

**IN THE HIGH COURT OF BOMBAY AT GOA.****SECOND APPEAL NO. 81 OF 2015.**

Mr. Caitano Rosario Furtado,  
Son of late Inacio Piedade Furtado,  
retired, 71 years of age, resident of  
House No.1246(1), Mazilvaddo,  
Benaullim, Salcete, Goa

.... Appellant.

Versus

1. Mr. Sebastiao Furtado,  
son of late Joao Santano Furtado,  
service, 49 years of age,  
resident of House no.1246,  
Mazilvaddo, Benaullim,  
Salcete, Goa.

2. Mr. Constantino Furtado,  
son of late Joao Santano Furtado,  
service, 47 years of age,  
resident of House No.1246,  
Mazilvaddo, Benaullim,  
Salcete, Goa.

.... Respondents.

Mr. J. Godinho, Advocate for the appellant.

Mr. C. A. Coutinho, Advocate for the respondents.

**Coram:- K. L. Wadane, J.**

**Reserved on:- 4<sup>th</sup> March, 2016.**

**Pronounced on:- 10<sup>th</sup> March, 2016.**

**ORDER**

The present appeal is preferred by the original plaintiff against the judgment and decree passed by the District Judge-I, South Goa, Margao in Regular Civil Appeal No. 117/2013/I dated 25.2.2015

by which the learned First Appellate Court has partly allowed the appeal with costs and the Judgment and decree passed by the trial Court is modified.

2. The brief facts of the case may be stated as follows:-

That the plaintiff/appellant herein filed a suit against the defendants/respondents herein for a specific performance, permanent injunction as well as mandatory injunction. The learned Trial Court by its judgment and decree dated 30.4.2013 has partly decreed the suit and the defendants were directed to demolish the northern wall of their house and reconstruct the same after maintaining a set back as per the agreement. The defendants/respondents further directed to reconstruct the window admeasuring 1 X 1 mt. The respondents herein presented an appeal and the First Appellate Court has allowed the appeal.

3. Being aggrieved with the same, the original plaintiff filed this Second appeal.

4. I have heard the arguments of Mr. J. Godinho, learned Counsel appearing for the appellant and Mr. C. A. Coutinho, learned Counsel appearing for the respondents.

5. I have gone through the judgment and decree passed by the Courts below and on perusal of the same, it appear that there is

dispute between the parties with regard to the construction of the wall between their houses. According to the plaintiff, the defendants have not maintained necessary set back as agreed between the parties by way of agreement dated 14.6.2007.

6. On perusal of the judgment of the learned Trial Court, it appears that the learned Trial Court has framed an additional issue no.1 in reference to the entitlement of the relief of specific performance which the trial Court has answered in the negative and plaintiff/appellant has not challenged this finding before the First Appellate Court and this finding with reference to the relief of specific performance has attained finality.

7. Looking to the another aspect, it appears that as per the contention of the plaintiff that the defendants have constructed a wall between the house of the plaintiff and the defendants by not maintaining necessary and mandatory set back of 1.5mts. Therefore, according to the plaintiff, it is an clear cut breach of the terms of agreement between the parties. The plaintiff has mostly relied upon the evidence of PW2 Shridhar Kamat, Engineer whose services were hired by the plaintiff to determine and find out whether the defendants have maintained necessary set back or not. However, this witness during the cross examination has stated that at the time of site inspection he did not issue notice to the defendants; that he had never visited the site after preparing his report; that he had not checked any

revised plan filed by the plaintiff and it is suggested to him that the construction of the defendants is as per the agreement dated 14.6.2007, the dimensions are as per the approved plan.

8. Looking the above admission, it appears that the site inspection was done by the PW2 Kamat in the absence of the defendants, that too without verification of the subsequent revised plan. Further from the evidence, it is seen that the plan at Exh. 43 was approved plan by the Town and Country Planning Department dated 13.2.2006, Exh. 47 is approved plan dated 10.11.2006 and Exh. 47 is a approved plan dated 17.10.2008. Exh. 49 is the NOC issued by the Town and Country Planning Department on 17.10.2008. Revised plan is at Exh. 48. Plaintiff has instituted a suit based upon the plan dated 10.11.2006 which was subsequently revised and approved on 17.10.2008. Further it is seen from the record that the occupancy certificate is issued in favour of the defendants. Thus, from the certificate issued by the competent authority, it suggests that the construction of the defendants regarding wall between the houses of the plaintiff and the defendants appears to be as per the approved plan. On this background, it is difficult to believe, the version of PW2 Kamat and its report which is prepared behind the back of the defendants.

9. Considering the overall circumstances of the case, I do not think that any substantial question of law is involved in the present

appeal. Therefore, appeal is liable to be dismissed at the admission stage and accordingly stands dismissed with no order as to costs.

**K. L. WADANE, J.**

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