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# Due Diligence in India -A Primer

## Introduction

A proper legal due diligence before acquisition of any real estate is critical in India given the complexity and multiplicity of land laws in India today. Uncertainties in land and land risks exacerbate transaction costs and are a significant deterrent to investments in India.

## The challenges in land diligence and title investigation in India are:

- (a) It is not uncommon to find legally non-compliant real estate being marketed for transactions;
- (b) There is no federal repository which maintains records or provides complete information about an immovable property. Thus, the engagement of a specialist lawyer is desirable;
- (c) Certain types of properties, such as agricultural and tribal lands, are zealously guarded by protectionist statutes. Breach of such laws is non-curable and may even result in confiscation or demolition of the property;
- (d) In large scale acquisitions of land, there could be rehabilitation and resettlement issues involving farmers. The acquiring company may be exposed to unexpected financial liabilities in case the regulators decide that additional compensation is payable to the farmers;
- (e) Development of properties in coastal regulation zones, archaeological and heritage precincts is governed by special rules.

This article takes a look at a real-estate lawyer's checklists and methodologies for ascertaining whether the title of an owner to a property is clear.

## Scope of Title Due Diligence in India

The scope of any title due diligence depends on the purpose of acquisition. However, the following questions are germane to any exercise on investigation of title:

- (a) Who is the owner of the property?

- (b) Are the ownership rights freely transferable?
- (c) Do the title documents stipulate any restrictions regarding change in management and control?
- (d) Is the owner in possession of the property?
- (e) Is the property subject to any encumbrances such as easements, mortgage, charge, lease, arrears of property taxes etc.?
- (f) Is the property subject to any litigation or compulsory land acquisition proceedings?
- (g) Is the property fit for the intended use?
- (h) Is the structure comprised in the property constructed as per law with proper environmental permissions and occupancy certificate has been obtained?

## Steps Involved in Title Due Diligence

Set out below are some of the key steps in due diligence to address the questions and risks raised above:

### 1. Review of Documents of Title

Documents of title are perused not just to ascertain the current owner but to trace the root of title as far back as 30 years. It is important to chart out the flow of title and check for any competing rights.

Based on the review of title documents, a real estate lawyer in India will opine that land title is clear and marketable, and that the seller has not mortgaged the property or created any encumbrance thereon.

### 2. Review of Revenue Records

In any title due diligence exercise, inconsistencies between the title documents and Revenue Records is a matter of concern. In addition to the corroboration of an owner's title to the property, Revenue Records reveal easements, encumbrances, outstanding statutory dues (including property taxes),

nature of the property (freehold / tribal/ leasehold), and other impediments such as the existence of any natural waterbodies, restrictions imposed by forest laws and other legislations that may impact ownership and title to private land.

### 3. Searches at the Sub-Registrar of Assurances' Office ("SRO")

As part of a title enquiry, searches are required to be conducted at the SRO for sale deeds, gifts, leases and mortgages that are compulsorily registrable with the SRO having jurisdiction over the property. These documents are available for public inspection. Since a due diligence exercise is usually based on the documents provided by the owner, searches at the SRO are conducted to ascertain the genuineness of the documents and any undisclosed noting.

### 4. Review of Plans & Approvals

In addition to the above, a title due diligence is also combined with a physical inspection of the site. Real estate lawyers, upon client instructions, may subcontract this part of the assignment to an engineering, technical or land surveyor team. This technical team will confirm that the land under consideration does not violate zoning issues, the existence of High-Tension Transmission Lines requiring additional clearances from other public authorities, public thoroughfares, or water bodies on the property; the proximity of the site to an airport, state or central highways, etc. which will limit the development potential of such site. These issues are required to be sorted with the owner at the time of acquisition.

Review of City Survey Plans, Zoning Certificates, Environmental Clearances, Building Approvals and Permissions form an integral part of title investigation. It helps in determining the suitability of the built-up premises for the intended use-

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IT/ITES, commercial, residential, industrial.

Though the possession of an Occupancy Certificate ("OC") is one of the final approvals that a lawyer will examine as part of title diligence, it is advisable to have an OC vetted by the technical team for unauthorised structural changes and violations by the seller.

#### 5. Litigation Searches

With respect to the ongoing litigation, third parties are not privy to court records. However, by way of caution, searches of the records of the High Courts, Supreme Court and Company Law Tribunals are undertaken in the name of the owner to ascertain if there is any litigation of the property owner and thereafter, ask him/her to produce litigation records.

#### 6. Searches of the Portal of the Ministry of Corporate Affairs

Registration of any type of mortgage is compulsory under the Indian Companies Act. Therefore, searches on the Ministry of Corporate Affairs' portal is a must.

#### 7. Public Notices

Inviting objections by publication of notices in newspapers brings to fore issues which cannot otherwise be discovered, such as unregistered MOUs, and intra-family disputes and claims.

#### Conclusion

A comprehensive due diligence can mitigate risk associated with acquisition of real estate and also serve to guide the process of drafting transactional documents. Knowledge of compliances or non-compliances in relation to a property will help acquirers ascertain whether to acquire or deal with a property (or interest therein) or not, and price risks accordingly. Each transaction is unique, and the methodology for title due diligence is adapted accordingly. It must also be remembered that land laws vary from state to state in India with significant variations in land titling, local protections and special legislations prohibiting land transactions especially in agricultural land behind appropriated for non-agricultural purposes.

The post pandemic legislative landscape of land laws in India appears to be transitioning to a more investor-friendly and

accommodative ecosystem. Several states have started to dismantle redundant distinctions between agricultural and non-agricultural lands, encourage the denotification of protected lands and allowing industries to acquire erstwhile prohibited lands for projects with greater ease. Together with a nationwide push for land titling and digitalisation of land records, opaque and antiquated land laws in India are primed for a genuine overhaul, to the benefit of investors, landowners and stakeholders alike.

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