

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 19th February, 2014.

+ **CS(OS) 1433/2012 & IA No.9528/2012 (u/O 15A r/w 151 CPC)**

OM PRAKASH SINGHAL

..... Plaintiff

Through: Mr. A.K. Singhla, Sr. Adv. with Mr.
Deepak R. Dahiya, Adv.

Versus

K.L. KURIAN

..... Defendant

Through: Mr. D.C. Yadav, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The pleadings have been completed and the suit is ripe for framing of Issues if any.
2. The senior counsel for the plaintiff states that on the defence contained in the written statement, no material question of law and fact arises for adjudication and the suit, insofar as for the relief of possession can be decreed immediately.
3. The counsels have been heard on the said aspect.
4. The plaintiff has instituted this suit for recovery of possession from the defendant of flat No.G-4 in the multi-storied building situated at DD-36, Kalkaji, New Delhi and for recovery of *mesne* profits, pleading:

(a) that the plaintiff is the sole absolute owner of the said flat

having purchased the same from Sh. Parvesh Kumar Kohli on 18.03.1996, though the Deed of Apartment with respect to the flat in favour of the plaintiff in accordance with the provisions of the Delhi Apartment Ownership Act, 1986 is still to be executed;

(b) that the said flat also stands mutated in the records of the municipal authorities in the name of the plaintiff and the plaintiff has been paying property tax with respect thereto;

(c) that the land underneath the said multi-storied building was originally owned by Sh. Inder Raj Sehgal who entered into an agreement with M/s Saraswati Builders for raising construction thereon and the said builder transferred the subject flat in favour of Sh. Parvesh Kumar Kohli and from whom the plaintiff has acquired the same;

(d) that the plaintiff in January, 2006 allowed the defendant to occupy the said flat, temporarily, on friendly basis, without charging any consideration therefor;

(e) that the possession of the defendant of the said flat since then has been permissive;

(f) that the plaintiff vide notice dated 11.04.2012 terminated the

licence of the defendant to use and occupy the said flat and called upon the defendant to vacate the same;

(g) that the defendant however failed to do so;

Hence the suit for recovery of possession and for *mesne* profits / damages for use and occupation at the rate of Rs.60,000/- per month has been filed.

5. The defendant has contested the suit, by filing a written statement, on the grounds:

(i) that the plaintiff is not the owner of the subject flat and has concealed material facts and has come to this Court with unclean hands and the suit is liable to be dismissed on this ground;

(ii) that the suit is bad for non-joinder of necessary party i.e. the wife of the defendant;

(iii) that the wife of the defendant namely Mrs. Mariam Kurien is the owner of the said flat and the defendant along with his wife is residing in the said flat since January, 2004, in the capacity of owner;

(iv) that the plaintiff has not filed any proof of his ownership of the said flat;

(v) that the said flat was transferred in favour of Ms. Mariam

Kurien by Sh. Ravinder Kumar Singhal son of the plaintiff and attorney of Smt. Sudesh Kohli wife of Sh. Parvesh Kumar Kohli (though in the written statement mentioned as Sh. Praveen Kumar Kohli but the counsels are ad-idem that reference is to the same person) supra;

(vi) that the copies of the income tax returns filed by the plaintiff along with the plaint showing the plaintiff as the owner of the subject flat do not make the plaintiff the owner of the flat;

(vii) that similarly merely because the said flat is mutated in the name of the plaintiff in the municipal records and the plaintiff is paying the property tax thereof, does not make the plaintiff the owner of the said flat;

(viii) that the flat is owned by the wife of the defendant vide “baynama executed by none other than the son of the plaintiff showing and claiming himself to be an authorized person / attorney of the actual owner of the suit premises i.e., Sudesh Kohli”;

(ix) that the suit for possession is not maintainable against the defendant since the wife of the defendant is the owner of the flat with effect from January, 2004.

6. Needless to state, the plaintiff has filed a replication controverting the defence.
7. The senior counsel for the plaintiff commenced arguments by stating that though the defendant has claimed his wife to be the owner but has not filed a single document in support thereof and since the plea of ownership of the wife is based on a 'baynama' executed by the son of the plaintiff and which has not been filed, no Issue needs to be framed thereon.
8. The counsel for the defendant stated that he attempted to file the copy of the 'baynama' yesterday in the Court but owing to not having the same in electronic form, it could not be filed. He has in Court handed over photocopy of list of documents dated 13.02.2014 along with the said 'baynama' dated 14th January, 2004 in Hindi language and which is taken on record.
9. The counsel for the defendant has further contended that the plaintiff, along with the plaint, did not file the documents by which he claims to have become the owner of the flat and has filed the documents subsequently and the defendant wants to amend the written statement in the light of the documents subsequently filed by the plaintiff.
10. It may however be noted that the "subsequent" documents were filed

by the plaintiff in this Court as far back as on 25.09.2012, after service of copies thereof on the defendant and the defendant filed the written statement on 12.02.2013.

11. The counsel for the defendant however states that the documents were received by him only in pursuance of the order dated 05.09.2013 in this suit.

12. Even if that be so, sufficient time has elapsed therefrom also. Need is thus not felt to adjourn the hearing, particularly when the counsel for defendant is not even able to tell, what plea by way of amendment of written statement, the defendant wants to take in view of the said documents.

13. I have pursued the aforesaid 'baynama' and the same, even if believed though denied by the plaintiff, is at best an agreement to sell the said flat executed by the son of the plaintiff in favour of the defendant for consideration of Rs.11,00,000/- out of which a sum of Rs.1,00,000/- was paid as earnest money and the balance consideration was payable on or before 15.04.2004. The defendant, along with the 'baynama' has also filed photocopy of a receipt for Rs.1,00,000/- purportedly executed by son of the plaintiff. It is also a term of the 'baynama' that upon the failure of the wife of the defendant to pay the balance sale consideration by 15.04.2004, the sum of Rs.1,00,000/- will be forfeited.

14. The counsel for the defendant, on enquiry, states that the originals of the 'baynama' and the receipt are not with the defendant, though in the ordinary course of human behaviour they should have been with the defendant.

15. The plaintiff in his documents of title of the flat, besides photocopy of Agreement to Sell dated 18.03.1996 executed by Sh. Parvesh Kumar Kohli and affirmed by his wife Mrs. Sudesh Kohli in his favour, has also filed a Power of Attorney executed by Mrs. Sudesh Kohli in favour of son of the plaintiff and whereunder, he had the authority to sell / agree to sell the said flat.

16. The documents filed by the plaintiff in support of his claim of ownership of the flat show, (i) that one Sh. Inder Raj Sehgal was the perpetual lessee of the land underneath the multi-storeyed building aforesaid; (ii) Sh. Inder Raj Sehgal entered into a Collaboration Agreement dated 28th October, 1991 with M/s Saraswati Builders and under which Agreement M/s Saraswati Builders constructed the multi-storeyed building on the said land, at its own cost and expense; (iii) that as per the said Collaboration Agreement the said built up multi-storeyed building was to be divided/shared between Sh. Inder Raj Sehgal and the said M/s Saraswati

Builders; (iv) that the said Sh. Inder Raj Sehgal and M/s Saraswati Builders vide Agreement to Sell dated 4th November, 1992 agreed to sell the subject flat No.G-4 in the said multi-storeyed building to Sh. Parvesh Kumar Kohli and upon receipt of entire sale consideration and in part performance of Agreement to Sell also put the said Sh. Parvesh Kumar Kohli into possession of the said flat; (v) that Sh. Inder Raj Sehgal had also at the time of entering into Collaboration Agreement on 28th October, 1991 constituted Sh. Satish Chander Seth being the managing partner of M/s Saraswati Builders as his general attorney with powers to sell the flats in the said multi-storeyed building; (vi) that the said Sh. Satish Chander Seth, at the time of Agreement to Sell dated 4th November, 1992 in favour of Sh. Parvesh Kumar Kohli constituted Mrs. Sudesh Kohli wife of Sh. Parvesh Kumar Kohli as attorney with respect to the subject flat No.G-4; (vii) that the said Sh. Satish Chander Seth at the time of Agreement dated 4th November, 1992 also executed a Will with respect to the subject flat No.G-4 in favour of Sh. Parvesh Kumar Kohli; (viii) that Sh. Parvesh Kumar Kohli vide Agreement to Sell dated 18th March, 1996 as aforesaid agreed to sell the subject flat to the plaintiff and Mrs. Sudesh Kohli as attorney with respect to the said flat confirmed the said Agreement; and, (ix) that Mrs.

Sudesh Kohli at the same time executed a power of attorney in favour of Sh. Ravinder Kumar son of plaintiff with respect to the said flat and Sh. Parvesh Kumar Kohli also executed a Will with respect to the said flat in favour of the plaintiff.

17. Though the plaintiff denies that his son executed the 'baynama' and receipt aforesaid, however even if the same were to be believed/accepted, the fact remains that the Agreement to Sell contained in the 'baynama' relied upon by the defendant, in favour of his wife, is an unregistered document. Pursuant to the amendment with effect from 24th September, 2001 of The Registration Act, 1908 and the Transfer of Property Act, 1882, no plea of delivery of possession in part performance is entertainable without the Agreement to Sell in pursuance to which possession is delivered being registered. Not only so, neither does the baynama state that possession has been delivered in part performance thereof nor is it the plea of the defendant in the written statement. The wife of the defendant, even if held to be an agreement purchaser of the said flat and even if it were to be held that possession of the said flat pursuant to the said Agreement to Sell was delivered, has no right to continue in possession thereof in pursuance of the said Agreement to Sell.

18. I may notice that in the receipt also dated 14th January, 2004 accompanying the 'baynama', the address of the wife of the defendant is given as that of the subject flat, meaning that the defendant was in possession of the said flat since prior to 14.01.2004. However the defendant has not pleaded any other right under which he was in possession of the flat.

19. Thus, the defendant cannot be said to have any right to continue in possession, on the basis of the said 'baynama'.

20. As far as the denial by the defendant of ownership of the plaintiff of the subject flat is concerned, the plaintiff as aforesaid has filed copies of the documents aforesaid, which unequivocally show that while the plaintiff was the purchaser of the said flat from Sh. Parvesh Kumar Kohli, the son of the plaintiff was constituted as the attorney with respect to the said flat. Though there is no Sale Deed of the flat in favour of the plaintiff but the Apartment Act, application whereof is not controverted by counsel for defendant, vide Section 4 thereof, vests ownership rights in favour of such allottees/transferees of apartments/such flats. The Division Bench of this Court in judgments dated 28th May, 2010 and 13th July, 2012 in W.P.(C) No.1959/2007 titled ***O.S. Bajpai Vs. The Administrator (Lt. Governor of Delhi)*** has noticed the difficulties being faced in execution of deeds of

apartments and given directions with respect thereto.

21. Further, though the defendant has denied the ownership of the plaintiff but the admission by the defendant of the son of the plaintiff being the Power of Attorney from Shri Sudesh Kohli with respect to the said flat proves the transaction under which plaintiff claims to be the owner. The existence of power of attorney with respect to the said flat in favour of son of the plaintiff does not negate the ownership of the plaintiff. The practice of taking a power of attorney of the property so aforesaid to be purchased, instead of in the name of the purchaser, in the name of the nominee/confidant of purchaser is well established and common in such transactions. If the Power of Attorney is taken in favour of the agreement purchaser, it poses a problem in the purchaser, as attorney of the seller subsequently executing the Sale Deed in his own favour. The defendant also, save for generally denying the title of the plaintiff, has not pleaded anybody else to be the owner and the very fact that the defendant / his wife dealt with son of the plaintiff as seller confirms the documents of title on the basis of which the plaintiff has instituted the present suit. It is worth noticing that the defendant in the written statement has not denied, the plea of the plaintiff in his income tax returns showing himself as the owner of the

said flat and the said flat in municipal records being registered in the name of the plaintiff and the plaintiff paying property tax thereof and has merely pleaded that the same do not constitute plaintiff as owner. However, the said admission also supports the transaction by which the plaintiff claims to be the owner. It cannot be lost sight of that it is the plaintiff who is the transferee of the flat under the Agreement to Sell aforesaid and not the son of the plaintiff and thus under the provisions of Apartment Act also, the ownership of the flat would vest in the plaintiff.

22. I may also notice that the Division Bench of this Court in ***Prabhu Dayal Vs. Roop Kumar*** AIR 2005 Delhi 144, relying on the earlier judgment of the Supreme Court in ***Sant Lal Jain Vs. Avtar Singh*** (1985) 2 SCC 332 has held that in a suit by licensor for recovery of possession from licensee, merely a mandatory injunction can be claimed and it is not necessary to claim the relief of possession. The same view has subsequently been followed in ***Joseph Severance Vs. Benny Mathew*** (2005) 7 SCC 667.

23. I have also considered whether a decree can be passed in the absence of the wife of the defendant. I am of the view that it can be, as the defendant in the present case has pleaded the defence of his wife and there is no reason to treat them differently.

24. Thus, on the basis of the law and the pleadings, no material Issue arises for adjudication.

25. Order 15 of the CPC permits the Court to decree the suit forthwith where the parties are not found at issue.

26. A decree for possession of flat No.G-4 in the multi-storied building situated at DD-36, Kalkaji, New Delhi is therefore passed in favour of the plaintiff and against the defendant.

27. The senior counsel for the plaintiff on instructions states that the plaintiff at present is not pressing the claim for *mesne* profits but with liberty to revive the same if the defendant pursues the matter further and /or if the defendant does not vacate the flat within a period of 3 months from today.

28. Liberty in this regard is granted.

29. The plaintiff is also awarded costs of this suit. Counsel's fee assessed at Rs.25,000/-.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 19, 2014

‘gsr’..