



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

76 APEAL FROM ORDER NO. 46 OF 2024
WITH
CIVIL APPLICATION NO. 13277 OF 2024
IN AO/46/2024

MOHD. HAMIDODDIN MOHD. MUNIRODDIN
VERSUS
MOHID KHAN MOHAMMAD KHAN PATHAN AND ANOTHER

...
Advocate for the Petitioner : Mr. Mane Dhananjay A.
Advocate for Respondent nos. 1 & 2 : Mr. Amol Ram Joshi

...
CORAM : SHAILESH P BRAHME, J.

DATE : 23.03.2026

PER COURT :

Heard both sides.

2. Appeal is heard on following substantial questions of law:

(i) Whether the judgment and order in question is sustainable when the material on record is adequate enough to decide the controversy involved in the matter ?

(ii) Whether the lower Appellate Court is justified in remanding the matter when the defendants and adequate opportunity to lead the evidence and the lapses are attributable to them ?

3. Appeal is directed against order of remand passed in Regular Civil Appeal No. 02/2024 on 23.11.2024. The appellant is original plaintiff, who had filed Regular Civil Suit No. 66/2022 for declaration, possession and mesne profits. It was decreed on 28.04.2023. Being aggrieved, respondent

nos. 1 and 2 had preferred Regular Civil Appeal no. 2/2024, in which impugned order is passed.

4. Learned counsel Mr. Dhananjay Mane submits that impugned order is perverse because adequate opportunity was extended to the defendants to file written statement, but they failed to do so. It is submitted that the defendants had opportunity to contest the suit or to lead evidence. On number of occasions they had sought adjournments but no steps were taken. It is submitted that lower Appellate Court committed patent illegality when there is adequate material on record to decide the appeal on merits. It is further submitted that Lower Appellate Court halfheartedly considered the merits of the matter. The certified copies of the relevant documents were on record at Exh. 29. It is further submitted that the co-sharers of the plaintiff had no grievance and therefore issue of relinquishment of the right is inconsequential. It is submitted by learned counsel Mr. Mane that points for determination have not been framed appropriately.

5. Per contra, learned counsel Mr. Joshi appearing for the respondents submits that Appellate Court has taken reasonable and plausible. Impugned order extends opportunity of hearing to both sides. No prejudice can be said to have been caused to the appellant. It is submitted that the appellant failed to adduce material to prove his absolute title. The documents produced on record has no probative value and the material is scanty, which is discussed by assigning reasons. It is further submitted that the appellant should have proved his absolute title because there are other co-sharers and the Appellate Court is justified in allowing the appeal partly. It is submitted that the Appellate Court has rightly exercised its jurisdiction under Order XLI Rule 33 of the Code of Civil Procedure. By implication of Section 99 of C.P.C., impugned order withstands to the scrutiny. It is submitted that both questions of law need to be decided against the appellant.

6. I have considered the rival submissions of the parties. The controversy

pertains to the area to the extent of 1662 square feet, which is in possession of the respondents/defendants. On the basis of oral evidence and relinquishment at the instance of other co-sharers plaintiff is claiming right to receive the possession. Agreement to sales were executed on 09.02.2003 and 15.03.2003 in favour of the defendants by father of the plaintiff. In pursuance of that agreements, the defendants are claimed to be in possession. It further reveals that Regular Civil Suit no. 154/2020 is filed by the defendants for specific performance of contract and ancillary reliefs, which is pending.

7. At the outset, it has to be mentioned that both parties are unanimous that after the decree passed by the Trial Court, appellant secured possession in execution. Presently he is in possession of the suit land. The framing of the points of determination is not decisive. If the tenor of the judgment shows that all aspects of facts in issue and the submissions of the parties are dealt with then incorrect framing of points for determination would not vitiate judgment. Therefore, I adopt pragmatic approach in examining the reasons assigned by the Appellate Court.

8. My attention is adverted to the Roznama by the learned counsel for the appellant. The respondents/defendants though appeared before the Trial Court and engaged lawyer did not file written statement. Before passing order of no written statement, the matter was adjourned and opportunity was given to the defendants to file written statement. On 02.08.2022 order of 'no written statement' was passed. No endeavour was made by the defendants to get the order set aside, when they were continuously represented by lawyer and appearing in the matter. No reasons are forthcoming as to why steps were not taken for setting aside the no written statement order. On 08.06.2022, 19.12.2022 and 05.01.2023 applications were filed for adjournment, which were allowed by imposing costs. It is recorded in Roznama that costs was not deposited.

9. It further reveals from Roznama that on 20.02.2023 the evidence of the defendants was closed. Thereafter, on 05.01.2023, 30.01.2023, 13.03.2023 and 19.04.2023 applications were filed by the defendants for adjournment. Respondents/defendants only went on applications but no effective steps were taken to place on record their pleadings or to lead their evidence. The appellate Court lost sight of this aspect of the matter.

10. The Appellate Court has recorded that sufficient opportunity was given to the defendants, then it is not understood as to why the matter is required to be remitted to the Trial Court. The stage of leading of evidence comes later than the stage of filing of the pleadings. In the absence of pleadings, no question of considering any defence of the respondents/defendants.

11. Impugned judgment and order reveals that the matter on merits is dealt with halfheartedly. If the relevant documents are not produced on record or proved by the plaintiff, then plaintiff will suffer the consequences. The Appellate Court has ample power under Order XLI Rule 24 and 33 to consider all aspects of the matter. It is not the case of the parties that the material on record is not adequate to decide the controversy or the matter could not have been decided in the absence of some additional evidence. In that view of the matter, I find that substantial question No. (ii) needs to be answered in favour of the appellant.

12. It is useful to refer to the judgment of the Supreme Court laying down scope of power of remand in the matter of **Shivkumar and others Vs. Sharan Basappa (2021) 11 SCC 277**. It is relevant to notice following extracts:

26.4. A conjoint reading of Rules 23, 23A and 24 of Order 41 brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an Appellate Court is to follow the mandate of Rule 24 of

Order 41 CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary that the Appellate Court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the Trial Court may not be considered proper in a given case because the First Appellate Court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.”

13. The appellant has adduced oral and documentary evidence. It would be open for the Lower Appellate Court to consider the matter on its own merits. The impugned judgment and order is casual in nature and needs to be interfered with. I find that the substantial question of law at Sr. No. (i) has to be answered in favour of the appellant.

14. Learned counsel for the respondents/defendants has placed on record judgment of the Supreme Court in the matter of **Mahant Dhangir and another Vs. Madan Mohan and others; (1988) Supreme Court Reports 679**. The observations of the Apex Court for the scope of the Appellate Court under Order XLI Rule 33 is laid down in it. There can be no quarrel for the scope. In fact, this Court is also of the view that invoking powers under Order XLI Rule 33, matter could have been decided by the lower Appellate Court itself.

15. Reference is also made to Section 99 of the Code of Civil Procedure by the respondents. The respondents/defendants have failed to file written statement despite adequate opportunity. It is not the claim of the appellant either before this Court or the lower Appellate Court that they wanted to place on record some additional evidence or they were not given opportunity. Therefore, submission that impugned order does not cause any prejudice and in fact that extends opportunity to the appellant, has no merit.

16. For the reasons stated above, appeal from order succeeds and I pass following order:

ORDER

- (I) Appeal from Order is allowed.
- (II) Impugned judgment and order is quashed and set aside and matter is remitted to lower Appellate Court for decision on its own merits after extending opportunity to both parties.
- (III) Parties shall appear before the lower Appellate Court on 09.04.2026. The Appellate Court is requested to decide the appeal expeditiously.
- (IV) Pending Civil Application is disposed of.

(SHAILESH P. BRAHME, J.)

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