



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

7 APEAL FROM ORDER NO. 3 OF 2025
WITH
CIVIL APPLICATION NO. 9191 OF 2025
IN AO/3/2025

MEHRUNNISA BEGUM SHAIKH RASUL

VERSUS

TAHERA W/O SHAIKH ABDUL RASHEED AND ANOTHER

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Advocate for the Petitioner : Mr. Shaikh Tarek Mobin H.

Advocate for Respondent nos. 1 and 2 : Mr. Deshmukh Saud Ahemad

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CORAM : SHAILESH P BRAHME, J.

DATE : 26.09.2025

PER COURT :

Heard both sides finally with the consent of the parties.

2. Both the counsels concede that the substantial question of law involved in the appeal is as to “whether order of remand is legal and valid when it was based upon the material, which was not placed on record by undertaking the procedure under Order XLI Rule 27 of the Code of Civil Procedure ?” It was reflected in earlier order dated 03.03.2025 that record was called for to examine the manner in which the order of remand was passed by the Lower Appellate Court.

3. This appeal is directed against order of remand dated 15.04.2024 passed by the Lower Appellate Court in Regular Civil Appeal No. 19/2023 relegating to the parties to the Trial Court for adducing oral as well as documentary evidence and conducting cross-examination of the witnesses. The appellant is original plaintiff. The respondents are original defendants, who were litigating in Regular Civil Suit No. 89/2025 for possession and mesne profits.

4. The respondents did not file written statement and filing of the written statement was forfeited. The appellant adduced oral evidence. No cross-examination was conducted and right to conduct cross-examination was also forfeited. Attempts were made by the defendants to get the orders referred above set aside. By imposing costs such opportunity was also even granted but the amounts of cost were not deposited in time and they lost that opportunity which is reflected in order dated 14.11.2019 passed by the Trial Court below Exh. 43.

5. By judgment and decree dated 03.03.2022, suit was partly decreed, directing the respondents to hand over possession within two weeks and to conduct separate enquiry for mesne profits. Being aggrieved, regular Civil Appeal No. 19/2023 was preferred before the Lower Appellate Court. In the Lower Appellate Court application Exh. 4 was filed along with six documents. Two documents were the impugned judgment and decree. Remaining documents were filed for the first time before the Court. Considering one of such documents, the Lower Appellate Court found that opportunity was required to be extended to the respondents to put forth their defence and in order to give fair opportunity the matter was remanded to the Trial Court by the impugned order.

6. The learned counsel for the appellant submits that the impugned order is patently illegal because the additional evidence could not have been considered without there being any application under Order XLI Rule 27 of the CPC and order to that effect. It is submitted that the Lower Appellate Court has committed perversity by taking into account a document in Urdu language which was not before the court and that was extraneous. It is vehemently submitted that 'no written statement order' as well as 'no-cross orders' were not quashed and set aside and merely relegating the parties to adduce the evidence would be an empty formality. It is further submitted that the respondents were given adequate opportunity for filing written statement as well as conducting cross-examination but, repeatedly, they

failed to comply the orders. My attention is adverted to order dated 14.11.2019 passed below Exh. 43 by the Trial Court. It is submitted that order below Exh. 43 has also not been challenged by the respondents.

7. Per contra, learned counsel for the respondents repels the submissions. By supporting the impugned order it is submitted that in order to extend opportunity to the respondents, matter was relegated to the Trial Court and the Trial Court would take into account documentary as well as oral evidence. It is further submitted that the Appellate Court has every right to consider the case on merits and to remand the matter. Therefore, no fault can be found in the impugned order. It is submitted that the identification of the suit property is a seriously disputed issue. The sale-deed, Hibanama and the plaint are inconsistent and the decree would be unexecutable. My attention is adverted to the findings recorded by the Lower Appellate Court. It is submitted that if the order of remand is sustained then both the parties would get the opportunity and real controversy can be gone into by the Trial Court.

8. I have considered the rival submissions of the parties. I have gone through the record and proceedings, which was called for. Record reveals that application Exh. 4 is the list of documents submitted by the respondents in Regular Civil Appeal No. 19/2023. Along with the list in all six documents were placed on record. Out of them first two documents are the judgment and decree passed by the Trial Court. Remaining four documents were filed for the first time in the Lower Appellate Court. It further reveals that no written statement was filed by the respondents and the order of no written statement remained intact.

9. Following sequence of event is very relevant :

Sr. No.	Date	Event
1)	27.07.2025	No written statement order was passed against the respondents.

2)	05.04.2016	No cross order was passed against the respondents.
3)	28.06.2016	Application Exh. 22 to set aside no-cross order was filed.
4)	Again on 28.06.2016	Application Exh. 22 was allowed on costs of Rs. 500/-
4)	11.12.2024	On failure to pay costs again no cross order was passed.
5)	15.07.2016	Application to set aside no written statement order was filed.
6)	05.08.2016	Application was allowed with costs.
7)	10.01.2018	As the costs was not paid, order of no written statement was restored.
8)		Application Exh. 43 was filed for depositing the costs and for permission to conduct cross-examination.
9)	14.11.2019	Application Exh. 43 was rejected.

10. Record reveals that twice opportunity was given to the respondents to pay costs and to file the written statement. Twice the respondents were given opportunity to pay costs and to conduct the cross-examination. Those opportunities have not been availed by the respondents. Even order below Exh. 43 passed on 14.11.2019 was not challenged and it became final.

11. While preferring appeal, the grounds of objections were incorporated. No specific challenge was raised to order of 'no written statement' or order of 'no-cross', albeit, a ground was raised for remanding the matter to the Trial court for filing written statement and the documents. A ground was taken that a separate application under Order XLI Rule 27 would be filed. I find from record that without filing any distinct application under Order XLI rule 27 of the CPC, application Exh. 4, a list of documents was filed and four new documents were filed for the first time in the Lower Appellate Court. In the absence of any application under Order XLI rule 27 of the CPC or any specific order of Lower Appellate Court, it was not permissible to consider

the documents, which were coming for the first time before the Lower Appellate Court.

12. Impugned order refers to a document in Urdu script, which was placed before the Court for the first time. It is a extraneous material. Such material could not have been taken by the Appellate Court. I find that the Lower Appellate Court has committed a patent illegality in entertaining extraneous material and showing sympathy to the respondents in relegating the matter to the Trial Court.

13. It is lost sight of by the Lower Appellate Court that there is no written statement filed by the respondents. In the absence of any order setting aside no written statement, it was of no use to relegate the matter for adducing any evidence. Its trite law that evidence without pleading would have no value. The conduct of the respondents, which was reflected in order dated 14.11.2019 passed below Exh. 43 has also been not been taken into account by the Lower Appellate Court. I am of the considered opinion that the findings recorded in paragraph No. 18 is misplaced sympathy towards the respondents, who repeatedly committed defaults.

14. The order of remand does not specifically reflect that the reasons for not filing the written statement were taken into consideration and the order foreclosing right of the respondents was examined by the Lower Appellate Court. On the basis of extraneous material and for extending opportunity of hearing, the order of remand was passed by the Lower Appellate Court in extremely casual manner. I find substance in the submissions made by the appellant. The impugned order is unsustainable.

15. It is brought to my notice by the learned counsel for the appellant that in pursuance of the order of remand parties appeared before the Trial Court and even new issues were settled. Once the impugned order is held to be illegal then the consequential acts are vitiated. For the reasons stated above, I find that the substantial question of law needs to be answered in the

positive i.e. the order of remand is unsustainable and invalid.

16. Appeal from order is allowed thereby quashing and setting aside the judgment and order dated 15.04.2024 passed in Regular Civil Appeal No. 19/2023. The Lower Appellate Court shall deal with the appeal on its own merits.

17. Pending Civil Application is disposed of.

18. Record and proceedings be sent back to the Lower Appellate Court.

19. After pronouncement of the judgment, learned counsel for the respondents prays for stay to execution of the order passed today.

20. The learned counsel for the appellant opposes the request.

21. The respondents are anxious to challenge the order before the Apex Court. However, the Trial Court is seized of the matter in Regular Civil Suit No. 89/2015. I propose to grant breathing time to the respondents to approach higher forum, but I am inclined to stay further proceedings of Regular Civil Suit No. 89/2015.

22. The operation of judgment and order passed today shall stand stayed for a period of four weeks and the stay shall stand automatically vacated without reference to the Court after expiration of period. Meantime the proceedings of Regular Civil Suit No. 89/2015 shall stand stayed.

(SHAILESH P. BRAHME, J.)

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