

# Protect your interests with ATS

An agreement to sell followed by the sale deed is a must for any property transaction. It sets out sale prices, payment timelines etc and protects the interests of both buyers and sellers

Sunil Tyagi  
htestates@hindustantimes.com

## htestates LEGAL REMEDIES

In most transactions of sale of immovable property, parties first execute an agreement to sell (ATS) followed by the sale deed. In the ATS, the parties usually set out the advance sale price, the total sale price, payment timelines, time period within which sale deed is to be executed, conditions to be fulfilled by both parties, if any, etc. In some ATS transactions, the seller also hands over physical possession of the property to the buyer at the stage of ATS itself. In such cases, Section 53A of the Transfer of Property Act, 1882 (Section 53A), is of relevance to both buyers and sellers. This section deals with part performance of a contract to transfer an immovable property. This section was enacted to protect buyers who had received

possession of a property under the ATS and were facing the prospect of eviction from the seller. However, to strike a balance between the interests of both parties, the legislature in its wisdom has specified certain conditions that are to be fulfilled to seek the benefit of this statutory protection. If all the specific conditions described below are fulfilled, a buyer would be able to effectively defend and protect his peaceful enjoyment and lawful possession of the property.

(a) There must be a contract between the buyer and seller to transfer an immovable property for consideration.

(b) The contract should have been captured in writing. Hence, this protection is not available to a buyer who alleges to be

in possession of the property simply on the basis of an oral agreement. Further, the written contract should have been signed by the seller or by someone on his behalf.

(c) The contract must be written in words from which the terms of the transfer can be ascertained with reasonable certainty. In the landmark case of Mool Chand Bakhu and Another v. Rohan and Others (2002), the Supreme Court dealt with a case where the parties had exchanged some letters for sale/purchase of the property.

The apex court held that the letters written by the seller did not amount to a written agreement, the terms of which have been reduced into writing. At the most, the letters could be seen as only an acknowledgement that there was an oral agreement to sell the property between the parties. Hence, the emphasis is

not simply having a written contract. The written contract should clearly spell out all the essential terms of sale and purchase of the property with sufficient clarity.

(d) The buyer must have taken possession of the property in part performance of the contract.

(e) The buyer must have done some act in furtherance of the contract, as well as fulfilled his obligations under the ATS.

For instance, if the buyer is found guilty of making delayed payment or non-payment of installments towards the total sale consideration, courts may take the view that the buyer was not ready and willing to perform his part of the contract in order to complete the sale transaction. If a buyer is able to prove that he has not breached any material term of the ATS, he would be able to successfully resist attempts on the part of the seller to disturb



lawful possession of the buyer.

The author is a senior partner of ZEUS Law Associates, a corpo-

rate commercial law firm. One of its areas of specialisation is real estate transactional/litigation work



htestates  
LAW BOOK  
Sunil Tyagi

I am planning to purchase an under-construction flat in a residential project from the original allottee of the flat. What is the stamp duty payable?

— Mahinder Gill  
No stamp duty is payable on a mere transfer of an allotment of the flat by the present allottee of the apartment in your favour. Transfer of allotment of a flat is simply a transfer of the right to purchase the flat by the original allottee in your favour.

My deceased grandfather left behind properties in both the UK and India. The will of my deceased grandfather has been proved and deposited with a court in the UK. What is the procedure to be followed for administration of his properties that are situated in India?

— Roshan Sunder  
As the will of the deceased has already been proved and deposited in a court of competent jurisdiction outside the territory of India, a petition under the Indian Succession Act, 1925, may be filed for grant of letters of administration or ancillary probate by the competent court, as the case may be, within whose jurisdiction the properties are situated in India.

I am the sole owner of a flat and want to include my wife as a joint owner of the flat during my lifetime. Can I relinquish my ownership in half the property in favour of my wife, as I do not want to take any consideration amount from her?

— TK Manish  
Presuming that the flat is a freehold property and that transfer of any rights does not require any prior permission, a valid relinquishment of property cannot be made

in favour of a person who is not already a co-owner of the property. As you are the sole owner of your flat, a transaction of relinquishment of ownership of a portion of the flat in favour of your wife shall be treated as a gift/sale/conveyance in her favour instead, and shall also be subject to stamp duty and registration charges payable on gift/sale/conveyance accordingly.

If you wish to transfer ownership of the property during your and her lifetime, without taking any consideration amount from your wife, you may execute a gift deed in favour of your wife for half, undivided portion of the flat. The gift deed should also be duly stamped and registered.

The tenant of my property has given a room on rent in my property to a paying guest, without my prior written permission. Can he do so?

— M L Jalan  
If there is a specific clause in the lease deed executed, expressly stating that throughout the duration of the term of lease, the lessee shall not be entitled to further sub-lease this property or create any rights or interest of whatsoever nature in the property then the lessee cannot further sub-let any portion of the property without your prior permission. However, if there is no specific clause in the lease deed to this effect, the lessee is entitled to sub-let the property in favour of a third party.

The author is senior partner, ZEUS Law Associates. If you have any query, email us at htestates@hindustantimes.com

## htestates CHEQUE BOOK Harsh Roongta

If the property (for which I have taken a home loan) goes under some kind of legal dispute or the builder stops construction, what will happen to the loan? Will I need to keep paying EMI? How will the property insurance help in such cases?

— Suresh  
Your liability to service your home loan is independent of

your inability to get possession of the property either due to a legal dispute or fault on the part of the builder. In case there is a delay in getting possession for any reason, you will have to keep on paying the EMI or the pre EMI interest. Property insurance does not cover risks on matters pertaining to delay due to builder's

fault or legal dispute. Basically, it is the buyer (ie you) who is responsible for checking on the property title or the possibilities of a delay in construction and the risks to be borne.

It is in your own interest to continue to pay the EMI so that your credit history is not spoiled. In case you stop paying your EMI, it will be reported in your credit history which, in turn, will damage your ability to avail any credit facility from the banking system in future.

I had booked a flat from a builder in

March 2010 which was confirmed by the builder through an allotment letter dated March 2010. The flat is still under construction and I have not taken its possession. About 80% payment has been made at various stages of construction to the builder. Now, I intend to sell the flat to a third person and want to invest in a new property. Will the gain in sale of flat be considered as capital gain (long/short) and will the profit be taxable if I invest the same in a new residential flat?

— Ganesh  
What you are selling is not a flat but a right to acquire the flat. The right to acquire a flat is also

a capital asset and any profit made on sale of such asset (the right to acquire the flat) shall be treated as capital gains.

Whether this will be a long-term or a short-term capital gain shall depend on the facts of the case. Since you had acquired the right on March 2010 and since it has already completed 36 months, in my opinion, this right should be treated as long term and should be taxed as such. However, the assessing officer can take a different stand depending on the different dates on which the payments

were made.

In case you invest the money for purchase or construction of another residential house property, the long-term capital gains shall be exempt under Section 54F proportionately to the extent of investment of sale consideration. For claiming exemption, you are required to invest the whole sale consideration and not only the amount of capital gains.

Harsh Roongta is CEO, Apna Paisa. He can be reached at ceo@apnapaisa.com

## news brief

### NCR witnesses subdued activity in residential market


Residential markets across the NCR observed subdued activity in the first half of 2013 as compared to the previous review

period, according to the findings of CBRE's latest report on the residential sector, India Residential Market View H1 2013.


The residential market of Delhi witnessed stagnancy—concentrated in both the mid-end/high-end as well as premium housing projects. Buyer interest remained largely focused upon cost effective suburban markets, with prime areas witnessing

no new launches during the first half of 2013.

Capital values across most micro-markets of Delhi witnessed a decline owing to restrained demand levels, besides a cautious buyer sentiment. Developers delayed the launch of new projects, as they focussed on clearing existing vacancy levels, the report said.



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