



**COUNTRY
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India

REAL ESTATE

Contributor

Solomon & Co.



Jonathan Solomon

Senior Partner | jonathan.solomon@slmnco.in

Michelle Solomon Le Page

Partner | michelle.solomon@slmnco.in

Agastya Sreenivasan

Associate | agastya.sreenivasan@slmnco.in

This country-specific Q&A provides an overview of real estate laws and regulations applicable in India.

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INDIA

REAL ESTATE



1. Overview

A transaction in real estate in India must take into consideration:

- The legal and contractual capacity of the transferor to transfer the property or interest proposed to be transferred;
- The legal and contractual capacity of the transferee to acquire and utilize the property or interest proposed to be acquired, for the intended purpose of acquisition; and
- Statutory requirements and restrictions on transfer and use of the property or interest proposed to be transferred.

The Republic of India is a federation of 28 States and 8 Union Territories, and is governed by laws enacted and rules and regulations framed by:

- Central Parliament on subjects in the Union List (e.g. taxes on income excluding agricultural income and taxes on the capital value of assets excluding agricultural land) and in the Concurrent List (e.g. transfer of property other than agricultural land, registration of deeds and documents, contracts, trusts);
- State Legislatures on subjects in the State List (e.g. municipal corporations and other local authorities, rights in or over land, including the relation of landlord and tenant and the collection of rents, maintenance of land records, taxes on lands and buildings) and in the Concurrent List to the extent they are not repugnant to any Central law provision on the same subject; and
- rules, regulations and bye-laws framed by local bodies like municipal corporations and statutory authorities such as planning and environmental authorities.

Many Central legislations on subjects in the Concurrent List (e.g. registration of documents) have State amendments.

Customary laws are applicable to the extent not inconsistent with the Constitution of India (e.g. Islamic Law is applicable to succession in the case of Mohammedans).

For our responses, Central laws and laws applicable in the state of Maharashtra (of which the capital city is Mumbai) have been taken into consideration. Note that some laws differ from state to state and that local laws may also apply depending upon the location of the property and type of transaction.

2. What is the main legislation relating to real estate ownership?

(i) Transfer of Property Act 1882 – which regulates the transfer of property including by way of sale, mortgage, lease, exchange, gift and transfer of actionable claims.

(ii) Real Estate (Regulation and Development) Act 2016 – which has been introduced to protect the interest of consumers in the real estate sector by establishing the Real Estate Regulatory Authority to regulate the sector and ensure the sale of plots, apartments and buildings in a transparent and efficient manner by making it compulsory for all pending and future real estate projects with land area in excess of 500 square meters and number of apartments in excess of 8, to be registered with the Real Estate Regulatory Authority; mandating material disclosures by the promoters on registration and in agreements executed with allottees of real estate projects; prescribing timelines for completion of projects and delivery of possession; prohibiting promoters from accepting any advance or deposit in excess of 10% of the total consideration without entering into an agreement for sale; restricting deviations from sanctioned and disclosed plans and specifications of the project and empowering allottees with remedial measures against defaults of the promoter; as also by providing mechanisms to allottees for expeditious dispute resolution. The provisions of this Act have overriding effect in case of inconsistent provisions contained in any other law in force.

(iii) Acts governing the ownership of flats (for example, Maharashtra Ownership Flats Act 1963 – which provides for the obligations of developers who construct apartment buildings for the purpose of sale of apartments – and Maharashtra Apartment Ownership Act 1970 – which provide for the rights and responsibilities of apartment owners who have chosen not to form a company or co-operative society).

(iv) Sums accepted from allottees of real estate projects have been classified as ‘financial debts’ for the purposes of the Insolvency and Bankruptcy Code, thereby providing aggrieved allottees with greater rights as ‘financial creditors’, including voting rights in meetings of the committee of creditors which is collectively entrusted with the management of the affairs of corporate debtors undergoing insolvency resolution and preference in distribution of debts on liquidation of corporate debtors.

(v) Co-operative Societies Acts applicable to the relevant States – which provide for the registration of co-operative societies, the rights and liabilities of its members, the management of societies and the settlement of disputes.

(vi) Rent Control Acts applicable to the relevant States – which provide for the fixing of standard rent and permitted increases in certain cases, which provides for specific cases in which a landlord may evict a tenant, which regulates sub-tenancies and which may provide for compulsory registration of lease and leave and license agreements. Note that the Model Tenancy Act 2021 was approved by the Union Cabinet in June 2021 for adoption by States and union territories. This Act seeks to: (i) establish a speedy adjudication mechanism for dispute resolution, (ii) regulate renting of premises, and (iii) protect interests of landlords and tenants. The Model Tenancy Act 2021, if implemented by a particular State, will prospectively repeal or amend the State’s Rent Control Act.

(vii) Indian Stamp Act 1889, and the relevant State Stamp Acts – to provide for the payment of stamp duty to the government upon certain instruments including agreements for sale, conveyances, mortgage deeds, agreements relating to the deposit of title deeds, reconveyances, gifts, leases, surrender of leases, leave and license agreements, powers of attorney, releases, etc. and consequences of failure or underpayment.

(viii) Registration Act 1908 – which provides for the compulsory registration of certain documents and sets out the procedure for registration and consequences for non-registration.

(ix) Land Revenue Codes which regulate land tenures

and conditions of grant of Government owned lands.

(x) Regional and Town Planning and Municipal Acts which regulate land use, construction and conversion.

(xi) Foreign Exchange Management Act 1999 and relevant regulations framed under it – which consolidate the law relating to foreign exchange.

(xii) Indian Succession Act 1925 – which regulates testamentary and intestate succession, in cases where the personal laws of the deceased do not apply.

3. Have any significant new laws which materially impact real estate investors and lenders come into force since December 2022 or are there any major anticipated new laws which are expected to materially impact them in the near future?

Real estate investors and lenders will have to be aware of the implications of the Real Estate (Regulation and Development) Act 2016. For example, 70% of the amounts realised from allottees for the real estate project, from time to time, need to be deposited in a separate account to cover the cost of construction and the land cost and are to be used only for that purpose. The promoter is allowed to withdraw amounts from this separate account to cover the cost of the project, in proportion to the percentage of completion of the project. The promoter is obliged to get his/her accounts audited within 6 months after the end of every financial year, with a confirmation from a chartered accountant that the amounts collected for a particular project have been utilised for that project and that withdrawals are proportionate with the percentage of completion of the project.

4. How is ownership of real estate proved?

Any transaction for transfer of interest in immovable property is required to be in writing and registered in the office of the “Sub-Registrar of Assurances”, subject to a few exceptions. Documents governing grant of land by government do not require registration. A document of transfer of interest in immovable property which is compulsorily registrable but has not been registered is not admissible in evidence in civil proceedings. Registration of instruments which are required to be registered will constitute deemed notice to the public of the immovable property transactions which have been effected by such instruments.

Most land holdings have been surveyed by government

authorities and allotted a revenue survey number and issued a "Record of Right" (in case of agricultural lands in Maharashtra) or "Property Register Card" (in case of non-agricultural lands in Maharashtra) and similar documents in other parts of India. These revenue documents record the name of the original owner and subsequent transfers as may have been notified to the authorities. The revenue documents provide *prima facie* evidence of ownership and devolution of title.

Documents registered in respect of the property in the office of the Sub-Registrar of Assurances and documents issued by the revenue authorities are necessary steps for establishing the ownership of real estate.

However, barring exceptions, an agreement for the transfer of immovable property or an interest therein (which does not itself operate to transfer any interest in land) is not required to be in writing or registered. A suit for specific performance of an unregistered agreement for sale of immovable property may be maintainable.

Also, devolution of title on the demise of the owner and whether the names of all heirs of the deceased have been recorded in the revenue records, require consideration.

5. Are there any restrictions on who can own real estate?

Persons resident outside India fall into the following three categories:

(i) non-resident Indians;

(ii) foreign nationals of Indian origin; and

(iii) foreign nationals of non-Indian origin.

(i) and (ii) can purchase or be gifted residential and commercial property (not agricultural land/plantation property/farm houses/private forest land which may only be inherited by (i) and (ii)).

(iii) cannot purchase any immovable property in India unless such property is acquired by way of inheritance from a person who was resident in India. (iii) can, however, acquire or transfer immovable property in India, on lease, for a period not exceeding 5 years. Foreign nationals of non-Indian origin who have acquired immovable property in India by way of inheritance with the specific approval of the Reserve Bank of India or have purchased the immovable property with the specific approval of the Reserve Bank of India cannot transfer such property without the prior permission of the Reserve Bank of India.

A foreign company cannot acquire immovable property in India. However, a foreign company which has established a branch office in India may acquire immovable property in India which is necessary or incidental to its activity, subject to certain conditions. A foreign company which has established a liaison office in India cannot acquire immovable property in India, but can acquire property by way of lease, for a period not exceeding 5 years. A branch office is subject to taxation in India; a liaison office is not, because it cannot earn revenue in India.

Foreign direct investment ("FDI") into India is governed by the Consolidated FDI Policy. Investment can be made into an Indian company by subscribing to or acquiring instruments, including equity shares, compulsorily convertible debentures, preference shares and certain other products available to foreign portfolio investors, within permissible limits.

- Foreign investment in incorporated or unincorporated entities (including companies, partnership firms, proprietary concerns, trusts, etc.) engaged or proposed to be engaged in "*real estate business*", construction of farm houses and/or trading in transferable development rights, is regulated. "*Real estate business*" means dealing in land and immovable property with a view to earning profit or income. It does not include the "*development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships and Real Estate Investment Trusts ("REITs") registered and regulated under the Securities and Exchange Board of India (REITs) Regulations 2014*". Earning of rent or income through leasing of property, which does not amount to a transfer, is also excluded from the scope of "*real estate business*".
- The Consolidated FDI Policy currently permits up to 100% investment, in resident entities engaged in "*Construction-development*" projects, under the "*Automatic Route*". "*Automatic Route*" means that prior approval of the government is not required for investment by non-resident entities in the capital of resident entities. Construction-development projects include the development of townships, construction of residential or commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities and other city and regional level infrastructure. Each

phase of the construction-development project is considered as a separate project for the purposes of the FDI policy. A foreign investor is permitted to exit the project and repatriate its foreign investment before the completion of a project under the Automatic Route (i.e. without government approval), provided that a lock-in-period of three years, calculated with reference to each tranche of foreign investment, has been completed. The transfer of a stake from one non-resident to another non-resident, without repatriation of investment, is not subject to any lock-in period and does not require government approval. However, the Indian investee company will be permitted to sell only “developed plots”, meaning plots where basic infrastructure (roads, water supply, street lighting, drainage and sewerage) has been made available.

- 100% FDI under the Automatic Route is permitted for investment in Industrial Parks, subject to satisfaction of certain conditions.
- 100% FDI under the Automatic Route is permitted in completed projects, for the operation and management of townships, malls, shopping complexes and business centres. Upon the receipt of the foreign investment, transfer of ownership and/or control of the investee company from resident to non-resident Indians is also permitted. However, a lock-in period of three years applies, calculated with reference to each tranche of FDI.
- Certain additional conditions apply to investments by Foreign Portfolio Investors, Foreign Institutional Investors and Foreign Venture Capital Investors.

External Commercial Borrowings (which are commercial loans raised by eligible resident entities from recognised non-resident entities) are not permitted to be utilised for any real estate activity involving owned or leased property, for buying, selling or renting of commercial or residential properties or land.

Under Indian law, a minor is not competent to enter into a contract. However, property can be acquired by a minor by inheritance or by the guardian for the minor or out of funds gifted to the minor. Transfer of immovable property during the minority of the holder can be effected with Court sanction.

6. What types of proprietary interests in

real estate can be created?

Freehold: Where the owners are dominant owners of the property in perpetuity with no obligation to make any payment to or seek consent from any other person and all other rights and interests in the property emanate from the owner. The absolute ownership of the owner is subject to some statutory restrictions e.g. on excavation and mining and extent and uses of construction.

Leasehold/Tenancy: Where the lessee/tenant has possession and use and income of the property for a fixed term or even in perpetuity, on condition that he pays rent and observes and performs the terms and conditions of the lease/tenancy, and the lessor/landlord has the right to terminate the lease/tenancy and take back possession, unless the lessee/tenant can claim protection from eviction under rent control legislation or the Transfer of Property Act.

Licensee/Occupancy Rights: Where a person is permitted by the owner or by the lessee/tenant (provided the terms of lease/tenancy permit the lessee/tenant to do so) to carry on a specified activity on the property of the owner/lessee on specified conditions.

Common Ownership: Where a building is owned by a Co-operative Society or Limited Company or Association of Apartment Owners/Condominium and individual apartments/offices/premises are acquired and used by Members/Shareholders/Apartment Owners on certain conditions.

Trusts: See our response to question 15 below.

7. Is ownership of real estate and the buildings on it separate?

Buildings form part of the land on which they are constructed and the ownership of the building vests in the owner of the land, unless there is a contract to the contrary.

In case land is leased from a lessor to a lessee, the concept of dual ownership may apply (in the absence of a contract to the contrary), which concept will allow the lessee to remove all things which he has attached to the earth (including structures or buildings). This is because the concept of dual ownership recognises the lessor as the owner of the open plot of land and the lessee (who has built a structure on the open plot of land) as the owner of the structure.

In case of common ownership, please refer to the response to question 8 below.

8. What are common ownership structures for ownership of commercial real estate?

Common ownership structures for ownership of commercial real estate are:

- Direct ownership by one or more individuals/entities as owners / joint owners (with or without an express agreement between co-owners on the mode of utilization and devolution of the asset).
- Co-operative societies, in which allottees of plots/premises on the property held by the co-operative society are members. Here, title to the entire property including common areas like internal roads vests in the co-operative society, whereas members of the society are allottees of demarcated premises. The property or the building is managed by the society from contributions from members in accordance with its bye-laws.
- Association of Apartment Owners / Condominium, in which ownership of individual apartments and their appurtenant common areas and facilities remains with the respective individual apartment owners. The property or the building is managed by the Association of Apartment Owners from contributions from apartment owners in accordance with its bye-laws.
- Limited Liability Companies (“LLCs”), in which allottees of plots/premises on the property held by the limited company are shareholders. Here, title to the entire property including common areas vests in the company, whereas shareholders of the company are allottees of demarcated premises. The property or the building is managed by the limited company from contributions from shareholders in accordance with its Articles of Association.
- Limited Liability Partnerships (“LLPs”) are also used for real estate investments, since the profits and losses of the LLP are assessed in the hands of the LLP itself and there is exemption from tax in the hands of its partners. Since November 2015, the government permitted FDI under the automatic route into LLPs operating in sectors where 100% FDI is allowed through the automatic route (including Construction-development projects, as explained in the response to question 5). But LLPs with FDI are not allowed to operate agricultural/plantation activity or “real estate business” (as defined in the response to question 5).

A co-operative society is preferred as a common holding structure, as it promotes participation by the members in decisions regarding management of the common asset in a democratic manner with one member having one vote, although majority rule can sometimes be a disadvantage.

9. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

For asset sales, legal due diligence on behalf of the buyer will involve the following (Note that Counsels/Advocates for the transferee are responsible for conducting legal due diligence. Generally, notaries in India do not carry out legal due diligence and the functions of the notary are limited to verification, certification, authentication and attestation of instruments. Various standard forms including for a promoter's certification of title are available in the Rules to the Real Estate (Regulation and Development) Act 2016):

- Review of title deeds: Inspection of original documents, if available, to ascertain their terms, whether they have been registered if compulsorily registrable, whether there is any “mortgage by deposit of title deeds” or any claim or lien on the basis of custody of original title deeds. The terms of any lease or grant under which the property is held are required to be considered to ensure that there is no breach of such terms.
- Searches in the office of the Sub-Registrar of Assurances, usually for the previous 35 years, for ascertaining whether, apart from documents provided for inspection, any other document or notice of *lis pendens* has been registered (since registration operates as notice of the registered document to the public).
- Online searches for charges on properties of LLCs and LLPs registered with the Registrar of Companies, online searches for information available in the public domain like status of litigations, disqualification of directors.
- Consideration of revenue records relating to the property.
- Publication of a public notice in two local newspapers inviting claims within 15 days of publication and stating that thereafter the transaction will be completed and any claims which are not notified within time will be considered as waived.
- Requisitions / inquiries with the transferor,

including about any third party claims, oral or written agreements, past and pending litigations/arbitrations, attachment orders, income tax proceedings, persons in occupation of the property.

- Consideration of the survey report / plan of the property showing its area, boundaries and construction thereon and consideration of any statutory restriction on permissible use of immovable property and conversion, such as under coastal zone regulations, development control regulations, etc.
- Consideration of whether, apart from the transferor, permission of any other person or authority, such as the landlord/lessor, Government, mortgagee, co-operative society or owner of adjoining land providing access to the property, is required.
- Searches to ascertain any compulsory registration of a developer/project and details and documents compulsorily made available pursuant to such registration, such as under the Real Estate (Regulation and Development) Authority Act 2016.

The extent of due diligence will depend on the asset under investigation. In case of purchase of a plot of land with or without buildings, it will have to be extensive. In case of purchase of a leasehold asset, the due diligence may start from the lease deed. In case of premises proposed to be taken on lease or leave and license for a limited period, public notice may not be issued.

10. What legal issues (if any) cannot be covered by usual legal due diligence?

Some legal issues which are not apparent from title documents, revenue records and inspection in the office of the Sub-Registrar are:

- Claims of persons in possession, like persons claiming adverse possession (for more than 12 years) or squatters or tenants protected from eviction – may require survey of the property by a Surveyor in order to be ascertained. A person acquiring immoveable property (or any share or interest in such property) is deemed to have notice of the right, if any, of any person who is in actual possession of the property.
- Legal status of construction on the property where construction or part thereof lacks requisite permissions – professional advice from Architects and Surveyors is required on these issues.

- Information on pending or likely Government actions to the extent not disclosed by the transferor or whether any proceedings which may result in liability for payment of income tax, Goods and Services Tax (**GST**) or any other tax, interest or penalty have been initiated against the transferor.
- Whether the property is notified for or reserved for compulsory acquisition by the Government.
- Whether the property is attached for recovery of any amount.
- Whether acquisition of property by the transferor is tainted by any illegality, for example by utilisation of proceeds of crime, money laundering, utilisation of borrowings from banks and financial institutions for purposes other than the agreed end-use, breach of Court order and any such illegality can expose the transferee to the risk of claims by the authorities.
- Claims based on reversionary rights.

11. What is the usual process for transfer of commercial real estate?

Transaction Steps	Seller	Buyer
Pre-Contract	<ul style="list-style-type: none"> • Prepare terms under negotiation / Letter of Intent. • Collect title deeds and documents including last transfer document, share certificate of co-operative society, information on outstanding liabilities of the property like property taxes, utility bills. • Prepare and finalise draft agreement for transfer, applications to co-operative society, lessor, government for transfer. • Consider whether consent of any authority like co-operative society or lessor or Government is required for transfer. • Consider ability of transferor to perform obligations proposed to be undertaken and stamp duty and tax liability likely to arise from the transaction. 	<ul style="list-style-type: none"> • Consider terms under negotiation. • Consider copies of title deeds and documents, share certificates, latest utility bills. • Consider amendments required in the draft agreement and finalise draft agreement. • Ascertain whether proposed transferor has the right to transfer and whether consent of any other person like co-owner, partner, beneficiary of a trust, lessor, co-operative society, mortgagee, persons in occupation or Government is required. • Consider stamp duty, transfer fee, premium to lessor and deposits which may become payable on the transaction. • Consider Government permissions already obtained and feasibility of obtaining permissions required for intended use of the assets. • Consider availability of means of finance to the transferee, whether from sale of other asset, mortgage of asset to be acquired and terms required to be complied with to enable the transferee to make payment to the transferor.
Conclusion of contract	<ul style="list-style-type: none"> • Execution of agreement for transfer against payment of earnest money to the transferor or deposited in escrow. 	<ul style="list-style-type: none"> • Payment of stamp duty on agreement for transfer. Execution of agreement. • Payment of earnest money. • Registration of agreement if deemed appropriate, to avail of finance by the transferee or to obtain possession of the property by the transferee before completion of sale.
Post conclusion of contract to completion of sale / transfer	<ul style="list-style-type: none"> • Production of original title deeds for inspection of the transferee's Advocate. • Answer requisitions on title raised by the transferee's Advocate. • Apply for no objection / consent of co-operative society, landlord, Government if required. • Obtain Income Tax clearance certificate and/or certificate for exemption from withholding tax if required. 	<ul style="list-style-type: none"> • Carry out the legal due diligence summarized in the response to question 9 above. • Prepare draft of Deed of Transfer / Sale Deed. • Prepare ancillary documents like possession receipt, declaration recording representations by the transferor, indemnity and limited power of attorney from transferor. • Make arrangements for payment of stamp duty. • Carry out surveys for ascertaining boundaries and areas and legal status of construction.
Completion	<ul style="list-style-type: none"> • Execute Sale Deed / Deed of Transfer and other documents and admit execution before Sub-Registrar. • Deliver original title deeds to the Purchaser. • Deliver possession. • Address Letters of Attachment to lessees/tenants. • Address letters to authorities for transfer of property and utilities to the name of transferee. 	<ul style="list-style-type: none"> • To ensure adequate stamp duty is paid on the Deed of Transfer. • Execute and register Deed of Transfer.
Post-Completion	-	<ul style="list-style-type: none"> • Complete transfer of property and utilities to the name of the Transferee in records of all concerned authorities.

12. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?

Yes. In case the asset to be transferred is the main asset

held by the limited company and all shareholders are in favour of the transfer, shareholders prefer transfer of shares, as in the case of transfer of an asset, the consideration remains with the company. Taxation implications (specifically, tax on capital gains for the transferor and “income from other sources” for the transferee) will also have to be taken into account when considering how best to structure the transfer. Stamp duty on transfer of shares is lower than on transfer of assets.

13. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?

Yes, unless the terms of transfer expressly provide to the contrary. Usually, notices calling upon lessees / tenants to attorn to the purchaser are served, post completion of the transaction.

14. What common rights, interests and burdens can be created or attach over real estate and how are these protected?

Rights, interests and burdens can be created or attached over real estate by:

- Covenants, positive as also negative, entered into by the owner under a registered document and attached to and running with the land e.g. restriction on extent of construction. Such covenants are binding on the covenanting parties and their heirs and on transferees with notice.
- Lessee’s covenants, for example covenant not to assign, sublet, encumber or part with possession, not to carry out further construction without previous written consent of the Lessor.
- Easements like right of way, right to lay electricity and water supply lines and amenities.
- Options to purchase / first rights of refusal.
- Security under a mortgage or charge.
- Interests of beneficiaries under a private trust.
- License (strictly not an interest) by which the owner or lessee of the property permits use thereof by another person, on specified terms, without transferring any right or interest in the property to that person.

15. Are split legal and beneficial ownership

of real estate (i.e. trust structures) recognised

The split of legal and beneficial ownership of real estate (trust structures) are recognised and common in India. While a third party may be able to deal with the registered legal owner of real estate without having to enquire about any beneficial ownership, it is advisable to make enquiries to determine whether there are any restrictions on the ability of the legal owner to act by itself and, if possible, obtain consents from beneficiaries for the transaction.

16. Is public disclosure of the ultimate beneficial owners of real estate required?

From mid-2019 onwards, those satisfying the definition of “significant beneficial owner” have to make a declaration to companies in which they own equity shares, global depository receipts, compulsorily convertible preference shares or compulsorily convertible debentures. This development extends the “significant beneficial owner” reporting requirements beyond the erstwhile areas of banking and tax Know-Your-Client checks. Note that the “significant beneficial owner” rules are not applicable to REITs registered with the Securities and Exchange Board of India.

Apart from the above, India has enacted legislation to penalize “benami” transactions, i.e. transactions in which one person pays for property but the property is transferred to/held by somebody else, and the real beneficiary of property is not disclosed. This may enable the payer/beneficiary to achieve undesirable purposes such as utilizing unaccounted money, evading the payment of tax, mitigating political and social risk, and defrauding creditors. Thus in India, all such transactions entered into in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, after 1st November 2016 are prohibited and punishable, and the property liable to confiscation.

17. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

Stamp duty must be paid upon a transfer of immovable property and the rate depends upon the nature, usage, location and valuation of the property and the nature of the instrument. Registration fees must also be paid. The market value of land is determined by Government authorities and declared each year (ready reckoner rates).

Except in case of transfer of agricultural land situated beyond specified limits of a municipality or a cantonment board, resident Indian transferees are required to deduct tax at source (or TDS) at prescribed rates at the time of payment or credit to the transferor. In case of payment of any sum to a non-resident Indian (not being a company), income tax is required to be deducted at source and paid by the payer/transferee at the rates in force, unless an exemption from making such deduction is granted by the authorities.

Capital gains tax liability may arise for the transferor upon a transfer of real estate if the asset was a long-term capital asset of the transferor. Alternatively, the profit upon transfer of real estate may be taxed in the hands of the transferor as income if the asset was held as a trading asset or short-term asset of the transferor.

Goods and Services Tax (GST) is payable upon a transfer of development and other rights in the real estate sector. Note that:

- GST is not applicable on sale of land and completed building including sale after development such as levelling, laying down of drainage lines, water lines, electricity lines, etc.
- GST is not applicable on the sale of units/apartments/flats in a building if the entire consideration is paid after issuance of a "completion certificate" by the government authorities.
- "Supply" has been given a wide definition in relation to the construction or real estate sector, and a range of transactions may be treated as supply of goods or services.

Other taxes, like municipal property taxes, may be payable to municipal authorities and corporations depending upon where the property is located.

18. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

In the absence of a contract to the contrary, the Transfer of Property Act imposes certain rights and obligations on the lessor and the lessee.

The State Rent Control Acts may grant some protections to certain categories of tenants. For example, in the State of Maharashtra, if premises are let or sub-let to private limited or public limited companies having a paid-up share capital of less than Rupees one crore (INR 10,000,000), then the tenant may become entitled to the protections of the Rent Control Act including fixing of

standard rent and provisions giving the tenant relief against forfeiture (narrow categories of cases in which a landlord may recover possession of tenanted premises). However, limited companies with a paid-up share capital of Rupees one crore or more cannot claim the protection of the Rent Control Act and are bound by the contractual terms of the lease/tenancy.

Apart from commercial leases, Agreements termed as "Leave and License Agreements" are also common in transactions relating to use of property/premises by an occupant for a fixed duration. This system has developed primarily to avoid the rigours of rent control legislation, which protected lessees/tenants from eviction, even after expiry or termination of their lease.

Common terms in leases (as also license agreements) are:

- Duration: Commencement date and term of lease. Stamp Duty on the lease increases depending on the duration. Lease may have a lock-in period during which there can be no termination (except on breach). Right of premature termination and option of extending the term to either lessor or lessee or both.
- Premises: Location and description of leased area – usually identified on a plan.
- Rent: Amount, dates for payment (usually periodically in advance), mode of payment, any rent-free period, periodic escalations.
- Security Deposit: Usually interest-free and refundable on termination.
- Taxes: Municipal taxes and increases usually borne by the lessor. Option to lessor to increase rent on account of increase in taxes payable by lessor. No GST is levied on interest-free refundable security deposit. The lessee is required to deduct tax at source on lease rent payment if such payment exceeds INR 240,000 annually.
- Utilities: Charges borne by the lessee.
- User: Purposes for which the premises can be used / cannot be used.
- Repairs: Structural repairs usually by the lessor. Routine repairs and maintenance of equipment like air-conditioning usually by the lessee.
- Lessee's covenants: e.g. Not to carry out additions and structural alterations, not to assign or transfer or part with possession without previous written consent of the lessor.
- Lessor's covenants: e.g. Assurance of quiet possession to lessee during the term so long as lessee's obligations are performed,

assurance of electric supply, permission to lessee to display signage on the exterior of the premises and entrance to the premises.

- Power of re-entry: Power of lessor to terminate the lease and take back possession in case of breach of terms of lease by the lessee, with or without requirement of the lessor having to give notice to the lessee to cure the breach.

19. How are use, planning and zoning restrictions on real estate regulated?

Planning and zoning are regulated under State legislation and municipal regulations.

Most urban and urbanisable areas have regional and local planning authorities who prepare and revise regional and city-wise development plans providing for land use for public purposes (like roads, gardens, playgrounds, schools, hospitals, public buildings) and private purposes (like commercial, industrial, residential).

Local authorities have framed Development Control Regulations and Building Byelaws prescribing the extent and nature of construction permissible and the procedure for obtaining sanctions and "Occupation Certificates", which are mandatory before premises can be occupied. Construction which is not authorized, that is, not in compliance with statutory requirements, is liable to be demolished without payment of any compensation to the owner / occupant.

In areas other than urban and urbanisable areas, the revenue authorities of the State Government regulate construction by prescribing conditions while permitting conversion of agricultural land for non-agricultural use.

At several locations such as eco-sensitive zones like lands within 500 meters of high tide line and lands in close proximity to sensitive locations like armed forces establishments, airports and heritage properties, there are severe restrictions on construction and use.

20. Who can be liable for environmental contamination on real estate?

There is no specific Act which concerns pollution of real estate. Toxins which pollute soil and human life are regulated by the Environment Protection Act, which uses the term "environment" in a wide sense, as well as by various rules framed under this Act.

Under the Environment Protection Act, the main rules to

be complied with are (i) no person carrying on any industry, operation or process shall discharge or permit to be discharged any environmental pollutant in excess of such standards as may be prescribed; and (ii) no person shall handle or cause to be handled any hazardous substance except in accordance with such procedure and after complying with such safeguards as may be prescribed. Additionally, prior to undertaking a real estate project a developer is required to obtain environmental clearance of the State Environment Impact Assessment Authority (SEIAA) which assesses the same based on the relevant development control regulations.

Whoever (person or company or other entity) contravenes any provision of the Act is liable. Therefore, liability may extend beyond the polluter to others who have permitted the environmental pollutant to be discharged or the person who has caused a hazardous substance to be handled without complying with prescribed safeguards. The person in whose name the property may be standing in the Government records is also held liable. Such liability is based on two principles (i.) precautionary principle which has been interpreted to mean that the State and statutory authorities must anticipate, prevent and address the causes of environmental degradation and the 'onus of proof' is on the industry to show that its actions are environmentally benign and (ii.) "polluter pays" principle which has been interpreted as absolute liability for harm to the environment which would extend to not only to compensate the victims of pollution but also the cost of restoring the environmental degradation (i.e. reversing damaged ecology).

21. Are buildings legally required to have their energy performance assessed and in what (if any) situations do minimum energy performance levels need to be met?

India's Bureau of Energy Efficiency (BEE) sets building standards and has published its Energy Conservation Building Code (ECBC) in 2007 and updated versions in 2017 and 2021 which has set minimum energy standards for new commercial buildings having a connected load of 100 kW or contract demand of 120 kVA or more. For residential buildings, energy standards have been set by the Eco-Niwas Samhita, Part 1 (2018) and Eco-Niwas Samhita, Part 2 (2021). However, while the national government sets building standards, it is the respective States which need to notify, adopt and implement the codes. Therefore, the respective State's laws need to be checked to confirm whether codes have been made mandatory for commercial or residential buildings in that State.

22. Is expropriation of real estate possible?

Yes. The State has the right and authority to compulsorily acquire property required for a public purpose or for a company in accordance with the laws relating to acquisition, on payment of compensation at a rate which shall not be less than market value.

Town Planning Schemes, Regional Plans and Development Plans for urban and urbanisable areas prepared by the planning authorities provide for reservation of lands for public purposes for which the land can be acquired. In other cases, compulsory acquisition must be preceded by a hearing on objections to the proposed acquisition.

There are several State laws providing for temporary requisitioning of properties and premises and for laying of electricity supply, gas pipelines, water pipelines, drainage and other utilities through properties on payment of reasonable compensation.

23. Is it possible to create mortgages over real estate and how are these protected and enforced?

Yes, mortgages can be created. In the case of leasehold property, the lessee can create a mortgage / security on his leasehold interest in the property, if the terms of the lease do not prohibit this.

A mortgage must be by an instrument in writing signed by the mortgagor, attested by at least two attesting witnesses and registered with the Sub-Registrar of Assurances.

A mortgage or charge by a company is also required to be registered with the Registrar of Companies. Mortgages/charges need to be disclosed by LLPs in their regulatory filings as well.

A “mortgage by deposit of title deeds” (equitable mortgage) can be created (in the towns of Kolkata, Chennai, Mumbai, Delhi and other specified towns) by delivery to the creditor of documents of title to immovable property, with intent to create a security thereon. If the parties intended to reduce the terms of the equitable mortgage into a written document, then such a document would also require registration. In certain circumstances, an equitable mortgage can even operate over a mortgage deed subsequently executed and registered in respect of the same property.

Unless agreed to the contrary, a seller of immovable property has a charge upon the property transferred, for unpaid purchase consideration and interest, except

against a transferee for consideration without notice of non-payment of the whole of the purchase price by the buyer to the seller. Similarly, unless agreed to the contrary, a buyer of immovable property has a charge on the property for the amount of any consideration properly paid.

Under what is known as an “English Mortgage” (where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage money) the mortgagee has the power to sell the property without intervention of the Court, in default of payment of the mortgage money.

Specialised statutes provide for realization of security upon a default in payment, depending upon the nature of the parties and the relief sought, such as:

- the Recovery of Debts Due to Banks and Financial Institutions Act for recovery, through specially constituted tribunals, of debts due to a bank or financial institution by attachment and sale of properties, arrest and detention, appointment of receivers;
- the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, by providing for registered and regulated securitisation and asset reconstruction companies and enforcement of mortgages by a secured creditor without intervention of a court or tribunal, when the mortgage debt has become a non-performing asset, subject to some exceptions; and
- the Insolvency and Bankruptcy Code, which prevents any action for enforcement of a mortgage during the pendency of an insolvency resolution process of a corporate debtor in default (or during the pendency of an insolvency resolution process against the corporate guarantor or personal guarantor of the corporate debtor) and the insolvency resolution professional appointed by a majority of a committee of the creditors is empowered to take over the mortgaged property. Enforcement of the mortgage is possible only in a regulated manner when liquidation proceedings are initiated on failure of insolvency resolution proceedings.

In other cases, mortgages are enforced by filing a civil suit.

24. Are there material registration costs associated with the creation of mortgages over real estate?

Stamp duty will be payable on the mortgage instrument. A reasonable registration fee is also payable.

25. Is it possible to create a trust structure for mortgage security over real estate?

Yes, mortgages can be created in favour of a security trustee to hold on trust for a syndicate of lenders.

Contributors

Jonathan Solomon
Senior Partner

jonathan.solomon@slmnco.in



Michelle Solomon Le Page
Partner

michelle.solomon@slmnco.in



Agastya Sreenivasan
Associate

agastya.sreenivasan@slmnco.in

