

***De Jure***  
***SEPTEMBER 18, 2023***

**AGREEMENT TO SELL or SALE?**



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Often at times, a buyer/purchaser believes that upon having executed an Agreement to Sell / Agreement for Sale and by making payment of entire consideration to the vendor/ seller coupled with a Power of Attorney in his favour to deal with the immovable property constitutes a transfer of the subject property in his favour and the Agreement to Sell becomes a valid title document whereunder the subject property is transferred to him absolutely and forever.

The clarity in relation to a valid transfer of the immovable property in favour of the purchaser has been clarified and dealt with by the Hon'ble Supreme Court of India as to when an Agreement to Sell shall qualify as a title document through a recent judgment passed in the matter of *Ghanshyam versus Yogendra Rathi*<sup>1</sup>.

The facts of the abovementioned case are as follows:

- a) The Appellant (Mr. Ghanshyam) executed the following documents in favour of the Respondent:
- (i) An Agreement to Sell dated April 10, 2002 ("**Agreement to Sell**") in favour of the Respondent (Mr. Yogendra Rathi) having agreed to sell an immovable property situated in Delhi, India;
  - (ii) Power of Attorney;
  - (iii) Memo of Possession;
  - (iv) Receipt of payment of the sale consideration; and
  - (v) 'Will' dated April 10, 2002 executed by the Appellant in favour of the Respondent thereby bequeathing the immovable property in favour of the Respondent.

However, at the same time at the request of the Appellant, the Respondent permitted the Appellant to occupy a portion of the immovable property for a period of three (3) months as a licensee. On account of the Appellant having failed to vacate the portion so occupied, the Respondent was left with no other alternative but to file a suit for eviction against the Respondent.

- b) The Respondent proved his right over the immovable property before the trial court and accordingly, a decree of eviction and payment of mesne profits came to be passed by the trial court against the Appellant. Thereafter, the Appellant filed an Appeal on

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<sup>1</sup> (2023) 7 SCC 361

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the question as to whether the above documents confer a valid title upon the Respondent so as to entitle Respondent to obtain a decree of eviction and mesne profits. Since the Appellant had failed to raise the abovementioned ground in his pleadings before the trial court and even before the first appellate court, the Hon'ble High Court in Second Appeal held that as such, the Second Appeal does not involve a substantial question of law and dismissed the Appeal. The Appellant being aggrieved by dismissal of the Second Appeal approached the Hon'ble Supreme Court by way of filing a Civil Appeal.

## Analysis

- c) The Supreme Court through its judgment clarified that Agreement to Sell is not a document of title or a deed of transfer of the property by sale and as such, may not confer absolute title upon the Respondent over the immovable property under question in view of Section 54 of Transfer of Property Act, 1882 ("**TOPA**"). However, given the facts and circumstances of the present case, the fact that the Respondent was put in possession of the immovable property which was evidenced through the '*possession memo*' issued by Appellant in favour of the Respondent, the Respondent is having a *de facto* possessory right over the immovable property which is liable to be protected under Section 53A of TOPA and cannot be disturbed by the Appellant. Further, the Appellant had merely permissive rights to occupy the portion for a stipulated period and in view thereof, the occupancy of the Appellant pursuant to handing over possession of the immovable property to the Respondent could only be construed as a '*licensee*' of the Respondent and does not possess any such rights as an owner.
  - d) The Supreme Court also held that since the documents mentioned above were proven by the Respondent to be genuine, the Respondent is in possession of the immovable property at least in part-performance of the Agreement to Sell which cannot be disturbed or disputed by the Appellant and further since, the Appellant's licence having been terminated, the Appellant is obligated to restore possession of the portion of immovable property back to the Respondent having rightful possessory title over the immovable property.
  - e) The Hon'ble Supreme Court also held that based on the Power of Attorney executed by the Appellant in favour of the Respondent, neither a sale deed nor any other action had been taken by Respondent which would have conferred title in respect of the immovable property upon the Respondent rendering the Power of Attorney as useless. Further, the Will executed by the Appellant in favour of the Respondent is also meaningless as the Will can only come into effect after the death of the testator (Appellant) and not during the lifetime of the Appellant and the Supreme Court also held that any such practice which is prevalent in any of the States or High Courts cannot override the specific provision of Section 54 of TOPA.
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- f) While dismissing the Civil Appeal, the Hon'ble Supreme Court relied upon the judgments of the Delhi High Court in *Imtiaz Ali versus Nasim Ahmed*<sup>2</sup> and *G. Ram versus Delhi Development Authority*<sup>3</sup> which observed that an Agreement to Sell or the power of attorney are not documents of transfer and as such no interest in the immovable property stands transferred by mere execution unless as contemplated under Section 54 of TOPA and registered under the Indian Registration Act, 1908. Further, reliance was placed on the judgment passed by the Supreme Court in the matter of *Suraj Lamp & Industries Pvt. Ltd. versus State of Haryana & Anr*<sup>4</sup> which deprecates the transfer of immovable property through Agreement to Sell, General Power of Attorney and Will instead of a registered Conveyance Deed.
- g) One must also be mindful of the decision that has been passed in the judgment of *N.N. Global Mercantile Private Limited versus Indo Unique Flame Ltd.*<sup>5</sup> which held that an unstamped instrument cannot be taken into cognizance for any purpose and it remains unenforceable. No Public Officer nor Court nor Arbitrator, can permit any person to ask them to act upon it or receive it as evidence. In law, such an unstamped agreement is bereft of life and not enforceable in law, cannot exist in law and would be void.
- h) From the aforesaid discussion, we conclude that an instrument of title to an immovable property is a vital document to claim, enforce one's rights and enjoy the benefits arising from and out of the immovable property to be conveyed. Therefore, while entering into any such deed of conveyance, the seller as well as the purchaser must ensure that all the parameters of Section 54 of TOPA are complied with including but not limited to requirement of stamping and registering the deed with the concerned authorities. Any such evasion and/or negligence would lead to a defect in conferring the title of the property unto the purchaser and the purchaser will then be required to seek appropriate measures and reliefs from the Courts to perfect the title to such immovable property.

**CONTRIBUTED BY:**

**Aradhana Bhansali, Partner:** [aradhana@rajaniassociates.net](mailto:aradhana@rajaniassociates.net)

**Digant Bhatt, Associate:** [dbhatt@rajaniassociates.net](mailto:dbhatt@rajaniassociates.net)

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<sup>2</sup> **[AIR 1987 DELHI 36]**

<sup>3</sup> **[AIR 2003 DELHI 120]**

<sup>4</sup> **[(2012) 1 SCC 656]**

<sup>5</sup> **[(2023) 7 SCC 1]**

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## CONTACT US



**Address:** Krishna Chambers  
59 New Marine Lines  
Churchgate  
Mumbai 400020  
Maharashtra, India  
**Telephone:** (+91-22) 40961000  
**Facsimile:** (+91-22) 40961010  
**Email:** [dejure@rajaniassociates.net](mailto:dejure@rajaniassociates.net)  
**Website:** [www.rajaniassociates.net](http://www.rajaniassociates.net)

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