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Real Estate Laws in India

India's large landscape and huge land area covering distance area of 3,287,263 km^2 has always attracted large scale real estate development and the economic boon, the rise of disposal income, rise of nuclear families and the rise of tier II and III cities and towns have paved the way for further growth in the real estate industry. A recent survey from leading magazine has declared India has a next popular destination for real estate development. These circumstances coupled with the opening up of real estate market to FDI or Foreign Direct Investment in 2005 has led to an increasingly growing interest of the investor in the real estate market. However, the investor is often faced with the serious issue of lack of clarity on the practices that are prevalent in this highly unorganised sector.

Laws and Policies of a country at the same time play a highly significant role in shaping the actions of the investors who are investing or wish to wish to invest in the real estate market and this article is aimed to describe and give a crystal clear view of the norms, practices and policies that govern the real estate sector and which thereby can help an Indian investor or a foreign investor who wish to invest in India.

It is first important to know what the term real estate mean and what comprises real estate development to understand the various laws, norms that are governing the same.

Real Estate means:

Real estate is anything in relation to land, buildings which can either be residential or commercial or may include any housing units, commercial office spaces, schools, shopping complexes etc. Real Estate development means anything in relation to construction or development of land or buildings and includes residential complexes, commercial centres, Malls, shopping complexes, buildings like schools, colleges, health centres, hospitals etc.

People in India like any other place in world require a place to reside, a school where the children of family can go for study, requires hospitals, shopping complexes, roads etc. and all basic amenities to live and these all are provided by constructing and developing land and buildings and therefore they can be said to be included in real estate development. Housing, townships, built up infrastructure, industrial parks includes the above mentioned and are comprised under the broad category of Real Estate development.

Real estate is always in relation to an immovable property. Immovable property has been defined under The Property Act and with help from the general clauses act 1897, the definition of immovable property can summarised as "immovable property is not a movable property and includes land or benefits arising out of land, things attached to earth or permanently fastened to anything attached to earth and attached to earth means rooted in the earth or embedded in the earth like walls or buildings.

The norms, laws, policies governing Real Estate in India:

The Central Acts, the local municipal laws of each state and union territory and the recently issued consolidated FDI Policy 2010 are some of the norms that govern the various transactions and practices in the Real Estate. Sale, lease, mortgage, licence are some of the transactions that are governed by the above mentioned laws and policies.

The laws and policies shall be accordingly described along with the transactions that come into play when investor ventures into Real Estate domain.

The investor who wishes to invest in a land, building that is investor wants to buy land or wants to sell, mortgage, let on lease etc. any immovable property as mentioned is required to first foremost know whether he is competent to enter any of above mentioned transactions:

The investor is first required to check whether he is competent to contract because the first basis of investment is being competent to contract.

The contract act governs the section 11 which states that a person is required to be:

- A major i.e. above 18 years of age.
- Of sound mind i.e. not insane.
- Not prohibited under the law of country to contract.

A resident and a citizen of India are not prohibited to invest or buy an immovable property in India. A non-resident is however prohibited to buy any immovable property in India. A non-resident is though allowed to enter into a lease agreement in relation to an immovable property for the purpose of residence in India for a period of not more than 5 years. This is governed by the Foreign Exchange Management Act and subsequent notifications issued under the same.

The lease agreement has to be executed in accordance to the provision of the Transfer Property Act i.e. section 105 that states that lease is an agreement to transfer only an interest to enjoy the immovable property for a certain period of time for a fixed period and for a consideration.

A foreign company that has not been in cooperated in Pakistan, Bangladesh, Sri Lanka, Bhutan, Afghanistan and Iran and has set up a branch office in India to carry out business activity can acquire immovable property that is an office space for carrying the same i.e. business activity without any prior approval from the Reserve Bank of India. However, the foreign company is required to acquire the said property by way of foreign inward remittance through proper banking channels as prescribed and is required to make declaration regarding the same in Form IPI within 90 days of the acquiring the same.

In case of winding up of the said company, the sale proceeds coming from the sale of such a property in case are required to repatriated to home that is foreign country than, necessary approval from the RBI is mandatorily required to be taken. In case if the foreign company is incorporated in any of above mentioned countries that is Pakistan, Bangladesh, Si Lanka, Bhutan, Iran and Afghanistan than prior approval of acquiring immovable property for running the branch office or the said business activity is required to be taken from the RBI.

The foreign company who wish to set up a liaison office is prohibited from acquiring the immovable property and can enter only a lease agreement governed by the transfer of property act and this lease should not be more than 5 years of duration. These are governed by the Foreign Exchange Management Act or FEMA.

A non-resident as mentioned above cannot acquire any immovable property but can invest in Indian entity that is involved in the real estate development by virtue of the recent issued consolidated FDI Policy by the RBI. The non-resident is permitted to invest in an Indian entity through the automatic route as mentioned in the policy whereby the said investor is not required to seek any prior approval for the said proposal from the RBI or The Department of Industrial policy and Promotion (DIPP), Ministry of Commerce. The investor is however after the inward remittance or issue of shares is required to inform about the same within 30 days to RBI.

Non-resident Indian or people of Indian origin or PIO who is resident in India are permitted to invest or buy immovable property in India. However, they cannot acquire agricultural land, farm land, and plantation property (excluding tea plantations). These are governed by the FEMA Regulations and FDI Policy.

The investor secondly is required to get title check of the immovable property or know the conditions upon which the investment can be made with respect to the land or immovable property:

The registration act, 1908 mandates that all written document that are creating interest or transferring interest in immovable property for a consideration of a value more than 100 rupees is mandatorily required to be registered in the land Registry. These documents or deeds are basically deeds that are indicating the title to the immovable property which can be sale deeds, lease deeds or mortgage deeds. Agreements of sale that are transferring the immovable property in the name of investor or transferee in the present case are registered with the Registry.

An investor may choose to get a title check of the property in which he/she is investing. The investor after paying a prescribed fee can check about the property in which he is investing. The registry records all details with respect to the immovable property that includes all holders who held the property, any dues against the property. The investor may seek encumbrance certificate that certifies that no legal dues remain against the property.

The person in case is investing in society flat or office space may check whether the respective society is registered under respective Society Act.

A foreign investor can invest in real estate in India by virtue of the FDI policy but subject to some conditions. The foreign investor can invest 100 percent FDI in Townships, Housing, built up Infrastructure and construction development projects which shall include but shall not be restricted to schools, housing, commercial premises, theatres etc. regional level infrastructure like roads, bridges etc. However, these investments are subject to the following conditions:

- A minimum of 10 hectares i.e. 25 acres of land shall be required to be developed in case of serviced housing plots.
- Construction developments projects shall be characterised with a minimum built up are of 50,000 sq. meters.
- The foreign investor is required to provide 10 million US dollars as a minimum capitalisation that is 10 million US dollars as minimum paid up capital in case of wholly owned subsidiaries owned by the foreign companies and provide a minimum of 5 million US dollars in case of joint venture with an Indian partner.
- In case of combination of both, either of the above mentioned are required to be satisfied.
- The funds are required to bring in within 6 months of commencement of business in India.
- Original investment cannot be repatriated before a period of three years from completion of minimum capitalization. The lock in period shall begin from date of last receipt of instalment of FDI or from the date of minimum capitalisation. However, the investor may be permitted to exit earlier with prior approval of the Government through the Foreign Investment Promotion Board (FIPB).
- 50 percent of the project should have been developed within 5 years from the date of obtaining all statutory clearances.
- The investor would not be permitted to sell underdeveloped plots (underdeveloped connotes, where roads, water supply, street lighting, drainage, sewerage and other conveniences as applicable under prescribed regulations, have not been made available)
- The investor must provide this infrastructure and obtain the completion certificate from the concerned local body/service agency before being allowed to dispose of the serviced housing plots.

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- The project shall conform to the norms and standards, including land use requirements and provision of community amenities and common facilities as laid down in the applicable building control regulations, bye -laws, rules and other regulations of the State Government / Municipal / Local Body concerned.
- The investor shall be responsible for obtaining all necessary approvals, including those of the building / layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements, as prescribed under applicable rules/bye-/regulations of the State Government / Municipal Body / Local Body concerned. The State Government / Municipal / Local Body concerned, which approves the building / development plans, will monitor the developer's compliance to the above conditions.
- A foreign investor is not subjected to above mentioned conditions in case he is investing in construction and development of Hotels, hospitals or investing in Special Economic Zones (SEZ). However, the investor is subjected to Special Economic Zone Act and is required to comply with requirements while undertaking constructing and developing activity in SEZ.

A foreign investor can invest 100 percent FDI in Indian entity that is involved with the development of industrial parks. Industrial parks are those areas of land that are exclusively developed for industrial activity. These are developed and equipped with all facilities of roads, schools and power supply and are allotted for industrial activity. A foreign investor before investing is required to know the following conditions that are mandatorily required to be compiled with when investing and be incorporated when developing the same.

- Industrial parks are required to comprise of minimum of 10 units and no single unit shall occupy more than 50 percent of the total allocable area.
  Here, the allocable area refers to:
  I. In case of plots of developed land, the net site land available to the unit excluding the area of common facilities,
  II. In case of built up space then, the floor area and built up space utilised for providing common facilities
  III. In case of combination of the two that is developed land and built up are then the net site area and floor area available for the allocation of the units excluding the site are and built up utilised for providing common facilities.

- In the industrial park, the minimum percentage of area to be allocated for industrial activity shall not be less than 66 percent of total allocable area.

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The third requirement is execution of the agreement of sale or lease by the investor:

The transaction that the investor or person dealing with real estate wish to affect that may be sale or lease or mortgage is governed by the transfer of property act. The transaction can be effected by written document that may either be transferring an interest or transfer the whole interest that is property in whole to the transferee. Transferee is the person in whose favour the interest is created and transferor is the person who transferring the interest. This document is required to a valid contract in the eyes of law and thus satisfies the provisions of contract act.

By virtue of the contract act and section 10 in this regard, the agreement to enforce as a contract is required to be:

- Between the parties who are competent to contract as mentioned above.
- There is meeting of mind that is both parties are aware of the contents of the agreement and agree on the same.
  The seller is required to disclose to the buyer of the immovable property about any material defect in the property and in case of misrepresentation, the sale can be set aside option of the buyer. The buyer can claim damages from the seller. This is governed by the section 55 of the transfer of property act and section 14 of Indian contract act respectively.
- There has to be valuable consideration i.e. consideration should be of reasonable value. Absence of consideration makes the agreement void in eyes of law that is it has no legal effect except in case of gift.

The investor may than choose to execute an agreement of sale of immovable property, a lease agreement, a mortgage agreement as per transactions and these are governed by the section 54, 58, 107 of the transfer of property act. An investor can acquire immovable property of minor only with the permission of the court and is required to check whether the guardian of the minor is permitted execute the sale agreement. In case the guardian is not permitted to enter such transaction and yet enters such transaction, the transaction can be later set aside by minor on attaining majority, therefore, the investor is required to check before hand to avoid such a situation.

Fourth requirement after execution of the document:

Stamp duty is required to be paid on all above mentioned documents and these documents as mentioned above are required to be registered with the Registrar of land registry. Stamp duty is governed by the stamp act and local prevalent rates of stamp duty imposed by the states are paid accordingly on the documents. Some states have double stamp incidence whereby first stamp duty is paid for the transaction of acquiring land and other for development of it. These written documents that are effecting the transaction are required to be registered with Registrar of land Registry. As mentioned above any document that is transferring an interest in immovable for a consideration of value above 100 rupees is required to be compulsorily registered.

The above mentioned document is required to be registered with registrar by virtue of the registration act 1908. Non- Registration of document does not affect the transaction of sale or lease or mortgage that is effected by the instrument but is important as only registered documents are admitted in the court.

The Registration act prohibits a non-registered document that is transferring or conveying title from being admitted as evidence in court. This registered document in fact acts as a notice to all people that property has been conveyed to the person in whose name it is registered and is notice of the transaction and thus it is advocated to register such a document as an unregistered document has no value in eyes of law and a registered document is preferred over a unregistered document in case in future if any challenge comes against the transaction.

After the registration of the document, the title or the interest is transferred and hence in case of lease, the transferee is after the registration of the same becomes the lessee, in case of sale, the transferee becomes the owner of the property or henceforth the transferee acquires titles with respect to the executed document or agreement.

Prohibition with respect to some transactions entered by NRI or PIO:

A resident and citizen of India are permitted to enter any kind of transaction with respect to immovable property. However, there are certain restriction placed upon non-residents and these are:

- The NRI may transfer any immovable property to a resident of India or can transfer immovable property other than agricultural land, farm land or plantation property to a person resident outside India but is citizen of India or PIO.
- NRI can transfer agricultural land, farm land or plantation land only to NRI and resident of India but can gift above mentioned only to residents of India.
- NRI can mortgage immovable property to an authorised dealer or housing finance institution in India without any approval required from RBI.
- This transfer should be from the funds that are remitted through normal banking channels or from account maintained in India and this payment cannot be made either through a traveller check or in foreign currency or from outside India.
- The NRI is permitted to repatriate but only that amount that does not exceed the amount paid for the property in the foreign exchange received through normal banking channels

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and the amount of sale proceeds repatriated should be restricted to 2 residential properties subject to certain conditions.

- The NRI in case wants to sell this property than he is not permitted to do so until three years from the acquisition of the same or from payment of last instalment.
- PIO can sell immovable property to a resident of India.
- PIO can gift immovable property to a person who is resident in India or NRI or PIO but in case of a non-resident who is not of Indian origin than permission is required to be taken from the RBI.
- PIO can sell and gift an agricultural land or plantation land or farm land only to a resident and citizen of India.
- PIO can mortgage immovable property to an authorised dealer or housing financial institution without seeking any approvals.
- A non-resident who is not of Indian origin can mortgage only to authorised dealer or housing and financial institutions after seeking approval of the same from RBI. These are governed by FEMA Laws.

There are some regulations and norms that an investor is generally required to follow:

- An investor who is constructing building or developing plots of land is required to get necessary approval from the local authorities as mentioned above for embarking on constructing the same.
- The investor in case of construction of building are required to be keeping in mind the local laws and bye laws governing the construction activity. For example in Delhi, the DDA and Delhi Municipal Corporation is the authority to frame laws on master plan etc. The investor is required to generally lay down construction in accordance to local laws in connection to building plan, master plan, zonal plans, fire safety plan and is required to see that construction activity is not harming any historical monuments, or ceiling of building in accordance to master plan.
- Other clearances like fire safety, sewage lay out and permission for operation of industrial unit are required to be taken from the local authorities or authorities authorised in this behalf. For example, industrial units are required to be not set up closer to human habitations by virtue of the environmental laws. In case of industrial units, the construction of the same and removal of waste are required to be approved by the State pollution control boards established under the Environmental protection act, Air and water acts respectively.
- The activity of constructing building etc. employs large scale labour and an investor is required to comply with the various labour laws passed for the welfare of the labour. The minimum wages act prescribes minimum wages to be given to the labour employed in

these construction activities and other labour laws providing for safety, insurance and other guidelines.

There are some of the laws that govern the real estate and these are not exhaustive list that are governing the real estate. For example, the specific Relief act, under which a person who is disposed from an immovable property without his consent and without the following of due process of law can recover possession of the same by filing a suit for same within 6 months of dispossession. The land Acquisition act 1894 under this act the government or society or cooperative society registered under the society and corporative society registration act can acquire any immovable property by issuing a notification for public purpose. This public purpose may include building hospitals, schools or affordable housing or residential complexes. The rent control act that governs letting out of immovable property also govern real estate. Various states have their own rent control laws, for example in Delhi the Delhi rent control act governs letting out premises for rent not exceeding 3500 Indian rupees monthly. The consumer protection act also governs the real estate as with definition of service is amended to include housing and thus if a developer provides inadequate housing facilities than the consumers can go the consumer dispute redressal forums for seeking the same.

Recently the Real Estate (Regulation and development) Bill, 2011 has been proposed in the Parliament which is aimed to address some of issue faced by urban real estate development and consolidate law on real estate and aims to establish a real estate Regulatory Authority and establish appellate tribunal to hear disputes and appeals from order passed by the Real Estate Regulatory Authority. This bill is aimed to promote a well-planned urban real estate development with the view to protect the consumer interest who invests in real estate and help in planned development.

In end, it can be said that the real estate in India is governed by largely elaborate structure of laws and policies and the above mentioned are some of laws that are operating in the real estate field.