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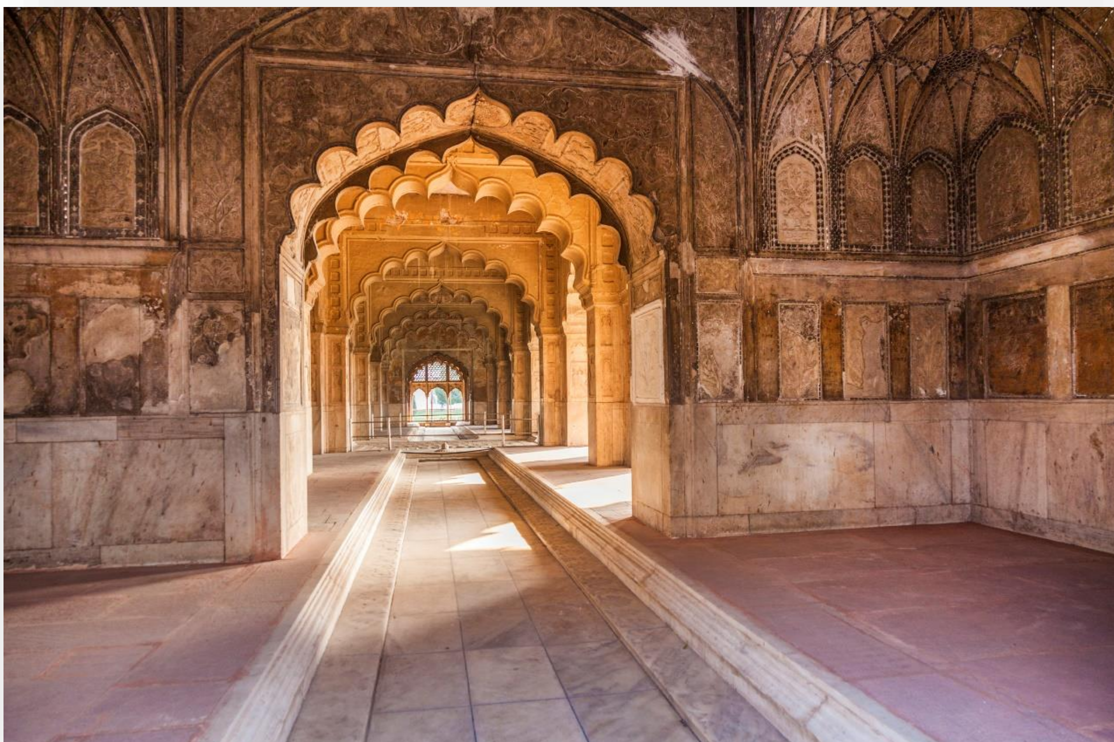

## AHLAWAT & ASSOCIATES ADVOCATES

## Buying and Selling Real Estate in India

ILN REAL ESTATE GROUP

## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER INDIAN LAW

**INVESTMENT AND CONVEYANCE OF REAL ESTATE IN INDIA**

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This chapter offers an overview with respect to investment in and conveyancing of real estate in India. The contents of this chapter are not intended to create and do not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

This chapter describes the law and procedure in force in India at the date of preparation of this chapter and the contents, statutes, regulations, and/or rules are subject to amendments and alterations in due course. The author hereby does not assume any duty to update the contents of this guide.

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**1. INTRODUCTION TO REAL ESTATE IN INDIA**

Since the liberalization of Indian economy, the real estate sector has been gradually growing and adopting to technologies that improve the market access, efficiency, quality, and consumer experience. In the last fifteen years, post liberalization of the economy, Indian real estate business has taken an upturn and is expected to grow multifold in the next decade.

The developments in real estate sector has been influenced by the all-around developments in the retail, hospitality, entertainment, education and information technology sectors. Major factors contributing to this development are favorable demographics, increased purchasing power, existence of customer-friendly banks and housing finance companies and favorable reforms initiated by the government to attract global investors. Further, increase in the business opportunities and migration of the labor forces acting as a fuel has increased the demand for commercial and residential space.

The real estate sector in India is being recognized as a developing sector that is driving the economic growth engine of the country. At present, there are various developments and elevations which are taking place in the real estate sector, on the basis of which Non-Resident Indians and Person of Indian Origin (PIO) have been permitted to own immovable property in India. On this basis, the past and future expected transformation of India, the real estate sector is being looked at as a unique market to invest for a long term with high possible rate of return.

## 2. LEGISLATIONS GOVERNING REAL ESTATE

Despite there being plethora of laws governing the real estate sector in India, most of the enactments are quite old and major amendments to existing laws are required to make them relevant to modern day requirements and transformations in the ever-changing dynamic sector. The Central laws governing real estate include:

### 2.1. Transfer of Property Act, 1882

The transfer of Property Act is a central act regulating the transfer of property particularly immovable in nature and enumerates the general principles of realty, like part-performance. The Act also specifies provisions for dealing with property through sale, exchange, mortgage, lease, lien and gift. A person acquiring immovable property or any share/interest in it is presumed to have notice of the title of any other person who was in actual possession of such property.

### 2.2. The Indian Contract Act, 1872

This legislation is the primary enactment governing essentials of a contract including parameters to ascertain capacity of an individual to contract. A contract pertaining to realty can be entered into, among others, by an individual (who is not a minor or of unsound mind, as per the Indian laws), partners of a firm, a corporate legal entity, a trust, a sole corporation, the manager of an undivided family, and a foreigner, however, all the essential requirements of a valid contract, i.e. consideration, intention to contract and validity under the law of the land must be satisfied.

### 2.3. The Registration Act, 1908

The Act was enacted to ensure conservation of evidence, assurances, title, publication of documents and prevention of fraud. It details the formalities for registering an instrument and specifically enumerates the instruments which are mandatorily required to be registered. An unregistered document, effectuating transfer, will not affect the property comprised in it, nor such unregistered document be received as an evidence of any transaction affecting such property (except as evidence of a contract in a suit for specific performance or as evidence of part-performance under the Transfer of Property Act or as collateral), unless the document/instrument has been duly registered.

2.4. **The Indian Stamp Act, 1899**

The Stamp Act is a fiscal enactment on the basis of which stamp duties are levied on transactions and the instrument effectuating the transaction, and the same is directly linked to the aforementioned Registration Act. The stamp duty is required to be paid on all instruments which are registered, and the rate varies from state to state. Some states even have double stamp incidence, primarily on immovable property and then on the development thereupon.

2.5. **The Real Estate (Regulation and Development) Act, 2016**

The Central Government, through the Ministry of Housing and Urban Poverty Alleviation, has enacted the Act. It is an Act to establish the Real Estate Regularity Authority for the regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, or a real estate sector project in an efficient and transparent manner and to protect the interests of the consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority.

2.6. **The Indian Evidence Act, 1872**

Under the Act, in the event status of any person as the owner of a piece of immovable property is questioned, of which such person is shown to be in possession of, the burden of proof clarifying that such person is not the owner lies on the person who asserts that person in possession of immovable property is not the owner.

2.7. **Urban Land (Celling and Regulation) Act, 1976**

This legislation affixed a ceiling on the vacant urban land that a 'person' in urban clusters can acquire and hold. Under the Act, excess vacant land is either to be surrendered to the Competent Authority appointed under the Act for a small compensation, or to be developed by its holder only for specified purposes. Even though the Government of India has repealed this Act in relation to most areas, it is still in effect in certain states.

## 3. CATEGORIZATION OF REAL ESTATE

3.1. **On the basis of ownership**

3.1.1. ***Freehold Property***

Refers to an estate which is free from the hold of any entity, besides the owner. In its true essence the owner alone enjoys the complete ownership and can utilize the estate for any purpose (renovate or transfer or lease) in accordance with the local regulations. In its strict interpretation, sale of such estate will not require any prior legal or government consent and thus has less paperwork attached. For such reasons, a freehold asset is more expensive when compared to a leasehold asset.

#### 3.1.2. *Leasehold Property*

Refers to an estate which has been leased to a person for a certain number of years but the estate at all times remains under the ownership of the state. Utilization of the Leasehold estates if affixed to the purpose for which it was obtained. Since the person is possession of such estate is not the owner and property is not freehold, transfer of such estate requires prior state consent (obtained at the land office).

### 3.2. On the basis of land use

#### 3.2.1. *Residential*

Such land is utilized exclusively or intended to be used for family dwelling or associated uses for residential purposes. Zoning for residential use may permit some services or work opportunities or may totally exclude business and industry. It may permit high density land use or only permit low density uses.

#### 3.2.2. *Commercial*

Such land is utilized for development of such structures or office buildings, medical centers, hotels, malls, retail stores, warehouses, garages etc.

#### 3.2.3. *Mixed Use*

Refers to the provision for undertaking non-residential activity in residential premises/land. Such land allows access to commercial activities in the proximity of the residences and reduces the need for commuting across zones in the city. However, at the same time, it needs to be regulated in order to manage and mitigate the associated adverse impact related to congestion, increased traffic and increased pressure on civic amenities.

#### 3.2.4. *Industrial*

Such land is typically a premise for undertaking industrial activity with non-hazardous, non-polluting performance and may include a group of small industrial units with common services and facilities of non-polluting nature.

## 4. PURCHASE OF IMMOVABLE PROPERTY

In the earlier constitutional regime, the right to property was guaranteed by the Constitution of India as a fundamental right. However, later vide 44$^{th}$ constitutional amendment, the right to property was moved from being a fundamental right to be a constitutional right under article 300A. The said article of the Constitution of India embodies the doctrine of eminent domain which specifies that the Government of India has the right to acquire immovable property of person in India in public interest.

A foreign national of non-Indian origin resident outside India cannot buy any immovable property in India. At present, apart from Indian non-residents as specified below, no person who is resident outside India can acquire any immovable property in India.

- Citizen of India residing outside; and
- Person of Indian origin residing outside.

The aforementioned persons are permitted to acquire immovable property in India, however, cannot acquire agricultural property, plantation property or a farmhouse, provided that the payment for purchase of the same has been made out of:

- Funds received in India through normal banking channel by way of inward remittance from any place outside India;
- Funds held in any non-resident account maintained in India in accordance with the foreign exchange regulations.

## 5. PRE-REQUISITES TO PURCHASE OF IMMOVABLE PROPERTY

### 5.1. Verification of title and ownership of Seller:

buyer should conduct due diligence over the immovable property to ascertain the existence of the title with the seller, the nature of the title and its marketability and the ability of the seller to convey a clear and marketable title free from any kind of encumbrance over the immovable property.

### 5.2. Verification of identity and authority of Seller

Similar to verification of title to the property, the purchaser must ascertain the identity of the seller and any specific conditions, governing the ability of the seller to convey the immovable property.

### 5.3. Conversion and land use permission

With increasing urbanisation and merging of revenue lands with urban conglomerates, and restriction on purchase of agricultural property by non-agriculturists, conversion of property for non-agricultural usage has assumed crucial significance. In the event actual use of land is different from the notified zoning, it is mandatory to obtain orders from the Town Planning Authority permitting change of land use.

### 5.4. Encumbrances search

Inspection of registers and records at the jurisdictional sub-registrar of assurances, where documents pertaining to immovable property are registered and information available on the official web portal of the Ministry of Corporate Affairs, in case of the seller being a corporate entity, must be conducted as the same will reveal information of any registered encumbrance on the property.

### 5.5. Physical inspection of the immovable property

It is recommended that the purchaser must undertake a physical inspection and confirm the extent and measurement of the immovable property intending to be purchased. In case of a vacant land, it is recommended to identify and demarcate the boundaries and access to the property and further, ascertain any other physical attributes that may impede enjoyment of the property.

## 6. MODES OF CONVEYANCING IMMOVABLE PROPERTY

Conveyancing is the legal process for transfer of ownership of property from a seller to the buyer and this term is used in both buying and selling of immovable property. Amongst various modes of conveyancing, the most commonly used means of transferring a property in India are:

### 6.1. Sale

Sale is a transfer of ownership in exchange for a price paid or promised or part paid, and part promised. It is pertinent to mention that as per the Transfer of Property Act, 1882 immovable property does not include standing timber, growing crops or grass.

### 6.2. Gift

A gift can be movable or immovable property that is transferable and tangible. As gifting is a voluntary action, the instrument evidencing gift must mention that the instrument has been made voluntarily and out of the donor's own choice without any force or coercion. The deed should also declare that the donor i.e. person who is gifting, is solvent (not bankrupt) and that the gift is being made without any consideration. However, there are certain aspects that need to be kept in mind while making gift – (i) as minor is not capable of entering into a valid contract, so the minor cannot make a valid gift deed; (ii) a gift once made cannot be revoked; (iii) gifts made to relatives defined by the Income Tax Act, 1916 are exempt from tax in the hands of the donee.

### 6.3. Lease

Section 105 of the Transfer of Property Act, 1882 states that a lease of immovable property is a transfer of a right to such property, for a certain time in consideration of the price paid or promised or any other thing of value, to be rendered periodically on specific occasions to the transferor by the transferee, who accepts the transfer on such terms. In simple terms, a lease is a contract that outlines the terms under which one party agrees to rent property owned by another party. It guarantees the transferor, tenant, use of an asset and guarantees the transferor, the property owned or landlord, regular payments from the transferor for a specific number of months or years.

### 6.4. Inheritance or Will

After the death of a person, his property devolves in two ways - according to his Will i.e. testamentary, or according to the respective laws of succession, when no Will is made. In case an individual dies intestate (no Will is made), the laws of succession come into play. The law of succession defines the rules of devolution of property in case a person dies without making a Will. These rules provide for a category of persons and percentage of property that will devolve on each of such persons.

Under the Indian Succession Act 1925, a Will is a legal declaration of the intention of the testator, with respect to his property which he desires to be carried into effect after his death, however certain formalities must be complied with in order to make a valid

Will. It must be signed and attested, as required by law. A Will is primarily intended to dispose of property in the manner the Testator desires.

## 7. REGISTRATION AND MUTATION OF LAND RECORDS

The registration of a property involves adequate stamping and paying the registration charges for a sales deed and having it legally recorded at the sub-registrar's office. If the property is purchased from a developer, registering the property amounts of an act of legal conveyance. If it is the second or third transaction for the property, it could involve a duly stamped and registered transfer deed.

The second step after registering a property is Mutation of land records with respect to the same. Mutation refers to the change of title ownership from one person to another when the property is sold or transferred. By mutating a property, the new owner gets the property recorded on his name in the land revenue department and the government is able to charge property tax from the rightful owner. The documentation procedure and the fee payable vary from state to state. In case of ownership related to land, mutation is considered a vital document.

## 8. REAL ESTATE INVESTMENT TRUST

REIT is an acronym for Real Estate Investment Trust, which is basically a company which develops and own 'income producing' real estate properties. Initial Public Offering of India's first REIT was launched on 18th March'19. Shares of Indian REIT started trading from 01st April'19 in Bombay Stock Exchange. REITs are registered with the Securities and Exchange Board of India (SEBI) under SEBI (REITs) Regulations, 2014 (the Regulation) as amended from time to time. The SEBI REITs Regulations, inter alia, set out the registration requirements, procedure of registration, and eligibility requirements of REITs as well as that the primary players. It is mandatory for units of all REITs to be listed on a recognised stock exchange having nationwide trading terminals, whether publicly issued or privately placed.

REITs are companies that own or finance income-producing real estate in a range of property sectors. They provide all investors the chance to own valuable real estate, present the opportunity to access dividend-based income and total returns, and help communities grow, thrive and revitalise. REITs allow anyone to invest in portfolios of real estate assets the same way they invest in other industries – through the purchase of individual company stock or a mutual fund or exchange traded fund. The stockholders of a REIT earn a share of the income produced through real estate investment – without actually having to go out and buy, manage or finance property.

REITS may invest either directly or through a Special Purpose Vehicle (SPV). Where the investment is through a SPV, it is required to hold controlling interest and not less than 50% equity in such SPV. Also, the SPV in turn is required to hold 80% equity in the REIT assets.

Foreign investments have now been permitted in REITs after a circular notification by Reserve Bank of India.

The Reserve Bank of India clarified that downstream investment by REITs will be regarded as foreign investment if either the sponsor or the manager is not Indian 'owned and controlled' as defined in Regulation 14 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000.

**9. FOREIGN DIRECT INVESTMENT IN REAL ESTATE SECTOR**

Foreign Direct Investment in India is governed in accordance with the FDI policy and norms as laid out and amended from time to time by the Government of India. Furthermore, FDI in India is also governed by the Master circular on foreign investments issued by the Reserve Bank of India and Foreign Exchange Management (Transfer or Issue of security by any person residing outside India) Regulations, 2017 (TISPRO). The 'Consolidated FDI Policy Circular' is issued annually by the Department of Industrial Policy and Promotion (DIPP) of the Ministry of Commerce and Industry which elaborates the policies and processes with respect to FDI in India.

At present, 100% FDI under automatic route is allowed for construction development projects including but not limited to development of townships, roads or bridges, hotels, resorts, hospitals etc. However, it is important to note that FDI is not permitted in an entity which is engaged in Real Estate activities or construction of farmhouses. However, it has been clarified that the Real estate business shall not include the development of town shops, construction of residential/ commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014.

The present FDI policy also stipulate that each phase of the construction development project would be considered as a separate project. Further, the investor will be permitted to exit on completion of the project or after development of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage. However, a foreign investor can exit and repatriate foreign investment before the completion of project under automatic route, provided that a lock-in period of 3 years has been completed.