



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

**SECOND APPEAL NO. 120 OF 1994
WITH CIVIL APPLICATION NO. 2720 OF 1994
IN SA/120/1994**

Jagannath Chango Mali And Others.

VERSUS

Dnyandev Ananda Mali And Others.

Mr. Anil Kesliwal, Advocate for appellants
Mr. S. S. Kulkarni, Advocate for respondents

CORAM : R. M. JOSHI, J.

DATE : 15th January, 2025

PER COURT :-

1. This appeal takes exception to the judgment and decree passed by the First Appellate Court dated 13.07.1993 in Regular Civil Appeal No. 432 of 1986 whereby the appeal came to be dismissed but with modification.

2. The facts as they appear from the record is to be mentioned in brief as under :-

There is no dispute about the fact that plaintiff and defendant No. 1 are the coparcener of the suit properties. Further admittedly there was a partition effected between them on 05.02.1968. Plaintiff was a minor, hence, he was represented by his mother. The suit is filed before the trial Court by claiming that the partition which was effected is

inequitable. Hence, for equitable partition, suit came to be filed.

3. Both Trial Court as well as First Appellate Court held that the partition effected on 05.02.1968 is inequitable. It is also held on the basis of evidence on record that the interest of the plaintiff the then minor was not taken care of. The Judgment of the Hon'ble Supreme Court in case of **Ratnam Chettiar and others Vs. S. M. Kuppuswami Chettir and others, AIR 1976, Supreme Court** was relied by the First Appellate Court in order to accept the case of the plaintiff with regard to the inequitable partition.

4. On the point of findings recorded by the Trial Court as well as First Appellate Court about inequitable partition, no interference is called therein since the said findings are in consonance with the evidence on record.

5. Learned counsel for the appellant has taken serious objection with regard to the modification of the decree as done by the First Appellate Court. It is his submission that admittedly the partition was effected in the year 1968 and original defendant No. 3 by filing written statement had relinquished her right in the suit properties. In such circumstances, it was not open for the First Appellate Court to give any

share to her in the suit properties. It is his further submission that in any case once previous factum of partition is accepted, question of suit property being partitioned again between any person other than plaintiff and defendant No. 1 does not arise and it would only be open for the Court to effect equitable partition between the parties.

6. Learned counsel for the plaintiff supported impugned judgment passed by the First Appellate Court.

7. Thus, following substantial question of law arises in this appeal.

“Whether First Appellate Court committed error in reopening the partition of suit properties for persons other than plaintiff and defendant No. 1, instead of directing equitable partition between them”

8. Once, there is no dispute about the fact that there was a partition between coparceners and the person having right in the suit properties has already relinquished her share therein, question of reopening of the partition does not arise. The suit could be filed by the plaintiff only for the purpose of correction of the partition and the shares in order to ensure that there is equitable partition. In such

circumstances, this Court finds substance in the contention of the appellant that it was not open for the First Appellate Court to modify the decree and appeal ought to have been dismissed. Moreover when there was no challenge to the decree by any other party to the suit, the such modification was not called for in any case. The substantial question of law, therefore, stands answered in affirmative.

9. In view of the above, appeal stands allowed to the extent that the modification effected by the First Appellate Court to the decree passed by the Trial Court is set aside. The decree passed by the Trial Court is set aside. Appeal stands disposed of on above terms. Pending applications stand disposed of.

(R. M. JOSHI, J.)

bsj