

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

**SECOND APPEAL NO. 222 OF 2013
WITH
CIVIL APPLICATION NO. 3476 OF 2013**

1. Sambhaji S/o Savta Ausare,
Age: 59 years, Occu: Agriculture,
R/o. Ingonda, Tal. Paranda,
Dist. Osmanabad.
2. Subhash S/o Savta Ausare,
Age: 44 years, Occu: Agriculture,
R/o. As above.
3. Shantabai W/o Savta Ausare,
Age: 78 years, Occu: Agriculture,
R/o. As above.
4. Kaushalya W/o Dilip Chowre,
Age: 50 years, Occu: Agriculture,
R/o Gursadi, Tal. Karmala,
Dist. Solapur. ...Appellants

versus

Pandurang S/o Sadashiv Ausare,
Age: 49 years, Occu: Agriculture,
R/o Ingonda, Tal. Paranda,
Dist. Osmanabad. ...Respondent

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Mr. Sudhir Telgote, Advocate h/f Mr. A. R. Devakate, Advocate for appellants.
Mr. A. C. Darandale, Advocate h/f Mr. P. S. Chavan, Advocate for respondent.

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CORAM : N.W. SAMBRE, J.

DATED : 5TH JANUARY, 2015

PER COURT :

. Present respondent filed a suit for possession bearing

Regular Civil Suit No. 83 of 2003 on the file of Civil Judge, Junior Division, Paranda, whereby the recovery of encroached portion of 37 Are land out of Gat No. 146 of village Ingonda, Tal. Paranda, District Osmanabad was sought.

2. Learned trial Court, based on the pleadings of the parties framed issues at Exhibit 24 and after considering the evidence of plaintiff, defendants, Cadestral Surveyor at Exhibit-36 and measurement map at Exhibit 37, was pleased to dismiss the suit, which was subject matter of challenge in Regular Civil Appeal No. 105 of 2006. The Principal District Court, Osmanabad has allowed Regular Civil Appeal No. 105 of 2006 and has decreed the suit of the plaintiff thereby declaring that the defendants-present appellants have encroached upon 37 Are land and further directed to hand over the possession of the same to the plaintiff, with an order of enquiry in accordance with Order 20 Rule 12(1) (c) of the Civil Procedure Code for mesne profits.

3. The judgment of the learned lower appellate Court is assailed by learned Counsel for appellant-defendants on the ground that judgment is cryptic one, as according to him, the considerations required under section 96 read with Order 41 of the Code of Civil Procedure are not taken into account. In support of his contentions,

he has pressed into service the judgment of the Apex Court in the matter of **Santosh Hajari vs Purushottam Tiwari (deceased) by LRs.** reported in **(2001) 3 S.C.C. 179.**

4. While opposing the above referred contentions, learned Counsel for the respondent-plaintiff submits that even though the suit was dismissed, however, there are findings qua ownership of present respondent are recorded. According to him, learned lower appellate Court though has not considered and dealt with the evidence in detail, however, according to him, in view of establishment of his ownership, learned lower appellate Court has rightly allowed the appeal in his favour. He submits that present second appeal lacks substantial question of law and needs dismissal.

5. The perusal of the judgment delivered by learned lower appellate Court depicts that after trial Court framed issues at Exhibit-24, in support thereof, the plaintiff has examined himself at Exhibit-29 and his witness Surveyor at Exhibit-36. He has also placed on record the 7/12 extract of the land of Gat No. 146 at Exhibit-5 and certified copies of measurement carried out by T.I.L.R. office, Paranda at Exhibit-37. The defendants in support of their contentions, examined defendant No. 1 at Exhibit-40.

6. With the aid of learned Counsel for the parties, I have gone through the evidence of the parties so as to place applicability of law laid down by the Apex Court in the matter of **Santosh Hajari** (sura). It is noticed that learned lower appellate Court has dwelt upon the controversy only to the extent of source of possession of the appellants-defendants and has relied upon mathematical calculations.

7. In view of judgment of the Apex Court, it was expected of learned lower appellate Court was to appreciate pleadings and evidence of the parties and after considering the findings recorded by lower Court and to give appropriate reasons for disagreeing the findings recorded by the trial Court.

8. Learned lower appellate Court summed up the reasons in one page, without discussing or adhering to the pleadings and evidence brought on record by the parties.

9. In view of that, it will be appropriate that the judgment delivered by lower appellate Court on 20/12/2012 in Regular Civil Appeal No. 105 of 2006 is set aside and the matter is remanded back to lower appellate Court to decide the same.

10. As such, second appeal is allowed with following order:-

The judgment dated 20/12/2012 passed by Principal District Judge, Osmanabad in Regular Civil Appeal No. 105 of 2006 is hereby set aside. Regular Civil Appeal No. 105 of 2006 is restored on the file of Principal District Judge, Osmanabad, who is directed to hear and decide the said Regular Civil Appeal after giving opportunity to the parties, as expeditiously as possible and in any case within a period of three months from the date of submission of the copy of this order before it. Parties have agreed to co-operate with lower appellate Court for expeditious disposal and as such, undertakes to appear before lower appellate Court on 27/01/2015. Second Appeal, as such, partly allowed and stands disposed of.

11. In view of final disposal of second appeal, civil application also stands disposed of accordingly.

[N.W. SAMBRE, J.]