



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

79 APEAL FROM ORDER NO. 24 OF 2025
WITH
CIVIL APPLICATION NO. 5528 OF 2025
IN AO/24/2025

SHAIKH AFSAR SHAIKH HABIB
VERSUS
SHAIKH HAMID SHAIKH HABIB AND OTHERS

...
Advocate for the Petitioner : Mr. Manjiri Achutrao Kulkarni

...
CORAM : SHAILESH P BRAHME, J.

DATE : 04.02.2026

PER COURT :

Heard Smt. Kulkarni, learned counsel for the appellant.

2. None appears for the respondents despite indication on earlier occasions for final disposal of the Appeal from Order at the admission stage.
3. This Court already formulated substantial questions of law. Accordingly learned counsel advanced arguments to demonstrate that impugned order was unsustainable and totally unwarranted.
4. Appeal from order is emanating from Regular Civil Suit 45/2006 preferred by present appellant for administration of the estate and the consequential relief as against defendant no. 1 to 6. The suit proceeded *ex parte*. The defendant nos. 7 and 8 though appeared did not file written statement. Being aggrieved by decree passed by the trial court, the defendant nos. 2 and 3 preferred Regular Civil Appeal No. 117/2023, in which impugned order is passed.
5. At the outset it is necessary to make it clear that it was not open for

the Appellate Court to examine whether the summons were duly served upon the defendants and whether they had any opportunity to participate in the proceedings, in view of law laid down by the Supreme Court in the matter of **Bhanukar Vs. Archana; 2005 (1) SCC 787**, the defendants preferred not to file application for setting aside *ex parte* decree and preferred Regular Civil Appeal under section 96 of the Code of Civil Procedure. They are estopped from raising challenge on the procedural aspect. They did not contest the matter by filing written statement. Therefore, they can harp upon merits of the matter based upon the material before the Courts.

6. It is pointed out by the learned counsel Mrs. Kulkarni that Regular Civil Suit No. 17/1982, which was filed by respondent no.1 Shaikh Hamid was ultimately dismissed vide judgment dated 30.09.1982. In that case attempt for settlement was made but that was not materialized. The statement made by the learned counsel has not been controverted and there is no reason to disbelieve those. In that view of the matter, the appellate Court should have decided the matter on its own merit on available material.

7. The remand of the matter for extending fair opportunity to the defendants, who did not resort to Order IX Rule 13 of the C.P.C. and diligently prosecuted the matter is unwarranted. The order of remand is passed in cavalier manner and this is against law laid down by the Supreme Court in the matter of **Shivkumar and others Vs. Sharan Basappa (2021) 11 SCC 277**. The substantial questions of law need to be answered in favour of the appellant. I, therefore, pass following order:

ORDER

- (I) Appeal from Order is allowed.
- (II) Impugned judgment and decree passed in Regular

Civil Appeal No. 117/2023 on 06.03.2025 is quashed and set aside.

(III) The parties are relegated to the Appellate Court and it shall decide the appeal expeditiously on its own merits on the basis of material available on record.

(IV) Pending Civil Application is disposed of.

(SHAILESH P. BRAHME, J.)

mkd/-