

**ACQUISITION OF PROPERTY
THROUGH
PURCHASE, WILL, INHERITANCE,
NOMINATION, GIFT
AND
BANK AUCTIONS.**

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WILL:

According to Section 2(h) of Indian Succession Act, 1925, "Will" means a legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death."

According to Section 3(64) of General Clauses Act, 1987, "Will as including Codicil and every writing making a voluntary posthumous disposition of property."

According to Section 2(d) of Indian Succession Act, 1925 'Codicil' means an instrument made in relation to Will and explaining, altering or adding to its dispositions and is deemed to form part of the Will.

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Types of Wills

There are various kinds of Wills and they are as follows:

Conditional or Contingent:

A Will expressed to take effect in the event of happening of some contingency or conditional.

Joint Wills:

When two or more persons agree to make a co-joint Will

Mutual Wills:

A Will is mutual when two testators confer upon each other reciprocal benefits.

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Duplicate Wills:

A testator may make a Will in duplicate one to be kept by him and to be deposited in safe custody with a bank or executor.

Holograph Wills:

A Will entirely in the handwriting of the Testator.

Privileged and Unprivileged Wills:

A soldier engaged in an actual warfare or an airman so engaged or a mariner being at sea may pronounce his Will by mouth before two witnesses. Wills so pronounced by such persons are Privileged Will and by persons other than those are called Unprivileged Wills.

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WHO CAN MAKE THE WILL?

Every person of sound mind, not being minor may dispose of his property by Will. According to Sec. 59 Indian Succession Act, a testator is presumed to be sane and to have a mental capacity to make valid Will. However no person can make Will while he is in a state of mind arising from intoxication or from illness or from any other cause such that he does not know what he is doing. Even persons who are deaf or dumb or blind can make Will provided they are aware of their action. Further a person who is ordinarily insane, may make his Will during the interval in which he is of sound mind.

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NOMINATION

WHETHER NOMINATION IS A WILL?

Nomination does not prima facie confer any beneficial interest on the nominee nor does it give the right to ownership.

In the case of *Ram Chander Talwar and Anr. v. Devender Kumar Talwar and Ors.* “it was held by the Supreme Court that the nominee is merely placed in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. But it by no stretch of imagination makes the nominee the owner of the money lying in the account.”

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Nomination is the process whereby a person is appointed to hold and take care of the flat after the death of the owner of the flat (in the present case) until it is transferred to the legal heirs by way of a Will or any other instrument of transfer or under succession laws.

And a nominee in such a case, therefore, is only a caretaker of the flat and not the owner thereof. The nominee will only hold the flat of the deceased as a trustee and will be legally bound to transfer it as per the provisions of the Will or the legal heirs as per the applicable laws of succession.

Upon death of a person, his interest stands transferred to the person nominated by him. Thus, a nomination is a facility to provide the housing society with a representative with whom it can deal with on the death of a person.

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In case of a flat, nomination does not confer any permanent right upon the nominee nor does it create any legal right in his favour.

If a Will is not made, then the legal heirs would be those as per the succession laws applicable to the deceased, where the structure is predefined on who gets how much and in what proportion.

For example, if a man during his lifetime executes a Will in which he mentions his wife and children as legal heirs, then after his death, his wife and children are the legal owners of his assets. It is essential that one needs to execute a Will. It is the ultimate source of truth and replaces the succession law. Nominee can also be one of the legal heirs.

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PROBATE

Probate is a certificate granted under the seal of Competent Court, certifying the Will as the Will of the testator and granting the administration of the estate of the deceased in accordance with that Will to the executor named under the Will.

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HOW TO TAKE PROBATE?

Under Section 264 of The Indian Succession Act, 1925:

A petition for probate must be filed in court along with the time of the testator's death that the writing annexed in his last will and testament that will in question.

It should contain the following facts:

- That it was duly executed
- The amount of assets which are likely to come to the petitioner's hands
- The petitioner is the executor named in the will
- The application for probate shall be signed and verified by the executor or beneficiary.

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GIFT

Gift is the transfer of ownership in an existing movable or immovable property without any consideration.

HOW TO CREATE GIFT

Can be created by registered instrument signed by or on behalf of donor and attested by at least two witnesses.

A Gift Deed of immovable property is required to be compulsorily registered.

ACCEPTANCE BY DONEE

Acceptance can be by conduct, silence or implied (except in case of onerous gifts). Donee who possesses knowledge of gift does not show any disapproval is said to be acceptance the same.

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GIFT TO MINOR

A minor donee who can be said to be competent to contract in law can accept a gift either on his own or by someone on his behalf.

GIFT BY WAY OF WILL

A testamentary gift is called a ‘will’ which comes into operation only after the death of the transferor (testator). A father can gift his self-acquired property to his son/family members for the benefit of the receiver.

GIFT OF ANCESTRAL PROPERTY UNDER HINDU LAW

A Hindu karta or member of coparcenary property can dispose of the said property only if –

1. disposition is of a reasonable portion
2. is for a recognized ‘pious’ purpose

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BANK AUCTIONS

With the zooming real estate prices showing no sign of hitting a speed bump, many prospective buyers have begun to tap another avenue to buy cheap houses, i.e. to say auction properties. Though it's not a common practice, banks auction the houses that they foreclose. What makes them attractive is that their selling price is usually advertised as being 15-20% less than the prevailing market price in that particular locality. However, before one jumps at the prospect of buying one, it is advisable to consider its multi fold ramifications.

A bank auctions the properties for which the owner is unable to repay the home loan taken from the bank. This means that there could be various incidental expenses that you too could have to pay. When a borrower misses a couple of EMIs on his home loan, the bank sends him notices. If he continues to default for a few months, the bank takes over the house under the SARFAESI Act. The property is then put up for auction and this is advertised in the local dailies.

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As the bank is only interested in getting its outstanding principal and some interest component, this amount is listed as the reserve price for the auction. This is usually much lower than the price that the property would fetch in the market. If the final auction price is higher than the reserve price, the extra amount is handed over to the original owner.

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AS IS WHERE IS BASIS

Secured creditor recover the debt by way of sale under Section 13 (4) of SARFAESI Act, 2002. Generally the assets are sold on "as is where is" and "as is what is" basis and while effecting sale by inviting tender from public or holding public action, the details of the encumbrance known to the secure creditor are declared/furnished to the public at large. Though while interpreting Rule 8(6) of Security Interest (Enforcement) Rule, 2002, the Bank/Financial Institution is imposed with the accountability to conduct due diligence/make thorough search on the assets before the sale, it is advisable to carry out detailed title investigation and due diligence of the property before bidding for a property in order to safeguard your rights and interests. The plea of ignorance of the knowledge of encumbrance on the assets sold on the pretext of "as is where is" is no longer an acceptable argument in the light of the judicial interpretation.

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WHAT TO CHECK

- The low reserve price may seem tempting, but you need to ascertain whether the amount mentioned by the bank is the gross price or if there will be additional costs that you may have to pay later.
- Whether the title is clear, marketable and without encumbrances
- Whether there is any unpaid maintenance fees, other incidental charges pending with the society
- Whether there are any unpaid taxes with the municipal authorities
- It is a must to visit the property and check its condition, admeasurement, etc. before bidding for the property
- To check if the utility services are running in the said property
- To get an estimated cost of renovation that would be required, if any
- Check for all incidental prices attached with the property

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