

TODAY the sale of most property, especially in the cities and big towns, is done through real estate agents. A person who wants to buy a property will approach a real estate agent if no direct seller is known. The same applies to sellers.

Real estate agents have a database of property available, and can show the buyer a range of property within his budget and enable him to make a better choice.

A busy seller may not even be interested in meeting the buyer. He may leave it to the agent to deal with the buyer. All he is interested in, may be to sign the Sale and Purchase Agreement, and get his payment within the stipulated period.

The buyer is more often in contact with the agent who showed him the property and is actively involved in securing the signing of the Sale and Purchase Agreement. This may be prompted by the fact that the agent usually gets his commission when the Sale and Purchase Agreement is signed.

Bankrupt seller

If a Sale and Purchase Agreement is signed with a bankrupt, the buyer may well lose the payment he made upon signing the agreement unless the bankrupt is solvent.

However, things can go wrong even though one has an agent and the Sale and Purchase Agreement is prepared by and signed before a solicitor. A reader narrates the following situation:

A purchaser wanted to buy a property and contacted a real estate agent. The agent showed him a few properties, one of which he decided to purchase. The purchase price was agreed on and an amount representing 2%

was paid to the agent as earnest money.

Another 8% was paid to the seller at the time of signing of the Sale and Purchase Agreement to make up 10%. This is because the 2% paid to the estate agent is considered as payment to the seller. In due course, the Sale and Purchase Agreement was signed.

However, a month later, the solicitors representing the purchaser informed him that the seller had been adjudicated a bankrupt a few months earlier. As such, it would not be possible to transfer the property unless consent was obtained from the Insolvency Department.

Given this scenario, the buyer wants to know whether he will have to wait for the Insolvency Department to give its approval or whether he can pull out of the transaction and get his money back.

Apart from that, in what way would the real estate agent or solicitor be responsible for any possible loss suffered by the buyer?

The situation here gives rise to numerous possibilities. There are also implications for the agent who has received the equivalent of 2% of the purchase price and would likely have taken it as payment of his commission when the agreement was signed.

To start with, the Sale and Purchase Agreement would in law be void. This is because at the time it was signed, the seller had no legal right to sign the agreement and receive the money. On basic legal principles, the buyer would be entitled to a refund of what is paid.

Void agreement

This is by virtue of Section 66 of the Contracts Act 1950 which states: "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it".

However, as the seller is a bankrupt, he would no longer have any capacity to pay back. In fact, on a receiving order being made, he would have lost his rights to deal with his property or dispose of it. Hence the need to get the consent of the Insolvency Department.

Waiting for consent from the Insolvency Department would be an option. However, it does not mean that at the end, the buyer will necessarily get the property by paying the balance of the purchase price. The interest of the creditors would be a relevant

consideration. If the seller's assets are more than his liabilities, such consent may well be forthcoming.

Otherwise the Insolvency Department may require for the full sum to be paid for the transaction to be completed. If so, the buyer will have to choose between aborting the transaction or completing it at what would be a premium.

Recovery

Of course, if the buyer decides not to go ahead with the transaction, he could lodge a claim with the Insolvency Department in respect of the initial sum paid. If this is accepted, it will allow him to join the unsecured creditors.

Once the bankrupt's assets have been identified and gathered, any secured creditor will be entitled to priority in payment. What is then left will have to be shared by the unsecured creditors together with dividends declared after any regular payments made by the bankrupt over a period of time.

On the basis of present standards of practice, the buyer will not have any cause of action against the agent or the solicitors. There would only be wrongdoing by

the agent or solicitors if they had knowledge that the seller was a bankrupt.

With regard to the 2% received and kept by the agent, the buyer will also have no rights to seek a refund from the agent. This is because it is money deemed to be paid to the seller. If at all, it would be for the Insolvency Department to claim this amount from the agent.

Conclusion

In hindsight, the situation could have been avoided if a bankruptcy search has been made prior to the signing of the Sale and Purchase agreement or for that matter, before the earnest deposit was paid.

Such bankruptcy checks are presently done at the behest of financial institutions before a loan is released. If the difference between the loan sum and balance purchase price is held back until the loan is received, it could also benefit from a bankruptcy search.

It may well be that the bankrupt may not know about his status as a bankrupt. But this is unlikely or rare. This is because before a person is made a bankrupt, various notices and cause papers would have been directed to him.

If he could not be served personally, these papers would have been served on him by substituted service. As such, even if he did not know, he would be deemed to have known.

In accepting the initial deposit, the bankrupt would no doubt have committed an offence. For this, there could be action taken against him but this would be of little comfort to the buyer in terms of being compensated for the loss he has suffered.

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