

Critical facet of title investigation

Introduction

Investigation of title is a very significant and important process in property transactions/transfers especially those governing the transactions relating to immovable properties. Investigation of title is critical to purchase of any asset and involves verification of clean and marketable title over a property. Generally, banks in India seek advice of advocates to prepare an exhaustive investigation reports on title of property. An investigation is conducted to ensure that the property belongs to the person claiming it and is free from any lien, charge, mortgage, all encumbrances, all property tax are fully paid and there is no dispute surrounding it.

The present bulletin provides insight into the process of drafting a title investigation report (“**Report**”) for banks on the basis of the various regulations that govern the title of the property and the mechanism available to verify the veracity of the title documents.

1.0 Essential Title documents

Title of the property can either be original or derivative i.e., acquired by transfer or operation of law. All titles to land are ultimately based on possession and ownership is always vested in a legal person or a living person and only the person in whom the property is vested can transfer it to another person. Sometimes, titles are also acquired by a wrong or tort, i.e., by wrongful possession, abatement, or usurpation. Also, prevalent is the widespread deceit in most of the land transactions. It is, therefore, crucial to carefully scrutinize the documents that determine the title of a property with the objective of ensuring that the ownership is complete in all respects, and there are no risks involved in the property.

Title to immovable property is determined by examining the instruments or documents pertaining to the title of the property - every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or record. Documents generally include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter.¹ It also includes electronic documents. For a proper investigation of title, the most essential title deeds/documents are the original title deed of the present owner, prior title deeds covering 30 years, encumbrance certificate, possession certificate from village office, if applicable, up to date basic tax receipt, up to date building tax receipt, if any, agreement for the sale and the agreement for building construction, as the case may be.

2.0 Inspection of documents

The banks should seek all material and essential documents of title relating to the property in original. The primary step is to check whether the documents provided are

¹ Per sec 3 (18) of the General Clauses Act, 1897.

stamped, executed, attested, and registered, if required. It is essential to verify that proper stamp duty is paid on the original agreement(s) for sale. With the purpose of conservation of evidence, assurances, title, and publication of documents and prevention of fraud, it is mandatory under the Indian Registration Act, 1908 to register certain documents. Even the Transfer of Property Act (“TPA”) provides that the documents related to sales, mortgages (other than by way of deposit of title deeds), and exchanges of immovable property should be registered.

The documents are subsequently verified, tallied and compared from the records of the office of the Sub-Registrar of Assurances and also from the records of any other appropriate authority like the office of the (a) Sub-Registrars office, municipal/collector or such other revenue office, (b) Registrar of Companies, (c) courts in the lispendens register, (d) Local development Authority, among others. Based on the information verified, the details of the property is noted with complete description such as total area of plot, construction, description of built-up area such as rooms, halls, balcony, etc, the location and landmark with a map of the property. These information are then included in the Report. The following facts should be thoroughly verified to be added in the Report -

- (i) Property is inheritable or transferable² and the borrower has the authority or capacity to transfer. The property should be in the name of the borrower in government and municipal records.
- (ii) For leasehold property - if the lease deed is registered, the residual period of lease, any prejudicial clauses or restrictive covenants in the lease deed which is likely to affect the lease hold interests offered as security and if the consent/permission from the lessor is obtained/available for creating the mortgage.
- (iii) For borrower/guarantor/mortgagor has only an occupancy right - to specify the safeguards to be taken by the bank, local laws which permits or restricts mortgage and sale of such occupancy rights, heritable and assignable right.
- (iv) For property under government grant or any other grant - any requirement of government permission, any adverse conditions in the grant.
- (v) For a mortgagee - if the possession of the property offered as security is unhindered/undisturbed possession of such mortgagee and the period for which the borrower is in such possession, any restrictive conditions in the mortgage deed, the period covered under the Encumbrance Certificate and the encumbrances if any, reflected therein.

Borrower has to make out a good title for a sufficient period, which in most cases depends on the facts and circumstances of each case. Generally, this period can be 30 years as under section 90 of the Evidence Act,³ a document 30 years old or more is generally

² Under TPA, the Indian Succession Act, 1925 and/or Agricultural Land Act, 1948, as the case may be.

³ Where any document, purporting or proved to be thirty years old is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the hand writing of any particular person, is in that person's hand

presumed to have been validly executed. Also, the period of limitation for redemption of a mortgage by the mortgagor is 30 years and the limitation for action by and against the government is like wise 30 years.⁴

3.0 Drafting the Report

Based on the review of the documents provided by the borrower, information gathered from questioning the documents related to the title of the property of the borrower collected from the bank and the scrutiny conducted thereof, the Report is drafted by the advocate providing an unqualified opinion on the title of the borrower on the said property. Investigation of title is a very significant and important process in the transactions relating to immovable properties.

“Verification of title” is different from “investigation of title” in an immovable property. Verification concerns only with the present owner of the property whereas investigation traces the roots of the title of the property, subsequent successions, or transfers and then decides the present status. A mere suspicion of fraud that cannot be made out will not make the title doubtful and the purchaser cannot reject the title. Advocate should tender specific and categorical opinions on all the aspects covered in the Report in the best interest of the bank. The following aspects should come out in investigating title to immovable property:

- A full description of the property.
- A chronological list of documents/deeds perused (in original or photocopy) and which amongst them actually verified from the government offices.
- The finding on the nature of title of the owner.
- Whether any dues recoverable as arrears of land revenue are outstanding.
- The result of the perusal of encumbrance certificates on the title to the property.
- The possibility of any subsisting equitable mortgage.
- Who has the actual possession of the property? Basis of such a finding.
- Any adverse interests exist on the property.
- Is the title clear and marketable, free from all encumbrances?
- In case the owner is a Company, Partnership, Trust, or other legal person – assessment on the impact on title.
- List of documents that should be kept with the bank in original.
- Any special or specific advice that the advocate may want to tender.

Any defect identified in the property like outstanding encumbrances, restrictive/onerous conditions, right of way, easements, party-wall notice, unusual onerous

writing, and in the case of document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation - Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin or if the circumstances of the particular case are such as to render such an origin probable.

⁴ Under section 25(3) of the Limitation Act, 1963.

conditions in a lease, and notification of the government relating to intended requisition or acquisition should be clearly cited in the Report. The advocate can also suggest banks to issue a notice in local newspapers inviting claims in the nature of mortgage, charge, easement, etc., against the property to be submitted within a specific time with supporting documents. Such a notice can basically help in establishing bona fide claim in case of disputes, though without any right to claim.

Conclusion

The Report summarizes whether the title of the property has been established. If any encumbrance or claim is existing or outstanding, it should be stated whether the same can be cured or curable and whether the same can be waived without any serious prejudice to the interests of the bank. If certified, duplicate or photocopies of title deeds are provided by the borrower to the advocate for any reason, the Report should subsequently be amended and a supplementary confirmation Report should be furnished by the advocate on the basis of the originals before any disbursement of loan is made to the borrower. A uncertain title cannot be forced upon the bank as bank is not bound if there are defects in the property, material or latent, which are not apparent in ordinary course.

Authored by:
Neeraj Dubey