

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

**REVIEW APPLICATION NO. 79 OF 2016
IN
SECOND APPEAL NO. 261 OF 2004**

Sandu s/o Kondiba Karde,
Age : 71 years,
Occupation : Agriculture/Labour,
R/o Ganori, Taluka Phulambri,
District Aurangabad. .. **APPLICANT.**

VERSUS

1. Anusayabai w/o Ramchandra Karde,
Age : 81 years,
Occupation : Household,
R/o : Ganori, Taluka Phulambri,
District Aurangabad
2. Digambar s/o Ramchandra Karde,
Age : 41 years,
Occupation : As above. .. **RESPONDENTS**

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Mr. M.S.Chaudhari i/b Mr.Shivaji T. Shelke,
Advocate for applicant.

Mr. Mustafa Gulam Mustafa, Advocate for respondent
Nos.1 and 2.

CORAM : SANGITRAO S. PATIL, J.

DATE : 26th JULY, 2017

ORAL ORDER :

Heard the learned counsel for the applicant and that of the respondents. The learned counsel for the applicant submits that, two substantial questions of law were framed by this Court which are as under :-

- (i) Whether the suit was hit by Order 23 Rule 1(4) of the C.P.C. ?
- (ii) Whether the suit was barred by the limitation ?

02. He submits that after considering provisions of law, this Court answered these questions in the negative. Therefore, the Second Appeal ought to have been allowed and the impugned judgments passed by the first appellate Courts ought to have been set aside and that of the trial Court ought to have been restored.

03. On the other hand, the learned counsel for the respondents submits that though the above-mentioned technical points were answered in favour of the applicants, considering the merits of the matter, on facts, this Court dismissed the Second Appeal. He pointed out to the observations of this Court made in paragraph 6 of the judgment, wherein it is observed that the appeal will fail because the learned Judge of the lower appellate Court disbelieved the plaintiff's case that the suit land was allotted to him in partition that took place in 1982. The learned counsel referred to point No. 1 framed by the first appellate Court in Regular Civil Appeal No. 274 of 2001, whereby the appellant was asked to prove that the suit land bearing block No. 578 was allotted to his share in partition. This question has been answered in the negative for the detail reasons recorded in connection with point No. 1 from paragraphs 12 to 17. The learned counsel,

therefore, submits that considering the merits of the matter, the first appellate court dismissed the claim of the applicant that he has become owner of the suit land block No. 578 due to partition that took place in 1982 and, therefore, dismissed the suit for possession by setting aside the judgment and decree of the trial Court.

4. The learned Judge of the first appellate Court referred to the different stands taken by the applicant in Regular Civil Suit Nos.479 of 1983 and 436 of 1985 filed by him in respect of the land block No. 578. Though it is the case of the applicant that he got the land block No. 578 in partition that was effected in the year 1982 and which has been evidenced by mutation entry No.231, in Regular Civil Suit No. 436 of 1985, he took a stand that the said partition was not acted upon. If that be the case, the applicant cannot be heard to say that he got the land block No. 578

to his share in the partition that was effected in the year 1982. In Regular Civil Suit No. 479 of 1983, the applicant had claimed the relief of perpetual injunction stating that he was the absolute owner of the land block No. 578. However, he had not pleaded it that suit that the suit land was allotted to his share in partition that was effected in the year 1982. He had not relied on Mutation entry No. 231 in support of his claim in that suit. With these divergent pleadings of the applicant in respect of his claim of title to the land block No. 578, the first appellate Court held that the suit land was not given to him in partition of the year 1982 and consequently, the decree for possession passed by the trial Court came to be set aside. Considering this factual position, this Court dismissed the Second Appeal.

05. There is no error apparent on the face of record which would invite the jurisdiction of this Court to review the order dated 26.02.2014 passed by my learned predecessor. The Review Application is without any substance. Hence, the order :-

O R D E R

- i) The Review Application is dismissed.
- ii) No costs.
- iii) The applicant is at liberty to take appropriate legal action to vindicate his rights, if any, in the suit property, as may be permissible under the law.

Sd/-

[SANGITRAO S. PATIL, J.]

shp