



Year 2009 Volume 1

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LAW IN FOCUS

A Newsletter of
Rahman's Chamber

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Should the Developer and the Landowner Execute a Registered Deed of Exchange?

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The multi-storied residential/commercial buildings which are located in important areas of Dhaka and some other major cities of Bangladesh are now-a-days constructed mostly under a joint venture agreement. Where akin like partnership the landowner comes with his land and a professional builder /developer ("Developer") comes with his capital investment and service. They jointly construct multistoried buildings in the said land. The landowner in receives 40% to 50% of the flats/space of the said building and retains proportional land. The rest of the flats/spaces are owned or sold by the developer along with proportional land under a registered Power of attorney executed by landowner.

The parties generally execute an unregistered Joint venture agreement, where the above understanding is reflected. The landlord execute the registered power of attorney authorizing the developer to construct the building on his/her land and allow the developer to do all other acts required to sell its portion of flats/space along with proportional land to third party purchaser and also mortgage the developer's portion of land as per joint venture agreement to any schedule bank for obtaining loan.

The above transaction however invites "exchange" of immovable properties. Section 118 of the Transfer of Property Act 1882 ("TPA") defined "Exchange" as mutual transfer of ownership of one thing for the ownership of another, one of which is not money. Hence, vide the above arrangement the landowner is in effect "exchanging" portion of his land with a percentage of flats constructed thereon owned and constructed by the developer.

Section 118 of the Transfer of Property Act 1882 read with section 54 states when such exchange is an exchange of "immovable property", it must be made through registered instrument followed by delivery of possession.

As per section 3(25) of the General Clauses Act 1897 "immovable property" means land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth". Any right of way, superstructure of a house etc. are also immovable property, which are transferable. Vide section 6 of TPA, certainly the flats constructed by the Developer on the land are immovable property, duly transferable irrespective of transfer of any proportional land thereof.

Therefore, it seems that the Landowner and the Developers required executing a deed of exchange, registration of which is compulsory vide section 17(b) of the Registration Act 1908 and section 54 of TPA.

As per the paragraph 32 of the schedule I under section 3 the Stamp Act 1899, same stamp duty is payable as that of transfer by sale, to be calculated upon the property of greatest value for exchange. The developers are in particular reluctant to do this as the landlord / the developer will have to pay huge amount as stamp duty. Hence, the above practice developed, where the parties execute an unregistered joint venture agreement along with a power of attorney as stated above.

Under the existing practice, due to the presence of a registered power of attorney, the Developer can lawfully sell, the proportional land it receives from the landowner and also the flats it owns, to a third party buyer.

The difficulty is that the landowner is left with an unregistered deed of agreement only to claim its title on the flats actually owned and developed by the Developer. This difficulty is not understood and/or realized since in most cases the landowners themselves live in the flats instead of selling it to third parties.

Although the landowner receives the possession, however, a third party purchaser will face problem with title if he/she purchase a flat from the landowner which is constructed under a joint venture agreement. It is simply because the Developer never "transfers" its flat to the landowner as there is no registered instrument of transfer. However, executing a registered deed of exchange followed by a deed of sale executed to the purchaser would be double taxation.

Hence, alternatively a construction contract may be executed where the developer is merely a contractor, who only receives proceeds for sale for agreed number of flats all owned by landowner under a registered power of attorney against its bills payable by the landowner.

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