

In The Matter of :-

Smt. Kusum

..... **Counter-claimant**

vs.

Udai Singh

..... **Respondent**

28/01/2022

Hearing through video conferencing/WebEx.

JUDGMENT

1. By this judgment, I shall decide whether to pass the judgment under Order 12 Rule 6 of CPC and whether any relief to the defendant (herein counter-claimant Ms. Kusum) can be given on the basis of admission in the pleadings. No formal application has been moved on behalf of the defendant under the aforesaid provisions of CPC.
2. The plaintiff (herein respondent, Sh. Udai Singh) filed the suit (main suit) for specific performance and permanent injunction with the averments in the plaint that the plaintiff had purchased the property bearing Flat no. 36-B, Pocket D-1, Janta Flats, Mayur Vihar, Phase-III, Delhi-96 (hereinafter referred to as the suit property shown in red colour in the site plan filed along with the plaint), along with leasehold rights of the land under the suit property vide Agreement to Sell dated 28/05/2008 entered into between the plaintiff and the husband of the defendant i.e.,

late Shri Shyam Sundar.

3. ***It is the claim of the plaintiff that the plaintiff acquired the absolute ownership rights with respect to the suit property after the execution of the Agreement to Sell dated 28/05/2008 to the exclusion of all others including the legal heirs of late Shri Shyam Sundar.*** The possession of the suit property is stated to have been handed over to the plaintiff by the deceased husband of the defendant immediately after the execution of the said Agreement to Sell and thereafter the plaintiff started residing in the suit property along with his family.
4. It is further the claim of the plaintiff that the plaintiff had paid the entire consideration amount of ₹3 lakhs by way of cheques/cash as agreed between the plaintiff and the deceased husband of the defendant with respect to the suit property at the time of execution of the Agreement to Sell dated 28/05/2008 and nothing remained to be paid with respect to the said transaction. It is pleaded by the plaintiff that as per the said Agreement to Sell it was agreed between the deceased husband of the defendant and the plaintiff that late Shri Shyam Sundar would co-operate in all the formalities for the transfer of the suit property in favour of the plaintiff as and when the same would be permissible. That, as the suit property was a leasehold property the sale deed with respect to the suit property could not have been executed at the time when the Agreement to Sell was executed between the plaintiff and the deceased husband of the defendant and the sale deed could have been only executed after the suit property was got converted into freehold property.

5. It is further pleaded that the husband of the defendant unfortunately expired around in the month of July-August 2010. After the plaintiff came to know about the death of the husband of the defendant, the plaintiff went to meet the family members and requested them to fulfil the promise (as per the Agreement to Sell dated 28/05/2008) and the assurances were given to the plaintiff by the family members of late Shri Shyam Sunder that sale deed would be executed in favour of the plaintiff after the suit property would be converted into freehold property. Thereafter, the plaintiff maintained regular contact with the family of late Shri Shyam Sunder and the plaintiff was informed that the suit property was converted into freehold property on 11/11/2011 and the suit property was mutated in the name of the defendant. After coming to know regarding the conversion of the suit property into freehold, the plaintiff approached the defendant for execution of sale deed in favour of the plaintiff.
6. It is the grievance of the plaintiff that the intentions of the defendant became malafide and the defendant refused to execute the sale deed with respect to the suit property in favour of the plaintiff as per the Agreement to Sell dated 28/05/2008. It is alleged by the plaintiff that on 29/09/2012 the plaintiff was threatened to vacate the suit property and also with respect to creation of third-party interest in the suit property. Briefly in aforesaid facts and circumstances the plaintiff has prayed for the following reliefs:-
 - a. Pass a decree for Specific Performance of the Agreement dated 28/05/2008 in favour of the plaintiff against the defendant

directing her to execute the Sale Deed in respect of the suit property being Flat No. 36-B, Pocket D-1, Janta Flats, Mayur Vihar, Phase-III, Delhi-96 in favour of the plaintiff.

- b. Pass a decree for permanent injunction in favour of the plaintiff against the defendant, her employees, servants, contractors, agents, attorneys, etc. directing them not to dispose of the suit property or create any third-party interest with respect to the suit property.
7. Before proceeding further, it may be mentioned that in the original plaint which was filed the Agreement to Sell was averred to have been dated 06/06/2008. On behalf of the plaintiff an application under Order 6 Rule 17 CPC was moved which was allowed vide order dated 09/08/2017. After the completion of the pleadings before the amendment, the issues were framed on 26/08/2014. After the amendment, the defendant filed amended written statement along with the counter-claim. No issues have been amended and the matter is at the stage of plaintiff's evidence. It may also be noted that the Agreement to Sell on the basis of which the plaintiff has filed the present suit does not bear any date as to the date of its execution.
8. The defendant has filed the written statement along with counter-claim for relief of the declaration, mandatory injunction, damages and recovery of arrears of license fees. (After the amendment of the plaint by the plaintiff, on behalf of the defendant amended counter-claim has been filed).
9. By way of preliminary objections the defendant in the written statement/counter-claim has stated that the suit filed by the plaintiff is not maintainable because the plaintiff has filed the suit on the basis of fabricated and forged documents that is Agreement to Sell dated

28/05/2008 with intention to grab the suit property.

10. It is the case of the defendant that the husband of the defendant neither sold the suit property nor executed any Agreement to Sell in favour of the plaintiff. The plaintiff was the tenant in the suit property. The husband of the defendant had let out the suit property to the plaintiff by way of oral contract in the year 2005 and again on 15/03/2008 at a monthly rent of ₹2000/- and on the advancement of ₹100,000/- for renovation-cum-extension of the suit property which was adjustable in the rent of each and every month till 15/05/2012. The defendant denied having been informed either by the plaintiff or her deceased husband regarding the execution of the Agreement to Sell in favour of the plaintiff either during the lifetime or after the death of the husband of the defendant. As per the defendant, the husband of the defendant never sold the suit property to the plaintiff and also plaintiff did not pay any consideration amount to the husband of the defendant. *It is also averred that the plaintiff did not file any receipt of payment of the consideration amount which has been mentioned in the Agreement to Sell dated 28/05/2008.*
11. It is further the case of the defendant that the husband of the defendant never handed over the documents pertaining to the suit property, did not sign the Agreement to Sell in the presence of the Notary Public. As per the defendant, the plaintiff dishonestly and fraudulently obtained the seal and signature of the Notary Public and traced/forged the signature of the husband of the defendant from the copy of the allotment and possession

letter of the suit property which was obtained by the plaintiff from the office of DDA by misleading the DDA officials.

12. The defendant has further pleaded that the plaintiff in a conspiracy with Mr. J.P. Pant has filed and used the forged documents in the Court of Law. The defendant has also taken the technical defences with respect to the suit not being properly valued and that the suit of the plaintiff being barred by limitation. On merits, the defendant has denied the entire facts as stated by the plaintiff in his plaint.
13. By way of additional plea in the written statement/counter-claim, the defendant has reiterated the facts with respect to the creation of the tenancy between the plaintiff and the deceased husband of the defendant as have been noted herein above.
14. It is further the case of the defendant that in the month of June 2012 the defendant requested the plaintiff to vacate the suit property, the plaintiff requested for six months' time and agreed to stay in the suit property on license basis and promised to pay the license fee of ₹5000/- per month. The defendant terminated the license of the plaintiff qua the suit property by sending a legal notice dated 12/07/2013, but the plaintiff did not hand over the possession of the suit property to the defendant. Briefly, in aforesaid facts and circumstances by way of counter-claim the defendant is praying for a decree of the declaration for declaring the Agreement to Sell dated 28/05/2008 with respect to the suit property as null and void. The defendant is also seeking relief of mandatory injunction seeking damages and recovery of arrears of license fees

against the plaintiff.

15. To the written statement/counter-claim of the defendant, the plaintiff has filed his replication/written statement. The plaintiff has reiterated the facts as stated by the plaintiff in his plaint and denied the facts as stated by the defendant in her written statement/counter-claim.
16. After the amendment of the plaint, filing of the amended written statement/counter-claim and thereafter the filing of the replication/written statement to the counter-claim there ought to have been the amendment in the issues. However, order dated 28/05/2019 reflects that the parties submitted that no additional issues required to be framed or any of the previous issues required to be recast. After taking into consideration the facts of the case and the issues which have been framed vide order dated 26/08/2014, this Court is of the opinion that certain additional issues are required to be framed. Be that as it may, on the aspect of framing of additional issues/amendment of the issues already framed, the Court would hear the submissions of both the parties at appropriate stage.
17. Pursuant to order dated 09/10/2021 the Court has heard arguments on the issue whether under Order 12 Rule 6 of CPC defendant is entitled to certain relief on the basis of admissions.
18. The admitted case of the plaintiff is that it was the deceased husband of the defendant who was the owner of the suit property. The husband of the defendant died (it has not been clarified by the intestate or testate) in the month of July-August 2010. (It has neither been clarified by the

plaintiff or the defendant that other than the defendant whether there were any other legal heirs of the deceased husband of the defendant). That the suit property stands mutated in the name of the defendant. The plaintiff does not have any registered/title documents qua the suit property in his favour.

19. The contentious issue between the plaintiff and the defendant is that as per the plaintiff the deceased husband of the defendant executed Agreement to Sell dated 28/05/2008 with respect to the suit property pursuant to which the plaintiff came into the possession of the suit property. Whereas, the case of the defendant is that with respect to the suit property the plaintiff was the tenant, after the tenancy of the plaintiff came to an end the plaintiff sought six months' time to vacate the suit property and thereby the plaintiff became a licensee. It is also the claim of the defendant that the Agreement to Sell dated 28/05/2008 is a forged and fabricated document.
20. Assuming that the entire case of the plaintiff is 24-carat gold. As on today the plaintiff cannot be held to be the owner of the suit property as the plaintiff does not have any document in his favour which could be said to be the title document of the suit property on the basis of which the plaintiff could be held to be the owner. All that the plaintiff has in his favour is the Agreement to Sell dated 28/05/2005. *During the arguments the counsel for the plaintiff submitted that the plaintiff does not even have the original Agreement to Sell dated 28/05/2005 and the plaintiff has filed the photocopy of the same.* But, assuming that Agreement to

Sell dated 28/05/2005 was in fact executed by the deceased husband of the defendant in favour of the plaintiff then on the basis of said document the only right which was created in favour of the plaintiff was to get a document on the basis of which the plaintiff would have had the title/ownership of the suit property. The Hon'ble Delhi High Court in **Jiwan Das v. Narain Das AIR 1981 Delhi 291** it was so held:-

"10. Adverting, Therefore, to the merits of the controversy, it may at the outset be taken note that unlike the law in England where an agreement of sale creates an equitable estate in the purchaser, the law in India does not recognise any such estate. section 54 of the Transfer of Property Act in specific terms provides that a contract for sale does not, of itself, create any interest in or charge on such property. Such contract is merely a document creating a right to obtain another document in the form of sale deed to be registered in accordance with law. In other words, a contract for sale is a right created in personam and not in estate, No privity in estate can be deduced there from which can bind estate, as is the position in cases of mortgage, charge or lease. Of course, such personal right created against the vendor to obtain specific performance can ultimately bind any subsequent transferee who obtains transfer of the property with notice of the agreement of sale. (See in this respect [1967]1SCR 293, **Ram Baran v. Ram mohit**,)

11. Till, Therefore, a decree for specific performance is obtained, the vendor or a purchaser from him is entitled to full enjoyment of the property. In fact, even if a decree for specific performance of contract is obtained, and no sale-deed is actually executed, it cannot be said that any interest in the property has passed. (See in this respect **AIR 1956 Cal 147, Govinda Chandra v. Provabati Ghose**, and **AIR 1957 AP 960 S. Ramalingm v. G.R. Jagadammal**)”.

21. It is the case of the plaintiff that the plaintiff was handed over the possession of the suit property pursuant to Agreement to Sell dated 28/05/2008. Assuming the contention of the plaintiff to be true, it would

make the legal status of the plaintiff qua the suit property as that of a licensee i.e., a personal privilege and no kind of right in the suit property.

22. The law as per Section 53A of Transfer of Property Act *before its amendment* was that if possession was traceable to the agreement to sell, then such possession could be sustained and protected on the basis of the principle of part performance under Section 53A of the Transfer of Property Act i.e., even if no title document was executed/registered in favour of the purchaser, but the purchaser was given the possession of the property to be sold then the owner/seller of such property could not have got the possession of such property. But, consequent to amendments to section 53A of Transfer of Property Act with effect from 24/09/2001 for the purposes of part performance there has to be a registered document.
23. As the Agreement to Sell dated 28/05/2008 is not a registered document, therefore the benefit of Section 53A of Transfer of Property Act is not available to the plaintiff.
24. The *division bench* of Hon'ble Delhi High Court in **Pawandeep Singh v. Gurdeep Singh Virdi 2019(7) AD(Delhi) 506** has held that an unregistered Agreement to Sell cannot be used as a shield to protect the claimants' possession under Section 53A of Transfer of Property Act as an Agreement to Sell is compulsorily registrable document under Section 17 (1-A) of the Registration Act, 1908.
25. The Hon'ble Delhi High Court in **Parveen Saini v. Reetu Kapoor;**

2018 (168) DRJ 121 as held:-

15(ii) The first reason for rejecting the argument that the existence of counter-claim would be a bar to allowing the application under Order 12 Rule 6 CPC, is a misconceived argument because an agreement to sell, assuming for the sake of arguments, *even if parties have entered into the same, this agreement to sell does not give a right to a prospective purchaser to on that basis stay in the suit premises* unless the agreement to sell encompasses the doctrine of part performance contained in section 53A of the Transfer of Property Act, 1882. With effect from 24.9.2001 section 53A of the Transfer of Property Act was amended whereby an agreement to sell in the nature of part performance will only be looked into if there is a written agreement which not only should be duly registered but it should be stamped with the stamp duty of 90% value of the sale consideration. Admittedly, this Court does not have before it any registered agreement to sell falling within the scope of section 53A of the Transfer of Property Act for the appellant/defendant to claim benefit of continuing to remain in the possession of the suit premises. Trial Court could have admittedly decreed the suit for possession because even if the appellant/defendant for the sake of arguments is taken not to be a tenant, yet the appellant/defendant still would have no legal right, title or interest to continue in the suit property. Of course I hasten to add that the appellant/defendant is a tenant under the registered lease agreement dated 14.7.2014 and that appellant/defendant cannot dishonestly shy away from this fact, and as stated in the discussion hereinafter. (Emphasis supplied.)

26. To summarise, in the light of discussion herein above, even if it is assumed that Agreement to Sell dated 28/05/2008 had been executed by the deceased husband of the defendant in favour of the plaintiff, the said document being compulsorily registrable for the purposes of Section 53A of Transfer of Property Act is not a registered document and the fact that the plaintiff has admitted the deceased husband of the defendant to be the owner of the property on the basis of Agreement to Sell dated 28/05/2008 the plaintiff does not have any right to retain the possession

of the suit property being mere a licensee (Ref Chapter VI of the Indian Easements Act, 1882). At this stage, no observation of the Court is called for with respect to the missing receipt of payment and the original Agreement to Sell. Accordingly, at this stage without deciding any other issues involved, the defendant, namely Ms. Kusum is entitled to have the possession of the suit property. The plaintiff, namely Sh. Udai Singh is hereby directed to hand over the possession of the suit property to the defendant within fifteen days from today. The counter-claim of the defendant is hereby partly decreed.

Preliminary decree sheet be prepared in terms of the judgment.

Announced through WebEx

From Residence

(VIJAY KUMAR JHA)

Addl. District Judge-02 (East)
Karkardooma Courts/ 28/01/2022