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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO. 722 OF 2014
WITH
CIVIL APPLICATION NO. 1697 OF 2014
IN
SECOND APPEAL NO. 722 OF 2014**

Sou. Smita Trimbak Chapherkar

.....Appellant

Vs.

Ashok Shamrao Kambale and Ors

.....Respondents

Mr. Vishwanath S. Talkute for the appellant

Mr. Shailesh Chavan a/w Mr. Hrishikesh Avhad for respondent no. 8

CORAM : GAURI GODSE, J.

DATE : 29th AUGUST 2024

ORDER:

1. Heard learned counsels for the parties. This second appeal is preferred by the original plaintiffs to challenge the concurrent Judgments and Decrees dismissing the plaintiffs' suit for declaration and mandatory injunction.

2. Learned counsel for the appellant submitted that both the Courts have concurrently held that the defendants are not entitled to seek any

easementary rights in respect of appellant's property. He submits that inspite of recording positive finding, both the Courts have erred in not granting mandatory injunction as claimed. He submits that the relief of mandatory injunction is refused on the ground that the construction started by the defendants is already completed. According to the learned counsel for the appellant, on the ground of delay, mandatory injunction cannot be refused. He thus submits that once there is a negative declaration prayed against the defendants, completion of construction cannot be a valid ground to refuse the relief of mandatory injunction. He submits that the defendants have admitted that the construction is carried out on the Southern side of plaintiffs' property and thus, the relief of mandatory injunction for closing the windows constructed by the defendants ought to have been granted. He thus submits that the second appeal raises a substantial question of law on the point that inspite of recording finding regarding defendants not having any easementary rights, both the Courts have erroneously refused to grant the relief of mandatory injunction.

3. I have considered the submissions made on behalf of the appellant. I have perused the reasons recorded in the impugned Judgments. The ownership of the respective properties of the parties

is not in dispute. There is no dispute that the construction is carried out by the defendants in their property. There is no finding recorded by either of the Courts that any particular construction carried out by the defendants is in the plaintiff's property or that the disputed windows are opened in the property belonging to the plaintiffs. Once there is no dispute that the construction of the windows is in the defendants' property, there would not be any question of granting mandatory injunction to remove the windows or close the windows. Such mandatory injunction cannot be granted in the absence of any findings of facts recorded that the windows are opened in the plaintiff's property. Thus, in view of the concurrent findings recorded by both the Courts, in my view, the grounds raised on behalf of the appellant does not raise any substantial question of law.

4. Hence, the second appeal is dismissed.

5. In view of dismissal of the second appeal, pending Civil Application No. 1697 of 2014 is dismissed as infructuous.

[GAURI GODSE, J.]