

IN THE HIGH COURT OF BOMBAY AT GOA***SECOND APPEAL NO. 128 OF 2012***

Nayantara Agrawal.

..... Appellant.

Versus

Albert B. Joanes (deceased)

through LR's.

..... Respondents.

Mr. R.G. Ramani, Advocate for the Appellant.

Ms. Agnetha Lobo, Advocate for the Respondent No.2.

Coram : N.M. Jamdar, J.***Date : 16 November 2017.*****P.C.:**

By this appeal, the Appellant has challenged the concurrent Judgments and Orders passed by the learned Ad-hoc District Judge, Fast Track Court, Margao and the learned District Judge, Margao, dismissing the Suit and the Appeal filed by the Appellant.

2. The Appellant filed Regular Civil Suit No.110/1998, renumbered as 22/2005, seeking an order and decree of injunction against the Respondents. According to the Appellant, the Appellant was residing in the bungalow named as "Krishna

Kunj", situated at Varde Valaulikar Road, Margao, Goa. It was the case of the Appellant that the Respondent No.1 had constructed a building close to the eastern boundary without leaving proper setback and kept an opening in the building towards her bungalow, which was in contravention of Article 2325 of the Portuguese Civil Code. Both, the learned Fast Track Court and the learned District Judge did not accept the contention of the Appellant that there was breach of Article 2325 of the Code and, accordingly, dismissed the suit and the Appeal.

3. Article 2325, upon which reliance is placed by the Appellant Plaintiff, reads thus :

“The landlord who constructs a compound wall, wall or other building close to the extremity of his property, cannot therein open a window, door, nor a terrace or verandah, overlooking directly over the property of his neighbour, without keeping in between each of these works and this property, a space of one and half metre”.

From a bare perusal of this Article, it is clear that the Appellant could have sought a Mandatory Injunction against the Respondents if factually there was a space of less than 1.5 metres

between the properties. The Respondents, in the Written Statement, had claimed that the distance kept may be three metres from the internal courtyard. Both the Court held that the Appellant had failed to prove the distance.

4. It is the contention of the learned Counsel for the Appellant that the evidence of the Appellant and his Architect wherein it was asserted that proper set back was not kept has not been specifically controverted in the cross examination. There is no merit in this contention. The distance between the two buildings is a question of fact. Since the Plaintiff was seeking a mandatory injunction and the Respondent disputing the exact distance, the Appellant should have sought to either carried out survey or called upon the Court to appoint a Court Commissioner to measure the distance. Even in First Appeal, when the decision of the Trial Court was against the Appellant, no such effort was made. In the absence of any such survey or a Commissioner's Report, merely on the basis of a statement that proper set back was not kept, the exact distance cannot be held to be established. Even in the affidavit in evidence, the Appellant has not specified the distance and merely has stated that proper setback is not kept.

5. On the basis of the evidence produced by the appellant which was assessed by both the Courts, it cannot be held that there is any perversity in dismissing the suit and the Appeal. I do not find that there is any clear and cogent admission, nor there is a clear statement by the Appellant specifying the distance in the evidence, which was necessary in view of the mention of a particular distance in the Article.

6. No substantial question of law arises. The Second Appeal is accordingly dismissed.

N.M. Jamdar, J.