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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 619 OF 2012**

Mh. Shaffi Mh. Esaque Shaikh ...Appellants

Versus

Mh. Hussein A. Karim Shaikh ...Respondent

Mr. Shrishail Sakhare, Advocate for the appellants.

Mr. S.S. Kanetkar, Advocate for the respondent.

**CORAM : Smt. R.P. Sondur Baldota, J.
DATED : January 27, 2015**

P.C.

This Second Appeal is preferred by the original plaintiff to challenge the judgment and order dated 31st January, 2012 passed by the Lower Appellate Court. By the impugned order, the Lower Appellate Court has allowed the appeal and dismissed the suit of the appellants.

2. The brief facts leading to the present appeal are that the plaintiff's suit for declaration that his easementary right of light and air in respect of two windows in the Southern side wall of his house is obstructed. Admittedly, there are three more windows in the same wall. The appellant had alleged that the work of reconstruction was commenced by the respondent which

obstructed his right of air and light from two windows which are described as window no. 1 and window no. 2. The appellant had made an application for interim reliefs restraining the respondent from carrying out his construction in such a way so as to obstruct the air and light through the said windows. The application was rejected. The respondent completed the construction in the year 2000. Since then the parties are in use of their respective properties.

3. The trial court had appointed an architect as Commissioner of the Court to visit the site and report as to whether the appellant will get air and light through disputed window, if the slab of the first floor is cast by the respondent and whether the respondent is carrying out the construction work on his property in accordance with the sanctioned plans and the building permission. The Commissioner submitted his report dated 29th July, 2014 stating that the opening before window no. 2 is 2.7"x8'0". This includes 9" thick horizontal beam. The clear open shaft excluding thickness of beam above, is 1'10"only. The Commissioner reported that the light and air through that window would be obstructed. However, since there are two more windows to the same wall, total light and air available to the appellant to that room from Southern side is sufficient.

4. The Lower Appellate court accepted the report of the Commissioner to hold that there is sufficient light and air available to the

appellant to the room in question though the right and air from one of the windows i.e. window no. 2 is obstructed.

5. The evidence also shows that the construction as proposed by the respondent would undoubtedly have obstructed the light and air of both the windows of the appellant. However, the respondent after realizing the situation got his building plans altered by increasing the distance between the windows of the appellant and his construction to 5 ft from the window no.1 and 8 ft from the window no. 2. Accordingly he has carried out the construction.

6. Mr. Sakhare, the learned advocate for the appellant submits that the lower appellate court has not properly considered the report of the Commissioner as also the evidence on record. According to the appellant, the admission given by the respondent in his cross examination that he was aware of the fact that the light and air through said windows would be obstructed by the construction proposed by him, was sufficient to decree the suit. However, it cannot be ignored that on realizing the same, the respondent had got the building plans altered and has carried out the construction in accordance with the altered building plans. Similarly though the report of the Commissioner indicates that one of the windows i.e. window no. 2 is in fact obstructed by the stair-case constructed by

respondent, the appellant has sufficient light and air to the room through window no. 1 and two more windows to the room that open to the road side. Thus the lower court in my opinion, has properly appreciated the evidence on record and the rights of the parties to enjoy their respective properties. No interference is required with the impugned order. There is also no substantial question of law arising. Hence, the Second appeal is dismissed.

(SMT R.P. SondurBaldota,J.)