

AMBIGUITY AND MISUNDERSTANDING OF THE LAW IN RELATION TO AGREEMENT TO SELL AND SALE DEED

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Abstract:

A sale deed is not identical to an agreement to sell of an immovable property. This paper will look from the legal position at the contrast that the sellers and buyers should be apprised of.

While buying an immovable property, people enter into an agreement with another person, i.e. the seller. The agreement may be a sale deed or an agreement to sell. In most cases, people don't compass the difference between the two documents and tend to treat them as same. However, the situation is not so.

This paper shall look at the prior and post developments of the laws in relation to conveyance of immovable property and the rights, duties of the sellers and buyers. It will also look the present scenario in relation to the construction developers and the proposed purchasers who give their money to the developers still find it hard to get the ownership of the property.

The legal denotation of an agreement to sell and a sale deed:

Agreement to sell

An agreement to sell is an agreement to sell an immovable property in future. The agreement only specifies the terms and conditions under which the property will be transferred.

In general, an agreement to sell is a memorandum of agreement along with the proposed consideration and details of the payment of a future contract to sell. It includes:

- a. Proposal to purchase and an agreement to sell,
- b. Description of the property,
- c. Requirement of good marketable titles and no encumbrances,
- d. Payment details,
- e. Delivery of original documents on payment,
- f. Mode of delivery of property,
- g. Remedies for non-completion of sale on part of vendor including specific performance,
- h. Bearing of expense of proceedings,
- i. Production of tax related certificates and all other matters incidental to the proposed sale.

In practical sense, an agreement to sell shows the readiness of the parties.

The Transfer of Property Act, 1882, defines the contract for sale/ an agreement to sell as :

“A contract for the sale of immovable property, is a contract that a sale of such property shall take place on the terms settled between the parties”ⁱ. It further provides that “It does not, of itself, create any interest in or charge on such property.”ⁱⁱ

Therefore, an agreement to sell cannot be called a sale deed because it does not create any rights on the property by the proposed buyer. It is a mere promise to transfer the property in question in future. So, it is a document which culminates in creation of a sale deed. It enables the process of sale to happen smoothly by describing the steps in detail. This helps in creating a better understanding between the parties and their individual roles in the sale.

In case of failure of the seller to sell or hand over possession of the property to the buyer, the buyer gets a right of specific performance, under the provisions of the Specific Relief Act, 1963. A similar right is available to the seller under the agreement, for seeking specific performance from the buyer.

Sale deed

Sale deed is the chief document that transfers the rights in a property from seller to buyer. Section 54ⁱⁱⁱ defines sale as a transfer of ownership of an immovable property for a

consideration. Hence, ownership of a property walks behind an execution and registration of a sale deed.

It is to be noted that the contents of the sale deed are decided by the sale agreement, therefore a sale agreement is extremely important. The sale agreement ceases to exist once the sale deed is executed. This means that neither party can go back to the sale agreement to enforce any terms therein.

The sale deed is made on a non-legal stamp paper of a value prescribed by the state government.

As a precautionary measure, one must not take into use a model or draft sale deed which are frequently available but made one according to their own clauses and modifications depending on their own situation. It is better to take help or hire a professional to make and understand the deed in its true sense before signing and executing it.

A sale deed is generally drafted in extension of an agreement to sell. It is advisable for the buyer to inspect the sale deed carefully. A buyer must be careful about the following ingredients in the sale deed:

- a. A sale deed must contain the name and description of the parties and the complete chain of title;
- b. Description of the property along-with details of adjacent properties on the site plan,
- c. Reference to the Agreement to Sell and details of consideration;
- d. Description of facilities measurements;
- e. Privileges, rights to access, easements and other rights;
- f. Transfer of all rights and full authority in relation to interests, claim, demand whatsoever of the property with peaceful enjoyment of the property without hindrance.

In short, a Sale deed mentions more of the transfer of property and rights which forms the crux of it. All other terms and conditions are mentioned in the agreement to sell. Also, a sale deed must be in compliance with the provisions of the Indian Contract Act. The parties

entering into the sale deed must be major, of sound mind and not prohibited under any law or judgement of a court to execute the sale deed^{iv}.

The rudimentary contrast:

It is always advisable that for a sale of immovable property, an agreement to sell should be drafted first.

Agreement to sell	Sale deed
It is an executory contract.	It is an executed contract.
It implies a future transfer of property. Risks remain with the seller till the future transfer.	It implies an immediate transfer of property as well as the ownership and risks in the property from the seller to buyer.
Breach of the agreement can only result in suit for damages under the Specific Relief Act.	Breach of the deed results in a suit for price as well as damages.
Registration of an agreement is subject to laws of the particular state. A registered agreement to sell can never be regarded as a sale deed.	It is compulsory to register a sale deed where the value of the property of more than hundred rupees under the Indian Registration Act, 1908 ^v except to the provisions of Section 53A of the Transfer of property act except to the provisions of Section 53A of the Transfer of Property Act where the buyer has the possession but the ownership still remains with the seller.

The earlier regime of conveyance of property

Selling of immovable property (specially lease hold properties) imposes a liability of depositing capital gains tax on the sale transaction by the seller. Therefore, in order to avoid such tax implications, properties were being sold by way of Power of Attorney^{vi} as a common practice. Instead of executing a sale deed, it was a prevalent practice to effect sale through execution of power of attorney by the vendor in favour of the vendee. However, this practice

not only caused a deficiency in collection of revenue for the government but also hampered updating of government records.

In 2012, the Supreme Court of India in *Suraj Lamp & Industries (P) Ltd (2) v State of Haryana*^{vii}, while deprecating the practice of sales of immovable properties through power of attorney, held as under:

*“Transactions of the nature of ‘GPA sales or ‘SA/ GPA/ WILL transfers’ do not convey title and do not amount to transfer nor can they be recognized **OR** valid mode of transfer of immovable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. Such transactions cannot be relied upon or made the basis for mutations in municipal or revenue records.”*

The three judge bench presided over by Justice Raveendran unremittingly said that an immovable property can be lawfully transferred only through registered sale deeds.

After interpreting the various provisions of law concerning conveyance the bench stated that *"A Power of Attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property,"*. Acknowledging that such transfers had not only led to evasion of registration charges and stamp duty but had also provided scope for investing black money in real estate. The Apex Court further stated that there can be no mutation of property in municipal and revenue records on the basis of such documents and clarified that its order should not be a ground for disturbing mutations already effected by the Delhi Development Authority (DDA) or any other authority. A proper due diligence of ownership of properties was possible only if all property were transferred through registered sale deeds. However, this would not affect "genuine transactions" under the GPA. For example, a person may give a Power of Attorney to his son, spouse, daughter, sister, brother or a relative to manage his affairs or to execute a deed of conveyance.

The bench additionally stated that a person can enter into a development agreement and execute an agreement to sell with a builder or land developer and grant a power of attorney that will allow the developer for developing the land either by forming plots or by constructing apartment buildings and then sell the property to prospective purchasers. In the scenario of the

developer and the prospective purchasers, the Real Estate Regulatory Authority comes into play. Recently the Maharashtra RERA has held that there is a necessary need of registered sale deed to seek interest on delay by the real estate developer while granting possession. This means that the home buyers, particularly investors till continue to rely on letter of allotment even after making a significant payment to the developer and do not enter into an agreement to sell and in turn delays in paying the stamp duty, goods and service tax and other property charges.

The Indian Registration Act does not make a power of attorney compulsorily registerable. However, the Power of Attorney granted to sell immovable properties should be registered. It should be done at the office of the sub registrar within whose jurisdiction the person giving the power resides. If the person resides abroad, the Power of Attorney should be attested by the Indian consulate in that country. Such Power of Attorney should be used within 3 months from the date of its execution.

Power of Attorney comes to play a major role when Non-Resident Indians (NRIs) try to purchase a property/land in India. All land/property sold or purchased in India should be registered in the presence of both buyer and seller with their correct signatures recorded and all the property registration documents submitted to the sub-registrar of the city^{viii}. In cases where the seller or the buyer is not present in India at the time of registry then in that case they can give a Power of Attorney to a family member or friend whom they trust. Apart from NRIs, it can also be used when the person is bedridden or ill or an old aged person with health problems or any other reason that makes unavailability to conduct the transactions personally. Also in the case of ***The Greater Bombay Co-operative Bank Limited vs. Nagaraj Ganeshmal Jain and Ors***^{ix}, the apex court held that

“16. This Court clearly held that an agreement to sell which is not a registered deed of conveyance would not meet the requirements of Section 54 and 55 of the Transfer of Property Act. With respect to Section 53A of the Transfer of Property Act, it is well settled that the same can only be used as a defence in proceedings initiated by the transferor or by any person claiming under him.”

Immovable property can be transferred/conveyed only by a deed of conveyance (sale deed), duly stamped and registered as required by law. I, therefore, reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Any contract of sale (agreement to sell), which is not a registered deed of conveyance (deed of sale), would fall short of the requirements of Sections 54 and 55 of the Transfer of Property Act and will not confer any title, nor transfer any interest in an immovable property (except to the limited right granted under Section 53A of the Transfer of Property Act).”

The Ambiguity In Law In Relation To Execution Of Sale Deed In Cases Of Dispute

In the case of *State of Rajasthan and Ors. vs. Khandaka Jain Jewellers*^x the question that arose was ‘Whether the valuation should be assessed on the market rate prevailing at the time of registration of the sale deed or when the parties entered into agreement to sell?’

The Supreme Court in this case held that “It may be mentioned that there is a difference between an agreement to sell and a sale. Stamp duty on a sale has to be assessed on the market value of the property at the time of the sale, and not at the time of the prior agreement to sell, nor at the time of filing of the suit. This is evident from Section 17 of the Act.

The expression "execution" read with Section 17 leaves no manner of doubt that the current valuation is to be seen when the instrument is sought to be registered. The Stamp Act is in the nature of a taxing statute, and a taxing statute is not dependent on any contingency. Since the word "execution" read with Section 17 clearly says that the instrument has to be seen at the time when it is sought to be registered and in that if it is found that the instrument has been undervalued then it is open for the registering authority to enquire into its correct market value.”

The inexactness arises after the recently amended Specific Relief Act in 2018. Section 10^{xi} of the Act has been substituted and instead the newly inserted Section 10^{xii} states that the specific performance of a contract **shall** be enforced by the court subject to the provisions contained in sub-section (2) of Section 11, Section 14 and Section 16 of the Act. The old Section 10 of the Act uses the phrase "may, in the discretion of the court".

It is clear from the usage of these words that the intention of the legislature at the time of the enactment of the Act was to give discretion to courts in deciding to direct or to not direct specific performance of a contract. At the time of sale as noted by the supreme court leads to an ambiguity as in cases where the parties to a sale deed gets into a brawl and the deed could not be fully executed then if the “shall” provision of the specific relief act would be applied, then the interest of the seller would be hampered while protecting the interest of the buyer as it will have to sell the property at a rate which was agreed and existed and which on many occasions is quite less than the present value of the property. On the other hand, if the property is sold at the present market value while avoiding the recent amendment then it will hamper the interest of the buyer. Therefore, a judge should always look from the point of view of the person who is at fault.

Conclusion:

“Litigation should always be avoided in the initial stage itself”

A buyer should always be aware of the words being cited in the agreement to sell as well as the sale deed as it tends to protect his interest. The buyer should be aware of the fraudulent sellers and should always inspect. A judge should at time eliminate the infection *sensu stricto* and decide the case on merits and protection the interest of the person who is not at fault. It is not only the buyer of a land be beware, but the purchaser of a flat from a construction developer should also be beware of the practices adopted by the developers and always execute a sale deed, as a letter of allotment it a mere letter and has no legal sanctity for proving one’s ownership in a property. There have been numerous cases where the purchaser treats the letter of allotment as the latter granting him the rights in the property and in the eyes of law, even after paying the full amount is not the owner of the said property.

Also, in cases of appointing a Power of Attorney, power should only be granted to a trustworthy person and only in exceptional circumstances in consonance with the provisions of law in force. It should always be kept in mind that the developers will always tend to protect their own interest and hamper the interest of the seller, therefore the seller should at times be aware of his rights and should take help from a legal professional while executing a sale deed.

REFERENCES

ⁱ Section 54, The Transfer of Property Act 1882

ⁱⁱ *Ibid.*

ⁱⁱⁱ Transfer of Property Act, 1882

^{iv} Section 11, Indian Contract Act 1872

^v Section 54, Transfer of Property Act, 1882

^{vi} Under Section 1A of the Powers of Attorney Act 1882, a power of attorney includes any instrument empowering a specified person to act for and in the name of the person executing it. Power of Attorney (POA) is also defined under Sec. 2(21) of the Indian Stamp Act, 1899, according to which Power of Attorney includes any instrument (not chargeable with a fee under the law relating to the Court fees for the time being in force) empowering a specified person to act for and in the name of the person executing it.

^{vii} (2012) 1 SCC 656

^{viii} Section 17, India Registration Act 1908

^{ix} (2012) 1 SCC 656

^x *AIR* 2008 SC 509

^{xi} The Specific Relief Act 1963

^{xii} The Specific Relief (Amendment) Act 2018