

Can you cancel a sale deed or ATS?

The registering authority is obliged to get a deed of cancellation registered if two parties involved in a property transaction want to cancel the deal

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htestates LEGAL REMEDIES

In many transactions of sale of immovable property, parties execute an agreement to sell (ATS) as a precursor to the sale deed. Unlike a sale deed, execution of ATS does not pass title of ownership in favour of the buyer. In an ATS, parties set out terms such as advance sale price, total sale price, timelines of payment, time period within which the sale deed is to be executed, obligations of the parties before the sale, etc.

In some cases, the ATS does not materialise into completion of sale of the property and execution of sale deed for various reasons such as breach or default by either party of its obligations contained in the ATS.

Now the question is: can a registered ATS or sale deed be cancelled if both the seller and buyer want it?

Cancellation of a previous-

ly executed and duly registered ATS can be done if the parties execute a cancellation deed. It is a settled law that a bilateral contract such as an ATS or sale deed may be cancelled only if both buyer and seller agree and execute a separate deed of cancellation. Cancellation deed, being a document relating to transfer of ownership of immovable property, should be registered by the sub-registrar provided the requirements under Proviso to Section 32A of the Registration Act, 1908 ('Act'), are duly complied with.

Section 32A of the Act provides for compulsory affixation of photograph and fingerprints by persons presenting the document for registration. Proviso to section 32A provides that in case of any document relating to the

transfer of ownership of immovable property, the passport size photograph and the fingerprints of each buyer and seller should be affixed to such a document.

In the matter of *GD Subramanian v sub registrar, P Shanmugam, B Dillibabu and B. Vasu* (2009 (1) CTC 709), the Madras High Court observed that the registering authority is obliged to register any deed of cancellation of a sale deed which has been mutually executed by the buyer and seller, provided it is in compliance with the requirements of Section 32A. Further, the court also observed that the registering officer is legally bound to reject and refuse to register a deed of cancellation if it has been executed unilaterally and without the knowledge and consent of the other party, and if it does not fulfil the requirements of Section 32A.

Prospective buyers hesitate to purchase a property which has a history of a cancelled transaction of sale or ATS. However, if cancellation of the ATS has been done in accordance with law and buyers undertake legal due diligence, risk may be minimised. The new buyer may inspect the original cancellation deed executed by the seller with the previous



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buyer. The clauses of cancellation deed must clearly and unambiguously state that ATS, which was previously executed by the owner and previous buyer now stands cancelled. Also, the new buyer must ensure that the cancellation deed was duly registered at the office of

sub-registrar in whose jurisdiction this property is situated.

The author is a senior partner, ZEUS Law Associates, a corporate commercial law firm. One of its areas of specialisation is real estate transactional/litigation work

htestates LAW BOOK Sunil Tyagi

I own a property in India which I wish to give on rent. However, as I am residing abroad, I am unable to negotiate and execute lease documents with interested tenants in India. What should I do?

—M Dhawan

You may execute a special power of attorney in favour of a person who resides in India, authorising the attorney to negotiate and execute lease documents in India on your behalf. The special power of attorney should be duly executed before and attested by the Indian Consulate or notary public located in the country where you are presently residing, as per the prescribed procedure. Once the special power of attorney is received in India, it is required to be stamped with the proper stamp duty payable thereon, within three months after it is first received in India. The holder of special power of attorney will then be authorised to execute lease documents for the property on your behalf.

I am planning to buy part of a plot, whose owner inherited it under his deceased mother's will. I am worried as the will is handwritten, that too on plain paper. What precautions should I take?

—ABC

A will is not rendered invalid by the mere fact that it is handwritten or written on plain paper by the testator. However, you must scrutinise the will in its entirety to ensure it is written in unambiguous language and that it clearly describes the testator's intentions of which legal heir is to inherit what portion of the property. Legal due diligence of the property (chain of title of ownership) may also be undertaken. You may check whether there are any objections from the



legal heirs of the deceased regarding this will. In case there are any disputes, probate or letters of administration, as the case may be, may be obtained from the competent court.

What details are required to be given in a sale deed for describing the property being sold if it is an entire building situated in Delhi?

Mythili Ramkumar

As per the Delhi Stamp (Prevention of Under-valuation of Instruments) Rules, 2007, details including total covered area with open land, if any, in square metres; plinth area in square metres; number of floors with covered area of each floor in square metres; lift provided or not wherever applicable; type of construction (pucca, semi-pucca or kutcha); year of construction; whether the building is situated in DDA/CGHS Colony or private colony; whether the building is located in commercial or non-commercial area; if the property is a commercial building, per square metre monthly rent of the covered area, and location (specific area or landmarks), etc. are required to be covered in the sale deed.

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htestates CHEQUE BOOK Harsh Roongta

I have booked a 1BHK flat in a project in Noida, Sector 75, and had applied for a home loan from HDFC Ltd. At the time of applying for the loan, the salesperson told me that another project of 2BHK flats by the same builder was already approved by HDFC and the 1BHK project was also in the pipeline for approval. Therefore, I submitted all my applications for loan specifying the purchased flat details in the form. After two months my application for the loan amount has been approved, but

the bank has still not approved the 1BHK project. According to the builder they have submitted all the necessary papers to the bank. The bank is not assuring me of any date till when the project will get approved nor giving me any information regarding disapproval of the project. I will have to pay the next installment for my flat soon, for which I was depending on the bank loan. It will take another two months to apply to another bank. My query is what should I do now? Should I wait or should I apply to

another bank? How can I get back my processing fees from HDFC Ltd?

—Sunil Motwani

You should never buy in an under-construction project unless it has been pre-approved by at least a couple of large lenders. Even then, do please remember that pre-approval does not mean that the risk of delay is not on your head.

It is always better to buy a ready-to-move-in flat even though it is more expensive because that you avoid all construction delay risks and saves on service tax and VAT that is payable only on under-construction flats.

I would advise you to approach another lender without any delay for the loan, as it is not certain within what time frame the lender will approve the project. Check with the developer in case any lender has pre-approved the project and you can approach that lender. Most lenders do not refund processing fees in case the loan sanction is not used. You can make an attempt to get the refund of processing fees but it may not really work.

I am planning to buy a property, which is expected to go under redevelopment in Goregaon,

Mumbai. I will be grateful if you can tell me whether the situation (with regard to home loans) still remains the same or if banks are more willing to give no-objection certificates and may not ask for additional security during the period under which the property is under reconstruction.

—Ajay Kumar

It is usually difficult to get an NOC from the existing lender if the property is going in for redevelopment. There are chances that the lender may ask the borrower to repay the entire loan amount in one go before it goes for redevelopment. The lenders are reluctant to give NOC because redevelopment is a long process

with frequent regulatory changes, high probability of litigation and delay in construction. This all may lead to the borrower defaulting on the loan repayment.

Hence, in such a situation the best option may be to approach the lender funding the developer of the redevelopment project for the balance transfer from your existing lender.

You can also use the corpus amount received, if any, from the redeveloper to pay-off the loan amount.

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Can education alone push realty prices?

An education-centric real estate development generally spans out to be a long-term proposition

Vandana Ramnani
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Can education help Kundli get into higher gear or will it require the support of other forces such as manufacturing, IT, and up-and-running infrastructure as seen in Greater Noida and Pune?

Real estate experts point out that education sector provides significant opportunities for developers to create an asset class in line with residential, commercial, retail and hospitality. However, it cannot be considered a sole driver for residential real estate. Most large education campus developments are centered along the peripheral locations of cities and provide hostel accommodation for both students and staff. Additionally, cities like Delhi and Pune, which have large student populations and have rental accommodation for them, lack volumes to drive residential real estate demand. "Therefore, presence of employment hubs (manufacturing and service sector) along with a

growth population are key drivers for residential real estate. A case in point is Hinjewadi in Pune where the Rajiv Gandhi Infotech Park spawned residential space along with a host of higher education institutes," says Anshul Jain of DTZ India.

Education-centric real estate development is still at a nascent stage in India. Proximity of major Tier-1 cities and availability of large land parcels have been the primary reasons for emergence of Pune and Greater Noida as education hubs.

Jain points out that the development of an education-centric real estate development is spread across various stages. While the first phase is focused on creation of education institutes and its ancillary services (hostel, staff housing, etc), the sector provides potential to create additional revenue-generating opportunities like budget hotel, retail, entertainment and recreation facilities, etc. As a result, real estate development spans out to be a long-term proposition.



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Assured returns plan – risk or reward?

For the investor, these schemes offer better returns than investing in a fixed deposit with an interest rate of not more than 10%

Neeraj Bansal

After the 2008 global financial crisis, the real estate sector witnessed inadequate liquidity. The problem aggravated with domestic financial institutions reducing exposure to the real estate sector and drying up of private capital. With commercial projects (office space and retail malls) taking most of the brunt of the financial crisis, these projects were worst off in securing funding.

Even if a developer was able to get funding for a commercial project from a financial institution, the

interest rate charged was very high, at about 15% to 24%. With weak support from financial institutions and private investors, developers explored alternative ways to raise funds for their projects.

Of late, developers are actively promoting assured return plans (ARP) for commercial properties. In ARP, a developer offers investors a fixed return (generally 11% to 13% a year) on the investment for a certain number of years (generally three to four years or till the time he gets possession). A few developers even offer lease guarantee in addition to ARP, wherein a developer guarantees leasing of the commercial property after completion of the property, even if the property remains vacant.

For the developer such schemes have proved to be a win-win situation as this enables them to raise funds for

the project at a lower effective rate in addition to finding a buyer for their project.

For the investor, such schemes offer better returns than investing in a fixed deposit in a bank with an interest rate of not more than 10%. Their investments are secured with an assured return to the investment and can be discounted upfront in case of an upcoming project and adjusted in the price. Further, the investors reap a dual benefit by getting interest and capital appreciation of the property.

However, at times the ARP schemes do conceal more than what they reveal. There are some hidden costs associated with ARP schemes, which are generally ignored by the investors. In an ARP, the property is generally priced higher than the prevailing market price. A developer offers no bulk discounts

which otherwise are available if an investor seeks a property without ARP. An investor can negotiate a lower price for the same property if it opts for a non-ARP. An investor also has to pay the property amount upfront instead of paying in instalments like in a construction-linked plan.

It has been observed that an investor ends up paying the same or more amount in the case of an ARP than a non-ARP. Hence, an ARP project may not lead to capital appreciation for an investor other than the general appreciation of the price of property.

In short, an ARP is suitable for investors who are primarily looking for a stable cash flow and not as a tool for capital appreciation.

The author is partner, real estate and construction, KPMG in India

THINGS TO KEEP IN MIND

If you plan investing in an ARP property, check the following details before signing on the dotted line

- The developer's credibility and track record. If required, obtain feedback from existing investors
- Size of the property – whether it is standalone or part of a township – and the status of the project
- The entity with whom an investor is entering into an agreement. Generally, developers float a separate company for such projects, thereby making the entity responsible for the project and not the entire group
- Always obtain post-dated cheques from the developer and if possible, a bank guarantee (few developers have started offering bank guarantees)
- Collateral offered by the developer at the time of the transaction

DEVELOPERS' SPEAK

SHASHANK JAIN, COO, Ansal API
The area has taken a long time to develop primarily because infrastructure development was not commensurate with residential development. The government needs to become proactive. There is a need to develop it into a software parts hub. Some land should be allocated to encourage call centres to set up offices in the area. This is likely to kick-start the economy in the area. We are planning to come up with a new township, highrises and independent floors

PANKAJ GOEL, MD, Express Builders Ltd
Infrastructure projects will put the Sonapat growth story on fast track. We are planning to launch 1000 units in 45 days, and floors in our township

ANIL BEHL, executive director, Jindal Realty (P) Ltd
We are looking at launching new projects this year depending on new licenses and in response to market conditions, good education institutes, and social infrastructure

While signing the builder-buyer agreement, watch out for clauses relating to overheads, super area and delivery date

Sachin Sandhir

An under-construction property in the primary market is considered sold when two agreeing parties – the builder and the buyer – decide to sign the builder-buyer agreement. While there could be a difference between the quoted rate and the final negotiated rate, various aspects of builder-buyer agreements remain the same across markets in the country. These are carefully documented and often favour the builder/developer and protect his interests.

However, it is important to understand the terms and conditions specified in the sale deed or the agreement.

If not understood properly, clauses within the agreement could be misleading and ambiguous. Moreover, your builder may profit from some of your misses. The big concern for any buyer is the payment. Thus, understanding this part of your builder-buyer agreement is most important. There are a few clauses that need special attention. Here are some insights on the same.

Usually, at the time of signing the deed with your developer, the negotiated price is given. In addition it also mentions the overheads such as parking charges, fire fighting and electrification charges, external and internal development charges and the



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preferential location charges. Mentioning these overheads and understanding them thoroughly would save you from any sudden payments that may come your way.

Also, often your developer may put a small clause on the possible change of super area in the final assessment of the

entire construction. The turn out of this clause could be devastating. The clause says that area of the apartment can increase or decrease, depending on market conditions and architectural changes, and price will be subject to change accordingly. And the size usually increases! In the absence

of any regulations that could otherwise monitor the scale of change, your developer can charge you for the change. Most put a cap of up to 50 sq ft. Thus for the miscalculation of your developer you may have to shell out more while at the time of possession. This additional cost may be in the

range of ₹2 lakh to ₹5 lakh for a mid-income house.

Builder-buyer agreements do not mention the exact timelines of delivery. The wordings put in the clause mentions the number of months for completion. This could be misleading. For any buyer it is difficult to really monitor the exact date of the commencement of the construction.

Moreover, because of the uncertainties within the real estate market, developers have started putting a clause, which gives them an additional six months for the completion of the project due to the uncertainties of the market. Often termed as the grace period, most builders are using the grace period to avoid any kinds of penalty due to a possible delay in the future.

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