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RVW 95 of 2022

24.06.2022

Ct-
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Ankur Gupta & Anr.
Vs.
Kanhaiya Lal Tulsyan & Ors.
with
I.A No. CAN 1 of 2022
in
FMAT 102 of 2022

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Kanhaiya Lal Tulsya @ Kanhaiya Lal Tulsyan & Anr.

Vs.
Ankur Gupta & Ors.
with
FMAT 116 of 2022

Ankur Gupta & Anr.
Vs.
Kanhaiya Lal Tulsyan & Ors.

Mr. Kishore Dutta, Sr. Adv
 Mr. Arindam Banerjee
 Ms. Sulagna Mukherjee
 Mr. Tanay Agarwal
 Mr. Tirthankar Nandy
 For the Review Petitioners

Mr. Jishnu Chowdhury
 Ms. Rajashree Kundalia
 Ms. Aritra Chakrabarty
 For the Plaintiff/Respondent

This is an application for review of the judgment and order dated 26th April, 2022.

Mr. Kishor Dutta Sr. Advocate appearing on behalf of the applicants/review petitioners submit that there is an error apparent on the face of the record as in deciding the matter between the parties we overlooked the fact that there has been a disruption of the mitaksara family which would be evident from the family arrangement.

It is submitted that in deciding the matter

against the applicants we did not take into consideration Clause 15, 22 and 26 of the family arrangement. The said three clauses would clearly show that there has been a disruption of the joint family status and each member of the mitaksara family acquired separate status and separate allotment of flat.

In view thereof, the question of joint possession of the roof or the temple at the roof exclusively by the members of the joint family could not and does not arise.

In this regard, Mr. Dutta has relied upon the decision of the Hon'ble Supreme Court in ***Nani Bai v. Gita Bai Kom Rama Gunge*** reported in **AIR 1958 SC 706** at paragraph 11 and ***Kalyani (Dead) by LRS. v. Narayanan & Ors.***, reported in **1980 Supp SCC 298** at paragraphs 26 and 28.

It is further submitted that the property was purchased by the applicants in distress sale. The property was mortgaged to a finance company and when the vendor of the applicants could not repay the debt, the mortgaged property was put to sale. The property was purchased by the applicants. It is submitted that by reason of exclusive possession of the property under the family settlement, our observation that right of the roof and temple were not parted with or could not have been conveyed to a purchaser is a clear mistake and an error apparent on the face of the record as we did not consider the aforesaid clauses.

In order to appreciate the argument of Mr. Dutta we refer to the clauses of the family settlement relied upon by him.

The said clauses read:

"15. It is agreed and recorded that all the rights and easements as stated hereunder shall

be deemed to be attached to the constructed areas of the building allotted to the parties as stated hereinabove:

(a) The parties shall be entitled to all privileges and rights including right of vertical and lateral supports easements, quasi-easement, appendages and appurtenances whatsoever belonging or in any way appertaining to their respective rights of the building.

(b) The parties shall have the right of protection of their respective areas of the building by or from all parts of the said building so far as may be necessary including right of support both vertical as well as lateral and right of passage in common as aforesaid of electricity, telephone, water and soil from and to their respective areas through pipes, drains, wires and conduits belong in under through or over the said building or any part thereof so far as may reasonably necessary for the beneficial occupation and enjoyment of their respective areas.

(c) The parties shall have the right of access in the building at all times connected with the use and enjoyment of their respective areas and common parts for entry into the said building provided always and it is hereby declared that nothing herein contained shall permit to obstruct in any way by vehicles, deposit of materials rubbish or otherwise free passage or other persons properly entitled to such rights way as aforesaid.

22. It is agreed and recorded that save and except the areas of the building exclusively allotted to the parties for their use and

occupation as stated hereinabove, the remaining constructed areas of the building shall be common areas and the details of which are morefully described in the third schedule stated hereunder and the parties stated hereinabove shall have undivided proportionate indivisible share therein which shall be deemed to be appurtenant or attributable to the areas of the building allotted to the parties for their use and occupation as stated hereinabove.

26. It is also recorded that in view of the settlement arrived among the parties in respect of the said remaining flats of the building comprised in the said premises No. 5A Robinson street, Calcutta – 700 017 as stated hereinabove the erstwhile Hindu Mitakahare Joint Hindu Family of Ganesh Lal Tulsyan has been totally and completely partitioned and/or disrupted for all purposes and all the coparceners and members of the joint Hindu Family of Ganesh Lal Purushottam Das (H.U.F) have agreed to severe the said joint Hindu Family and shall henceforth shall be deemed to be disrupted.

In our judgment we have relied upon clause 11 and 12 of the deed and also part VII. Those clauses were mentioned and reproduced in the judgment dated 26th April, 2022.

When we considered this matter the applicants did not argue that by reason of the aforesaid clauses there is a severance of the joint family status and the vendor of the appellant became the exclusive owner of the flat and had the right to part and/or deal with the roof and the temple to the extent of his share.

However, since clause 15 and 26 was brought to our attention we feel it necessary to

refer to clause 16 of the family arrangement to ascertain the nature in extent of the vendor of the appellant in relation to his share in the property which could be conveyed. The said clause reads as follows:

“16. It is agreed and recorded that each party who have been allotted areas of the building as stated hereinabove hereby covenant with the other that in case any party decides to convey and transfer areas of the building of any part thereof they and any person deriving title from them will enter into the covenant with the purchaser that the purchaser shall observe and perform all covenants, stipulations, obligation and agreements as envisaged herein.” (emphasis added)

The family settlement has to be read as a whole. The intention of the members of the Tulsyan family to treat the roof together with family temple built on the roof to be exclusively enjoyed by them to the exclusion of all others is quite clear from clause 12 of the family arrangement. The intentions of the parties are to be gathered from a wholesome reading of the document. The clauses cannot be read in isolation.

Even if the clauses now relied upon by the applicants were drawn to our attention earlier we would not have taken a different view.

On such consideration the review application fails.

However, there shall be no order as to costs.

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)

