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India: Title Insurance: New Product for Old Issues

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An analysis of why there are no takers for title insurance and what needs to be done.

Real estate is among the priciest investments around. More so for the common man who has to live with the burden of monthly EMIs. Yet, it is an art to discover the real owner of any property. Government and revenue records, which are easily accessible to the public, are not properly maintained. Individual plot owners don't even think it necessary to update these records as such omissions do not attract stringent penalties. The entire process of finding out whether a person's ownership rights are free of any defects depends largely on the co-operation of the purported seller. And the seller may have a vested interest in not making a clean breast of things.

Real estate projects have got stalled on account of various defects in the title of the owner/ developer to the property. Examples of such defects include litigation by a co-owner who was not made a party to the sale; boundary disputes with neighbouring plot owners; non-availability of the requisite approvals.

No takers for title insurance

The Real Estate Regulation & Development Act, 2016 ('Rera'), therefore, made it compulsory for developers/ promoters to obtain insurance against any defect in the title of the land and buildings of their projects. However, there has been no progress on this front. In 2016, it was impossible to obtain insurance coverage against any defect in title since none of the insurers offered this kind of insurance product. This is not the case today. New India Assurance, HDFC Ergo, Tata AIG General Insurance

and National Insurance Company have introduced title insurance. Yet, there are no takers for title insurance.

As per recent media reports, only HDFC Ergo has successfully sold title insurance with a humble count of two. This is not good news, neither for the insurance sector nor the common man, for whom the stakes are the highest. Some of the factors responsible for this state of affairs are discussed below. Fixing these loopholes will not only help the common flat purchasers but will also have a direct bearing on ease of doing business in India.

Reasons for non-performance of title insurance

(1) Expensive product

It is an expensive product. The premium is based on the gross developed value (which includes value of land, cost of construction, and profit margin of the developer) and ranges from 0.5% to 3%. Such a high premium is payable for a policy which typically covers a period of 7 to 12 years. Since developers of under construction properties cannot pass on the burden of insurance costs to the customers with whom they have firmed up the prices and executed registered agreements, the title insurance market appears to be a non-starter. To expect a reduction in the premium is unreasonable. The endemic problem of credible data regarding ownership and valuation of the property tells at every step of the way.

In order to hedge their positions, insurers rely on reinsurance. However, given the mystery around the entire issue of title, ownership, valuations, the reinsurers are not confident of doling out the usual terms and condition to insurers at usual prices.

(2) Notable exclusions

In spite of the high premium, title insurance, in its current form, does not cover two vital concerns.

- a. Title insurance only covers past defects. One of the biggest fears of landowners or developers is future encroachment of land. Land mafia is as much a truth and reality as day and night. Professional encroachers operate in both, cities, and the mofussil. For the high premiums that are being charged, this exclusion from the insurance policy makes it rather unattractive.
- b. Stoppage of work on account of government approvals is also excluded from the ambit of title insurance. Often, government approvals are not forthcoming due to ambiguity and policy paralysis. For example, some years ago, non-availability of environmental clearances under the Environment Protection Act, 1986, and the Environment Impact Notification thereunder, was a major stumbling block in timely completion of projects. In certain cases, projects were pulled back after soft launch. None was to be blamed.

The principal issue that title insurance seeks to cover is litigation costs (including out-of-court settlement) from past defects. However, there is no clarity as to when the costs shall be reimbursed. Given the time taken to have disputes resolved, if the

amounts are proposed to be reimbursed when the matter has reached finality, it shall be meaningless.

A committee has been set up to look into standardisation of title insurance policies. Eventually, words and expressions of insurance policies floated by different companies shall be interpreted identically. However, some simple solutions discussed below will also bolster title insurance.

Simple solutions

(1) Linking of departments

All property related documents are compulsorily registrable with the sub-registrar of assurances. These documents are maintained as per the survey numbers assigned to the property. The sub-registrar can be so linked to the revenue department that the name of the buyer in whose favour a sale deed is registered is automatically reflected in the revenue records.

A new webpage of property under litigation reflecting the survey numbers, flat numbers, address of the properties along with names of the parties can be uploaded on the court websites, particularly that of the district and high courts.

Even the extant system is not exploited to the fullest. A notice, notice of *Lis Pendis*, recording basic details of any pending dispute in relation to a property can be registered with the sub-registrar of assurances by the plaintiff. However, hardly anyone goes that extra mile. Registration of *Lis Pendis* effectively puts the world to notice about the dispute. It protects the litigant against any third parties who may have acquired interest in the property pending litigation with their eyes wide open. Creation of third-party rights is a common ruse employed by the defendants to frustrate the remedies available to a plaintiff. If a notice of *Lis Pendis* is registered, such a third party cannot claim to be a bona fide purchaser for value.

The Torrens system of title

The Torrens system of title is followed in many developed countries, notably the United States. Here, the government register serves as the ultimate proof of ownership. The title of the owner so reflected in the government records is guaranteed by the government. In other words, the government indemnifies third parties who rely on the government records. The Land Titling Bill drawn on similar lines, in India, is simply languishing. Governance Now had, a year back, carried an article on the Land Titling Bill [[What is rightfully yours](#)]; precious little has changed ever since.

(2) Creating a market beyond the confines of Rera

Should the pricing be right, there is a huge market for title insurance amongst real estate lenders. Abroad, title insurance is the norm. The seller of an ordinary apartment, more often than not, furnishes title insurance to the buyer. In fact, the common man, without the capacity to appoint a battalion of advisors, may stand to

benefit the most form such a product. No product can last unless the market for it is wide and deep. It's myopic to look at title insurance exclusively through the prism of Rera.

Once a market for title insurance is established, the biggest benefit shall come in the form of credible data regarding property valuations. These solutions are desirable for overall good order and transparency.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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