learned counsel for the appellants submitted that the shop premises belongs to third person and so partition of such property is not possible. This submission is not acceptable. The rights of the landlord/owner are not being considered in the present dispute and his rights will not be affected due to the decree given. The landlord can use this decree if he gets any right under any law to get possession due to the conduct of these 2 brothers.

8. Learned counsel for the appellants placed reliance on the case reported as (1989) 3 Supreme Court Cases – 77 [H.C.Pandey Vs. G.C.Paul]. The facts of the reported case were different. The validity of the termination of tenancy in notice given u/s 106 of the Transfer of Property Act to one heir of the deceased respondent was in question. It was held that such notice was sufficient. Such point is not involved in the present matter. As the defendants have not

disputed that plaintiff was not running the business presently and he was out of station, the relief of mesne profit is given in favour of the plaintiff. The findings are on question of facts. No substantial question of law as such is involved in the matter.

9. In the result, Second Appeal stands dismissed. In view of dismissal of Second Appeal, C.A. Nos. 3129 of 2016 and 3001 of 2015 stand disposed of.

**[T.V.NALAWADE, J.]**