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

**SECOND APPEAL NO. 560 OF 2016
WITH
CIVIL APPLICATION NO. 11425 OF 2016**

Sampat Shankar Awari,
Age: 49 years, Occu: Agri.,
R/o. Randhe, Tq. Parner,
Dist. Ahmednagar

..APPELLANT
(Orig.Deft.No.7)

VERSUS

1. Aba Nana Awari
Deceased
- 1A. Sau. Pramila Kondaji Padwal,
Age: 59 years, Occu: Household,
R/o Shirur, Tal. Shirur,
Dist. Pune
- 1B. Sau. Lata Dashrath Kale,
Age: 45 years, Occu: Household,
R/o. Kalyan, Tal. Kalyan,
Dist. Thane
- 1C. Sau. Shobha Kisan Yeole,
Age: 40 years, Occu: Household,
R/o. Mumbai, Dist. Mumbai
2. Nana Aba Awari,
Age: 35 years, Occu: Service,
R/o. Randhe, Tal. Parner,
Dist. Ahmednagar
3. Sundarabai Aba Awari,
Age: 65 years, Occu: Agril.,
R/o. Randhe, Tal. Parner,
Dist. Ahmednagar
4. Machindra Aba Awari,
Age: 36 years, Occu: Service,
R/o. Randhe, Tal. Parner,
Dist. Ahmednagar
5. Sunita Janardhan @
Balasaheb Awari,
Age: 29 years, Occu: Household

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6. Mayur Janardhan @
Balasaheb Awari,
Age: 17 years, Occu: Education,
Under legal guardian Mother
Respondent No.5 ,
Resp. Nos. 5 & 6 R/o Vadzire,
Tal. Parner, Dist. Ahmednagar
7. Bhagubai Aba Awari,
Age: 60 years, Occu: Household,
R/o Babhulwade, Tal. Parner,
Dist. Ahmednagar
8. Appasaheb Dagdu Awari,
Age: 32 years, Occu: Agri.,
Resp. Nos. 8 & 9, R/o. Randhe,
Tal. Parner, Dist. Ahmednagar ..RESPONDENTS

Mr V. D. Sapkal, Advocate for appellant;
Mr A. S. Sawant, Advocate for respondent Nos. 1A to 1C and 2 to 4;
Mr A. B. Jagtap, Advocate for respondent Nos. 5 to 7;
Mr V. V. Tarade, Advocate for respondent No.8

CORAM : N.W. SAMBRE, J.

DATE : 20th June, 2017

ORAL ORDER

The present appellant-original defendant no.7, by virtue of sale deed dated 5th July, 2003, executed in his favour by one Appasaheb – defendant no.6, purchased property to the extent of 47 R from Gat No.1299. Defendant no.6 Appasaheb purchased the said property on 5th August, 2003 from Aba and within one month transferred it to the present appellant-defendant no.7.

2. Aba thereafter filed a suit being Regular Civil Suit No.312 of 2003 questioning the sale deed dated 5th July, 2003, which is at Exh.160, same is pending adjudication.

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3. The legal heirs of Aba, namely, Nana, his son and his wife Sunderabai filed Regular Civil Suit No.303 of 2003 questioning the aforesaid both sale deeds executed by Aba in favour of defendant no.6 and by defendant no.6 in favour of defendant no.7 as not binding on them.

4. The aforesaid suit came to be decreed by judgment and order dated 30th September, 2011, thereby declaring that the sale deeds are not binding on the plaintiffs. So far as the property Gat No.1299, to the extent of 47 R, which the present appellant had purchased is concerned, it was declared that the plaintiffs and defendants no.1-A, 1-B, 1-C, 2 and 7 are entitled to the extent of 1/7th share. However, the share of defendant no.7 i.e. present appellant is declared to be based on the outcome of Regular Civil Suit No.312 of 2003.

5. In the aforesaid backdrop, the present appellant-original defendant no.7 preferred an appeal being Appeal No.412 of 2011 in the Court of District Judge, Ahmednagar. The said appeal came to be dismissed by judgment and decree dated 24th April, 2014. As such, present Second Appeal.

6. While trying to formulate a substantial question of law for consideration of this Court, Mr Sapkal, learned Counsel appearing on behalf of the appellant-original defendant no.7 would raise a ground as regards the sons of deceased Aba who are held to be entitled to the share

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in the property, namely, Nana and Machhindra, who are witnesses to the sale deed dated 5th July, 2003 executed in favour of defendant no.6, the property to the extent of their share from land Gat No.1299 will also come to the share of the present appellant as he has every right to claim share from their property. According to him, even though the appellant had purchased un-divided share from land Gat No.1299, the land fallen to the share of Aba will be in common hotchpotch. The appellant will be entitled for share to the extent of land purchased by him. To substantiate the said contention, he would raise a principle that in case if a purchaser initiates the proceedings for partition, then his claim cannot be restricted only to the extent of property purchased but has to be against the entire undivided property which is required to be subjected to partition.

7. Mr Sapkal would invite attention of this Court to the observations made by the Trial Court and the lower appellate Court and then would rely upon the judgment of the Apex Court, in the matter of **Revansiddappa and anr. vs. Mallikarjun & ors.**, reported in **AIR 2011 SC (Supp) 155**. The aforesaid judgment is sought to be pressed in service on the count that illegitimate child Machhindra born to Aba whether will be entitled from share of Aba or from the share at par with other legal representatives is an issue which is referred to the Constitution Bench of the Apex Court.

8. Mr Sawant, learned Counsel appearing on behalf of the respondents-plaintiffs would support the judgments and decrees rendered by the Courts below. According to him, the Courts below have rightly held

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that the present appellant will be entitled to the extent of share of land which he had purchased from Gat No.1299, which had fallen to the share of Aba. However, the same is made subject to the out-come of Regular Civil Suit No.312 of 2003. He would then urge that the claim as is sought to be put-forth that in case of short of property from Gat No.1299, the appellant will be entitled for compensation from the share of Aba to which he is entitled from the other properties is an issue which was never canvassed and raised and the same cannot be termed as substantial question of law. According to him, since the appeal is against concurrent findings and does not involve any substantial question of law, the same deserves to be dismissed.

9. It is required to be noted from the pleadings of the respective parties that the present appellant has stepped into the shoes of one Appasaheb, who had purchased property to the extent of 47 R out of Gat No.1299 to which it is claimed that deceased Aba had title. It is not in dispute that the said property including the other properties in the suit are ancestral properties. Once the said property is held to be ancestral property, the co-parceners were equally entitled for the share in the property and accordingly Trial Court proceeded to consider entitlement of each of the claimants to the share in the ancestral property.

10. The other issue *qua* the declaration that the sale deed Exh.160 is not binding on the present respondents-original plaintiffs is based on the evidence that was brought before the Court and if the arguments of the

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appellant in the appeal are appreciated, the appellant, in clear terms has restricted his challenge to the judgment and decree of the Trial Court to the extent of his interest in the land purchased by him i.e. 47 R. in Gat No.1299. The observations of the lower appellate court, to that effect in paragraph 10 of the judgment, are worth referring to.

11. As the appellant had purchased the property Gat No.1299, in my opinion, his claim that he will have share from the property of other co-owners, namely, Nana and Machhindra, particularly when they were witnesses to the sale deed in question is required to be rejected when such plea was not established before any of the courts below. Apart from above, the present appellant having stepped in the shoes of deceased Aba, he cannot claim better title and better share than to what deceased Aba was entitled to in the ancestral property. As such, it appears that the appellant has rightly restricted his claim before the Court below to the extent of 47 R which was purchased by him.

12. In the aforesaid backdrop, the claim that the present appellant is entitled for the share from other co-parceners, namely, Nana and Machhindra is liable to be rejected and is rightly rejected by the Court below.

13. So far as inappropriate carving out of the shares of the co-parceners including that of illegitimate son Janardhan is concerned, though Shri Deshpande is right in inviting attention of this Court to the judgment of the

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Apex Court in the matter of Revansiddappa & anr. (supra), the Courts particularly on the said issue are not precluded by the Apex Court in deciding the said issue just because the entitlement of illegitimate son to the share in the ancestral property is *sub judice*. Said issue, in my opinion, will not have direct bearing over the issue raised by the appellant.

14. Apart from above, it is required to be noted that the claim of the appellant that he is entitled to be compensated from the share of Aba from the other property, in my opinion, is not permissible particularly when his right under the sale deed in question is restricted to the extent of share from Gat No.1299.

15. For the aforesaid reasons, in my opinion, the present Second Appeal which is against concurrent findings lacks merit and stands dismissed. In view of dismissal of the appeal, pending civil application does not survive and stands disposed of.

16. Parties to the appeal agree that the *status quo* in respect of possession of the property shall be continued for a period of four weeks from today and accordingly the same is continued.

(N.W. SAMBRE, J.)

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