

Know all about a 'holding over' lease

This lease refers to the lessee retaining possession of the premises beyond the original lease term. But it does not automatically create a new tenancy

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In our previous columns, we discussed the implications of having a renewal clause and an extension clause in a lease deed for an immovable property. Renewal and extension of lease deal with a situation where the lessee (ie, tenant) wishes to continue occupying the leased premises, after the expiry of the original lease period. In both renewal and extension of lease, the rights and duties of the lessee and lessor flow from the written lease deed executed by them.

This column deals with the third kind of situation that may arise, wherein although there is no written contract that is executed, a fresh lease may come into effect by an implied agreement between the parties.

It is common knowledge that on expiry of a lease, it is the duty of the lessee to hand over vacant and peaceful possession of the premises to the lessor. The expression 'holding over' is used in the sense of a lessee retaining possession of the

premises, beyond the original lease term. However, the mere act of retaining possession of the premises after expiry of the lease term does not necessarily or automatically create a new tenancy. In such situations, there must be a bilateral act by the parties for a new lease to be created.

Under ordinary circumstances, the lessee's conduct of remaining in possession of the leased premises and/or offering to pay rent would indicate his desire to continue as a lessee. The lessor's consent to this offer may be indicated by conduct such as voluntarily accepting rent from the lessee. Acceptance of rent is in most cases treated as a form of consent to the lessee continuing to have possession. Upon receiving the lessor's consent, a fresh tenancy would stand created by virtue of an implied agreement between the parties, unless of course

there is an agreement to the contrary. This would amount to a fresh tenancy even if the parties decide to continue the tenancy on the same terms and conditions of their earlier lease.

Here, a distinction must be drawn between the two classes of lessees who may be in possession of the premises after the expiry of the lease term – on one hand is X who is occupying the premises without the consent of the landlord, and on the other hand is Y who does so with the landlord's consent. Under the law, X is a 'tenant at sufferance' while Y is a tenant 'holding over'.

In simple terms, a tenant at sufferance is one who earlier had lawful possession of the property but who wrongfully continues to be in possession despite termination or expiry of the lease term. As no tenancy relationship exists in such a situation, the lessor would be entitled to seek possession of the premises by filing a suit of eviction forthwith against X. However, in the case of Y who is a lawful occupant, the lessor would first be required to give



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a notice for termination of the ongoing tenancy. In the event Y fails to vacate the premises beyond the termination notice period, the lessor may seek the relief of eviction.

Hence, for creation of a lease by 'holding over', fulfillment of two conditions are necessary.

Firstly, the lessee should be in possession of the premises after expiry of the lease. Secondly, the lessor or his representative should accept rent or otherwise give his consent to the lessee continuing in possession as a lessee.

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htestates CHEQUE BOOK Harsh Roongta

I am buying my sister's apartment. A PSU bank has rejected the loan saying that they will not approve this sale transaction. Please let me know if a sister can sell the property to her brother.

— Piyush Malhotra

The value of the sale transaction between the two of you will be subject to special scrutiny as your lender may not be very comfortable giving you the loan. Since the transaction in question will be between close relatives, the lender will want to rule out a sham transaction to raise money at low interest rates.

Yes, you can certainly approach another bank, but you will have to take your lender into confidence about buying the property from a close relative. If the transaction is genuine and as per the prevailing market rate, then getting a loan will not be a problem.

I purchased a new flat two years ago. But now I want to sell it and purchase a new flat in another location (I have taken a home loan of ₹15 lakh). Is it possible to buy a new property by selling an existing one? What are the procedures and tax implications?

— Varun Sridhar

Yes, you can sell your existing flat, but you will need the bank's consent. This consent letter will typically provide the amount, on payment of which the outstanding loan will be fully paid off, and the bank will release the property documents. This amount includes the prepayment charge (presently payable only on fixed rate loans and on dual rate loans when they are in the fixed rate stage of the loan), if any, chargeable by your bank, and should list the documents held by them that will be released on payment of the stated amount. This amount mentioned in the certificate is typically calculated as on a future date, to give time to the buyer to arrange the payment.

If you sell a house within a period of three years from the

date of taking possession of it, the difference between the cost price and the net price shall be treated as short-term capital gains. This will be taxed at the rates applicable.

In case you sell the house purchased within a period of five years from the date on which it was purchased, with a loan, and you had availed the tax benefits under section 80 C in respect of capital portion of loan repayment, the deductions allowed in respect of such property will be treated as income of the year in which this house is sold. Please note that there is no such provision of treating the interest benefits claimed earlier as income in the year such a property is sold.

I need to purchase land worth ₹15 lakh and build a house on the plot

immediately. The construction cost will be roughly around ₹10 lakh. Can I get a loan for both plot and construction? Will I also get a tax exemption?

— Abhishek Kothari

You can avail a composite loan which is a loan taken for self-construction of a house. The loan is given to finance cost of land as well as cost of construction of property on such plots of land. You will have to submit an estimate of the total cost of construction, certified by an architect/civil engineer.

The cost of the plot to you or the current market value, whichever is lower, will be taken into account to work out the total cost of the project, provided you commence the construction within a reasonable time after purchase of the plot.

The bank will determine the home loan amount based on the total cost comprising construction cost and cost of the plot. The loan will be released in parts, based on the progress of the construction, and after you have brought in your full contribution. The bank may insist on sending its own technical personnel to assess the progress of construction or may rely on certificates/photographs submitted by you.

Some banks are not comfortable funding self-constructed properties, so choose your lender wisely. The tax benefits will be available only from the year in which the construction is completed.

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htestates LAW BOOK Sunil Tyagi

I am planning to write a will for bequeathing all my properties to my only daughter. As she is the sole beneficiary under my will, can I also name her as the executor of the will?

— Vaibhav Sharma

Yes, you may appoint your daughter as the executor and also name her the sole beneficiary under your will.

I own a retail space in Noida. For the purpose of stamp duty, is it possible to enter into an arrangement where the rent is calculated on a revenue-sharing basis and hence may vary from time to time?

— Ravneet Kaur

Yes, under the provisions of Uttar Pradesh Stamp Act, 2008, it is permissible to execute a lease deed where the rent varies by virtue of being calculated on a revenue/profit-sharing arrangement, provided the lease period is not more than 30 years.

I had taken a house on lease five years ago and paid stamp duty and registration fee on the lease deed. The lease deed contains a clause which states that upon expiry of the initial period of five years, I would be entitled to stay in the premises for an additional five years. Do I have to enter into a fresh lease deed?

— Bhavna Rustagi

It is not clear whether stamp duty and registration fee on the lease deed has been deposited based on the lease period of five years or 10 years. In case it has been paid on the basis of only the initial five-year term, a fresh lease deed is required. The lease deed should be duly stamped and registered again. However, in case stamp duty and registration

fee has been calculated and paid in the first instance for the entire period of 10 years, a fresh lease deed is not required.

I have a property which I purchased entirely out of my own funds. Over the years, I have executed wills on three separate occasions to make changes regarding inheritance of this property. All these wills were also registered. Would making any further changes to my will negatively affect the inheritance in any manner?

— Abhay Bhaskar

A will may be revised any number of times and to any extent during one's lifetime. In your latest will, you may clearly state that it is your intention that the new will should supersede and nullify any/all wills previously executed by you.

My brother and I are planning to invest in a fully constructed residential property. My brother will purchase the ground floor and I will purchase the first floor and terrace area. Who will have the right to keep title documents of the entire property?

— Saroj Sharma

The buyer who is purchasing the portion having greater value will be entitled to receive chain of title documents of the entire property.

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