

DUE DILIGENCE OF PROPERTY TITLE

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**INDIAN PROPERTY SHOW AT LONDON
APRIL 2016**

WHAT IS DILIGENCE ?

DILIGENCE can be termed as reasonable steps taken by a person to avoid committing mistake or breach of law.

WHAT IS LEGAL DUE DILIGENCE ?

Legal ---- related to Law

Due ---- proper

Diligence ----- any act done meticulously/scrupulously

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means investigation or legal audit to confirm all material facts relating to its history, title and other privileges and obligation attached with it.

It is the process of obtaining sufficient reliable information about the real estate to help to uncover any facts & circumstances that would come in the way of a good, clear and marketable title.

Real Estate Due Diligence is the inspection and investigation of Real Property, Personal Property or a Business Entity, before a buyer makes the final decision whether to consummate an acquisition, merger, or a loan transaction.

-U S Securities Act of 1933.

A scrutiny of all, or specific parts, of the legal affairs pertaining to a property with a view of uncovering all legal risks involved in acquiring the property and to provide the buyer an extensive insight into the nature of the property and risk involved in purchasing the same.

It is an investigation of the title, legality, status and/or user of the property prior to signing a contract as an act to prevent mistakes, breach of law, saving one from committing an offence or even taking a property which is either unsuitable for the use or which is encumbered.

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Title

In simple language, it means right in property. The word title does not necessarily always mean ownership. Title can mean right over property as owner, possessor, permanent lessee etc.

Tracing of Title

Article 64 and 65 of The Limitation Act, 1963 provides for limitation of 12 years in case of adverse possession. While in case of govt. land or govt. rights it is 30 years. Therefore tracing of titles should be for minimum of 12 years and preferably for 30 years.

Marketable Title

Marketable title means a title free from reasonable doubts.

Good Title

Good title means that the property is free from all encumbrances.

Life Interest Vs. Absolute Title

As a vendor having only life interest in the property can not convey absolute title to the purchaser.

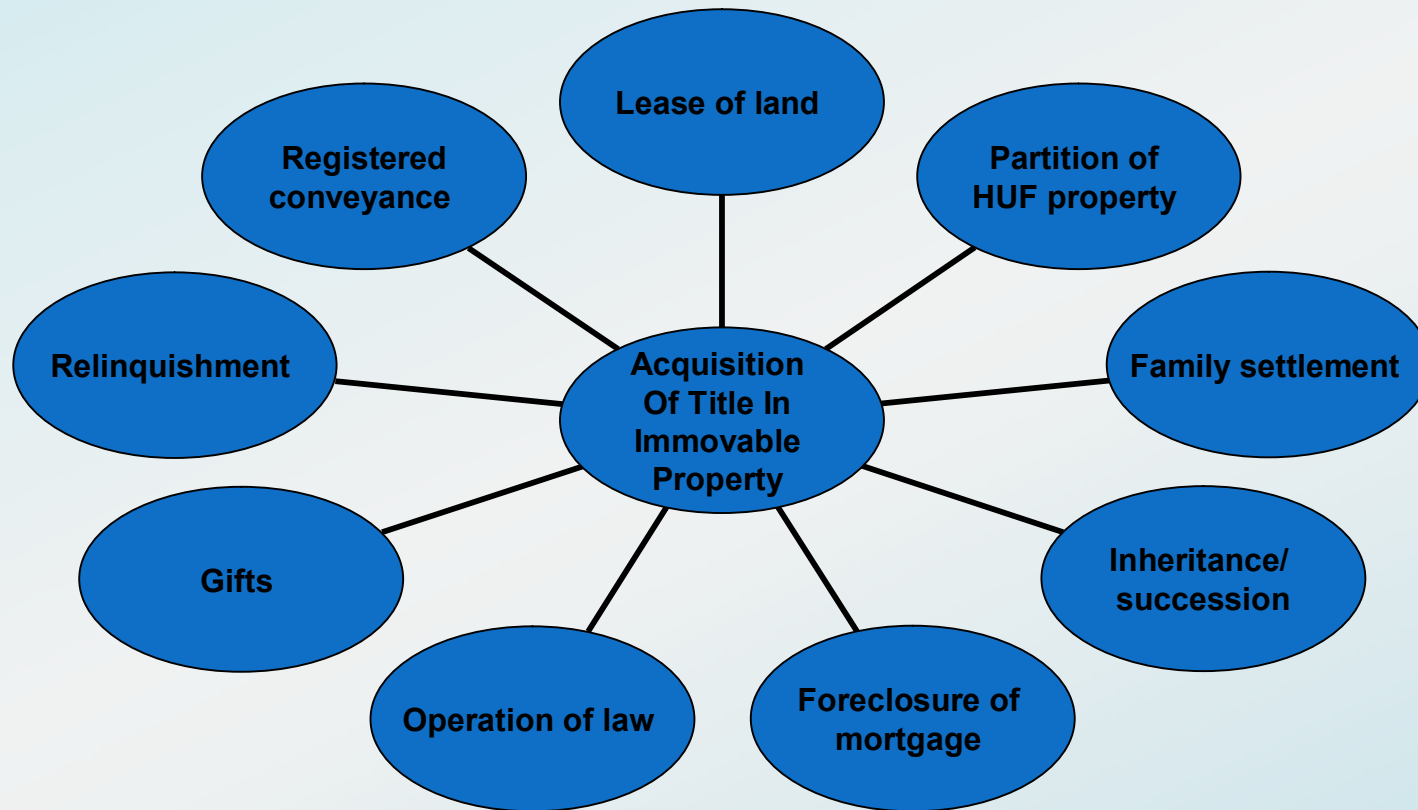
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Acquisition of Title In Immovable Property



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Broad Check-list for carrying out the due diligence with respect to title -

- To check the classification of property from the Govt. records along with copy of site plan, survey no., layout, sanctioned plan etc. identifying the property against the adjoining land. The documents should be certified by the officer of the Land Records.
- To check whether the land is to be used for agricultural purposes or can be used for industrial, commercial or residential purposes. In case of change of land use, the permission given by the competent Govt. authority and the fee paid for conversion should be checked.
- To ensure that the land is not subject to land acquisition proceedings by verifying the records in the Office of Tahsildar and by seeing the notifications issued by the land acquisition authorities.

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- To check chain of title deeds, with stamped receipts/lease deed/gift deed through which the property has been transferred/acquired by the present owner.
- To ensure that the provisions contained in the title deed do not restrict the right of the owner to transfer the property.
- If the property is in joint names, then NOC should be obtained from the co-owner(s).
- In case the property is held by HUF or is an ancestral property, to check the family tree and to verify death certificate of original owner, copy of will, succession certificate, probate obtained from Court, legal heirship certificate in original, registered copy of the partition deed/ gift deed/settlement deed, as the case may be.

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- In case the property belongs to partnership firm, society or trust, to check the copy of the partnership deed/trust deed.
- In case the property is being sold by the Official Liquidator, the Court order authorizing the Official Liquidator to sell the land/property should be verified.
- Tarence Plan (a detailed plan of the property) is done by a licensed surveyor. The said plan consists mainly of measurement details such as length, width, borders etc. of the property.
- One must make enquiry in government and municipal offices to ensure whether all the tax has been paid or not as on date. Property taxes are first charge on property that is paid to government or municipality and thus the same requires to be confirmed and checked.

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- There are cases where there are more than one owner of the property. In such cases it is a must to get No Objection Certificate or Release Certificate from other owners.
- In case the property belongs to a company, then check the Memorandum & Articles of Association, Resolution passed by the Board of Directors/Shareholders (as applicable) under section 293(1) (a) of the Companies Act, 1956 authorising the sale of the property. Inspection should also be done at the office of the Registrar of Companies (where the registered office of the Company is situated) to ensure that the property has not been mortgaged / charge created under the Companies Act, 1956 in favour of any Financial Institution/Bank/Debenture Trustee through filing of Form No. 8/10.
- To check the occupation certificate and also the environmental clearance issued by the competent authority.

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- In some cases, the seller may not be physically present to sell the property and might appoint an agent with the power to sell. In such cases it is necessary to check the Power of Attorney to see if the principal who has executed the power is the owner of the property. The Power of Attorney must bear the photograph of the principal and it should be registered in the office of the Sub-Registrar.
- In case the owner is a NRI and the Power of Attorney (POA) has been executed in a foreign country, the POA should be notarized before the Indian Consulate for the purpose of authentication and thereafter it is to be attested by the Sub-Registrar of the area concerned. In order to safeguard against the subsequent third party claims, it is advisable to give a public notice by way of advertisement inviting objections, if any, before the purchase of property. The above check list is only illustrative and not exhaustive since some more areas may need to be looked into depending upon the nature of the transaction.

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Title Verification



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Title Investigation of Property of Residential Or Commercial Complex

The following points should be kept in mind

- Scrutiny of legally established title, all related documents and the title of the owner of the land and its sources for atleast the past 30 years.
- Nature of agreement with the seller
- Whether all persons having an interest in the property are a party to the documents
- The rights of both the owner and builder of the property.
- Examining the apartment sanction plan by the Municipal Authorities with regards to permitted area etc.
- Total area of the flat
- Common area and other facilities
- Parking lots
- Payment of charges such as electricity, taxes, water etc.

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Titles In Flats Owned By Societies –

- The bye-laws, rules and regulations of the society must be checked. Further it must be checked if the society is formed only for a particular class of persons and restrictions if any, in the sale or transfer of flat by such members.

Titles In Court Litigation Property –

- Ideally a person should refrain from buying a law suit property subject to the investigation of the facts of the case, rights of the parties, legal implications etc. for ascertaining the probable success of litigation. However one may purchase such property after obtaining permission by the concerned court.

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Lis Pendense

- Sec 52 of The Transfer of Property Act is based on the principle “during pending litigation nothing new should be added” meaning thereby that when litigation is pending no parties to the suit can alienate or deal with the suit property so as to affect its title. However mere pendency does not prevent the parties from dealing with the suit property, it is just a condition that such act will not affect the rights of other parties.

Elements of Lis Pendense

- suit must be pending
- must not be collusive
- right in immovable property must be directly in question
- must be a transfer or dealing with the property by either party
- transfer must affect the rights of the other party

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Legal Owner

- Unlike English laws, Indian laws do not draw any distinction between legal and equitable property and owner. It recognizes only one ownership in respect of immovable property i.e. legal ownership.

Essential ingredients

- Amount and terms of consideration, dates of payments, break-up of payments etc.
- Particulars of the parties and the property.
- Time of transfer and possession of the property.
- Other terms relating to the transfer.

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Transferable and Non-Transferable Property

The following types of properties are prohibited from being transferred:

- Mere right of re–entry on breach of condition
- Easement right
- Restrictive interest created in the property
- Mere right to sue
- Transfer opposed to the nature of the interest
- No transfer for an unlawful object or consideration
- To a person legally disqualified to be a transferee

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Competent Persons

- A person who is competent to contract
- Who has at least an authority to transfer if not the title

Bonafide Purchaser

- A bonafide purchaser is a person who purchases a property believing it to be free of all charges of which he has no notice whether actual or constructive.
- A person is said to have notice of a fact if he actually knows a fact or when he due to gross negligence or wilful neglect of enquiry that he ought to have made in the ordinary course abstains from discovering a fact.

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- Further documents required to be compulsorily registered under The Transfer of Property Act but not under sec 17 of The Registration Act fall within the scope of sec 49 of The Registration Act. Such unregistered documents cannot be admitted as evidence.
- As per sec 13 and 20 of The Transfer of Property Act an interest in a property is permitted to be transferred in favour of an unborn person.

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Importance of Registration

- The Registration of a document serves as a notice of the transaction to the persons affected by the transaction and an implied notice to any person subsequently acquiring interest in the property, covered by the registered document. For a document, which is compulsorily to be registered and is not registered, it fails to confer any title given by the document.
- The importance of Property Registration can be gauged from the fact that except in case of transfer of shares of a co-operative housing society and housing limited company where Registration is optional, it is compulsory virtually in all cases of transfer of immovable property.

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- Agreement to Sell, Conveyance, Gift Deed, Lease Deed (above one year), Leave and License Agreement, Tenancy Agreement, Declaration Deed, etc. have to be registered compulsorily under Indian Registration Act, 1908 otherwise the proper legal title will not be transferred to the purchaser/transferee i.e. the title will be considered defective if Registration is not done.
- The Registration Certificate is mere evidence that a document has been registered. When the execution of a document is disputed between two parties, the fact that the document is registered is not sufficient to prove its genuineness.

Stamp Duty

There is a direct link between Registration Act and Stamp Act. Stamp duty needs to be paid on all documents which are registered and the rate varies from state to state.

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CONCLUSION

- In a country like India, with a population of more than one billion and that too consisting of a large middle class, the demand for real estate would continue to grow. Since the land available for real estate development is limited, the prices would continue to increase in the long run.
- This creates multifaceted problems, confusions and frauds and to guard against them, due diligence assumes great significance. As a matter of fact, it is sine qua non to do due diligence of property before entering into any transaction.
- Every individual should carefully observe the various legal issues involved in real estate transactions and, if necessary, take the help of an Advocate for carrying out due diligence to ensure that his investment doesn't end up into a nightmare in the form of protracted litigation in a Court of Law.

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