

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE SOUMEN SEN

&

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

FMAT 116 of 2022

Ankur Gupta & Anr.

Vs.

Kanhaiya Lal Tulsyan & Ors.

FMAT 102 of 2022

With

CAN 1 of 2022

Kanhaiya Lal Tulsya @ Kanhaiya Lal Tulsyan & Anr.

Vs.

Ankur Gupta & Ors.

For the petitioner : Mr. Arindam Banerjee, Adv.
Ms. Sulagna Mukherjee, Adv.
Ms. Stuti Baid, Adv.

For the Respondents : Mr. Jishnu Chowdhury, Adv.
Mr. Rajesree Venket Kundalia, Adv.
Mr. Aritra Chakraborty, Adv.

Order dated: 26th April, 2022.

Soumen Sen, J.: By consent of the parties the appeal, cross-appeal and the applications are taken up together and disposed of by this common order.

The appeal is arising out of an order passed by the learned Judge-in-Charge, Bench 6, City Civil Court in connection with an application for injunction under Order XXIX Rule 1 and 2 read with Section 151 C.P.C filed by the plaintiff/appellant.

The dispute is with regard to the right to use the roof by Ankur Gupta and Arun Kumar Gupta.

One Ganesh Lal Purushottam Das Hindu Undivided Family (hereinafter referred to as 'HUF') represented by its Karta Tulsyan was the sole and exclusive owner of a reasonably big plot of land at 5A, Robinson Street Calcutta- 700 017. The HUF constructed a multipicated building comprising at a basement, ground floor and 7 floors consisting of 13 number of self contained flats on the suit property. Out of the said 13 flats Ganesh sold, transferred and conveyed the right title interest in connection with 5 flats being flat no. 1A on the ground floor, flats no.2A and 2B on the second floor and flat nos. 3A and 3B on the 3rd floor together with all proportionate shares and common areas. After the death of Ganesh his elder son Purusattam became the Karta of the said HUF and his brothers and mother became coparceners and members of the said HUF. However, due to expansion of family members dispute arose amongst the coparceners of the HUF with regard to the use and occupation of the remaining flats on the ground floor and flat nos. 1B, 4A, 4B, 5A, 5B, 6, 7 and roof of the said building. With the intervention of the friends and well-wishers of the Tulsyan family the disputes were resolved by an amicable arrangement and settlement in respect of the use and occupation of the flats mentioned aforesaid along with right to use and enjoy the roof of the said building. The said arrangement was reduced in writing and culminated in the deed of family arrangement and partition executed on 24th February, 1999. The settlement, *inter*

alia, includes the enjoyment of the remaining flats on the ground floor and flat nos. 1B, 4A, 4B, 5A, 5B, 6 and 7 and roof of the said building togetherwith car parking area in the basement and servant quarters on the ground floor with each flat togetherwith undivided proportionate share in the land of the said premises appertaining thereto with right to use and enjoy the common areas, benefits and utilities in the manner indicated in the said deed.

The predecessor in interest of the appellant namely, Satyanarayan Tulsyan was allotted flat no.7 as would appear from Clause 11 of the aforesaid deed of settlement read with Part-VII of the said deed. Clause 12 of the said deed records that the parties had agreed that the roof together with family temple built up thereon and all other areas of the said building in the said premises no.5A, Robinson Street Calcutta- 700 017 not specifically allotted to the parties shall belong to and shall remain in common amongst the parties to the said deed. Satyanarayan mortgaged the said flat in favour of Fullerton India Credit Company Limited, a finance company. Due to failure to pay mortgage debt the said flat was put to sell and the defendants in the suit purchased the suit property in the auction sale.

The defendants on the basis of the deed of sale asserted their right of enjoyment of the roof of the building in question. The remaining members of the Tulsyan family who are presently residing in the suit property resisted such user of the roof on the ground that the deed of

family settlement does not give any right to Satyanarayan to sell or transfer his interest in the roof in favour of a stranger.

In the earlier round of litigation between the parties we permitted the appellants to carry out repairing work on the roof immediately above the flat of the appellants under the supervision of an Advocate and we directed the learned Trial Judge to dispose of the injunction application on merits upon consideration of the rival contentions. The learned Trial judge disposed of the injunction application by permitting the appellants as well as the plaintiffs to use and enjoy the roof to the extent of easement right only without having any right of construction, addition, alteration therein in order to preserve and protect the suit property till the disposal of the suit. However, Tulsyan family was given the exclusive enjoyment and use of the temple and all other parties in the suit were restrained from causing any infringement to the enjoyment of such right in respect of the said temple.

The plaintiffs as well as the defendants in the suit are both aggrieved by the said order.

Mr. Anirban Banerjee, the learned Counsel appellant/defendant nos. 1 and 2 has argued that having regard to the recitals in the family settlement it is clear that by virtue of the auction sale the entirety of the interest that Satyanarayan had in respect of flat no.7 along with all rights appertaining thereto have devolved upon the appellants, whereas Mr. Jishnu Chowdhury the learned Counsel representing the plaintiffs/

respondents has argued that the roof right exclusively belonged to the members of the Tulsyan family as would be evident from Clause 12 of the deed of settlement read with Part-VII of the said deed where the nature and extent of right of Satyanarayan in relation to flat no.7 has been specifically and clearly stated.

Mr. Chowdhury has submitted that Clause 12 has specifically mentioned the roof rights to be used exclusively by the family of Tylsyan as the family deity has been consecrated thereon. It is submitted that the roof would remain common amongst the members of the Tulsyan family to whom the flats have been allotted in the family arrangement and use and enjoyment of roof has not been included in the schedules defining the common areas the parties to the family arrangement are entitled to use. The deed of mortgage has not conferred any roof right to the mortgage and accordingly the appellants as purchaser of the property cannot claim any right over and above specifically mentioned in Part-VII of the family arrangement.

Mr. Chowdhury has argued that the right to use the roof cannot be equated or treated at par with the use of the common staircase or for accessing the roof for repair as for similar purpose for beneficial enjoyment of the flat purchased by the appellants.

In order to appreciate the rival contention it is necessary to reproduce Clause 11 and 12 of the deed and also Part-VII. The said Clauses and Part-VII are reproduced below:

“11. It is declared and recorded that All that flat No.7 on the seventh floor measuring about 2410 sq. ft. togetherwith two car parking spaces one in the basement and one in the ground floor and one servant quarter on the ground floor of the building with right to use and enjoy common areas benefits and utilities togetherwith undivided proportionate indivisible share in the land of the said premises No.5A. Robinson Street, Calcutta 17 appertaining thereto morefull described in the part-VII of the second schedule stated hereunder togetherwith all the easements profits privileges advantages rights benefits and appurtenances whatsoever attached thereto have been allotted to Sri Satyanarayan Tulsyan the party hereto of the second part in severalty to the exclusion of all other parties and all other parties hereby relinquish release assign and assure all their right title interest whatsoever of nature upto and in favour of the said Satyanarayan Tulsyan in respect of all that the said flat No.7 on the seventh floor measuring about 2410 sq. ft. togetherwith two car parking space and one servant quarter as stated hereinabove of all the covenants stipulations restrictions terms and conditions contained herein.

12. It is hereby agreed and recorded that roof togetherwith family temple built up thereon and all other areas of the said building in the said premises No.5A, Robinson Street. Calcutta not specifically allotted to the parties herein shall belong to and shall remain in common amongst the parties herein and shall be enjoyed whatever the flats already sold by the parties hereto who have been allotted the said remaining flats of the building in the proportion to their respective areas of the said building in the said premises. (emphasis added)

Part-VII.

Allotted to Satya Narayan Tulsyan: ALL THAT flat No.7 on the seventh floor measuring about 2410 sq. ft. togetherwith two car parking space one in the basement and one in the ground floor and one servant quarter on the ground floor with right to use and enjoy all cannot areas benefit and utilities togetherwith undivided proportionate indivisible share in the land of the said premises No.5A. Robinson Street, Calcutta -700 017 appertaining thereto and the said flat is valued at Rs.3,42,400/- calcuted being 20 times of present Annual

valuation of Rs. 17.120/- as assessed by the Calcutta Municipal Corporation.”

The learned trial Judge in deciding the issue has referred to Rule 117 of the KMC Building Rules, 2009 which suggest that the right to enjoy the roof as allotted in favour of Tulsyan family members including the respondents will be in a restricted manner. All the rights as enjoyed by the erstwhile owner of flat no.7 of the suit premises having been transferred to the subsequent transferee the right to use the roof along with other rights are inseparable and on such *prima facie* findings the learned Trial Judge relying upon the principle of easement passed the impugned order.

At this interlocutory stage the Court is required to satisfy if the plaintiffs have made out any *prima facie*, case and once it is established to decide the matter on the balance of easement and comparative hardship. While disposing the interlocutory application the court is required to balance the equities and to preserve the right of the parties as far as possible. It is not in dispute that the appellants have purchased the property for valuable consideration. However, the right has to be asserted on the basis of the deed of partition and the deed of mortgage. In the deed of mortgage Satyanarayn did not consciously mortgage the roof right as it is clearly evident from the recital of the deed of mortgage that he created a mortgage in respect of flat no.7 with all rights as mentioned in Part-VII of the deed of partition. The schedule referred to in the deed of mortgage corresponds to the right being

enjoyed by Satyanarayan in respect of Part-VII of the deed of family settlement. By necessary implication it can be said that a transferee would not automatically get the right to use the roof unless the other members of the Tulsyan family permit a purchaser not belonging to the Tulsyan family to use the roof for enjoyment. A clear demarcation of right is discernible from a bare reading of clauses 11, 12 and Part-VII of the deed. On such consideration we are of the view, that allowing the appellants to use the roof without the permission of Tulsyan family is not permissible. Moreover, there is nothing on record to show other purchasers not belonging to the Tulsyan family has been allowed to use and enjoy the roof as incidental to their ownership in respect of their flats. On such consideration, we are of the view that the Trial Court could not have given unfettered right to the respondents to use a roof at par with the members of the Tulsyan family. Clause 12 of the deed clearly curves out the restrictive use of the roof because of the consecration of the family deity in the temple constructed on the roof. On such consideration, we allow the cross appeal. However, we make it clear that for genuine reasons or causes a permissive use of the roof can be claimed on a condition that such use of the roof in no way shall affect the sanctity of the temple or interfere with the right of enjoyment by the plaintiffs in relation to the temple. The appellants have not able to demonstrate that flat owners unconnected with the Tulsyan family were given access to the roof as a part of enjoyment of their flats on the basis of same or similar deed of conveyance and in absence of such evidence

prima facie, it cannot be contended and held at this stage that the appellants have right of enjoyment of the roof.

The views, however, widely expressed are only for the purpose of deciding the appeal and the cross appeal and shall not be stretched beyond it. The views are, *prima facie*, and shall not influence the trial of the suit.

The order impugned is modified to the aforesaid extent.

The appeal, cross appeal being no. FMAT 102 of 2022 with CAN 1 of 2022 are accordingly disposed of.

We request the learned Trial Judge to dispose of the suit as expeditiously as possible.

However, there shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Ajoy Kumar Mukherjee, J.)