

# 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

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## 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 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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